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ALGORITHMS, HOUSING DISCRIMINATION, AND THE NEW DISPARATE IMPACT RULE

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In the coming years, algorithms—often but not always powered by artificial intelligence—will experience increasing adoption in relation to home loan approvals, real estate marketing and sales, and zoning decisions. While algorithms offer many potential advantages, they also bring the risk of perpetuating or even amplifying longstanding patterns of housing-related discrimination. When that occurs, disparate impact litigation under the Fair Housing Act (FHA) will be a key mechanism for seeking redress.

This Article aims to help ensure that FHA disparate impact claims can serve as an effective tool to combat housing discrimination in an era when an increasing number of decisions will be made by algorithms. This issue is particularly timely in light not only of the broader imperative to ensure that federal antidiscrimination frameworks remain effective as the technology used in the housing sector evolves, but also because the Department of Housing and Urban Development has recently published a final rule that, subject to a pending court challenge, will codify a set of explicit steps for

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litigants to follow in cases involving allegations of algorithm-based housing discrimination.

Depending on its interpretation in the courts, the new rule risks erecting very high barriers to future FHA plaintiffs in light of the proprietary nature of the algorithms they will be challenging. To address this, the Article analyzes Supreme Court cases in relation to both FHA disparate impact litigation as well as pleading standards more generally and presents a roadmap which would allow plaintiffs to access the information necessary to address the pleading requirements of the proposed rule while simultaneously protecting the rights of defendants and avoiding overburdening courts.

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I. INTRODUCTION

The Fair Housing Act (FHA)[1] was enacted in 1968 and bars discrimination on the basis of "race, color, religion, sex, familial status, or national origin"[2] in relation to home sales, rentals, and related activities such as home advertising,[3] brokerage services,[4] and loan approvals.[5] In spite of the law's purpose, and despite a half century of enforcement through the courts, housing discrimination and patterns of segregation remain persistent and pervasive in the United States. To consider one example among many, a recent University of California, Berkeley study found that both online and face-to-face lenders charge higher interest rates to African American and Latinx borrowers, earning 11 to 17 percent higher profits on such loans.[6] Researchers found that African American and Latinx homebuyers ultimately pay up to half a billion dollars more in interest every year than white borrowers with comparable credit scores.[7] Against this backdrop, an increasing tendency to use algorithms—including but not limited to those used in artificial intelligence—in housing, is poised to further complicate, and likely impede, effective FHA implementation and enforcement.[8]

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1. Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2018).

2. 42 U.S.C. § 3604 (2018). Some, but not all, of the provisions in § 3604 also prohibit discrimination based on handicap status. While the Fair Housing Act does not address employment discrimination, it is nonetheless notable that in June 2020, in *Bostock v. Clayton Cty.*, the Supreme Court considered the meaning of the prohibition in Title VII of the Civil Rights Act of 1964 on employment discrimination based on "sex." 140 S. Ct. 1731 (2020). The Court held that "[a]n employer who fires an individual merely for being gay or transgender defies the law." *Id.* at 1754. While that decision applies to employment discrimination under Title VII of the Civil Rights Act of 1964 and therefore does not constitute formal precedent in relation to housing discrimination under the FHA, a reasonable conclusion in light of *Bostock* is that the protections in the FHA against discrimination based on "sex" will also be read to protect members of the LGBTQ community.

3. 42 U.S.C. § 3604(c) (2018).

4. 42 U.S.C. § 3605(b)(2) (2018). In addition to prohibiting discrimination based on race, color, religion, sex, familial status, or national origin, § 3605(b)(2) prohibits discrimination based on handicap status.

5. 42 U.S.C. § 3605(b)(1) (2018). In addition to prohibiting discrimination based on race, color, religion, sex, familial status, or national origin, § 3605(b)(1) prohibits discrimination based on handicap status.

6. Laura Counts, *Minority Homebuyers Face Widespread Statistical Lending Discrimination, Study Finds*, HAAS SCH. BUS., U.C. BERKELEY (Nov. 13, 2018) https://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds.

7. *Id.*

8. All artificial intelligence (AI) uses algorithms, though not all algorithms use artificial intelligence. For example, a simple mathematical formula used to compute how large a monthly mortgage payment a person can afford as a function of income and other loan obligations (such as monthly car payments) is an

In addition, the U.S. Department of Housing and Urban Development (HUD) recently published a final rule that, pending the outcome of an ongoing court challenge, stands to significantly complicate the challenges faced by FHA plaintiffs, particularly in cases involving algorithms.[9] The key goal of this Article is to identify ways to ensure that the FHA can provide an effective mechanism for addressing housing discrimination in an environment in which algorithms are increasingly common, and in which FHA litigation is governed by a new and complex procedural framework.

Algorithms offer both benefits and risks when used in relation to housing. The authors of the U.C. Berkeley study cited above illustrate these conflicting benefits and risks by comparing algorithmic and traditional application approvals for residential loans.[10] They found that algorithmic approaches can help mitigate bias, writing that with respect to the price of mortgages as reflected in interest rates, "FinTech [financial technologies] algorithms discriminate 40% less than face-to-face lenders."[11] However, algorithmic lending still imposed what amounts to a race-based interest rate penalty.[12] In short, the algorithmic lending decisions studied by the Berkeley researchers reduced but did not eliminate interest rate discrimination.[13]

In the coming years, algorithms will experience growing adoption not only for loan approvals but also for multiple other types of FHA-relevant decisions. For example, algorithms are already in common

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algorithm, but it is not AI. By contrast, an algorithm for home valuation that monitors recent home sales in a neighborhood and automatically refines the computations it uses to perform valuation computations would be an example of artificial intelligence.

9. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100). As discussed *infra*, the rule was scheduled to take effect on October 26, 2020, though that has been preliminarily enjoined.

10. Counts, *supra* note 6.

11. Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era* 4-5 (Nat'l Bureau of Econ. Res., Working Paper No. 25943, 2019), https://www.nber.org/system/files/working_papers/w25943/w25943.pdf. The authors wrote that, among the subset of loan applicants whose applications were approved, "Latinx and African-American borrowers pay 7.9 and 3.6 basis points more in interest for home-purchase and refinance mortgages, respectively, because of discrimination" and that "Latinx and African-American [borrowers] pay 5.3 basis points more in interest for purchase mortgages and 2.0 basis points for refinance mortgages originated on FinTech platforms." *Id.* Interestingly, the researchers also found that "algorithmic lenders . . . show no discrimination in rejection rates." *Id.*

12. *Id.*

13. Of course, not all algorithms will result in these sorts of outcomes. Some algorithms could worsen discrimination, some could leave it unchanged, some could (like those studied by the Berkeley researchers) reduce but not eliminate discrimination, and some could eliminate it.

use in marketing and sales, both generally and in the housing sector.[14] Algorithms are also in use, or contemplated for use, in decisions about zoning or the price of home insurance.[15] The implications of this shift are profound given the enormous historical and continuing costs of housing discrimination borne by members of underrepresented groups.

Whether a particular algorithm used in the housing sector eliminates, reduces, perpetuates, or amplifies discrimination will depend on a wide range of factors, including data collection practices, methods used by algorithm designers, the extent to which algorithm designers are aware of and test for bias during the development process, the nature of the input data, and how outputs are used. As algorithm use grows, so too will the risks of amplified housing discrimination and the resulting FHA concerns. In resulting litigation, courts will need to apply a statutory framework and associated case law developed over the past half-century in response to human-made decisions in a new context defined by computer-made decisions.

Antidiscrimination law in housing (and in other protected domains such as employment) generally recognizes two separate categories of discrimination: disparate treatment and disparate impact.[16] As the Supreme Court explained in a 1993 employment case, "[i]n a disparate treatment case, liability depends on whether the

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14. *See, e.g.*, Andrea Riquier, *Why Buying and Selling a House Could Soon Be as Simple as Trading Stocks*, MARKETWATCH (Dec. 29, 2019, 9:23 AM), https://www.marketwatch.com/story/how-buying-and-selling-a-home-could-soon-be-as-simple-as-trading-stocks-2019-09-11.

15. *See, e.g.*, Nicole Friedman, *No One Can Agree on How to Price California Home Insurance for Wildfires*, WALL ST. J. (Sept. 16, 2019), https://www.wsj.com/articles/no-one-can-agree-on-how-to-price-california-home-insurance-for-wildfires-11568649298; Danny Crichton, *Algorithmic Zoning Could Be the Answer to Cheaper Housing and More Equitable Cities*, TECHCRUNCH (Feb. 19, 2018, 3:18 PM), https://techcrunch.com/2018/02/19/algorithmic-zoning-could-be-the-answer-to-cheaper-housing-and-more-equitable-cities/.

16. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 534 (2015) ("The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase 'otherwise make unavailable' refers to the consequences of an action rather than the actor's intent. And this phrase is equivalent in function and purpose to Title VII's and the ADEA's 'otherwise adversely affect' language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word 'otherwise' also signals a shift in emphasis from an actor's intent to the consequences of his actions." (citations omitted)); De Reyes v. Waples Mobile Home Park L.P., 903 F.3d 415, 421 (4th Cir. 2018) ("[A]n FHA claim can proceed under either a disparate-treatment or a disparate-impact theory of liability, and a plaintiff is not required to elect which theory the claim relies upon at pre-trial, trial, or appellate stages.").

protected trait . . . actually motivated the employer's decision."[17] Disparate treatment doctrine protects individuals and groups from intentionally differential treatment based on protected attributes such as race, gender, religion, disability status, age, national origin, etc. Succeeding in a disparate treatment claim requires a showing of either discriminatory *intent*, or explicit classification or treatment based on protected attributes.

By contrast, disparate impact occurs when a facially neutral policy or practice nonetheless leads to a discriminatory outcome. In explaining disparate impact, the Supreme Court wrote in its 1988 *Watson v. Fort Worth Bank & Trust* opinion that "practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[18] Disparate impact doctrine is a particularly powerful and important tool for combating discrimination, much of which occurs under circumstances in which intent is lacking—or, when present, would be challenging to show.

Disparate impact doctrine will play an important role in antidiscrimination law as algorithms become more widely used. Few algorithm developers would intentionally create algorithms that violate federal antidiscrimination law. But unintentional algorithmic discrimination can arise from a variety of sources. For instance, biases in input data are a major source of concern.[19] Another concern is that the people developing algorithms might hold unrecognized biases that are inadvertently reflected in their algorithmic creations. Algorithm developers will be aware of the potential that data can be biased as a result of discriminatory social structures, or errors in data collection, but they will not always succeed in identifying and fully mitigating it.

In some cases, the dynamic nature of artificial intelligence (AI) systems can also contribute to discriminatory outcomes.[20] A key attribute of AI is its ability to learn and to automatically adapt its behavior. [21] This means that an AI algorithm will evolve as it has the benefit of learning from an ever-increasing database of information and accumulated experience. Usually, this evolution is beneficial, as

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17. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (citations omitted).

18. 487 U.S. 977, 987 (1988).

19. *See, e.g.*, John Villasenor, *Artificial Intelligence and Bias: Four Key Challenges*, BROOKINGS INST.: TECHTANK (Jan. 3, 2019), https://www.brookings.edu/blog/techtank/2019/01/03/artificial-intelligence-and-bias-four-key-challenges.

20. For a primer on AI and an explanation of the difference between algorithms and AI, see John Villasenor & Virginia Foggo, *Artificial Intelligence, Due Process, and Criminal Sentencing*, 2020 MICH. ST. L. REV. 295, 300-07 (2020).

21. *See generally id.*

AI systems are designed to adapt and improve their predictions. But AI systems are also complex, and there will inevitably be circumstances in which AI-driven adaptation could cause an algorithm to evolve in ways that might introduce discrimination.[22] For instance, an AI system designed to make loan decisions based on very large amounts of data might, during the course of its natural evolution, begin using information that is highly correlated with protected attributes as an input. Given the high level of segregation in many American cities, this could occur if an algorithm evolved in a manner to make decisions based on residential address location. That correlation could lead the AI system to make decisions that result in discriminatory outcomes reminiscent of those made by humans when redlining was common.

FHA violations may arise from the use of algorithms when—whether due to biases among algorithm developers, biased data, biases arising from automatic adaptations due to artificial intelligence, or other reasons—an algorithm used for housing sector decisions leads to discriminatory outcomes. The efficacy of the FHA in addressing future discrimination claims will depend significantly on the extent to which disparate impact claims can be adjudicated in a manner that is fair to both plaintiffs and defendants when the allegedly discriminatory policy is embodied in an algorithm. Given the proprietary nature of many algorithms, it will be particularly important to ensure that plaintiffs are not blocked from accessing the information necessary to pursue FHA claims.

