Eradicating Race-Based Health Disparities by Effectuating the Fair Housing Act's De-Segregation Intent

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I. INTRODUCTION

"*De jure* residential segregation by race was declared unconstitutional almost a century ago."[1] Yet, segregation levels today mirror those that existed in the 1960s.[2]

Current levels of segregation are startling because, when it comes to predicting residence near environmental hazards, race is more predictive than poverty.[3] Today, a child's zip code is the greatest determinant of their long-term outcomes and lifespan—especially for Black children, who are seven times more likely to live in a high-poverty neighborhood than white children.[4]

These segregated living patterns were not created by accident. Throughout the twentieth century, with almost surgical precision, the federal government used taxpayer dollars to segregate communities.[5] Working in partnership with private entities, government-sponsored segregation utilized race-based zoning maps and low-interest federal loans for developing white-only subdivisions.[6] Fortunately, the Fair Housing Act (FHA)—adopted a half century ago—prohibits the perpetuation of racial segregation.[7]

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1. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 529 (2015) [hereinafter *ICP*] (citing Buchanan v. Warley, 245 U.S. 60 (1917)).

2. Jeremy E. Fiel, *Decomposing School Resegregation: Social Closure, Racial Imbalance, and Racial Isolation*, 78 AM. SOCIO. REV. 828, 828 (2013) (explaining that through the resegregation of schools, minorities attend schools with segregation levels reflective of the 1960s); *see also* Ginny G. Lane & Amy E. White, *The Roots of Resegregation: Analysis and Implications*, RACE, GENDER & CLASS, no. 3-4, 2010, at 81, 82 (stating that due to racial segregation levels, schools in some parts of nation are more segregated than in 1972).

3. Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018); *see also* Victoria Finkle et al., *Ensuring Fair Housing During the COVID-19 Pandemic*, 19 J. AFFORDABLE HOUS. 179, 187 (2020).

4. THE ANNIE E. CASEY FOUNDATION, CHILDREN LIVING IN HIGH-POVERTY, LOW-OPPORTUNITY NEIGHBORHOODS 2 (2019); *see also* Joe Cortright, *Local Neighborhoods Matter Even More for Black Kids*, CITYCOMMENTARY (Oct. 29, 2018), https://cityobservatory.org/local-neighborhoods-matter-even-more-for-black-kids/ [https://perma.cc/QAV8-WSD9].

5. *See* 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, 550–52 (2014). *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

6. ROTHSTEIN, *supra* note 5, at xii, 75; *see also* Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 334 (1999).

7. 42 U.S.C. § 3604(a) (banning discrimination in the sale or rental of housing "to any person because of *race*, *color*, religion, sex, familial status, or national origin" (emphasis added)).

This Article illustrates how Congress did not adopt this anti-segregation legislation in a vacuum. Rather, as the Supreme Court recently acknowledged, the FHA was a response to racial segregation.[8] Congress enacted the legislation days after Dr. Martin Luther King Jr.'s assassination and on the heels of the Kerner Commission's report, which identified segregation as the cause of unprecedented nationwide civil unrest.[9]

Part II of this Article demonstrates how housing is a major determinant of health, identifies the extent to which our nation is segregated, and illustrates how segregation exacerbates health inequities among racial and ethnic lines. Part III presents the historical landscape during which the FHA was adopted to demonstrate its primary purpose of dismantling segregation, by detailing the Kerner Commission, housing justice work spearheaded by Dr. King before his assassination, and the Supreme Court's early FHA decisions. Part IV sets forth the FHA's statutory framework and presents the perpetuation-of-segregation theory of disparate-impact liability, focusing on claims against government entities. This Article concludes by arguing the time is ripe for this nation to wage a war on segregation. Such an effort is not only possible within the current legal landscape, but also necessary to effectuate the FHA's purpose at a time when the nation is at risk of deepening segregation and widening disparities due to the COVID-19 public health crisis.

II. SEGREGATION'S ASSAULT ON HEALTH

A. Concentrated Poverty and Segregation Today

In the 100 largest metropolitan areas, two in three poor Black children live in very low-opportunity neighborhoods, compared to one in two poor Hispanic children and one in five poor white children.[10] Around the time the FHA was passed, a poor Black child was approximately three times more likely to live in an area of concentrated poverty than a poor white

8. *ICP*, 576 U.S. at 528–30.
9. *Id.*
10. Dolores Acevedo-Garcia et al., *Racial and Ethnic Inequities in Children's Neighborhoods: Evidence from the New Child Opportunity Index 2.0*, 39 HEALTH AFFS. 1693, 1697–98 (2020). While this Article uses "Hispanic" when citing sources that use that terminology, this Article recognizes the inclusive term "Latinx" is used to describe the population commonly referred to as Hispanic/Latino. For more information on the term, see generally ED MORALES, LATINX: THE NEW FORCE IN AMERICAN POLITICS AND CULTURE (2018).

child.[11] By 2000, this likelihood increased to seven times, and almost nine times more likely in 2010 in some communities.[12]

While the economic fallout from the COVID-19 pandemic is far from over, it is predicted to have a disproportionately adverse impact on communities of color.[13] At the end of 2020, Black and Hispanic adults were experiencing more financial hardship than white adults.[14] Compared to 2017, the gap in financial well-being between white adults and Black and Hispanic adults grew by 4% by 2020.[15] As of March 2021, 29% of Black renters and 21% of Hispanic renters were behind on rent, compared to 11% of white renters.[16] And in the first quarter of 2021, while the national unemployment rate was 6.1%, it was 9.7% for Black workers and 7.9% for Hispanic workers.[17]

Based on past housing crises and preliminary information from the COVID-19 pandemic, the health crisis is likely to reinforce segregation and inequality.[18] The adverse impacts on health and housing will be generational.[19] The Great Recession exacerbated racial and wealth inequality, furthered the displacement of people of color, and increased racial segregation across the nation.[20] A 2013 estimate found that African American families lost over half of their wealth during the Great Recession.[21] As a result of the Great Recession, the number of individuals living in extreme poverty census tracts doubled.[22] Twenty-five percent of Black individuals and

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11. John A. Powell, *Understanding Structural Racialization*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 146, 150 (2013).

12. *Id.*

13. Finkle et al., *supra* note 3, at 180.

14. BD. OF GOVERNORS OF THE FED. RSRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2020, at 3 (2021) ("Less than two-thirds of Black and Hispanic adults were doing at least okay financially, compared with 80 percent of White adults and 84% of Asian adults.").

15. *Id.*

16. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2021, at 4 (2021).

17. *Id.* at 5.

18. Finkle et al., *supra* note 3, at 180; *see also* MICHAEL NEAL & ALANNA MCCARGO, URB. INST., HOW ECONOMIC CRISES AND SUDDEN DISASTERS INCREASE RACIAL DISPARITIES IN HOMEOWNERSHIP, at v–vi, 12, 16 (2020).

19. Finkle et al., *supra* note 3, at 184.

20. *See* Jarrid Green with Thomas M. Hanna, *Community Control of Land & Housing: Exploring Strategies for Combating Displacement, Expanding Ownership, and Building Community Wealth*, DEMOCRACY COLLABORATIVE, Aug. 19, 2018, at 1, 15, 34.

21. *Id.* at 34 (citing NAT'L ASS'N OF REAL EST. BROKERS, STATE OF HOUSING IN BLACK AMERICA 1 (2013)).

22. Abraham Gutman, Katie Moran-McCabe & Scott Burris, *Health, Housing, and the Law*, 11 NE. U. L. REV. 251, 263 (2019).