Two related developments are fundamentally shifting the foundation on which future FHA disparate impact claims involving algorithms will be evaluated. The first was a 2015 Supreme Court ruling on a case that was not about algorithms at all. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Court confirmed that disparate impact claims could be brought under the FHA, and also provided guidance on how such claims should be adjudicated, as discussed in Part II.a of this Article.[23]

The second development was HUD's 2020 publication of a final rule (hereinafter, the "2020 Disparate Impact Rule") for adjudicating

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22. *See, e.g.*, Villasenor, *supra* note 19.

23. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 539 (2015) (holding that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose."). The Court also addressed the importance of establishing a causal relationship between the challenged policy and a resulting disparate impact, writing that 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." *Id.* at 542, (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)).

FHA disparate impact cases.[24] The 2020 Disparate Impact Rule articulates a highly detailed set of new pleading requirements that will profoundly impact how algorithm discrimination cases will be adjudicated.[25] While its promulgation was ostensibly motivated by *Inclusive Communities*, the rule goes well beyond merely updating FHA administrative law to bring it into compliance with the *Inclusive Communities* holding. Additionally, the rule leaves much open to interpretation, including critically important questions of the timing and degree of discovery that a plaintiff will be permitted to conduct in relation to a defendant's proprietary algorithm.[26]

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24. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

25. Another question that might reasonably be raised in relation to the 2020 Disparate Impact Rule is whether HUD has gone beyond its authority by imposing a framework that, at least as some courts might interpret it, places such a high hurdle on plaintiffs that it substantively impedes access to relief under the FHA. As the Court stated in *Chevron*:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc. 467 U.S. 837, 843-44 (1984).

It is also worth noting that future Supreme Court decisions could weaken or overturn *Chevron*. *See*, *e.g.*, Kimberly Strawbridge Robinson, *High Court Could Take First Step to Chevron Doctrine's Demise*, BLOOMBERG (Mar. 27, 2019, 4:56 AM), https://news.bloomberglaw.com/us-law-week/high-court-could-take-first-step-to-chevron-doctrines-demise.

26. Strictly speaking, "proprietary" refers to ownership and does not necessarily involve the existence of trade secrets. However, in practice, and as used herein, a proprietary algorithm is typically one that is owned by a private (or in some cases government) entity and for which there is less than full public disclosure regarding its design and inner workings, including the source code. As used herein, a proprietary algorithm refers to an algorithm protected at least in part by trade secret law. Trade secret laws are found at both the state and federal level, and would generally apply to the non-public internal workings of an algorithm used in relation to housing sector transactions such as loan approvals. State civil trade secret statutes are typically based on the Uniform Law Commission's (ULC's) Uniform Trade Secrets Act (UTSA), which states that trade secret:

> [M]eans information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005).

At the federal level, in addition to the longstanding federal criminal laws addressing trade secret theft (*see* 18 U.S.C §§ 1831-1832), in 2016 Congress enacted, and President Obama signed into law, the Defend Trade Secrets Act, Pub. L. No. 114–153, 130 Stat. 376 (2016) (codified at 18 U.S.C. § 1836), a bill creating a federal civil cause of action for trade secret misappropriation in the context of interstate or foreign commerce.

HUD published the 2020 Disparate Impact Rule on September 24, 2020 with a stated effective date of October 26, 2020.[27] However, on September 28, plaintiffs Massachusetts Fair Housing Center and Housing Works filed a lawsuit in federal district court in Massachusetts seeking a stay of the effective date.[28] In an October 6th memorandum, the plaintiffs argued that "[t]he 2020 [Disparate Impact] Rule marks an abrupt and unjustified departure from the historical approach to disparate impact enforcement under the FHA, by introducing novel pleading and proof requirements that will be virtually impossible to meet, and creating broad new defenses to liability."[29] On October 25, the court issued an order granting a preliminary injunction, writing that "[t]he effective date of the Final Rule is hereby POSTPONED pending conclusion of these review proceedings."[30] At time of publication, it remains unclear when the rule will become effective and what changes, if any, might be made to its text as a result of the litigation. Given that uncertainty, this Article analyzes the 2020 Disparate Impact Rule in the form that it was published by HUD, with the recognition that some portions of the analysis may need to be revisited in light of future litigation-driven changes.

The main contribution of this Article is to provide analysis and guidance to facilitate the effective application of the FHA, in accordance with the 2020 Disparate Impact Rule, in litigation involving alleged algorithm-driven discrimination. The rest of this Article is organized as follows. Part II gives a brief review of *Inclusive Communities* and then provides a description and analysis of the 2020 Disparate Impact Rule, examining its provisions in terms of their likely impact in FHA algorithm litigation. Part III considers questions related to stating a claim. In doing so, we examine the Supreme Court's plausibility standard in light of *Bell Atlantic Corp. v. Twombly*[31] and *Ashcroft v. Iqbal*,[32] and the implications of those frameworks for the 2020 Disparate Impact Rule as applied to algorithm discrimination cases. Part IV addresses discovery.

When the alleged discrimination arises from an algorithm—in particular one that might be proprietary and therefore involve non-public inner workings—complex questions arise regarding whether

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27. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,288.

28. Complaint, Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., No. 20-cv-11765 (D. Mass. Sept. 28, 2020).

29. Memorandum in Support of Plaintiffs' Motion Under 5 U.S.C. § 705 to Postpone the Effective Date of HUD's Unlawful New Rule at 2, *Mass. Fair Hous. Ctr.*, No. 20-cv-11765 (D. Mass. Oct. 6, 2020).

30. Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., No. 20-cv-11765, 2020 WL 6390143, at *8 (D. Mass. Oct. 25, 2020).

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

32. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

and to what extent plaintiffs should gain access to early discovery. On the one hand, a meritorious plaintiff needs access to sufficient information to make the requisite showings to construct (and later amend as appropriate) a complaint with sufficient support to survive a dispositive motion.[33] On the other hand, it is important to avoid granting excessive access to broad discovery too early in pre-trial proceedings, as doing so would place unnecessary procedural and financial burdens on defendants, courts, and plaintiffs. Conclusions are presented in Part V.

II. *Inclusive Communities* and the 2020 Disparate Impact Rule

A. Inclusive Communities

Disparate impact case law first arose in relation to employment.[34] In 1971, the Supreme Court explained in *Griggs v. Duke Power Co.* that under the Civil Rights Act of 1964, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the *status quo* of prior discriminatory employment practices."[35] The *Griggs* Court further concluded that the Civil Rights Act of 1964 "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."[36] However, because the Civil Rights Act of 1964 did not address housing discrimination, *Griggs* left the applicability of disparate impact doctrine to the housing sector unclear, despite the fact that it was decided after the FHA's 1968 enactment.

The Eighth Circuit became the first federal appellate court to find an FHA violation based on disparate impact in *United States v. City of Black Jack*.[37] In *City of Black Jack*, the Eighth Circuit considered a "zoning ordinance which prohibited the construction of any new multiple-family dwellings"[38] and explained that "[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results

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33. "Dispositive motion" herein refers to a motion to dismiss or a motion for judgment on the pleadings. Of course, a motion for summary judgment is also dispositive, though it is less relevant for the purposes of this Article as that would occur after the close of discovery. In theory, a motion for judgment on the pleadings could also occur after the close of discovery.

34. The fact that disparate impact case law emerged earlier in relation to employment than to housing is a consequence of the fact that while employment discrimination was addressed at the federal level in the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2), it was not until 1968 that the Fair Housing Act was enacted.

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

36. *Id.* at 431.

37. 508 F.2d 1179 (8th Cir. 1974).

38. *Id.* at 1181.

in racial discrimination; in other words, that it has a discriminatory effect."[39] The Eighth Circuit further underscored that a showing of intent was not necessary in an FHA claim, writing that "[e]ffect, and not motivation, is the touchstone."[40] By 2013, "[e]very circuit court [that had] to decide the question, which include[d] all but the D.C. Circuit, . . . determined that liability can be imposed under the FHA on a showing of discriminatory effects."[41] However, in 2014 a federal district court in Washington D.C. explicitly rejected the assertion that the FHA allowed disparate impact claims, concluding that "the FHA prohibits disparate treatment *only*."[42]

It was not until 2015 in *Inclusive Communities* that the Supreme Court definitively resolved, in the affirmative, the question of whether disparate impact claims could be brought under the FHA. *Inclusive Communities* arose from a challenge to the allocation of tax credits to developers of low-income housing.[43] In 2008, plaintiff Inclusive Communities Project (ICP) filed an FHA disparate impact claim in district court alleging that the Texas Department of Housing and Community Affairs (TDHCA) was "granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods."[44] The decisions at the district court and from the Fifth Circuit on appeal centered largely on issues of burden—i.e., whether ICP had established a *prima facie*

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39. *Id.* at 1184.

40. *Id.* at 1185.

41. 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, 359 (2013). Despite this agreement among circuit courts, prior to Inclusive Communities, questions remained regarding disparate impact doctrine in relation to the FHA. In applying the burden-shifting framework developed in relation to addressing employment discrimination (under Title VII of the Civil Rights Act of 1964) to housing discrimination cases under the FHA, "[t]he Black Jack court relied directly on equal protection precedent in finding disparate impact liability under the FHA." William F. Fuller, *What's HUD Got to Do With It?: How HUD's Disparate Impact Rule May Save the Fair Housing Act's Disparate Impact Standard*, 83 FORDHAM L. REV. 2047, 2066-67 (2015). A few years later in Village of Arlington Heights v. Metropolitan Housing Development Corp., the Supreme Court articulated an "unmistakable rejection of the disparate impact theory of equal protection liability," which "cut Black Jack from its constitutional moorings." Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 430 (1998) (quoting Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 356 (1951) (Frankfurter, J., concurring)).

42. Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urb. Dev., 74 F. Supp. 3d 30, 32 (D.D.C. 2014).

43. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 525 (2015) ("The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. . . . Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.").

44. *Id.* at 526.

case of disparate impact,[45] and, if so, whether TDHCA then had the burden of proving that the tax credits could have been allocated in a less discriminatory manner.[46] TDHCA filed a petition for *writ of certiorari* on the question of "whether disparate-impact claims are cognizable under the Fair Housing Act."[47]

In a 2015 decision authored by Justice Kennedy, the Supreme Court held that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose."[48] The Court also underscored an important set of constraints on such claims, explaining that "disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, e.g., if such liability were imposed based solely on a showing of a statistical disparity."[49]

Under *Inclusive Communities,* FHA disparate impact claims are adjudicated through a three-step burden shifting framework.[50] The *Inclusive Communities* framework echoes the process laid out in 2013 HUD regulations.[51] The first step in establishing a *prima facie* disparate impact claim requires a plaintiff to show a "robust causality" tying a defendant's particular policy(s) to an alleged disparate impact. The Court explained 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."[52] In addition, the Court wrote that 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."[53]

45. *Id.* ("The District Court concluded that the ICP had established a prima facie case of disparate impact.").

46. *Id.* at 527 ("Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits.").

47. *Id.* at 525.

48. *Id.* at 539.

49. *Id.* at 521. While *Inclusive Communities* was an FHA case, the *Inclusive Communities* Court also addressed limitations on disparate impact claims more broadly, explaining that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *Id.* at 533.

50. *See, e.g.*, De Reyes v. Waples Mobile Home Park L.P., 903 F.3d 415, 424 (4th Cir. 2018), cert. denied, 129 S. Ct. 2026 (2019) ("In *Inclusive Communities*, the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework.").

51. 24 C.F.R. § 100.500 (2014).

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

53. *Id.* (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)).

The second step shifts the burden to the defendant who must state and explain the valid interest served by their policies."[54] The Court explained that this second step "is analogous to the business necessity standard under Title VII [of the Civil Rights Act of 1964, addressing discrimination in employment] and provides a defense against disparate-impact liability."[55]

In the third step, the burden shifts once again to the plaintiff. Drawing again from the 2013 HUD regulations, the Court explained that "once a defendant has satisfied its burden at step two, a plaintiff may 'prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.'"[56] It should be noted that the 2020 Disparate Impact Rule lays out a litigation framework that departs in significant ways from the standard articulated in *Inclusive Communities*, as discussed later in this Article.

While the Supreme Court's endorsement of disparate impact liability under the FHA was essential to the advancement of the original purpose of the FHA, *Inclusive Communities* also created confusion in lower courts regarding how to interpret the meaning of "robust causality," as well as *when* that test should be applied.[57] For instance, in *De Reyes v. Waples Mobile Home Park L.P.*[58]—a 2018 case to be discussed again later in this Article—the Fourth Circuit examined "whether the district court erred in dismissing Plaintiffs' disparate-impact theory of liability at the motion to dismiss stage on the grounds that they failed to show the required causality between the Policy and the disparate impact on Latinos."[59] In doing so, the court noted that *Inclusive Communities* focused "on the plaintiff's need to demonstrate a 'robust causality requirement' under the first step of the framework in order to state a prima facie disparate-impact claim."[60] "Understanding this robust causality requirement," wrote the court, "is at the crux of this appeal."[61]

Different rulings regarding the timing of when a plaintiff gains access to the information necessary to show robust causality present

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54. *Id.* at 541.

55. *Id.*

56. *Id.* at 527 (quoting 24 C.F.R. § 100.500(c)(3) (2014)).

57. Inclusive Cmtys. Project v. Lincoln Prop. Co. (*Inclusive Communities II*), 920 F.3d 890, 903-04 (5th Cir. 2019) ("Although the Supreme Court's opinion in [*Inclusive Communities*] established 'robust causation' as a key element of the plaintiff's prima facie burden in a disparate impact case, the Court did not clearly delineate its meaning or requirements. Nor are we aware of any post-[*Inclusive Communities*] Supreme Court or Fifth Circuit decisions clarifying the standard.").

58. 903 F.3d 415 (4th Cir. 2018).

59. *Id.* at 423.

60. *Id.* at 425.

61. Id.

a logical conflict. In considering what sort of analysis is required to survive a motion to dismiss, the *De Reyes* court claimed that "[t]he Supreme Court's opinion in *Wards Cove* provides a clear example of *Inclusive Communities*' robust causality requirement."[62] However, the *Wards Cove* Court wrote that "[s]ome will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims."[63] In other words, *Wards Cove* assumed that causality would be shown at some point *after* plaintiffs have had the benefit of "liberal civil discovery rules."[64] Yet the *De Reyes* court cited *Wards Cove* as a supposedly "clear example of *Inclusive Communities*' robust causality requirement," despite the fact that, as quoted by *De Reyes*, *Inclusive Communities* characterized that requirement as a step that would happen at the pleading stage, likely before plaintiffs have had access to substantive discovery.[65]

There are also other concerns that have been raised by legal scholars surrounding the *Inclusive Communities* ruling that remain unresolved. For example, Claire Williams wrote that "the Supreme Court should abandon the new standard [i.e., the standard articulated in *Inclusive Communities*] because it restricts access to courts, and does not align with the FHA's substantive goal of fair and safe housing."[66] Similarly, in a 2017 article titled *When Causality is Too "Robust": Disparate Impact in the Crosshairs in De Reyes*, Nick Bourland argued against the robust causality requirement introduced by *Inclusive Communities*, claiming that it "will undoubtedly leave otherwise liable defendants off the hook and plaintiffs without recourse under the FHA."[67] As will be discussed in this Article, questions regarding the meaning of robust causality are particularly

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62. *Id.* at 426 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)). Note that despite the chronological order that might be implied by the phrasing in this quotation from *De Reyes*, *Wards Cove* was a ruling the predates *Inclusive Communities*. *Wards Cove* was decided in 1989, while *Inclusive Communities* was decided in 2015.

63. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

64. While this *could* occur at the summary judgment phase, *Wards Cove* considered causality—and the *prima facie* burden generally—after the case had already advanced to trial. *See generally* Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985).

65. As noted in the text, the *De Reyes* court characterized *Inclusive Communities* as addressing "the plaintiff's need to demonstrate a 'robust causality requirement' under the first step of the framework in order to state a prima facie disparate-impact claim." *De Reyes,* 903 F.3d at 425.

66. Claire Williams, *Inclusive Communities and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants*, 102 MINN. L. REV. 969, 971 (2017).

67. Nick Bourland, When Causation Is Too Robust: Disparate Impact in The Crosshairs in De Reyes, 20 CUNY L. REV. F. 132, 139 (2017).

acute when proprietary algorithms are involved given the challenges in establishing a causal relationship tying the inputs to and/or operations within an algorithm to an allegedly discriminatory outcome.

B. The 2020 Disparate Impact Rule

In September 2020, HUD published the 2020 Disparate Impact Rule. According to the accompanying Supplementary Notes, the rule "amends HUD's 2013 disparate impact standard regulation to better reflect the Supreme Court's 2015 ruling in *Inclusive Communities*."[68] The 2020 Disparate Impact Rule, which upon becoming effective replaces 24 C.F.R. § 100.500,[69] applies to both administrative actions and litigation initiated by private parties.[70] As noted previously, the originally anticipated effective date of the rule, October 26, 2020, has been stayed pending the outcome of a challenge brought in a federal district court in Massachusetts.[71] Before discussing the details of the rule and how it will impact suits alleging algorithmic discrimination, it is helpful to provide some context regarding the current FHA disparate impact framework established in 2013 that stands to be replaced by the 2020 Disparate Impact Rule.

In 2013, HUD published a Final Rule (hereinafter, the "2013 Discriminatory Effects Rule") to "formalize HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the Fair Housing Act."[72] In a response to public comments published alongside the final rule, HUD explained that the FHA "prohibits two kinds of unjustified discriminatory effects: (1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns."[73] As Robert Schwemm

68. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

69. *Id.* at 60,332. The changes to 24 C.F.R. § 100.500 will be by far the most consequential aspects of the 2020 Disparate Impact Rule. That said, the 2020 Disparate Impact Rule also makes changes to 24 C.F.R. §100.5 and 24 C.F.R. §100.70. *Id.*

70. The Supplementary Information accompanying the publication of the 2020 Disparate Impact Rule states that "This Final rule also establishes a uniform standard for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act and provides greater clarity of the law for individuals, litigants, regulators, and industry professionals." *Id.* at 60,288.

71. Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., No. 20-cv-11765, 2020 WL 6390143 (D. Mass. Oct. 25, 2020).

72. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,459, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. § 100.500).

73. *Id.* at 11,469.

explained in a 2017 law review article, prior to the 2013 publication of the new rule, "[t]hese two theories had been recognized by numerous courts."[74] Furthermore, while disparate impact cases had long been a part of the landscape of employment discrimination litigation, "the segregative-effect theory has no clear analog in Title VII law."[75] In addition, the 2013 Discriminatory Effects Rule "formally establishe[d] the three-part burden-shifting test for determining when a practice with a discriminatory effect violates the Fair Housing Act."[76]

Against this backdrop, the 2020 Disparate Impact Rule introduced a number of key changes. One is the elimination of the language addressing segregative effects. This change is reflected clearly in the titles of the respective Federal Register announcements. While the 2013 Discriminatory Effects Rule was published in the Federal Register under the title "Implementation of the Fair Housing Act's *Discriminatory Effects* Standard,"[77] the 2020 Disparate Impact Rule was published under the title "HUD's Implementation of the Fair Housing Act's *Disparate Impact* Standard."[78]

More fundamentally, this change is reflected in the text of the rule. In the language of 24 C.F.R. § 100.500 adopted pursuant to the 2013 Discriminatory Effects Rule: "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[79] Notably, this phrasing uses the disjunctive "or." A discriminatory effect can arise from a practice that results in disparate impact, or it can arise from a practice that exacerbates segregated housing patterns. The 2020 Disparate Impact Rule removes references to the latter entirely.

In the Supplementary Notes accompanying the publication of the 2020 Disparate Impact Rule, HUD noted that commenters on the text of proposed rule published in August 2019[80] had raised concerns

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74. Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 713 (2017).

75. *Id.* at 714.

76. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,460.

77. *Id.* at 11,459 (emphasis added).

78. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100) (emphasis added).

79. 24 C.F.R. § 100.500 (2019).

80. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R pt. 100).

about the removal of the language in 24 C.F.R. §100.500 addressing segregative effects. In response, HUD wrote:

> HUD does not agree that removal of the phrase "perpetuates segregated housing patterns" modifies any obligation under the Fair Housing Act. Specifically, HUD's removal of this phrase was part of HUD's streamlining of the regulation and is not meant to imply that perpetuation of segregation could never be a harm prohibited by disparate impact liability. A plaintiff need only prove in a case brought under disparate impact theory that a policy or practice has led to the perpetuation of segregation, which has a discriminatory effect on members of a protected class, in order for that policy or practice to be prohibited under this rule.[81]

The courts will decide whether this bit of legislative history is sufficient to overcome the change in scope implied by removing references to "segregated housing patterns" in the text of 24 C.F.R. §100.500 provided in the 2020 Disparate Impact Rule. It is possible—and concerning—that the 2020 Disparate Impact Rule may be interpreted in a manner that narrows the scope of protections conferred by the FHA, replacing a framework that encompasses both disparate impact and segregative effects with a framework that offers no explicit provision for pursuing segregative effects claims. At worst, this change opens the door to a deeply flawed "separate but equal" argument under which FHA permits segregative effects so long as those effects are allegedly not also discriminatory. Of course, to paraphrase the Supreme Court in *Brown v. Board of Education*, segregation is inherently unequal.[82] Any housing policy that creates segregative effects necessarily has a discriminatory effect. The fact that the rule change gives a foothold to those who might argue otherwise is highly concerning.

In addition, the proposed rule introduces significant changes to the structure of disparate impact litigation. The discussion herein considers that structure, focusing on 1) the requirements on plaintiffs at the pleading stage, 2) pleading stage defenses, 3) the burden of proof, 4) post-pleading stage defenses, and 5) the timing and role of discovery in addressing informational asymmetries.

1. Plaintiff Pleading Stage Requirements

81. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,306.

82. Brown v. Board of Education, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

Under the 2020 Disparate Impact Rule, "to state a discriminatory effects claim based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a plaintiff . . . must sufficiently plead facts to support each of" five elements.[83] Those elements, each of which will be discussed in more detail below, are as follows:

> 1) "[t]hat the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective . . ."[84],
> 2) "[t]hat the challenged policy or practice has a disproportionately adverse effect on members of a protected class;[85]
> 3) that "there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect;"[86]
> 4) that "the alleged disparity caused by the policy or practice is significant,"[87] and
> 5) that "there is a direct relation between the injury asserted and the injurious conduct alleged."[88]

The first element is "[t]hat the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law."[89] Notably, this places the burden with respect to "arbitrary, artificial, and unnecessary" squarely on the plaintiffs, a departure from *Inclusive Communities*, which does not explicitly assign this burden to a party—or even state that it is a distinct burden to be satisfied over and above those already built into the steps of the burden-shifting framework used in disparate impact litigation.

The proposed rule takes a phrase—"arbitrary, artificial, and unnecessary"—that was introduced in *Griggs*[90] and repeated in

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83. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. 100.500(b)) ("At the pleading stage, to state a discriminatory effects claim based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a plaintiff or charging party . . . must sufficiently plead facts to support each of the following elements . . . .").

84. *Id.* (Proposed 24 C.F.R. § 100.500(b)(1)).

85. *Id.* (Proposed 24 C.F.R. § 100.500(b)(2)).

86. *Id.* (Proposed 24 C.F.R. § 100.500(b)(3)).

87. *Id.* (Proposed 24 C.F.R. § 100.500(b)(4)).

88. *Id.* (Proposed 24 C.F.R. § 100.500(b)(5)).

89. *Id.* (Proposed 24 C.F.R. § 100.500(b)(1)).

90. Griggs v. Duke Power Co., 401 U.S 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed [under Title VII]. What is required by Congress is the removal of

Inclusive Communities,[91] and elevates it to a formal component of a pleading. The use of the conjunctive "and" means that the plaintiff will have to address each of "arbitrary," "artificial," and "unnecessary" separately.[92] For instance, if a court finds that a plaintiff has sufficiently pled facts alleging that the policy is arbitrary and unnecessary but not that it is artificial, that can be grounds to lead a court to grant a motion to dismiss for failure to state a claim.