17.6% of Hispanic individuals reside in these census tracts, compared to 5.5% of white individuals.[23]

Even when government support is directed at mitigating harm from disasters, the funding and programs are not distributed in an equitable manner, as the natural disaster context illustrates.[24] One in three federally subsidized homes—disproportionately households of color—and one in four renter-occupied homes are in areas at high risk for harm from natural disasters, compared to one in seven owner-occupied homes.[25] Despite the intent behind post-disaster housing opportunities and their choice and equal opportunity goals, implementation may further—rather than mitigate—segregation.[26] The Biden Administration acknowledged these disparities and, in April 2021, sought public input to address them.[27]

B. Zip Codes Predict Health

Housing is a major determinant of health.[28] The link between neighborhood opportunities and health is well-documented.[29] Neighborhood opportunities are associated with cognitive development, educational achievement, cortisol levels, asthma-related hospitalizations, and the number of pediatric acute care visits.[30] Racially segregated neighborhoods have been linked to adverse

23. *Id.*

24. James R. Elliott, Phylicia Lee Brown & Kevin Loughran, *Racial Inequities in the Federal Buyout of Flood-Prone Homes: A Nationwide Assessment of Environmental Adaptation*, SOCIUS, Feb. 12, 2020, at 1; *see also* Junia Howell & James R. Elliot, *Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States*, 66 SOC. PROBS. 448, 457 (2019).

25. THE PUB. & AFFORDABLE HOUS. RSCH. CORP. & THE NAT'L LOW INCOME HOUS. COAL., TAKING STOCK: NATURAL HAZARDS AND FEDERALLY ASSISTED HOUSING 1, 14–18 (2021).

26. Finkle et al., *supra* note 3, at 184; Elliott, Brown & Loughran, *supra* note 24, at 2.

27. Request for Information on FEMA Programs, Regulations, and Policies, 86 Fed. Reg. 21,325 (Apr. 22, 2021).

28. R.A. Hahn, B.I. Truman & D.R. Williams, *Civil Rights as Determinants of Public Health and Racial and Ethnic Health Equity: Health Care, Education, Employment, and Housing in the United States*, 4 SSM - POPULATION HEALTH 17, 22 (2018).

29. Acevedo-Garcia et al., *supra* note 10, at 1693; BARBARA SARD & DOUGLAS RICE, CREATING OPPORTUNITY FOR CHILDREN: HOW HOUSING LOCATION CAN MAKE A DIFFERENCE 11–16 (2014).

30. *Id.*

health conditions, including "heart disease, obesity, tuberculosis, reduced life expectancy, depression, and infant mortality."[31]

One's zip code is a stronger predictor of health than other factors, including genetics.[32] The longer a child spends in a neighborhood determines the extent to which that neighborhood impacts their life, including likelihood to graduate high school.[33]

Toxic stress and adverse environmental factors in childhood—including lack of access to open space and nutritious food—contribute to educational disparities and lifelong physical and mental health impairments.[34] For example, given nutritious food's role in a child's cognitive and physical development, including immune system, living in a food desert risks adverse health outcomes.[35] Often located in inner cities, food deserts reflect patterns of segregation and exist due to the cumulative effects of structural racism, from white flight to the federal government financially incentivizing the presence of fast-food companies in these communities.[36]

While improving a child's environment may have immediate benefits—for example "greening" may improve academic performance in inner-city, high-poverty schools, which are less green than schools serving more white, well-off students—moving to a low-poverty area improves a child's health *and* long-term outcomes.[37] A 2015 study on the moves of low-income families from public housing to low-poverty areas illustrates a 32%

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31. Gutman, Moran-McCade & Burris, *supra* note 22, at 264.

32. Garth Graham, MaryLynn Ostrowski & Alyse Sabina, *Defeating the ZIP Code Health Paradigm: Data, Technology, and Collaboration are Key*, HEALTH AFFS. BLOG (Aug. 6, 2015), https://www.healthaffairs.org/do/10.1377/hblog20150806.049730/full/ [https://perma.cc/A3LY-786T].

33. Geoffrey T. Wodtke, David J. Harding & Felix Elwert, *Neighborhood Effects in Temporal Perspective: The Impact of Long-Term Exposure to Concentrated Disadvantage on High School Graduation*, AM. SOCIO. REV. 713, 713 (2011); Robert J. Sampson, Patrick Sharkey & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PROCS. NAT'L ACAD. SCIS., 845, 846, 850–52 (2008).

34. *See* Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS 232, 232, 240 (2012).

35. *See* N.Y. L. SCH. RACIAL JUST. PROJECT WITH AM. C.L. UNION, UNSHARED BOUNTY: HOW STRUCTURAL RACISM CONTRIBUTES TO THE CREATION AND PERSISTENCE OF FOOD DESERTS 27 (2012).

36. *See id.* at 20–23; Olga Khazan, *Being Black in America Can Be Hazardous to Your Health*, ATLANTIC (Aug. 15, 2018), https://www.theatlantic.com/magazine/archive/2018/07/being-black-in-america-can-be-hazardous-to-your-health/561740/ [https://perma.cc/SEY9-58WW].

37. *See* Ming Kuo et al., *Might School Performance Grow on Trees? Examining the Link Between "Greenness" and Academic Achievement in Urban, High-Poverty Schools*, 9 FRONTIERS PSYCH., Sept. 25, 2018, at 1, 1–2; Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855 (2016).

increase in college attendance, a 31% increase in earnings as young adults, and a 30% decrease for girls in single parenting when compared to children who did not move.[38] On average, the moves increased the child's lifetime earnings by about $302,000.[39] In turn, the resulting increased taxes on higher earnings result in greater tax revenue that exponentially offsets the cost of the housing subsidy.[40] These benefits are in addition to the societal benefits of mitigating segregative housing patterns and disrupting the cycle of intergenerational poverty.[41] Citing a former Department of Housing and Urban Development (HUD) secretary's recognition that it was "wrong" how a child's ZIP code predicts life outcomes, the Obama Administration adopted a rule aimed at deconcentrating poverty and racial segregation in the nation's largest subsidized housing program.[42]

C. Housing Units and Environmental Racism

Allergens and pollutants, which contribute to asthma morbidity, are found in higher concentrations in inner-city homes that are often dilapidated as opposed to non-inner-city-homes.[43] Asthma disproportionately burdens Black children, who are twice as likely to be readmitted to hospitals as white children.[44]

Compared to white communities, communities of color receive a disproportionate number of permits for the placement and disposition of toxic waste and hazardous materials.[45] Historically, the federal government

38. Chetty, Hendren & Katz, *supra* note 37, at 855, 857, 877.
39. *Id.* at 859–60.
40. *Id.* at 860.
41. *Id.* at 860, 882.
42. U.S. DEP'T HOUS. & URB. DEV., HUD FAQS CONCERNING HUD'S NOTICE OF PROPOSED RULEMAKING: "ESTABLISHING A MORE EFFECTIVE FAIR MARKET RENT (FMR) SYSTEM; USING SMALL AREA FAIR MARKET RENTS (SAFMRS) IN HOUSING CHOICE VOUCHER PROGRAM INSTEAD OF THE CURRENT 50TH PERCENTILE FMRS" 3 (2016).
43. *See generally* Elizabeth C. Matsui et al., *Asthma in the Inner City and the Indoor Environment*, 28 IMMUNOLOGY & ALLERGY CLINICS N. AM. 665 (2008).
44. Andrew F. Beck et al., *Role of Financial and Social Hardships in Asthma Racial Disparities*, 133 PEDIATRICS 431, 431 (2014).
45. JENNIFER BISGAIER & JENNIFER POLLAN, POVERTY & RACE RSCH. ACTION COUNCIL, THE CALL FOR ENVIRONMENTAL JUSTICE LEGISLATION: AN ANNOTATED BIBLIOGRAPHY 1 (2018) ("Since the modern environmental justice movement began in the 1980s, a series of reports as well as lawsuits and administrative complaints also have documented the ways in which people of color and low-income communities are disproportionately affected by decisions regarding the siting of hazardous facilities as well as other environmental issues. People of color are more likely to live near coal plants

imposed lower penalties against corporations that violate environmental laws in communities of color than in white neighborhoods.[46]

Toxic waste and pollution sites are more likely to be in communities of color than in white communities.[47] A 1987 report found that the most significant factor used in the placement and disposition of commercial hazardous waste sites was race, with race being a more significant factor than socio-economic status.[48]

While the Environmental Protection Agency's (EPA) mission includes ensuring that Americans have clean air and water, it has historically exercised its discretion in a manner that results in decreased regulation in majority non-white areas.[49] In response to the EPA releasing a report which identified the disparate impact hazardous waste facilities and pollution sites had on communities of color, President Clinton issued Executive Order 12898 directing the avoidance of such race-based environmental disparities; however, as of 2018, the EPA's Office of Civil Rights dismissed over 90% of complaints.[50]

Majority non-white communities continue to be deprived of access to clean air and land, and safe drinking water.[51] Air quality alone is linked to cancer and cardiovascular disease.[52] People of color are more likely than white people to live close to hazardous sites, such as landfills and industrial

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and landfill sites, and experience higher rates of asthma, heart disease, lung problems, and other adverse health outcomes.").