Under the proposed rule, plaintiffs are also required to sufficiently plead facts alleging four additional elements: that "the challenged policy or practice has a disproportionately adverse effect on members of a protected class;"[93] that "there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect,"[94] that "the alleged disparity caused by the policy or practice is significant,"[95] and that "there is a direct relation between the injury asserted and the injurious conduct alleged."[96]

These requirements will be challenging for plaintiffs. Again, the conjunctive nature of the language means that the plaintiff must satisfy each of the five elements; an insufficient showing on any one or more of them (or, within the first element, on any one or more of "arbitrary," "artificial," and "unnecessary") will mean that the litigation will not move forward. Furthermore, the showing for each of the five elements in the proposed rule must be made with respect to a "specific, identifiable policy or practice." This can place an unsurmountable barrier in front of plaintiffs charged with identifying a sufficiently specific policy as the cause of the alleged disparate impact. Satisfying the pleading requirements will in some circumstances be difficult without access to discovery early on in the

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artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

91. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 545 (2015) ("[D]isparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.").

92. The requirement to show that a challenged policy is "arbitrary, artificial, and unnecessary" also raises questions about how, exactly, each of those terms should be defined in a manner that avoids redundancies. For example, it seems that a policy that is probably arbitrary would also be unnecessary.

93. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(b)(2)).

94. *Id.* (Proposed 24 C.F.R. § 100.500(b)(3)).

95. *Id.* (Proposed 24 C.F.R. § 100.500(b)(4)). Among other things, this raises the question of the level to which a disparity must rise to be considered "significant."

96. *Id.* (Proposed 24 C.F.R. § 100.500(b)(5)).

proceedings in relation to the workings of the challenged algorithm, as the requisite information is unlikely to be publicly available during pre-complaint investigations.

2. Pleading Stage Defenses

Once a plaintiff has alleged a case of disparate impact, the 2020 Disparate Impact Rule provides a defendant with a set of affirmative defenses both at and after the pleading stage. At the pleading stage, the defendant can:

> establish that a plaintiff has failed to sufficiently plead facts to support an element of a prima facie case under paragraph (b) of this section . . . *including by showing* that the defendant's policy or practice was reasonably necessary to comply with a third-party requirement, *such as* a: (i) Federal, state, or local law; (ii) Binding or controlling court, arbitral, administrative order or opinion; or (iii) Binding or controlling regulatory, administrative or government guidance or requirement."[97]

This language provides a very broad shield for defendants. First of all, a defendant can establish that the plaintiff has failed to satisfy any one or more of the five elements required to plead a case as discussed above. In addition, the rule provides what amounts to an additional defense, of vague but potentially broad scope, that is not specifically tied to the text of any of those five elements. The relevant provision states that a defendant can show that the challenged "policy or practice was reasonably necessary to comply with a third-party requirement."[98] Defendants, bolstered by the open-ended nature of the phrases "including by" and "such as,"[99] will undoubtedly push for broad interpretations of "reasonably necessary" and "third-party requirement." In the notes accompanying the publication of the rule, HUD states that this is intended to allow defendants to cite "binding authority which limits the defendant's discretion in a manner which shows that the defendant's discretion could not have plausibly been the direct cause of the disparity."[100] But that statement does little to clarify the scope of what might be "reasonably necessary" to comply with such authority.

3. Burden of Proof

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97. *Id.* at 60,333 (Proposed 24 C.F.R. § 100.500(d)(1)) (emphasis added).

98. *Id.*

99. The use of "including by" and "such as" in the language conveys in two ways that the scope of the defense is broad; i.e. that the list of third-party requirements that a defendant can invoke is exemplary but not limiting.

100. HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard, 85 Fed. Reg. at 60,290 (Proposed 24 C.F.R. § 100.500(d)(1)).

Once the case moves past the pleading stage, the plaintiff "must prove by the preponderance of the evidence each of the elements in paragraphs (b)(2) through (5);"[101] i.e., the second through fifth of the five pleading stage elements. Notably, the first element, which requires pleading facts to support the argument "[t]hat the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law,"[102] is addressed separately.

A defendant can rebut this element by "producing evidence showing that the challenged policy or practice advances a valid interest (or interests) and is therefore not arbitrary, artificial, and unnecessary."[103] This language is concerning, as it appears to endorse the view that a discriminatory policy is acceptable so long as it is not *all three* of arbitrary, artificial, and unnecessary, though it may be one or two of those things. Furthermore, the "valid interest" defense gives defendants a broad foundation for a rebuttal.

For instance, consider a financial institution making decisions on loan applications based on data that is highly correlated with a protected category such as race, and other data that is not.[104] The financial institution might argue that it has a valid interest in considering as much data as possible, claiming that more data allows more reliable predictions regarding loan repayment. Yet that does not mean it was *necessary* to consider the maximum amount of data, particularly if sufficiently reliable loan decisions could be made using only the subset of data not correlated with a protected category. Despite that, defendants will argue that they have a valid interest in considering data that may be unnecessary. And, a successful showing by the plaintiffs that this approach to gathering and using data is unnecessary still leaves open the question of whether it was arbitrary or artificial.

Consider another instance in which collecting the maximum amount of data may not be an arbitrary or artificial step if doing so arguably promotes predictive accuracy (even if only slightly). Thus, defendants can successfully rebut the assertion that collection of a maximum amount of data is arbitrary, artificial, and unnecessary, simply by demonstrating that it is *not* arbitrary, and/or *not* artificial. And, if a defendant makes the showing that "the challenged policy or

101. *Id.* at 60,332 (Proposed 24 C.F.R. § 100.500(c)(1)).

102. *Id.* (Proposed 24 C.F.R. § 100.500(b)(1))

103. *Id.* at 60,332-33 (Proposed 24 C.F.R. § 100.500(c)(2)).

104. In this example we are further assuming that the correlation is such that decisions based on that data would lead to discriminatory outcomes disadvantaging member of the protected class.

practice advances a valid interest,"[105] the burden shifts back to the plaintiff to show that an alternative, less discriminatory policy is available. But in this example, it is difficult to imagine what it might mean to identify an alternative to collecting a maximum amount of data, as the defendant will argue that collecting less data is not a true alternative. This means that defendants will be permitted to continue an admittedly unnecessary practice, despite its discriminatory impact.

This asymmetry in the respective burdens for plaintiffs and defendants departs significantly from existing precedent. Under HUD's 2013 Discriminatory Effects Rule,"[i]f the charging party or plaintiff proves a prima facie case, the burden of *proof* shifts to the respondent or defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests."[106] Such shifting of the burden of proof from plaintiff to defendant was not an arbitrary aspect of the 2020 Rule. As commentators on the proposed version of the rule published in 2019 noted, "HUD specifically rejected giving the defendant only a production burden, but not a persuasion burden, in the 2013 Rule because it is consistent with the burden of proof allocation in settled Fair Housing Act case law and with the standard under Title VII and the ECOA."[107]

Despite such objections, HUD stated in the Supplementary Notes accompanying the 2020 Disparate Impact Rule that "if a Title VII plaintiff establishes a prima facie case of discrimination, the burden of producing evidence of a legitimate business justification for those practices will shift to defendant, but the burden of persuasion will remain with the plaintiff at all times."[108] Thus, HUD's current position appears to be that a defendant only has a burden of production, a contrasting view from the 2013 Discriminatory Effects Rule in which the burden-shifting included a stage where the defendant had a burden of proof comprised of both a production burden and a persuasion burden.

4. Post Pleading Stage Defenses

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105. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(c)(2)).

106. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,459, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. § 100.500) (emphasis added).

107. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,320. The commentators' input was provided in response to the August 2019 publication of the proposed rule, and summarized by HUD in the Supplementary Notes accompanying the September 2020 publication of the final rule.

108. *Id.*

For cases that move beyond the pleading stage, the 2020 Disparate Impact Rule specifies an additional three affirmative defenses, any one of which is sufficient to "establish that the plaintiff has failed to meet the burden of proof to establish a discriminatory effects claim."[109]

One defense is for the defendant to demonstrate that the challenged "policy or practice is reasonably necessary to comply with a third party requirement."[110] This is identical to the language found in the portion of the rule addressing pleading stage defenses, giving defendants what amounts to two bites at the apple when attempting to make this showing. Of course, in the second instance the plaintiff will have had access to discovery. Thus, plaintiffs aiming to thwart this defense will likely preemptively aim to present evidence not only to address the four elements[111] discussed above for which proof by preponderance of the evidence is required, but also to show that the policy was not necessary to comply with a third-party requirement.

A second defense is for the defendant to demonstrate that "the plaintiff has failed to establish that a policy or practice has a discriminatory effect."[112] The inclusion of this defense is interesting in light of the fact that the plaintiff already has the burden of showing that "the challenged policy or practice has a disproportionately adverse effect on members of a protected class."[113] At first glance, this might appear symmetric; i.e., that a plaintiff has the burden of making a showing that the defendant has the opportunity to rebut.

However, to the extent that a disproportionately adverse effect is differentiable from an adverse effect, that symmetry is missing. The plaintiff must prove that the policy has a *disproportionately* adverse effect on the group in question. The defendant can prevail by showing failure to establish a discriminatory effect. In one sense, this asymmetry disadvantages plaintiffs, who not only need to show an adverse effect, but one that is *disproportionately* adverse.

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109. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,333 (Proposed 24 C.F.R. § 100.500(d)(2)).

110. *Id.* (Proposed 24 C.F.R. § 100.500(d)(2)(iii)) ("The defendant may establish that the plaintiff has failed to meet the burden of proof to establish a discriminatory effects claim . . . by demonstrating [that] . . . [t]he defendant's policy or practice is reasonably necessary to comply with a third party requirement, such as a: (A) Federal, state, or local law; (B) Binding or controlling court, arbitral, administrative order or opinion; or (C) Binding or controlling regulatory, administrative, or government guidance or requirement.").

111. *Id.* at 60,332 (Proposed 24 C.F.R. § 100.500(c)(1)). As noted previously, while the pleading stage identifies five elements, once the case has moved past the pleading stage, only four of the elements must be shown by a preponderance of the evidence.

112. *Id.* at 60,333 (Proposed 24 C.F.R. § 100.500(d)(2)(ii)).

113. *Id.* at 60,332 (Proposed 24 C.F.R. § 100.500(b)(2)).

This will tempt defendants to underscore that higher bar, and argue plaintiffs have not met it. But making that argument can be perilous for defendants, as it could undermine their ability to assert the affirmative defense of showing that "the plaintiff has failed to establish that a policy or practice has a discriminatory effect."[114] In other words, in focusing too much on the "disproportionately" language, a defendant might inadvertently provide what amounts to a concession that a plaintiff may have shown an adverse effect, just not a *disproportionately* adverse effect. That implied concession would then remove or severely undermine the ability of the defendant to invoke the defense that the plaintiff had failed to establish a discriminatory effect.

The third defense is by far the most complex and far-reaching, particularly in relation to algorithms. That defense provides that a defendant can demonstrate that "the policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class . . . ."[115] There is an exception to this defense: "This is not an adequate defense, . . . if the plaintiff demonstrates that an alternative, less discriminatory policy or practice would result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant."[116]

While the text of this third defense does not specifically mention "algorithms" or "models", it is clearly directed at predictive models. In analyzing this defense, it is helpful to consider how its components will be applied when predictive models are used. A defendant must show that "the policy or practice is intended to predict an occurrence of an outcome."[117] By definition this is what any predictive model aims to do. A defendant must also show that "the prediction represents a valid interest."[118] By definition, this will also be easy to establish. To take an example, a prediction regarding whether a loan applicant will

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114. *Id.* at 60,333 (Proposed 24 C.F.R. § 100.500(d)(2)(ii)).

115. *Id.* (Proposed 24 C.F.R. § 100.500(d)(2)(i)). This language also leaves unclear what might be meant by "similarly situated." Identifying what it means for individuals to be "similarly situated" will present significant challenges. What sort of characteristics should be considered relevant (or irrelevant) to the question of whether two groups of people are "similarly situated"? How this question gets answered will have a non-trivial impact on the outcome of litigation.

116. *Id.*

117. *Id.*

118. *Id.*

repay a loan represents a valid interest, even if the prediction itself is flawed.[119]

The final prong of this defense is that "the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class,"[120] The outcome of cases involving alleged algorithm-based discrimination will often turn on this element, as it involves comparing outcomes for two different classes.[121]

There are important definitional challenges that will arise in relation to how those outcomes should be measured. There is no standard, agreed-upon definition of algorithmic predictive performance or of accuracy. It could be argued that an algorithm achieves an acceptable level of accuracy (and of predictive performance) if it provides predictions with error rates below a particular threshold. But that then raises the question of what the threshold should be and who sets it, as well as the question of what "error rate" refers to. For instance, one type of error rate is the false positive rate: Out of all those individuals predicted by the algorithm to have a particular positive outcome (e.g., staying current on mortgage payments), what fraction actually had negative outcomes (e.g., fell behind on mortgage payments)? Another type of error rate is the false negative rate: Out of all those individuals predicted by the algorithm to have a particular negative outcome, what fraction actually had positive outcomes?