46. *Id.*

47. Kathleen Bonner, *Toxins Targeted at Minorities: The Racist Undertones of "Environmentally-Friendly" Initiatives*, 23 VILL. ENV'T L.J. 89, 90–93 (2012); ROTHSTEIN, *supra* note 5, at 56 (noting that a 1991 EPA report found "a disproportionate number of toxic waste facilities were found in African American communities nationwide"); Exec. Order No. 12898, 59 Fed. Reg. 7,629 (Feb. 16, 1994); BISGAIER & POLLAN, *supra* note 45, at 2–6.

48. ROBERT D. BULLARD, ENVIRONMENT AND MORALITY: CONFRONTING ENVIRONMENTAL RACISM IN THE UNITED STATES 5 (2004); COMM'N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES, at xiii (1987).

49. Logan Judy, *Liberty and Environmental Justice for All? An Empirical Approach to Environmental Racism*, 53 WAKE FOREST L. REV. 739, 760 (2018) ("Controlling for extraneous variables, race is a predictor of EPA enforcement—high minority population areas receive less severe EPA enforcement.").

50. Bonner, *supra* note 47, at 89, 98–100; ROTHSTEIN, *supra* note 5, at 56; Exec. Order No. 12898, 59 Fed. Reg. 7,629 (Feb. 16, 1994); BISGAIER & POLLAN, *supra* note 45, at 2, 5.

51. *See* BISGAIER & POLLAN, *supra* note 45, at 14–15.

52. Darrell J. Gaskin et al., *No Man Is an Island: The Impact of Neighborhood Disadvantage on Morality*, INT'L J. ENV'T RSCH. PUB. HEALTH, Apr. 9, 2019, at 1, 2.

facilities, and with air pollution—with race being more predictive than poverty.[53]

Examples of environmental racism exist across the country. In North Carolina, while the state has five times the number of mostly white census tracts as compared to predominantly non-white census tracts, almost twice the number of large pollution sites operated in the predominantly non-white census tracts, as compared to the mostly white census tracts, in 2010.[54] In "Cancer Alley," Louisiana, which produces one-fourth of the nation's petrochemicals, the area's residents are 40% Black; Black communities live closer to the chemical plants than white communities; and Black communities have a 16% higher cancer risk.[55] Flint, Michigan, a once majority-white, now majority-Black city knowingly poisoned its residents through what residents trusted to be a supply of clean public water.[56] Meanwhile, city officials let GM return to using the city's former water source because the new source—that was 8.6 times more corrosive––caused its engine parts to rust.[57] The crisis came to light when a team of physicians identified the increased lead levels in children.[58] Thousands were permanently harmed, including children for whom the poisoning can result in reduced intellectual ability.[59]

The next sections discuss the context in which a tool for dismantling segregation, the FHA, was enacted and how the FHA can be used to address the harms of segregation, including those details in this section.

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53. Ihab Mikati et al., *supra* note 3, at 480.

54. Spencer Banzhaf, Lala Ma & Christopher Timmins, *Environmental Justice: The Economics of Race, Place, and Pollution*, J. ECON. PERSPS., Winter 2019, at 185, 186.

55. Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L. REV. 363, 372–73 (2019).

56. REP. OF THE MICH. C.R. COMM'N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 2–4, 97, 104–05 (2017); Richard Casey Sadler & Andrew R. Highsmith, *Rethinking Tiebout: The Contribution of Political Fragmentation and Racial/Economic Segregation to the Flint Water Crisis*, ENV'T JUST., Sept. 2016, at 143, 143, 150; Tomeka M. Robinson, Garrett Shum & Sabrina Singh, *Politically Unhealthy: Flint's Fight Against Poverty, Environmental Racism, and Dirty Water*, 1 J. INT'L CRISIS & RISK COMMC'N RSCH. 303, 305, 307, 317 (2018); Laura Pulido, *Flint, Environmental Racism, and Racial Capitalism*, CAPITALISM NATURE SOCIALISM, July 27, 2016, at 1.

57. Pulido, *supra* note 56, at 4; Robinson, Shum & Singh, *supra* note 56, at 309–10.

58. Robinson, Shum & Singh, *supra* note 56, at 312.

59. Pulido, *supra* note 56, at 6.

III. HISTORICAL LANDSCAPE: THE FHA'S PRIMARY PURPOSE OF DISMANTLING SEGREGATION

During the Civil Rights Movement, passage of anti-segregation legislation was far from guaranteed, with the 1964 Civil Rights Act specifically excluding the Fair Housing Administration from its purview.[60] This section provides an overview of the events catalyzing the FHA's passage, including the release of the Kerner Report the month prior and Dr. King's assassination days prior, to illustrate how desegregation was the FHA's primary purpose.

A. The Kerner Commission

In July 1967, President Lyndon B. Johnson formed the National Advisory Commission on Civil Disorders ("Kerner Commission") to identify the cause of nationwide civil unrest to prevent future unrest.[61] In March 1968, the Kerner Commission released its report concluding the cause of the "urban disorders" was not an organized plan or conspiracy, but rather white racism and dire conditions experienced by Black Americans living in racially segregated neighborhoods.[62] The 300-page report opened with:

> This is our basic conclusion: Our Nation is moving towards two societies, one black, one white—separate and unequal.
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> . . .
>
> Discrimination and segregation have long permeated much of American life; they now threaten the future of every American.
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> . . .
>
> Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.[63]

The report identified "grievances" underlying the civil unrest and recognized Black residents were "demanding fuller participation in the social order and the material benefits enjoyed by the vast majority of American citizens."[64] The report categorized the grievances' intensity levels, with inadequate

60. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 574 (2015).

61. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

62. *Id.* at 4–5, 290.

63. *Id.* at 1.

64. *Id.* at 64.

housing listed in the first level of intensity, followed by inadequate education in the second level.[65]

While it addressed a spectrum of subject areas, the report consistently identified segregation as the cause of inequality, especially in housing and education.[66] The report summary identified the removal of barriers–primarily segregation–as the primary objective for national action: "Opening up opportunities to those who are restricted by racial segregation and discrimination, and eliminating all barriers to their choice of jobs, education and housing."[67]

The report summary described how segregation not only dictates the location of housing for Black families, but also the quality and cost of housing.[68] It detailed how discrimination prevented non-white families from accessing high-quality housing in low-poverty areas, and allowed landlords in high-poverty, segregated areas to gouge tenants by keeping rents artificially high for substandard housing.[69] The report summary concluded these actions forced non-white families to pay more for substandard housing in high-poverty, segregated areas. Over 40% of these families paid more than 35% of their income on rent for segregated, substandard housing.[70]

Responding to inequities inherent to a segregated housing system, the Kerner Commission recommended a "federal open housing law to cover the sale or rental of all housing" and "a new thrust aimed at overcoming the prevailing patterns of racial segregation" in federal housing programs to stop concentrating poverty in areas without sufficient public sources to meet needs.[71]

The report repeatedly referenced *Brown v. Board of Education* and the unacceptability of a separate, unequal society. Dr. Kenneth Clark, one of the psychologists behind the famous doll test the Supreme Court cited in its decision, testified before the Kerner Commission.[72] The report concluded

65. *Id.* at 4.
66. *Id.*
67. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS: SUMMARY OF REPORT 20 (1968).
68. *Id.* at 24.
69. *Id.*
70. *Id.*
71. *Id.*
72. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 61, at 13, 303. Citing the doll test, the Supreme Court found the segregation of children "generates a feeling

with Dr. Clark's testimony calling for immediate action and remarking on the nation's pattern of commissioning studies on racial unrest, reviewing recommendations, and then taking no action.[73] The report urged the nation to increase efforts to eliminate education segregation to eradicate the harms cited in *Brown,* and set forth numerous educational recommendations, including urgent investments to mitigate the inequality in segregated schools because "[n]o matter how great the effort toward desegregation" many children will not attend integrated schools within their school careers.[74]

While the report detailed the harms of segregation and recommended federal fair housing legislation, the report's deficiencies—although beyond the scope of this Article—cannot be denied.[75]

B. Dr. Martin Luther King, Jr.

By the time of his assassination in April 1968, Dr. King was strongly associated with fair housing due to his work in Chicago.[76]

Dr. King's dedication to fair housing is well documented in books and articles he authored.[77] Dr. King wrote of discrimination, segregation, and the federal government's explicit role granting home ownership through federal loans.[78] He addressed worsening segregation in *Where Do We Go From Here: Chaos or Community?,* declaring "[s]lums are worse" and Black children "attend more thoroughly segregated schools today than" when the Court decided *Brown* in 1954.[79]

In 1966, Dr. King moved his family to Chicago, one of the nation's most racially segregated cities, to draw attention to discriminatory housing practices and economic justice.[80] As a co-leader of the Chicago Freedom

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of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

73. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 61, at 265.