Yet another measure of accuracy and predictive performance is the "positive predictive value," which is the probability that individuals predicted to have a particular positive outcome (e.g., staying current on mortgage payments) actually have that outcome. There is also a

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119. We are not suggesting that all predictions are valid. Rather the point is that a prediction regarding loan repayment, whether flawed or not, represents a valid *interest* (i.e., the interest a financial institution has in not making a loan that will lead to a default). Whether or not the *prediction* is valid is of course another question.

120. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,333 (Proposed 24 C.F.R. § 100.500(d)(2)(i)).

121. In a world of complex and intersecting identities, there is also the very important question of how a "class" should be defined in relation to disparate impact cases. For instance, a policy that discriminates against Black women might not be easily identifiable as discriminatory when examined only in relation to its impact on women, or on Black people. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 167 (1989) (discussing DeGraffenreid v. General Motors Assembly Div., Etc., 413 F. Supp. 142 (E.D. Mo. 1976)).

different measure of accuracy and predictive performance termed the "negative predictive value."[122]

Simultaneously maximizing accuracy across all possible accuracy measures is generally mathematically impossible.[123] In this way, questions about the accuracy of an algorithm are closely connected to questions about an algorithm's fairness. Determining whether an algorithm "accurately predicts risk or other valid objectives" requires deciding which of multiple possible definitions of "accuracy" are to be used when evaluating predictions.

There is an entire field of research in computer science relating to the question of how to measure bias—or its converse, fairness. There are many different ways to measure fairness, and in general (though there are a few exceptions[124]) these approaches are mutually incompatible. As a result, under most circumstances it is impossible to design an algorithm that exhibits fairness according to all possible fairness measures. Instead, an algorithm designer must choose a *particular* fairness measure (or in some cases, a pair of fairness measures) to use when attempting to achieve parity across groups that differ with respect to a protected characteristic such as race or gender. However, having made that choice, the algorithm designer will then be forced to create an algorithm that fails to satisfy fairness under most other fairness measures.

Questions about the fairness of outcomes produced by facially neutral policies (including policies embedded in algorithms) are precisely what courts are asked to address in FHA disparate impact cases. For that reason, courts should be wary of automatically dismissing a disparate impact claim on the grounds that the defendant has provided evidence alleging that a particular algorithm is an "accurate" predictor of risk (or other FHA-relevant objective). It will also be important to understand which measure of accuracy was used, and whether that choice was appropriate.

The issue of measuring fairness is a challenge not only for algorithm designers but also for courts, plaintiffs, and defendants involved in disparate impact litigation. The existence of multiple fairness measures (and relatedly, multiple ways to measure the level of discrimination in an algorithm) means that there will be cases where a plaintiff and defendant disagree on whether statistics

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122. The negative predictive value is the probability that individuals predicted to have a particular negative outcome (e.g., failing to stay current on mortgage payments) actually have that outcome.

123. *See* Virginia Foggo et al., *Algorithms and Fairness*, 17 OHIO ST. TECH. L.J. 123, 144–45 (2020) (explaining the incompatibility of equalized odds and predictive parity).

124. *See* Pratyush Garg, John Villasenor & Virginia Foggo, *Fairness Metrics: A Comparative Analysis*, 2020 IEEE INT'L CONF. ON BIG DATA 3662 (2020).

regarding algorithm performance indicate disparate impact. For example, if an algorithm produces predictions in which the true positive rate for two groups (e.g., men and women) is equal, but the true negative rate is unequal, is there disparate impact? As measured by the true positive rate, the answer is no, but as measured by the true negative rate, the answer is yes. Courts will face challenges trying to resolve questions of this sort.

There is also the question of how the exception to this defense will be adjudicated. As noted above, the defense that "the policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class" will not be successful if the plaintiff can demonstrate that "an alternative, less discriminatory policy or practice would result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant."[125]

But there is a logical problem with this exception. If the defendant has convinced a court that the policy "does not or would not have a disparate impact," then it would seem impossible for a plaintiff to demonstrate the existence of a "less discriminatory policy." Or, conversely, if the plaintiff is able to convince the court that a less discriminatory policy exists, then the court will necessarily have concluded that the defendant's policy is, at least to some extent, discriminatory—thereby foreclosing the possibility for the defendant to invoke this defense by showing that the policy is *not* discriminatory.[126] Given that this defense will be invoked in proceedings aimed at determining whether or not a policy has an unlawful disparate impact on a protected group, it risks leading to a premature decision regarding the outcome of the case in its entirety.

5. The Timing of Discovery

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125. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,333 (Proposed 24 C.F.R. § 100.500(d)(2)(i)).

126. The opportunity for a plaintiff to identify a "less discriminatory" alternative to the challenged policy is not new to the 2020 Disparate Impact Rule. Under the discriminatory effects rule adopted in 2013, "the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a *less discriminatory effect*." 24 C.F.R. § 100.500(c)(3) (2014) (emphasis added). Thus, common to both disparate impact rules is the concept that a discriminatory policy can be successfully challenged if a less discriminatory alternative can be found. This leaves open the question of whether that alternative policy itself could then be challenged under the FHA, since a "less discriminatory" policy generally still discriminates.

The text of the 2020 Disparate Impact Rule does not explicitly mention discovery. Discovery is a major potential issue because, when the challenged policy is embedded in an algorithm, the information necessary to plead a case with the required level of specificity to survive a motion for summary judgement will often not be publicly available. Commenters raised concerns on this very issue after the publication of the proposed rule in 2019. In response, HUD asserted in the Supplementary Notes accompanying the publication of the final rule that the pleading stage, when a plaintiff does not yet have access to discovery, requires only that the plaintiff "'sufficiently plead facts to support [sic] the prima facie case, and thus, the requirement to plead facts supporting a prima facie case is lower than some commenters suggested."[127]

Whether a court would agree with HUD on this point is another matter altogether. In addition, the assumption built into the rule that the pleading stage has no overlap with discovery is an oversimplification. Pleadings can be amended after a case has nominally moved past the "pleading stage." The Federal Rules of Civil Procedure grant judges substantial discretion in deciding issues related to the timing and scope of discovery.[128] It is unlikely that a defendant could convince a judge that the HUD rule has removed the court's ability to grant discovery before the pleading stage is terminated.

However, it would be problematic if a court were to block access to *any* discovery at the pleading stage while also adopting a reading of HUD's 2020 Disparate Impact Rule that requires a detailed and specific complaint regarding an allegedly discriminatory algorithm. When the accused system involves an algorithm, without discovery it will often be difficult to provide the level of specificity that a court might expect of a plaintiff pleading "facts to support" the required five elements, much less to identify the particular "policy" embedded in an algorithm responsible for the alleged disparate impact. Thus, it is reasonable to conclude that allowing some measure of discovery to proceed at the pleading stage, to a degree appropriate given the nature

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127. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,308. This text as published in the Federal Register has an open quotation mark immediately prior to "sufficiently plead", leaving it unclear where the missing close quotation mark was intended to be placed. However, a reading of the text of the rule suggests the intended quoted phrase was likely "sufficiently plead facts to support." Elsewhere in the Supplementary Notes, HUD once again referenced the lack of early discovery: "[t]he revised text clarifies that defendants can, as part of a motion to dismiss, argue that the plaintiff has failed to sufficiently plead facts sufficient to state a prima facie case, which would allow a judge to dismiss the case before discovery." *Id.* at 60,315.

128. *See* FED. R. CIV. P. 16(b)(3)(B).

of the claim, will sometimes be appropriate given the specific requirements of those elements.

In sum, the 2020 Disparate Impact Rule establishes new pleading stage requirements and adds new pleading and post-pleading stage defenses. Clearly, the Rule has the potential to substantially affect housing discrimination litigation. How these changes will affect the pleading requirements can best be understood by looking to the broader context of pleading requirements and how lower courts have interpreted similar concepts.

III. PLEADING REQUIREMENTS

Pleading an FHA disparate impact case of necessity requires plaintiffs to identify a policy that they believe to be responsible for the alleged disparate impact. When the source of alleged discrimination is an algorithm, the complaint will need to meet the domain-specific requirements for FHA disparate impact litigation as laid out in the 2020 Disparate Impact Rule. These requirements include each of the five elements of the pleading stage burden discussed earlier. At the same time, broader standards on pleading that apply across civil litigation generally lower the hurdle for plaintiffs drafting a complaint. This Part explores the tension between these rules, and in particular the fact that the stringent pleading requirements in the 2020 Disparate Impact are arguably at odds with broader Supreme Court precedent on pleading standards.

A. Algorithms and an Allegedly Discriminatory "Policy"

Every FHA disparate impact complaint will need to be centered on an allegedly discriminatory "policy." This Article will use "policy" to refer to what the 2020 Disparate Impact Rule sometimes terms "policy" and sometimes terms "policy or practice."[129] In cases where the source of alleged discrimination is tied to an algorithm, this challenged "policy" can take on multiple different forms. One form of policy is the choice of input data. In other words, a plaintiff could argue that the defendant's choice to use a particular type of data is itself the source of the disparate impact.

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129. Using "policy" to refer to "policy or practice" is simpler, and it comports with how these terms are used in the 2020 Disparate Impact Rule. Evidence that "policy" and "practice" in the text of this rule have identical meanings is found in the text of the rule. "Liability may be established under the Fair Housing Act based on a specific *policy's or practice's* discriminatory effect on members of a protected class under the Fair Housing Act even if the specific *practice* was not motivated by a discriminatory intent." HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(b)) (emphasis added). Note that this text uses "the specific practice" interchangeably with the "specific policy[] or practice[]." *Id.*

Consider a credit score, which plays a central role in home financing transactions and which might appear to be a facially neutral piece of data. As Lisa Rice and Diedre Swesnik explain in a 2013 law review article, "[o]ur current credit-scoring systems have a disparate impact on people and communities of color."[130] They further observe that "many credit-scoring mechanisms include factors that do not just assess the risk characteristics of the borrower; they also reflect the riskiness of the environment in which a consumer is utilizing credit."[131] Thus a credit score is a form of data with embedded bias, and a defendant's choice to place too much weight on a credit score, absent affirmative steps to contextualize the manner in which it is used to take account of that bias, could lead to a disparate impact.

A second form that a policy might take is the algorithm itself. In this category, the "policy" would be the way that the input data are combined to arrive at a decision. The concept that an algorithm itself might be the discriminatory policy is especially important in the era of "big data," in which algorithms making decisions on issues such as loan approval might use hundreds of pieces of data, including forms of data that have not traditionally been considered in relation to credit decisions. Types of data that might not lead to discriminatory outcomes when used in isolation could do so when they are combined. For example, when combined internally within an algorithm, information regarding the high school that a person attended and a person's credit payment history might produce a new value—one that is created and exists only within the algorithm—correlating much more strongly with race than either of those pieces of information do alone.[132] If that new value is used to drive loan approval decisions, it could result in the racially disparate denial of loan applications.

A third form of policy is the affirmative choice by a defendant to give deference to an algorithm for decision-making in sectors covered by the FHA. On this issue, *National Fair Housing Alliance v. Fannie Mae,*[133] a 2018 case from the Northern District of California, is instructive. The plaintiffs in that case were a group of 21 fair housing community organizations that alleged that Fannie Mae neglected Real Estate Owned (REO) properties in communities of color while performing more maintenance on properties in predominantly white communities. The plaintiffs argued that "Defendant's failure to maintain REO properties in communities of color had created deteriorating eye sores and depressed property values in communities

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130. Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK U. L. REV. 935, 936 (2013).

131. *Id.*

132. *Id.*; *see generally id.* at 953 (addressing bias in payment history data).

133. Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Ass'n. ("Fannie Mae"), 294 F. Supp. 3d 940 (N.D. Cal. 2018).

of color, undermining neighborhood stabilization, and curtailing economic recovery."[134]

The plaintiffs pointed to a "policy of delegation of discretion or failure to supervise and differential maintenance based on the properties' age and value as the robust cause of discriminatory impact."[135] In response, defendant Fannie Mae argued that the plaintiffs failed to identify a relevant policy, but the court disagreed and denied Fannie Mae's motion to dismiss.[136] While this case did not involve algorithms, it is relevant because it indicates that in FHA disparate impact litigation, a failure to properly supervise decisions for which one is ultimately responsible *can* (at least in some courts) be the sort of discriminatory policy sufficient for satisfying the pleading burden.

Further evidence that failed supervision of this kind is a legitimate theory of disparate impact liability under the FHA comes from a 2018 Northern District of Illinois decision, *National Fair Housing Alliance v. Deutsche Bank*, involving alleged race-based discrepancies in the maintenance quality of REOs.[137] While plaintiffs were ultimately unsuccessful in their claims, the court did affirm "the general rule that a property owner may not delegate to another its duty to obey the laws relating to racial discrimination. Under that rule, a property owner cannot foist upon its agent the responsibility for FHA compliance and then close its eyes to that agent's shortcomings."[138] Read more broadly, this language suggests that reliance on algorithmic decision-making, without sufficient oversight regarding the impact of such decisions on protected groups, is a form of policy covered by the FHA.

B. Stating a Plausible Claim

The 2020 Disparate Impact Rule requires that a plaintiff, after identifying the challenged policy, plead facts to support a detailed set of consequences tied to that policy. Thus, as HUD explained in the Supplementary Notes accompanying the publication of the rule, "[a]t the pleading stage, the plaintiff must allege facts that state a plausible disparate impact claim."[139] This requirement can be better contextualized by first considering the broader backdrop of recent Supreme Court case law on pleading standards, and then addressing

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134. *Id.* at 944.

135. *Id.* at 948.

136. *Id.* at 947-48.

137. Nat'l Fair Hous. All. v. Deutsche Bank, No. 18 C 0839, 2018 WL 6045216 (N.D. Ill. Nov. 19, 2018).

138. *Id.* at *5 (citations omitted).

139. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,289 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

the resulting implications in the context of FHA litigation regarding allegedly discriminatory algorithms.

1. *Twombly* and *Iqbal*

Bell Atlantic Corp. v. Twombly[140] was a 2007 Supreme Court decision in an antitrust case that addressed the pleading standard required under the Federal Rules of Civil Procedure for a plaintiff to survive a motion to dismiss. The *Twombly* Court held that a complaint need not contain "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[141] The requirements for plausibility were also addressed in the 2009 decision *Ashcroft v. Iqbal.*[142] The *Iqbal* Court explained that "[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,"[143] and that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief . . . ."[144] It further held that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[145] Importantly, the *Iqbal* Court also resolved uncertainty regarding whether the *Twombly* holding was limited to antitrust claims, writing that "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike[.]"[146]

What exactly does it mean to "state a claim to relief that is plausible on its face"? *Twombly* and *Iqbal* spurred an entire genre of legal scholarship on the issue of how much these rulings changed pleading standards, if at all. As a 2010 commentary from a partner at a prominent law firm explained, "[a]ccording to some commentators, *Twombly* and *Iqbal* upended 70 years of federal pleading standards and have dramatically burdened plaintiffs. According to others, the decisions changed little if anything."[147] In an example of the latter view, Nicholas Tymoczko argued in a 2009 law review article that "the plausibility standard is best understood as a minimal standard . . .

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140. 550 U.S. 544 (2007).
141. *Id.* at 570.
142. 556 U.S. 662 (2009).
143. *Id.* at 663.
144. *Id.* at 664.
145. *Id.* at 678.
146. *Id.* at 684 (citing *Twombly*, 550 U.S. at 555-56, 555 n.3).
147. C. Kevin Marshall, *Pleading Facts and Arguing Plausibility: Federal Pleading Standards a Year After* Iqbal, JONES DAY (June 2010), https://www.jonesday.com/en/insights/2010/06/pleading-facts-and-arguing-plausibility-federal-pleading-standards-a-year-after-iiqbali.

which requires only that a complaint support a reasonable inference that the plaintiff has a viable claim."[148]

Moreover, in discussing the threshold set by the plausibility standard, Tymoczko wrote that "courts should be hesitant to use it to dismiss any but the most tenuous claims,"[149] especially when one considers that "cases where discovery is likely to be too expensive may also be those where it is needed most because of the defendant's monopoly on the relevant information. In such situations, it seems particularly unfair to ask plaintiffs to know and plead what they cannot know."[150] In a law review article specifically addressing disparate impact litigation, Joseph Seiner noted that when plausibility is applied to the first step of the burden-shifting framework, plaintiffs "should often have little difficulty surviving a motion to dismiss."[151]

If *Twombly* and *Iqbal* are interpreted as having raised the pleading standard, a conclusion that they didn't raise it much is still consistent with the *Twombly* Court's rejection of the "no set of facts" pleading standard articulated in *Conley v. Gibson*. In that 1957 decision, the Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[152] The *Twombly* Court wrote that the "'no set of facts' language has been questioned, criticized, and explained away long enough."[153] In addition, the Court wrote that "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[154] There is also the question of whether, and to what extent, *Twombly* alters the precedent set by *Swierkiewicz v. Sorema* (2002). *Swierkiewicz* explicitly considered the question of "whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination," and held that "an employment discrimination complaint need not include such facts."[155]

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148. Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. *v. Twombly and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 507 (2009).

149. *Id.* at 530.

150. *Id.* at 525.

151. Joseph A. Seiner, *Plausibility and Disparate Impact*, 64 HASTINGS L. J. 287, 305 (2013).

152. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

153. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 562 (2007).

154. *Id.* at 563.

155. Swierkiewicz v. Sorema N.A., 534 US 506, 508 (2002) (citation omitted). While *Swierkiewicz* was concerned with disparate *treatment* rather than disparate *impact*, and considered employment discrimination, not housing discrimination, there is no reason to think that the pleading requirements set out in the Federal

However, as Claire Williams explains in a 2017 law review note, "[t]he Supreme Court favorably cited its decision in *Swierkiewicz* in its *Twombly* decision, indicating that it still envisioned a liberal pleading standard like the one articulated in *Swierkiewicz*."[156] Moreover, after *Swierkiewicz* and prior to *Twombly* and *Iqbal*, various courts of appeal had interpreted the notice pleading standard as requiring factual support of allegations, again indicating a favorable middle ground between a "no set of facts" standard and a "heightened fact pleading of specifics." For example, in 2003 the Fourth Circuit wrote that "[w]hile a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint a plaintiff is required to allege facts that support a claim for relief."[157] Similarly, the Eleventh Circuit in 2004 articulated the view that "[t]he liberal standard of notice pleading still requires a plaintiff to provide the defendant with fair notice of the factual grounds on which the complaint rests."[158] Thus, an interpretation of the plausibility standard as a low burden—requiring only the allegation of facts sufficient to lead to a *reasonable inference* of liability—despite the fact that it represents a *de jure* heightened pleading standard, is justified.

2. Plausibility and FHA Litigation

There are multiple examples of post-*Twombly/Iqbal* decisions in FHA disparate impact cases that either explicitly or implicitly endorse a "reasonable inference" standard for pleading. In *National Fair Housing Alliance v. Bank of America*, a federal district court in Maryland in 2019 denied a motion to dismiss, explaining that "[t]he facts pled raise a *reasonable inference* that the defendants violated anti-discrimination provisions of the Fair Housing Act, and the threshold legal arguments for dismissal are not persuasive at this stage of the case."[159] In a 2018 ruling in *County of Cook v. Wells Fargo & Co.*, the Northern District of Illinois found that "Cook County's FHA

Rules of Civil Procedure should be interpreted differently in disparate impact cases than in disparate treatment cases, or that it should be applied differently across various civil rights domains.

156. Williams, *supra* note 66, at 983.

157. Bass v. E.I. Dupont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003).

158. Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1271 (11th Cir. 2004).

159. Nat'l Fair Hous. All. v. Bank of Am., N.A., 401 F. Supp. 3d 619, 623 (D. Md. 2019) (emphasis added) (citation omitted). In a discussion surrounding robust causality (although the court seemed to conflate proximate cause and robust causality) the court also explained: "The plaintiffs urge that they have sufficiently pled a direct connection between the injuries alleged and the defendant's arbitrary, artificial, and unnecessary policy of delegating maintenance duties. The regression analyses laid out in the complaint, they submit, root out any intermediary variables that might explain the maintenance discrepancies, thus raising a fair inference that communities of color are disproportionately affected by the defendants' policies." *Id.* at 634.

disparate impact claim surmounts the plausibility hurdle," because "[at] the pleading stage of a lawsuit, '[i]t is enough to plead a plausible claim . . . so long as the hypotheses are consistent with the complaint.'"[160] The court in *County of Cook* also explained that the plaintiff's allegation "that Wells Fargo was disproportionately likely to foreclose on loans issued to minority borrowers in Cook County"[161] had sufficiently alleged "a bona fide disparity."[162] Another relevant FHA decision is the Seventh Circuit's ruling in *Swanson v. Citibank*.[163] In describing its understanding of *Twombly*, the Seventh Circuit wrote that "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen."[164]

While these decisions, and more importantly the Supreme Court in *Twombly,* emphasized a *low* hurdle ("*only* enough facts to state a claim . . . that is plausible") for surviving a motion to dismiss, Seiner correctly notes, in a law review article written prior to *Inclusive Communities*, that "a claim accompanied by numerical support demonstrating a disparate impact in the workplace would seem to allege a more plausible case than a claim without these data."[165] If a plausible disparate impact claim must include some sort of numerical support regarding a quantified disparate impact, the bar must be set fairly low. To not do so would be inconsistent with the pleading standards set forth by *Twombly*, in addition to *Iqbal* and *Swierkiewicz*. In relation to FHA disparate impact claims, consistency also requires that a "reasonable inference" approach be applied to the entirety of the pleading requirements under the 2020 Disparate Impact Rule. In other words, it must apply to the specific assertions required under the rule, including those supporting allegations regarding "robust causality" and the "arbitrary, artificial, and unnecessary" nature of a challenged policy.[166]

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160. Cty. of Cook, Ill. v. Wells Fargo & Co., 314 F. Supp. 3d 975, 992 (N.D. Ill. 2018) (citing Chapman v. Yellow Cab Coop., 875 F.3d 846, 848 (7th Cir. 2017) (citation omitted)).

161. *Id.*

162. *Id.*

163. Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010).

164. *Id.* at 404.

165. Seiner, *supra* note 151, at 304.

166. This reading is also consistent with the 2020 Proposed Disparate Impact Rule itself which states that "to state a discriminatory effects claim based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a plaintiff . . . must sufficiently plead facts to support each of" five elements. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,332 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100) (Proposed 24 C.F.R. § 100.500(b)) (emphasis added).

C. "Robust Causality"

As noted earlier, one of the five elements of the pleading stage burden in the 2020 Disparate Impact Rule requires a plaintiff to "sufficiently plead facts" supporting[167] "that there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect;"[168] The "robust causal link" language in the rule arises directly from *Inclusive Communities*, which required plaintiffs in FHA disparate impact cases to demonstrate "robust causality" between the policy in question and the alleged disparate impact. However, as Williams has written, there is ambiguity in the language of *Inclusive Communities* regarding "when the robust causality standard should be employed, [whether] at summary judgment phase or earlier at the pleading stage."[169] Under the 2020 Disparate Impact Rule, robust causality is considered at both stages, though in different ways. The rule requires a plaintiff to sufficiently plead facts *to support* robust causality in a complaint, and then to *prove* robust causality by a preponderance of the evidence at the summary judgment stage.[170]

However, that still leaves a question of whether the pleading stage requirement to "plead facts to support" *robust* causality is in some sense an oxymoron. Arguably, if an allegation just barely clears the bar of support, it might fall short of showing a "robust" level of causality. The answer to this potential contradiction should lie in a very permissive interpretation of "robust" at the pleading stage.[171] HUD rulemaking cannot contravene *Twombly*/*Iqbal*. And it would be unreasonable to conclude that the *Inclusive Communities* Court was attempting to create a new elevated (relative to *Twombly*/*Iqbal*) pleading standard uniquely for FHA disparate impact litigation. A more reasonable reading of *Inclusive Communities* is therefore that the Court identified *what* must be addressed (i.e., robust causality, among other things) at the pleading stage, while also allowing a

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167. *Id.* (Proposed 24 C.F.R. § 100.500(b)).

168. *Id.* (Proposed 24 C.F.R. § 100.500(b)(3)).

169. Williams, *supra* note 66, at 989.

170. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(c)(1)) ("Plaintiff must prove by the preponderance of the evidence each of the elements in paragraphs (b)(2) through (5) of this section.").