74. *Id.* at 242–44.

75. For example, the report underemphasizes the role structural racism played in disadvantaging Black individuals while benefitting, including through government assistance, whites; omits significant events of white-initiated civil unrest and white terror campaigns; and regurgitates race-based narratives from the Moynihan Report. *See generally id.*

76. Monroe H. Little, Jr., *More Than a Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 IND. L. REV. 523, 534 (2008).

77. *See id.* at 530 (noting that Dr. King authored five books between 1957 and 1968).

78. *See id.* at 530–31.

79. *Id.* at 530 (quoting MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 35–36 (1968)).

80. *Id.* at 530–31 (noting that Dr. King's "reception in Chicago was none too cordial" and "the public reception they received in Chicago was much worse than in the South, the politics more corrupt, and the threat of violence more dire").

Movement, he worked on fair housing through a campaign centered on "open housing" or one's right to live where they wish.[81]

At the time, discrimination and exclusionary housing practices reinforced patterns of residential segregation—created through the issuance of federal loans—and prevented Black families from accessing homes outside of high-poverty, segregated areas.[82] The Federal Housing Administration's discriminatory practices, including issuing low-interest rate loans to white families to the exclusion of Black families, laid the groundwork for predatory home sale practices targeted at Black families.[83]

Because Black families could not get loans from most financial institutions due to discriminatory practices, realtors and sales agents preyed on Black families.[84] Sales agents sold installment contracts for houses priced at twice or triple their value, with title only transferring upon full and final payment.[85] These predatory transactions caused unjust evictions with no accrued equity, and fifteen to twenty years of inflated monthly payments that families could afford only through multiple jobs and often additional tenants, which gave rise to "overcrowding" allegations from white neighbors paying less for equivalent property through federal loans.[86] During the 1950s, approximately 85% of Black families in Chicago bought their homes through these contracts.[87]

Through the Chicago Freedom Movement, Dr. King brought attention to these practices as well as the dilapidated conditions of apartments, which like the predatory sales contracts, were priced far above market value.[88] In July 1966, before a crowd of 30,000 people, Dr. King declared: "This

81. *See id.*; *The Chicago Freedom Movement*, NAT'L LOW INCOME HOUS. COAL. (Oct. 23, 2018), https://nlihc.org/resource/chicago-freedom-movement [https://perma.cc/J526-D6UU]; Aastha Uprety, *Martin Luther King, Jr.'s Fair Housing Legacy: How Testing Played a Role in the Civil Rights Movement*, EQUAL RTS. CTR. (Jan. 21, 2019), https://equalrights center.org/martin-luther-king-fair-housing/ [https://perma.cc/3WCC-KHS4].

82. *See* ROTHSTEIN, *supra* note 5, at 63–99.

83. *Id.*

84. *See id.* at 95–97.

85. *See id.* at 96; *The Chicago Freedom Movement*, *supra* note 81.

86. *See* ROTHSTEIN, *supra* note 5, at 96–97; *see also* Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1150–53 (1998).

87. *See* ROTHSTEIN, *supra* note 5, at 98.

88. *The Chicago Freedom Movement*, *supra* note 81 ("[M]any of the apartments were rat-infested, without heat, dangerous, not regularly repaired by landlords, and extremely overpriced.").

day we must decide to fill up the jails of Chicago, if necessary, in order to end slums."[89] The following month, he led a housing justice march through Marquette Park, a white Chicago neighborhood.[90] The backlash from both of these events included white-led violence, which he detailed as more hostile than what he experienced in the South.[91] In August 1966, Dr. King reached an agreement with Chicago's mayor, under which the Chicago Housing Authority agreed to build public housing in predominantly white neighborhoods and the Mortgage Bankers Association agreed to end its discriminatory practices.[92] Dr. King declared that Chicago was at last an open city.[93]

Two years later in 1968, upon Dr. King's assassination, the nation again erupted with social unrest.[94]

C. FHA Adoption and Interpretation

Despite its failure to pass fair housing legislation when it was introduced two years prior, Congress enacted the FHA six days after Dr. King's assassination.[95] President Johnson pushed for its passage as a memorial to Dr. King.[96]

At the time of Dr. King's assassination, the FHA was under review in the Rules Committee where it was destined to fail.[97] Upon Dr. King's death, twenty-one House Republicans changed directions to support the legislation.[98] In turn, a Rules Committee member, whose constituents were against the legislation, broke ranks to be the deciding vote of support.[99] The member

89. *50 Years Ago: MLK Jr.'s Speech at Soldier Field, March to City Hall with Demands for Daley*, CHI. TRIB. (July 10, 2016, 4:19 PM), https://www.chicagotribune.com/news/ct-martin-luther-king-jr-1966-speech-chicago-20160706-story.html [https://perma.cc/F44A-QAA8].

90. *See* Samuel Momodu, *Chicago Freedom Movement (1965–1967)*, BLACKPAST (Aug. 31, 2016), https://www.blackpast.org/african-american-history/chicago-freedom-movement-1965-1967/ [https://perma.cc/QNQ4-HJNY].

91. *See id.*

92. *Id.*; Uprety, *supra* note 81.

93. *50 Years Ago: MLK Jr.'s Speech at Soldier Field, March to City Hall with Demands for Daley*, *supra* note 89.

94. *See* Jenna Raden, *Fragmenting Local Governance and Fracturing America's Suburbs: An Analysis of Municipal Incorporations and Segregative Effect Liability Under the Fair Housing Act*, 94 TUL. L. REV. 365, 383 (2020).

95. *Id.* at 383–84; *ICP*, 576 U.S. at 530; Schneider, *supra* note 5, at 553.

96. Little, Jr., *supra* note 76, at 534.

97. *See* Kimberly Harrison, Charlene L. Smith & Jamie Baron Rodriguez, *John B. Anderson: The Exemplary Dark Horse*, 34 NOVA L. REV. 347, 359 n.82 (2015); *see also* Massey, *supra* note 60, at 574 ("[T]he prospects for passage seemed bleak as 1968 dawned.").

98. Massey, *supra* note 60, at 575.

99. *Id.*; Harrison, Smith & Rodriguez, *supra* note 97, at 360.

shared a personal story involving a young Black man who sought to have his family live in the same community where he worked, but was unable to do so due to discrimination.[100] After President Johnson signed the FHA, FHA co-drafter Senator Walter Mondale attributed its passage to the fair housing work of Dr. King and the Kerner Commission's recommendations.[101]

The legislative record illustrates the FHA's desegregation purpose.[102] Senator Mondale emphasized citywide problems are "directly traceable to the existing patterns of racially segregated housing,"[103] and declared "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'"[104] Supporting the legislation, Senator Jacob Javits explained discriminatory housing practices harm the "whole community" and not only "[t]he person on the landlord's blacklist."[105]

During the following decade, the Supreme Court explicitly recognized the FHA's primary purpose of ending segregation.[106] In 1972, the Court decided its first FHA case, *Trafficante v. Metropolitan Life Insurance Company*, where two tenants in an 8,000 person, 1% Black apartment complex challenged their landlord's rental policy of excluding non-white tenants.[107] The tenants claimed injuries from the loss of "social benefits of living in an integrated community" and "missed business and professional advantages which would have accrued if they had lived with members of minority groups."[108]

While the tenants were not excluded by the discriminatory rental policy and thus not the object of the discriminatory practice, the Court held they had standing based on "the loss of important benefits from interracial

100. Harrison, Smith & Rodriguez, *supra* note 97, at 361.

101. John Nichols, *Walter Mondale's Decades-Long Crusade for Fair Housing and the Full Promise of Civil Rights*, NATION (Apr. 23, 2021), https://www.thenation.com/article/activism/walter-mondale-housing/ [https://perma.cc/2EDV-QLF5]; 114 CONG. REC. 9493 (1968).

102. *See* 114 CONG. REC. 2276, 2706 (1968).

103. *Id.* at 2276; *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972).

104. *Trafficante*, 409 U.S. at 211 (quoting 114 CONG. REC. 3422 (1968)).

105. *Id.* (citing 114 CONG. REC. 2706 (1968)).

106. *Id.* at 209–10.

107. *Id.* at 206–08.

108. *Id.* at 208 ("they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto'").

associations."[109] In reaching this conclusion, the Court relied on the congressional record from the FHA's adoption, including Senators Mondale's and Javits's statements.[110] The Court also gave weight to HUD's determination that the tenants were "aggrieved persons within the jurisdiction" of the Act.[111] The Court recognized the FHA's purpose of ending racial segregation required any individual harmed by discriminatory housing practices—"not only those against whom a discrimination is directed"—have standing to sue.[112]

Seven years later, the Court held a neighborhood and its residents had standing to challenge racial steering practices.[113] In *Gladstone Realtors v. Village of Bellwood*, the Court held that Congress intended for indirect victims of discrimination to bring FHA challenges.[114] The plaintiffs included residents of a neighborhood they claimed was transforming from integrated to segregated as a result of racial steering.[115] The Court found the residents' claims, based on harm through deprivation of "the social and professional benefits of living in an integrated society," sufficient under the FHA to have standing.[116] The Court discussed the harms of segregation, citing the Kerner Commission and Senator Mondale's remarks.[117]

D. FHA Amendment and Anniversaries

In 1988, by amending the FHA to protect disability and familial status, Congress recognized the harms from the "highly segregated housing patterns" that continued to exist.[118] The amendment's sponsor, Senator Kennedy, stated: "[S]egregation is the primary obstacle to meaningful school integration. And as businesses move away from the urban core, housing discrimination prevents its victims from following jobs to the suburbs, impeding efforts to reduce minority unemployment."[119]

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109. *Id.* at 209–10.
110. *Id.* at 210–11.
111. *Id*. at 210.
112. *Id.* at 211–12.
113. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 92 (1979).
114. *Id.* at 126 ("Anyone claiming to have been injured by a discriminatory housing practice, even if not himself directly discriminated against, is authorized to seek redress under § 810.").
115. *Id.* at 95
116. *Id.* at 111, 115.
117. *Id.* at 109–10, 111 & n.24.
118. Megan Haberle, *Introducing HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 211, 212 (2013).
119. *Id.*

At the FHA's 40th anniversary, the House of Representatives stated: "[T]he intent of Congress in passing the [FHA] was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States."[120]

In 2015, fifty years after Congress adopted the FHA, the Court cited the Kerner Commission's findings on segregation, unequal housing, and how "both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities."[121] The Court concluded: "The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.'"[122]

IV. THE FHA: FROM THEORY TO LITIGATION

This section identifies the actions the FHA prohibits, briefly delineates theories of FHA liability—intentional discrimination and discriminatory effects, including disparate impact and segregative effect—and sets forth evidentiary standards for perpetuation of segregation claims.

A. Prohibited Conduct

The FHA prohibits discrimination in housing and the perpetuation of segregation.[123] Under the FHA, it is unlawful to make unavailable dwellings because of race; reinforce or perpetuate segregated housing patterns; engage in unlawful steering practices; and restrict choice in a way that perpetuates segregated housing patterns and discourages or obstructs choices in a community or neighborhood.[124] The FHA also contains a mandate requiring recipients of federal funds to affirmatively further fair housing, under which recipients must not only analyze their programs and services to determine the existence of fair housing barriers, they also must remove those barriers.[125] While relevant to this Article, this mandate is not addressed here.

120. 154 CONG. REC. 6002 (2008).
121. *ICP*, 576 U.S. at 530.
122. *Id.* at 546.
123. 42 U.S.C. §§ 3601–3619.
124. *Id.* § 3604(a); 24 C.F.R. §§ 100.50, 100.70 (2000).
125. *See* 42 U.S.C. § 3608(e)(5).

B. Theories of Liability

Regardless of the theory of liability, upon finding that a discriminatory housing practice has occurred or is about to occur, the FHA authorizes a court to grant injunctive relief, an order enjoining the defendant from engaging in such practice, or other such affirmative actions as may be appropriate.[126]

1. Intentional Discrimination

Generally, intentional discrimination—or disparate treatment—claims are based on allegations that a defendant treated a plaintiff differently than other similarly-situated individuals because of the plaintiff's protected class, and a discriminatory reason motivated the defendant's conduct.[127] Courts determine whether a plaintiff properly alleged facts that suggest a discriminatory motive by conducting a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[128] Courts apply a multi-factor analysis, considering the presence of:

> (1) statistics demonstrating a "clear pattern unexplainable on grounds other than" discriminatory ones, (2) "[t]he historical background of the decision," (3) "[t]he specific sequence of events leading up to the challenged decision," (4) the defendant's departures from its normal procedures or substantive conclusions, and (5) relevant "legislative or administrative history."[129]

A plaintiff does not need to establish any particular element to prevail.[130] Rather, a court evaluates the factors in their totality to determine if the allegations are sufficiently plausible.[131] Also relevant is the foreseeability

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126. *Id.* § 3613(c)(1).

127. A plaintiff is not required to allege the defendant treated similarly situated individuals better, but may proceed on a theory of discriminatory motive alone. Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1158 (9th Cir. 2013). For examples of disparate treatment claims based on recent litigation, including a post-Hurricane Katrina case, see Schneider, *supra* note 5, at 566–67.

128. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); *see also* John Pollock, *Breathing Life Back into Intent: Proving Racially Discriminatory Purpose in Housing Cases in a Post-*Arlington Heights *World*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 341, 348 (2006).

129. *Pac. Shores Props., LLC*, 730 F.3d at 1158–59 (citing *Vill. of Arlington Heights*, 429 U.S. at 266–68).

130. *Vill. of Arlington Heights*, 429 U.S. at 268 ("The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.").

131. Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 504 (9th Cir. 2016); *see also* Yellowstone Women's First Step House, Inc. v. City of Costa Mesa, No. SACV 14-1852 JVS (JCGx), 2016 WL 6124509, at *6 (C.D. Cal. Oct. 17, 2016; Yellowstone Women's First Step House, Inc. v. City of Costa Mesa, No. 19-56410, 2021 WL 4077001, at *2 (9th Cir. Sept. 8, 2021) (affirming disparate treatment ruling)).

of segregative consequences, including "[a]dherence to a particular policy or practice, with *full knowledge* of the predictable effects of such adherence upon racial imbalance."[132]

2. Discriminatory Effects

Absent discriminatory intent, a practice is unlawful if it "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns," and the "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[133]

In 2013, under its authority to administer and enforce the FHA, HUD issued a disparate impact rule adopting a three-step burden-shifting framework for discriminatory effect claims:[134]

1. The plaintiff has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.
2. If the plaintiff satisfies that burden, the defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant.
3. If the defendant satisfies the burden, the plaintiff may still prevail upon proving that the defendant's interests could be served by another practice that has a less discriminatory effect.[135]

This framework and the *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (*ICP*) decision, through which the Supreme Court endorsed the disparate impact theory of liability under the FHA, is discussed in detail *infra.*

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132. Pollock, *supra* note 128, at 349 (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979)).

133. 24 C.F.R. § 100.500 (2013).