171. It is also reasonable to argue that consideration of robustness should not arise at all at the pleading stage, as *Inclusive Communities* reached the Supreme Court after dispute over the Fifth Circuit's ruling on a motion for summary judgment, rather than a motion to dismiss. *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014), aff'd, 576 U.S. 519 (2015). However, HUD obviously arrived at a different conclusion, as evidenced by its decision to require a plaintiff to sufficiently plead facts supporting robust causality as one of the elements of the pleading stage burden.

plaintiff to defer the actual showing (by a preponderance of the evidence) of robust causality until later in the litigation, after access to full discovery.

Inclusive Communities did not address what "robust causality" means. However, HUD has provided a definition in the 2020 Disparate Impact Rule. The rule requires pleading facts to support (and later prove) "a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, *meaning that the specific policy or practice is the direct cause of the discriminatory effect*."[172] In the Supplementary Notes accompanying the publication of the 2020 Disparate Impact Rule, HUD explained that "HUD intends 'robust causal link' to be the same standard as 'direct cause.'"[173] But HUD does not provide an explanation for this definition. In any case it is not clear that HUD has standing to impose a definition of "robust causality" to the extent that doing so gives that term a different scope than is required in light of Supreme Court precedent.[174]

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172. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(b)(3)) (emphasis added).

173. *Id.* at 60,289. Elsewhere in the Supplementary Notes, HUD also writes "HUD intends 'robust causal' link to mean that the policy or practice is the direct cause of the discriminatory effect. HUD intends these two terms to be synonymous." *Id.* at 60,312.

174. It is also worth noting that there is no Supreme Court precedent that defines "robust causality"—a phrase that was used, but not defined, in *Inclusive Communities*. In the Supplementary Notes accompanying the publication of the 2020 Disparate Impact Rule, HUD stated that "HUD intends to align with Supreme Court precedent in *Bank of Am. Corp. v. City of Miami*." HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,315. In that case, the Court wrote that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017) (citing Holmes v. Securities Investors Protection Corporation, 503 U. S. 258, 268 (1992)). The citation from *Bank of America* ties "proximate cause" to a "direct relation" between conduct and a resulting injury. But despite HUD's apparent assertion to the contrary, it does not address the extent to which "robust causality" might differ from causality that is "proximate." Furthermore, proximate cause ties directly to standing in the traditional tort law sense; i.e., whether the plaintiff "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). Thus, in the context of the FHA, robust causality can diverge from proximate cause if the plaintiff did not itself suffer a discriminatory effect from the allegedly discriminatory policy. For instance, to prevail in an FHA claim, an organization that advocates for fair housing will be required to show a "a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class." But making such a showing does not establish standing, as it does not identify an alleged injury suffered by the *plaintiff*. Rather, to establish standing, the organization will additionally have to show proximate cause; e.g., by alleging that the discriminatory policy forced it to expend more funds to support impacted persons than it otherwise would have

In fact, recent lower court decisions have resulted in two divergent understandings of robust causality in FHA disparate impact cases. A first interpretation of robust causality simply requires a showing that a particular policy rendered housing less available for an identifiable, protected group. A second interpretation of robust causality goes further: It requires a plaintiff to demonstrate not only that a particular policy has a disparate impact on a protected group, but also that the policy is responsible for creating the conditions that led that group to be disproportionately affected. But this latter definition of causality risks eliminating disparate impact liability altogether. To see why, recent case law is illustrative.

1. *Inclusive Communities Project II*

Inclusive Communities Project v. Lincoln Prop. Co.[175] (hereinafter *Inclusive Communities II*) was a separate 2019 Fifth Circuit decision arising from defendant's policy of refusing to accept Section 8 housing vouchers anywhere other than their properties in "racially concentrated [predominately minority] areas of high poverty that are marked by substantially unequal conditions."[176] Plaintiff ICP brought a disparate impact claim asserting that this policy had a discriminatory effect proscribed under the FHA. However, the district court found that plaintiffs had failed to meet their *prima facie* burden of showing *how* the "no vouchers" policy caused the statistical racial imbalance among voucher holders, and dismissed the case with prejudice.[177] This is an example of the second (and stricter) of the two interpretations of robust causality identified in the previous paragraph.

On appeal, the Fifth Circuit stated that "the Supreme Court's opinion in [*Inclusive Communities*] established 'robust causation' as a key element of the plaintiff's prima facie burden in a disparate impact case," but noted that "the Court did not clearly delineate its meaning or requirements."[178] To interpret robust causality, the Fifth Circuit considered decisions from three other circuits—the Fourth,

spent. HUD's treatment of robust causality, and in particular its reliance on *Bank of America*, appears to fail to recognize this distinction.

175. Inclusive Cmtys. Project v. Lincoln Prop. Co. (*Inclusive Communities II*), 920 F.3d 890 (5th Cir. 2019).

176. *Id.* at 896-97 (citing Complaint at 6, Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., No. 3:17-cv-206, (N.D. Tex. 2017)).

177. Inclusive Communities Project, Inc. v. Lincoln Prop. Co., No. 3:17-CV-206-K, 2017 WL 3498335 (N.D. Tex. Aug. 16, 2017), aff'd, 920 F.3d 890 (5th Cir. 2019). ICP also brought a disparate *treatment* claim alleging that the defendants "refusal to negotiate with or rent to ICP, pursuant to ICP's guarantor or sublease proposals, constitutes disparate treatment based on race and color, because ICP's voucher clients are predominantly black." *Inclusive Communities II*, 920 F.3d at 898. However, this discussion focuses on the disparate impact claim.

178. *Inclusive Communities II*, 920 F.3d at 903.

Eighth and Eleventh.[179] The Fifth Circuit ultimately found "no error in the district court's determination that the allegations of ICP's complaint . . . fail to allege facts sufficient to provide the robust causation necessary for an actionable disparate impact claim."[180] The court explained that "[n]either the aforementioned 'city-level data' nor the 'census-level data' cited by ICP supports an inference that the implementation of Defendants-Appellees' blanket 'no vouchers' policy, or any change therein, caused black persons to be the dominant group of voucher holders in the Dallas metro area."[181]

Judge Davis correctly noted in his *Inclusive Communities II* dissent that such an "interpretation of 'robust causation' threatens to eviscerate disparate-impact claims under the FHA altogether,"[182] as it would be impossible for ICP to have shown that the defendant's *recent* policy caused a *pre-existing* statistical imbalance.[183] However, the refusal to accept Section 8 vouchers still causes housing to be disproportionately unavailable for members of protected groups, compared to the availability of housing for those groups absent such policies. Since the very purpose of disparate impact doctrine is to combat discrimination against historically disadvantaged and oppressed groups, most cases of disparate impact that create liability under the FHA will occur in environments with pre-existing patterns of discrimination. The fact that pre-existing statistical imbalances exist should not absolve individuals or organizations from liability for policies that perpetuate (and perhaps amplify) harmful, pre-existing segregative trends.

2. *De Reyes*

By contrast, the Fourth Circuit in *De Reyes v. Waples Mobile Home Park* declined to apply an overly stringent interpretation of robust causality.[184] *De Reyes* arose from a challenge to a mobile home park's policy of "requiring all occupants to provide documentation evidencing legal status in the United States to renew their leases."[185] The plaintiffs alleged that because undocumented immigrants

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179. *Id.* at 904 ("[D]ecisions from three other circuits—the Fourth, Eighth and Eleventh—have considered its [i.e., the robust causality test's] application, yielding opinions reflecting varying views of the prerequisites.").

180. *Id.* at 906.

181. *Id.* at 907.

182. *Id.* at 913 (Davis, J., concurring in part and dissenting in part).

183. *Id.* at 907 ("ICP alleges no facts supporting a reasonable inference that Defendants-Appellees bear any responsibility for the geographic distribution of minorities throughout the Dallas area prior to the implementation of the 'no vouchers' policy."). This indicates that to succeed, ICP would have had to show that the defendants were responsible for the "geographic distribution of minorities" that existed "*prior to*" the adoption of the policies at issue—an obvious impossibility.

184. 903 F.3d 415 (4th Cir. 2018).

185. *Id.* at 419.

constitute a much larger fraction of the Latinx population in Virginia than of the non-Latinx population, and because Latinx persons constitute approximately two-thirds of the undocumented population in Virginia, they would suffer disproportionate adverse impacts due to the policy.[186]

Before reaching the Fourth Circuit on appeal, the district court had dismissed the plaintiffs' claim. It held that "the female plaintiffs were impacted by the Policy because they are illegal immigrants, which is distinct from their identity as Latinos (a protected class)."[187] But the Fourth Circuit reversed the district court, explaining:

> The district court's view threatens to eviscerate disparate-impact claims altogether, as this view could permit any facially neutral rationale to be considered the primary *cause* for the disparate impact on the protected class and break the robust link required between the challenged policy and the disparate impact. Thus, the district court's view of causation would seem to require an *intent* to disparately impact a protected class in order to show robust causality, thereby collapsing the disparate-impact analysis into the disparate-treatment analysis.[188]

The Fourth Circuit's *De Reyes* opinion thus amounts to a rejection of the stricter interpretation of robust causality (e.g., as applied by the Fifth Circuit in *Inclusive Communities II*) in support of the more permissive one. In considering the plaintiff's allegations, the Fourth Circuit wrote that:

> [T]he evidence did not merely allege that Latinos would face eviction in higher numbers than non-Latinos. Instead, Plaintiffs satisfied the robust causality requirement by asserting that the specific Policy requiring all adult Park tenants to provide certain documents proving legal status was likely to cause Latino tenants at the Park to be disproportionately subject to eviction compared to non-Latino tenants at the Park.[189]

De Reyes appears to be in conflict with *Inclusive Communities II*, despite the *Inclusive Communities II* court's assertion to the contrary.[190] The Fifth Circuit in *Inclusive Communities II* required

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186. *Id.* at 428.

187. *Id.* at 429-30.

188. *Id.* at 430.

189. *Id.* at 429.

190. *See, e.g.,* Inclusive Cmtys. Project v. Lincoln Prop. Co. (*Inclusive Communities II*), 920 F.3d 890, 906 (5th Cir. 2019) (finding "no error in the district court's determination that the allegations of ICP's complaint regarding Lincoln's

the plaintiffs to show that a "no section 8 voucher policy" caused the majority of voucher holders to be members of racial minorities. But in *De Reyes* the Fourth Circuit *did not* require plaintiffs to show that the challenged policy was responsible for the underlying demographic and social conditions that led the majority of undocumented persons in the mobile home park to be Latinx. Instead, the *De Reyes* court found that plaintiffs satisfied the robust causality requirement by providing statistics supporting a conclusion that "a policy that adversely affects the undocumented immigrant population will likewise have a significant disproportionate impact on the Latino population."[191] Such an approach is far more reasonable than one that requires plaintiffs to assert that a challenged policy caused *pre-existing* statistical disparities, and thus furnishes the better model for how future courts should interpret "robust causality." This interpretation also finds support in cases such as *Avenue 6E Investments, LLC v. City of Yuma,*[192] *Betsey v. Turtle Creek Associates,*[193] and *Mhany Management, Inc. v. County of Nassau.*[194]

D. "Artificial, Arbitrary, and Unnecessary"

The 2020 Disparate Impact Rule also requires a plaintiff at the pleading stage to "sufficiently plead facts to support . . . [t]hat the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law."[195]

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and the Owners' 'no-voucher' policies fail to allege facts sufficient to provide the robust causation necessary for an actionable disparate impact claim").

191. *De Reyes*, 903 F.3d at 428.

192. 217 F. Supp. 3d 1040, 1050 (D. Ariz. 2017). Plaintiffs "provided statistical evidence . . . regarding the racial makeup of those priced out of the market as a result of the price increase associated with the City's denial of Plaintiffs' rezoning application." *Id.* The District Court found that plaintiffs had satisfied the *prima facie* burden with no discussion of underlying conditions that led the policy to disproportionately affect certain racial groups. *Id.* at 1053.

193. 736 F.2d 983, 988 (4th Cir. 1984) ("[T]he district judge acknowledged that 'the immediate effect of the conversion will have a disproportionate impact on the black tenants.' The district court erroneously concluded, however, that this alone was insufficient to establish a *prima facie* case of discriminatory impact.").