134. 42 U.S.C. §§ 3535(d), 3608(a); 24 C.F.R. §§ 100.1, 100.500 (2013); Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590, 33,591 (June 25, 2021) (codified at 24 C.F.R. pt. 100).

135. *See* Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. at 33,591.

C. Discriminatory Effects Analysis

In *ICP,* the Court endorsed liability based on discriminatory effects to "permit plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment" and "prevent segregated housing patterns that may otherwise result from covert and illicit stereotyping."[136] Before *ICP*, federal appellate courts and HUD had already adopted the discriminatory effects theory of liability under the FHA.[137] While the importance of implicit bias in the context of discrimination was not novel, the Court's explicit reference to it was significant.[138] Discrimination and segregation persist, not because of explicit forms of exclusion like racial covenants, but because of structural racism and implicit bias.[139]

When government officials have discretion, they often use it in a racially biased manner, often a result of implicit bias.[140] For example, despite federal integration goals, HUD's deference to local public housing authorities to administer housing programs has often contributed to segregation.[141] Given the evidentiary hurdles inherent in requiring an express purpose to discriminate, being able to prove cases through disparate impact is vital, especially for implicit bias, because "unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy."[142]

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136. *ICP*, 576 U.S. at 521, 540.

137. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 & n.12, 11,462 & n.28 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100) (identifying cases for both disparate impact and segregative effect).

138. *See* Honorable Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1028 (2008); Larry G. Simon, *Racially Prejudiced Government Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1111 (1978); Justin Steil, *Disparate Impact and an Antisubordination Approach to Civil Rights and Urban Policy*, POVERTY & RACE, Sept. 6, 2019, at 1, 3, 4.

139. *See* JILLIAN OLINGER, KELLY CAPATOSTO & MARY ANA MCKAY, CHALLENGING RACE AS RISK: HOW IMPLICIT BIAS UNDERMINES HOUSING OPPORTUNITY IN AMERICA—AND WHAT WE CAN DO ABOUT IT 8–9 (2017).

140. *See, e.g.*, Philip D. Tegeler, *Housing Segregation and Local Discretion,* 3 J.L. & Pol'y 209, 212–16, 236 (1994) (discussing ways in which federal government grants discretion to local housing authorities, resulting in a system that tends to exclude and promote segregation).

141. *Id.* at 212–13.

142. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* 39 STAN. L. REV. 317, 355 (1987).

1. Prima Facie Case: Identifying a Policy and Causation

To set forth a prima facie case, a plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect."[143] Courts look to whether allegations, including statistical evidence, demonstrate the challenged policy's discriminatory outcomes or effects.[144]

In addition to allegations and statistical evidence, a plaintiff must identify the specific policy causing the disparity.[145] In *ICP*, the Court stated that identifying a specific policy is essential because any remedy must "concentrate on the elimination of the offending practice."[146] "[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."[147] Through its robust causality discussion, the Court explained the importance of requiring the plaintiff to identify a specific policy.[148] The Court cited *Wards Cove Packing Company, Inc. v. Atonio*, where the Court reversed a Ninth Circuit employment law ruling on grounds that statistics alone, without a challenge to a specific practice, were insufficient for disparate impact.[149] The *ICP* decision explained: "A robust causality requirement ensures that '[r]acial imbalance . . . does not, *without more*, establish a prima facie case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create.'"[150] The Court used the terms "without more" to emphasize how a disparity alone, unconnected to a policy, is insufficient.[151] Two years later, in *Bank of America Corporation v. City of Miami*, the Court held causation under the

143. 24 C.F.R. § 100.500(c) (2013).
144. *See* NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 479 (3d Cir. 2011) (noting that 0.62% of firefighters hired were African-American, compared to an African-American population of 3.4%); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988) (noting that action "had twice the adverse impact on minorities as it had on whites"); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 929 (2d Cir. 1988) (noting that impact was "three times greater on blacks than on the overall population"), *aff'd per curiam*, 488 U.S. 15 (1988).
145. *See ICP*, 576 U.S. at 542.
146. *Id.* at 544.
147. *Id.* at 542.
148. *Id.* at 521.
149. *Id.* at 542 (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)).
150. *Id.* (emphasis added) (quoting *Wards Cove Packing Co.*, 490 U.S. at 653).
151. *Id.* (quoting *Wards Cove Packing Co.*, 490 U.S. at 653).

FHA requires "some direct relation between the injury asserted and the injurious conduct alleged."[152]

In addition to discussing robust causality, the *ICP* decision included language regarding barriers, specifically those that are "artificial, arbitrary, [or] unnecessary."[153] Like robust causality, the Court did not add a new requirement for discriminatory effect claims, but simply provided context for the review of such claims.[154]

In discussing "artificial, arbitrary, or unnecessary" barriers, the Court cited *Griggs v. Duke Power Company*, an employment case, to describe the safeguards in place within the traditional discriminatory effects analysis.[155] In *Griggs*, the Court held that policies "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior employment practices."[156] In *ICP,* the Court consistently cited *Griggs* at page 431, which stated: Congress requires "the removal of artificial, arbitrary, and unnecessary barriers to employment *when the barriers operate invidiously to discriminate* on the basis of racial or other impermissible classification."[157]

ICP held that when a seemingly reasonable, necessary policy has a disparate impact *and* there is a less discriminatory alternative, the FHA requires the policy to be struck down because the policy then constitutes an "artificial, arbitrary, and unnecessary barrier."[158] The decision goes on

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152. Bank of Am. Corp. v. City of Mia., 137 S. Ct. 1296, 1306 (quoting Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992)) (noting that city alleged banks issued mortgages in a discriminatory manner, impaired fair housing and benefits of an integrated community, decreased city's tax revenues, and increased costs related to foreclosure properties in disproportionately minority neighborhoods and directing the lower court to determine the issue of causation but found that allegations laid within FHA's zone of interest).

153. *ICP*, 576 U.S. at 540 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

154. *See id.* at 540–44.

155. *See Griggs,* 401 U.S. at 427–32 (noting statistical evidence showed employer's high school diploma requirement and IQ test disproportionately adversely impacted Black employees and the employer argued the claim could not survive absent discriminatory intent, but the Court focused on the "consequences" of employer's practice).

156. *Id.* at 430.

157. *Id*. at 431 (emphasis added); *see also ICP*, 576 U.S. at 540, 543, 544.

158. *ICP*, 576 U.S. at 540–46. In *Avenue 6E Investments, LLC v. City of Yuma*, the court cited *ICP* in applying the "artificial, arbitrary, and unnecessary barrier" language to challenges to facially neutral policies. *Ave. 6E Invs.*, 818 F.3d at 503. The Ninth Circuit stated, "disparate impact not only serves to uncover unconscious or consciously hidden biases, but also targets "artificial, arbitrary, and unnecessary barriers" to minority housing and integration that can occur through unthinking, even if not malignant, policies of developers and governmental entities." *Id.* (citing *ICP*, 576 U.S. at 540). In this way, disparate impact "recognize[s] 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

to explain how an existing governing regulation, 24 C.F.R. § 100.500(c), ensures disparate impact liability is properly limited.[159] The safeguard in that regulation requires a plaintiff to establish a less discriminatory alternative that accomplishes the same legitimate ends raised by the defendant.[160] At the final stage in the burden shifting analysis, a policy that causes an adverse impact despite the existence of a less discriminatory alternative is deemed arbitrary, artificial, or unnecessary.[161]

The Court discussed the safeguards in place when addressing potential concerns, but did not add new requirements for a prima facie case or change the burden-shifting approach.[162] In fact, the Court referenced existing limitations and safeguards multiple times and explicitly stated that disparate-impact liability has "always" been properly limited.[163] After all,

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scheme." United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974); *see also* Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Ass'n, 294 F. Supp. 3d 940, 947 (N.D. Cal. 2018) (subsequent ruling on motion to dismiss amended complaint did not address disparate impact claim, *Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Ass'n*, No. C 16-06969 JSW, 2019 WL 3779531, at *4 (N.D. Cal. Aug. 12, 2019)).

159. *ICP*, 576 U.S. at 541 (citing 78 Fed. Reg. 11,460, 11,470 (Feb. 15, 2013)).

160. *Id.* at 541.

161. *See id.* at 543–44; 24 C.F.R. § 100.500 (2013). For example, see the *ICP* oral argument:

> MR. KELLER: And each regulated entity is going to have to examine the racial outcomes of their policies in every zoning decision made —
> JUSTICE SOTOMAYOR: No.
> MR. KELLER: —in every raise in rent —
> JUSTICE SOTOMAYOR: What they do is what everyone should do. Is before they set up any policies, think about what is the most race-neutral policy. That's a very different thing. That, I think, everyone is obligated to do.
> MR. KELLER: And that's precisely what the Department –
> JUSTICE SOTOMAYOR: It's only if the other side proves that a qualification has an – a race effect that's not necessary, can they win.

Transcript of Oral Argument at 54, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (No. 13-1371).

162. *ICP*, 576 U.S. at 540–44.

163. *See, e.g.*, *id.* at 521 ("But disparate-impact liability has always been properly limited in key respects . . . ."); *id.* at 541 ("An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability." (citing 78 Fed. Reg. 11,470 (Feb. 15, 2013)); *id.* at 542 ("Without adequate safeguards at the prima facie stage, disparate-impact liability might . . . ."); *id.* at 544 ("The limitations on disparate-impact liability discussed here are also necessary to protect . . . ."); *id.* ("Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then . . . ."). For discussion of the Court's use of the term "valid" in reference to government priorities,

the Court granted *certiorari* on the question of whether disparate impact claims were cognizable under the FHA, not on whether the standard set out by HUD should apply to such claims.[164]

2. Segregative Effect Claims

A segregative effect claim challenges a practice that causes a discriminatory effect by "creat[ing], increas[ing], reinforc[ing], or perpetuat[ing] segregated housing patterns."[165] For a segregative effect claim, a plaintiff must first identify a "segregated housing pattern[ ]," and second demonstrate how the challenged practice "actually or predictably" "creates, increases, reinforces, or perpetuates" that segregated housing pattern.[166] Most segregative effect claims challenge local policies or actions.[167]

Unlike traditional disparate impact claims, which require analysis of the effects of the challenged policy on a protected class, segregative effect claims center on how the challenged policy affects residential segregation in a specific geographic area.[168] While separate claims,[169] they are not mutually exclusive, and successful segregative effect claims are generally brought with additional FHA claims.[170]

HUD describes the population at risk of harm in a segregative effect claim as a "community."[171] The geographic area is therefore the boundaries

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see Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After* Inclusive Communities, 24 GEO. MASON L. REV. 663, 691 (2017).

164. *See ICP*, 576 U.S. at 525.

165. 24 C.F.R. § 100.500(a) (2013).

166. *Id.*; *see also* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 738–39 (2017) (noting HUD's discriminatory effects regulations requires two elements for a segregative effect claim (citing 24 C.F.R. § 100.500(a) (2013)).

167. Raden, *supra* note 94, at 389; Schwemm, *supra* note 166, at 715.

168. For example, if a plaintiff alleges a discriminatory effect based on the way a policy disproportionately adversely impacts racial minorities, it is a disparate impact claim based on greater effect. Schwemm, *supra* note 166, at 713–14. If, however, the plaintiff alleges that the discriminatory effect is based on how the policy reinforces—or will predictably reinforce—segregation, it is a segregative effect claim. *Id.*

169. Regarding the separate nature of the segregative effect claim, see Nat'l Fair Hous. All. v. Deutsche Bank, No. 18 C 0839, 2018 WL 6045216, at *30 (N.D. Ill. Nov. 19, 2018) (subsequent ruling on amended complaint denied motion to dismiss segregative effect claim, *Nat'l Fair Hous. All. v. Deutsche Bank Nat'l Tr.*, No. 18 CV 839, 2019 WL 5963633, at *20 (N.D. Ill. Nov. 13, 2019)).

170. Regarding success of segregative effect claims through 2018, see Schwemm, *supra* note 166, at 735–37. Regarding inconsistent outcomes, depending on the protected class in the traditional disparate impact claim, see Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d. 34, 49–50 (2d Cir. 2015).

171. Schwemm, *supra* note 166, at 738.

within which a harmed community exists.[172] Compared to the geographic area at issue in traditional disparate impact claims, the area at issue in a segregative effect claim is generally smaller.[173]

Recently, in a case involving discriminatory effect claims—including a rejected segregative effect claim—the Ninth Circuit found a city relied on too broad a geographic area in justifying a zoning denial.[174] Recognizing the extent to which segregation can exist at the granular level, the Ninth Circuit denounced allowing cities to deny housing in one area by "scouring large swaths of a city for housing in another part of town that is largely populated by minority residents."[175] The Ninth Circuit declared that such reasoning "ignores the fact that neighborhoods change from mile to mile, if not from block to block . . . ."[176]

Once the geographic area is determined, the focus narrows to the data for that geographic area.[177] While traditional disparate impact claims can be based on various data sources, segregative effect claims are generally based on census data.[178] Evidence can also include dissimilarity indices and geographic information system mapping.[179] In cases involving proposed construction, in addition to census data for the target geographic area, courts consider evidence on the demographic makeup of residents of the proposed development and the need for the type of affordable housing.[180]

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172. *Id.* The geographic area in segregative effect claims may be a locality, like the City of Black Jack. *See* United States v. City of Black Jack, 508 F.2d 1179, 1182 (8th Cir. 1974). The area may instead be a neighborhood or area within a city, such as in the city of Yuma. *See Ave. 6E Invs.*, 818 F.3d at 511–13.

173. Schwemm*, supra* note 166, at 738.

174. *Ave. 6E Invs.*, 818 F.3d at 511–13.

175. *Id.* at 511.

176. *Id*.

177. Schwemm, *supra* note 166, at 738–39 (noting the analysis for a segregative effect claim).

178. *Id.* For example, the plaintiffs in *Village of Arlington Heights* effectively used census data to compare the demographics of the target community, a 99% white suburb of Chicago, and the diverse metropolitan area, resulting in the Seventh Circuit finding "overwhelming" racial segregation. *Id.* at 739; *Vill. of Arlington Heights*, 429 U.S. at 255 ("According to the 1970 census, only [twenty-seven] of the Village's 64,000 residents were black.").

179. Raden, *supra* note 94, at 400; LEAH HENDEY & MYCHAL COHEN, USING DATA TO ASSESS FAIR HOUSING AND IMPROVE ACCESS TO OPPORTUNITY: A GUIDEBOOK FOR COMMUNITY ORGANIZATIONS 123 (2017); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 404–09 (1983); *see also* Nat'l Fair Hous. All. v. Bank of Am., 401 F. Supp. 3d 619, 641 (D. Md. 2019).

180. Schwemm*, supra* note 166, at 740.

In *ICP*, the Court recognized the segregative effect theory and the FHA's goal of integration.[181] The Court noted while the FHA does not "force housing authorities to reorder their priorities," it does aim "to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[182] In addition, the Court cited with approval two perpetuation-of-segregation cases, *United States v. Black Jack* and *Huntington Branch, NAACP v. Town of Huntington*.[183] In discussing these "heartland" of disparate-impact liability cases, the Court also cited a third case, the complaint of which described perpetuation of segregation but did not set forth a segregative effect claim.[184]

In *Black Jack,* plaintiffs challenged a white St. Louis suburb's ordinance barring new multifamily housing.[185] The plaintiffs presented evidence that Black individuals would live in the development and challenged the ordinance on grounds that it had a discriminatory effect and perpetuated racial segregation.[186] The Eighth Circuit considered the segregated housing patterns, rejected the city's justifications, and enjoined the ordinance on grounds "that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99% white."[187]

In *Huntington Branch,* plaintiffs challenged a highly segregated white suburb's refusal to rezone land to allow a subsidized housing development in a predominantly white neighborhood.[188] The zoning plan limited new multifamily developments to a segregated urban renewal area.[189] Plaintiffs brought challenges based on both disparate impact and segregative effect.[190] The Second Circuit affirmed the appellate court's ruling for plaintiffs on their disparate impact claim, and after ruling that the city's action also perpetuated segregation, recognized how the appellate court failed to consider plaintiffs' segregative effect claim.[191]

Decisions after *ICP* recognize FHA-based perpetuation-of-segregation claims, two of which will be discussed here. In *Ave. 6E Invs., LLC v. City of Yuma,* the Ninth Circuit recognized the segregative effect claim within the theory of disparate-impact liability: "[T]he FHA also encompasses a

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181. *ICP*, 576 U.S. at 546–47.
182. *Id.* at 540.
183. *Id.* at 535–36.
184. *Id.* at 539–40; *see also* Transcript of Oral Argument at 49–50, *ICP*, 576 U.S. 519.
185. United States v. City of Black Jack, 508 F.2d 1179, 1179–80 (8th Cir. 1974).
186. *Id.* at 1186.
187. *Id.*
188. *Huntington Branch*, 844 F.2d at 928.
189. *Id.*
190. *See id.* at 933.
191. Schwemm, *supra* note 166, at 721.

second distinct claim of discrimination, disparate impact, that forbids actions by private or governmental bodies that create a discriminatory effect upon a protected class or perpetuate housing *segregation* without any concomitant legitimate reason."[192]

In *Ave. 6E Invs.*, the Ninth Circuit recognized plaintiffs' separate perpetuation-of-segregation claim, but affirmed the district court's holding that plaintiffs failed to set forth sufficient facts for this claim.[193] Reversing rulings adverse to plaintiffs on their disparate-treatment and disparate-impact claims, the Ninth Circuit held that the existence of similarly-priced housing elsewhere in the city did not negate the possibility of disparate impact.[194] In reaching this conclusion, the Ninth Circuit emphasized the importance disparate-impact liability has on "the continuing persistence of housing segregation"[195] The Ninth Circuit recognized how the FHA's disparate-impact theory of liability "has helped to change the old patterns prevalent in the 1960s and will continue to help produce a fairer and more just society."[196]

The Ninth Circuit held that under the city's reasoning—where after a zoning denial, the presence of similarly priced housing *anywhere* within a quadrant or part of a city would preclude a finding of disparate impact––"would threaten the very purpose of the FHA."[197] The Ninth Circuit found such reasoning would "permit cities to block legitimate housing projects that have the by-product of increasing integration" by identifying housing in majority minority parts of the city.[198] Such practices could cause cities to increase—rather than diminish—segregation.[199] The Ninth Circuit

192. *Ave. 6E Invs.*, 818 F.3d at 503 (emphasis added).

193. In *Ave. 6E Invs.*, a developer known for developing low and moderately priced homes sought to rezone land, and the city's planning staff recommended that the city council approve the change. *Id.* at 496, 498–99. Residents opposed the change primarily based on the demographics of the residents of the future homes. *Id.* at 499. The city council denied the rezoning, which was the first denial in seventy-six requests over three years. *Id.* at 497, 501. The plaintiff's FHA claims were based on discriminatory intent and disparate impact. *Id.* at 497. The court contested the sufficiency of the developer's discriminatory intent allegations and justified the city's denial based on the presence of other similarly priced housing opportunities in the area. *Id.* at 509 & n.10, 510, 513.

194. *Id.* at 497, 509.

195. *Id.* at 510.

196. *Id.*

197. *Id.* at 511.

198. *Id*.

199. Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, COLUM. HUM. RTS. L. REV., Spring 2017, at 98, 143.

went on to cite *ICP* in concluding: "Such segregated areas, when based on consciously or unconsciously biased decisions that disproportionately, and needlessly, adversely affect minorities, are the antithesis of what the [FHA] stands for."[200]

In *Anderson Group, LLC v. City of Saratoga Springs*, a plaintiff set forth a prima facie case for its perpetuation-of-segregation claim.[201] The City of Saratoga Springs rezoned land to preclude the construction of high-density developments after a developer proposed a high-density residential project, with 20% affordable units.[202] The developer challenged the city's zoning policy through disparate impact, based on both race and familial status, and perpetuation-of-segregation claims.[203] A jury returned a verdict in which it concluded that the city engaged in "disparate impact discrimination" and "in the perpetuation of segregation," but found the city liable only as to the disparate impact claim because the city met its burden for the segregative effect claim.[204]

The city challenged the jury's verdict on grounds it was inconsistent, and prevailed on both claims at a new trial.[205] However, the Second Circuit reinstated the original verdict, holding the city waived its argument regarding inconsistency, and any error in the verdict was not fundamental in light of the possibility that "a rule or policy may be invalidated on the ground that the legitimate governmental interest served can be achieved by alternatives with less discriminatory effect on families with children, even though that same legitimate governmental interest cannot be achieved by alternatives with less segregating effect on the community."[206]

Additional post-*ICP* cases discuss perpetuation-of-segregation claims.[207]

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200. *Ave. 6E Invs.*, 818 F.3d at 511.

201. Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34, 49–50 (2d Cir. 2015).

202. *Id.* at 38.

203. *Id.*

204. *Id.* at 43.

205. *Id.* at 43–44.

206. *Id.* at 49–50.

207. *See, e.g.*, *Ave. 6E Invs.*, 818 F.3d at 513; *Anderson Grp.*, 805 F.3d. at 49–50; *see also* Schwemm, *supra* note 166, at 729–35 (discussing *Mhany Management, Inc. v. County of Nassau* and *Boykin v. Fenty*); Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 616–20 (2d Cir. 2016) (affirming findings of disparate impact based on both greater adverse effect and segregative effect in challenge to the city's zoning-related actions, but remanded on the issue of whether there were less discriminatory alternatives); Boykin v. Fenty, 650 F. App'x 42, 44–45 (D.C. Cir. 2016) (affirming rejection of plaintiffs' disparate impact claims, both greater adverse effect and segregative effect, against the District of Columbia's closure of a homeless shelter). The Fifth Circuit has also heard a case involving a segregative effect claim against a private actor instead of a government entity. *See* Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 901–09 (5th Cir. 2019) (affirming rejection of plaintiffs' disparate impact claims, both greater effect and

V. CONCLUSION

At a time when the COVID-19 public health crisis threatens to exacerbate inequality and segregation, dismantling segregation is critical for ensuring health equity for all. The time is ripe for the nation to use the FHA to wage a war on segregation through disparate impact and segregative effect claims. Such an effort is possible within the FHA's framework and necessary to effectuate its primary intent and purpose.

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segregative effect, which required plaintiffs to meet a higher pleading standard than the statute's requirement, resulting in a decision inconsistent with the Court's *ICP* decision and post-*ICP* decisions from other circuits). Other disparate impact cases discuss segregation in the FHA context although do not address segregative effects claims. *See* Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., No. 20-15506, 2021 U.S. App. LEXIS 33614, at *14, *38 (9th Cir. Nov. 12, 2021) (affirming rejection of plaintiffs' disparate impact claim, but finding plaintiffs did establish a prima facie case of disparate impact, and instead affirming judgment on grounds that plaintiffs failed to establish an equally effective, but less discriminatory, alternative, and citing *Avenue 6E* and *ICP* for the FHA's perpetuation of segregation prohibition); Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 423–38 (4th Cir. 2018) (upholding disparate impact claim, without a segregative effect claim, the Fourth Circuit reversed dismissal of the claim against a mobile home park because there was sufficient evidence of a prima facie case); Ellis v. City of Minneapolis, 860 F.3d 1106, 1114 (8th Cir. 2017) (affirming rejection of a disparate impact claim challenging a city's heightened enforcement of housing and rental standards); Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, 759 F. App'x 828, 833–36 (11th Cir. 2018) (affirming the rejection of the plaintiffs' disparate impact claim against the city regarding utility rate increase). Additionally, there are post-*ICP* FHA cases involving discriminatory lending practices, including steering. *See* City of Mia. Gardens v. Wells Fargo & Co., 931 F.3d 1274, 1287–88 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 1125 (2021); City of Mia. v. Wells Fargo & Co., 923 F.3d 1260, 1271 (11th Cir. 2019), *vacated on other grounds*, 140 S. Ct. 1259 (2020); City of Oakland v. Wells Fargo & Co., 14 F.4th 1030, 1042 (9th Cir. 2021).