194. 819 F.3d 581, 620 (2d Cir. 2016) ("[T]he district court concluded that 'the R-T zone's restriction on the development of multi-family housing perpetuates segregation generally because it decreases the availability of housing to minorities in a municipality where minorities constitute approximately only 4.1% of the overall population . . . and only 2.6% of the population living in households.'"). We agree with the district court's assessment that plaintiffs more than established a prima facie case. Notably, there was no discussion about *how* or *why* the development of multi-family housing disparately affects minority groups.

195. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(b) and (b)(1)).

Similar to the "robust causality" element, the "arbitrary, artificial, and unnecessary" language raises important questions of interpretation.

The phrase "artificial, arbitrary, and unnecessary" originally arose in Supreme Court jurisprudence in 1971 in *Griggs*—which considered employment discrimination—where the Court explained:

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed [under Title VII]. What is required by Congress is 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.[196]

In *Inclusive Communities*, the Supreme Court, citing *Griggs*, wrote that "[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"[197] Notably, both *Griggs* and *Inclusive Communities* arguably present the "artificial, arbitrary, and unnecessary" inquiry as being subsumed by the burden-shifting frameworks under Title VII and the FHA, respectively.[198] However, HUD has nonetheless treated the test as having introduced an

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196. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

197. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 543 (2015) (quoting *Griggs*, 401 U.S. at 431).

198. For example, in *Griggs*, plaintiffs were not required to make an independent showing that the employment practice in question was all three of "artificial, arbitrary, and unnecessary." Rather, the "artificial, arbitrary, and unnecessary" nature of the defendant's practice was either confirmed or debunked by examining whether the practice served a business necessity—the second step of the burden-shifting framework. "The [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." *Griggs*, 401 U.S. at 431; *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2017). Similarly, in *Inclusive Communities*, the Court explained that "disparate-impact liability has always been properly limited in key respects," and that "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies." *Inclusive Communities*, 576 U.S. at 540 (quoting *Griggs*, 401 U.S. at 431). The Court further noted that:

> 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.

Id. at 541.

This suggests, as was the case in *Griggs*, that the second step of the burden-shifting framework—the opportunity for defendants to explain a valid interest served by the policy in question—is sufficient to avoid unfairly assigning liability for housing related practices that are *not* "artificial, arbitrary, and unnecessary."

additional requirement to the first step of the FHA disparate impact burden-shifting framework. Notably, though, HUD cites an Eighth Circuit ruling from the 2017 case, *Ellis v. City of Minneapolis*,[199] as grounds to include the "artificial, arbitrary, and unnecessary" showing as part of the pleading stage burden in the 2020 Disparate Impact Rule.[200]

1. *Ellis v. City of Minneapolis*

Ellis arose from a complaint filed in district court by for-profit affordable housing providers Andrew and Harriet Ellis against the City of Minneapolis. The Ellises alleged that Minneapolis had a policy "to discourage for-profit rental housing"[201] by applying "'heightened' housing-code enforcement"[202] and "'above minimum' housing standards"[203] to for-profit properties, as compared to public rental properties. Moreover, the plaintiffs alleged that "[i]f the City were to apply the same standards to for-profit rental owners . . . the City's code enforcement would have less discriminatory impact on their provision of affordable housing to individuals protected under the FHA."[204]

The district court granted, and the Eighth Circuit affirmed, the defendant's motion for judgment on the pleadings. In assessing whether the Ellis' had successfully met their *prima facie* burden of disparate impact as laid out by *Inclusive Communities*, the Eighth Circuit noted that:

> [T]he fact that the Ellises have had numerous disagreements with the City over application of the housing code does not, without more, plausibly suggest a City *policy* to misapply the housing code. The Ellises, in essence, attempt to bootstrap

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199. 860 F.3d 1106, 1114 (8th Cir. 2017).

200. In the Supplementary Notes in the Federal Register accompanying the publication of the 2020 Disparate Impact Rule, HUD wrote that: "HUD believes that the 'artificial, arbitrary, and unnecessary' standard gives valuable guidance about the qualitative nature of policies and practices that are suspect because otherwise, there would be a tendency to simply consider how much statistical disparity is too much—something the Supreme Court specifically directed parties to avoid as constitutionally suspect and which would constitute mere second guessing of reasonable approaches. *Ellis v. Minneapolis* supports HUD's interpretation." HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,311 (Sept. 24, 2020) (citation omitted).

201. *Ellis,* 860 F.3d at 1109.

202. *Id.* at 1108.

203. *Id.*

204. *Id.* at 1109.

> numerous "one-time decision[s]" together in order to allege the existence of a City policy to misapply the housing code.[205]

To support its conclusion that the alleged "policy" did not satisfy the *prima facie* requirement, the Eighth Circuit noted that there were other likely explanations for the inconsistent application of housing code, and that the FHA could not be used to displace justified government policies.[206] Emphasizing the "importance of considering both whether a policy exists and whether it is justified,"[207] the court held that "a plaintiff must, at the very least, point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity."[208]

2. An Unnecessary Showing?

While the *Ellis* court's reading of "artificial, arbitrary, and unnecessary" as HUD has interpreted in the 2020 Disparate Impact Rule does not explicitly contradict *Inclusive Communities*, it is arguably not a *correct* reading. The potential for confusion lies in the language of the *Inclusive Communities* opinion itself. *Inclusive Communities* did not include an explicit requirement for a plaintiff to affirmatively establish that the challenged policy is "artificial, arbitrary, and unnecessary." Instead, as noted earlier, the burden shifting framework laid out in *Inclusive Communities* requires the following: 1) the plaintiff has the burden of making a *prima facie* showing of "robust causality" tying a defendant's particular policy(s) to an alleged disparate impact,[209] 2) the defendant is then given an opportunity to "state and explain the valid interest served by their policies,"[210] and 3) "a plaintiff may 'prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.'"[211]

This language does not include the phrase "artificial, arbitrary, and unnecessary." This suggests that the question of whether a policy is "artificial, arbitrary, and unnecessary" is inherently subsumed within the burden shifting test.[212] Under this interpretation, the three-part *Inclusive Communities* burden shifting framework *as a whole*

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205. *Id.* at 1113 (citing Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 543 (2015)).

206. *Id.*

207. *Id.* at 1112 (citing City of Joliet v. New West L.P., 825 F.3d, 827, 830 (7th Cir. 2016)).

208. *Id.* at 1114 (citing *Inclusive Communities*, 576 U.S. at 521, 539, 543.)

209. *Inclusive Communities*, 576 U.S. at 541.

210. *Id.* at 521.

211. *Id.* at 527 (quoting 24 C.F.R. §100.500(c)(3) (2014)).

212. *Id.* at 527.

protects defendants from liability unless their policies are "artificial, arbitrary, and unnecessary" without requiring either party to make an explicit showing with respect to each of those three attributes. However, HUD did not adopt this approach in drafting the 2020 Disparate Impact Rule. Instead, HUD has chosen to give national scope to the Eighth Circuit's interpretation of *Inclusive Communities* in *Ellis*, creating (or at least attempting to create) what amounts to a new national standard requiring FHA disparate impact plaintiffs to plead facts to support and then prove that a challenged policy is "artificial, arbitrary, and unnecessary."

IV. ALGORITHMS AND THE ROLE OF DISCOVERY

The discussion can now turn to the increasingly important role of discovery in FHA disparate impact cases. Courts are often presented with challenges in determining when and to what extent to grant discovery. Providing broad discovery too early in litigation can generate significant and sometimes unwarranted costs for defendants (and plaintiffs). However, where information asymmetries exist, denying or significantly delaying plaintiffs' access to necessary discovery can result in premature dismissal of a case. This issue can be particularly acute in disparate impact cases involving proprietary algorithms, because a plaintiff will often need early access to discovery to make the required pleading stage showings.

A. Discovery: Broader Context

1. The New Proportional Discovery Rule

The enormous amounts of digital information potentially available for discovery spurred recent changes to the Federal Rules of Civil Procedure (FRCP). As the Advisory Committee for the FRCP explained in 2014, "the explosion of ESI [electronically stored information] in recent years has presented new and unprecedented challenges in civil litigation."[213] In 2015, the FRCP were amended to reflect these challenges. FRCP Rule 26 now states the following:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to

213. Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Red. Rules of Civil Procedure to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure at B-15 (June 14, 2014), http://www.uscourts.gov/file/18218/download.

> relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[214]

This approach to discovery is often referred to as "proportional discovery." As noted by Elizabeth Laporte and Jonathan Redgrave, proportional discovery is "a concept that is easy to articulate in general terms, yet can be difficult to implement in practice.[215] The current Federal Rules (and associated Advisory Committee Notes) do not give specific direction to litigants and courts on how to properly consider the factors listed."[216]

In the context of the 2020 Disparate Impact Rule and the growing use of algorithms for decision-making, a lack of guidance regarding how to assess proportionality creates room for a range of interpretations, some but not all of which could involve consideration of the financial exposures at issue. Michael Thomas Murphy has written (in relation to discovery generally, not specifically in relation to discrimination law) that a "natural tendency exists to use the amount in controversy as the dominant factor to determine proportionality."[217] Murphy also noted that such a "tendency is likely to be helpful in cases such as a commercial dispute among litigants on equal financial footing, but troublesome in cases involving significant nonmonetary rights such as actions to enforce constitutional or statutory rights."[218]

The suggestion to consider constitutional or statutory rights is particularly important in relation to discrimination claims, in which it can be impossible and inappropriate to attempt to measure harms in purely financial terms. For instance, consider a loan applicant who, due to discrimination, is denied a loan at a favorable interest rate and is therefore forced to instead obtain a more costly loan. It would be improper to assert that the only resulting harm arises from the cost difference between the favorable and unfavorable interest rates. A full measure of harm would need to also account for the social, psychological, and professional consequences of this sort of exclusion.

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214. FED. R. CIV. P. 26(b)(1) (emphasis added).

215. Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV 19, 44 (2015).

216. *Id.*

217. Michael *Thomas Murphy, Occam's Phaser: Making Proportional Discovery (Finally) Work in Litigation by Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG. 89, 101 (2016).

218. *Id.* at 101-02.

Thus, while the FHA does allow a plaintiff to seek monetary damages,[219] this should not be the dominant factor when determining proportionality in discovery. This is because the primary harm that an FHA plaintiff is alleging is generally not financial (or at least, not *only* financial), but rather relates to a denial of civil rights.[220] When courts only consider the financial ramifications when making decisions about discovery, they fail to recognize the extent of alleged harm to plaintiffs. Stated another way, a low amount in controversy should not in and of itself be the basis for denying or unreasonably limiting discovery.

"Proportional" discovery in FHA litigation must provide plaintiffs with sufficient access to information necessary to state a claim. This includes general information about the workings of an allegedly discriminatory algorithm. But guaranteeing plaintiffs proportional *access* alone does not guarantee that they have a fair opportunity to challenge an allegedly discriminatory policy. It is also necessary to consider the issue of *timing*— i.e., when in the proceedings the discovery should occur.

2. Domain-Specific Discovery Frameworks

Questions regarding the timing of discovery are not new.[221] As David Green wrote, "during the process to revise the Federal Rules

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219. *See* 45 U.S.C. § 3613(c)(1) ("In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages.").

220. Of course, there will sometimes be instances in which housing discrimination leads to consequences that include substantial financial harms. Those harms should be given full recognition in the litigation—though not at the cost of disregarding the non-financial consequences.

221. While *Twombly* was primarily concerned with the requirements to state a claim (holding that, to survive a motion to dismiss, a plaintiff must plead sufficient "facts to state a claim to relief that is plausible on its face"), it considered discovery as part of its rationale. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Noting that "the success of judicial supervision in checking discovery abuse has been on the modest side," the Court wrote: "It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" *Id.* at 559, 573. In his dissent, however, Justice Stevens argued that "[e]ven a sworn denial of that [antitrust] charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from" a representative from each of the defendants. *Id.* at 593 (Stevens, J., dissenting). An example of a discovery timing dispute can also be found in a 2014 District Court of New Mexico ruling involving oil and gas rights. In *SWEPI, Ltd. P'ship v. Mora Cty.*, the primary issue was "whether the Court should exercise its discretion and stay discovery until it decides SWEPI's Motion for Partial Judgment on the Pleadings [JOP Motion]." No. CIV 14-0035 JB/SCY, 2014 U.S. Dist. LEXIS 179295, at *1 (D.N.M. Dec. 19, 2014). The court ruled that "because discovery may assist the parties in supplementing the record and assist the Court in ruling on the [Judgement on the Pleadings] Motion,

of Civil Procedure, the participants noted the problem in 'cases in which plaintiffs lack access to information necessary to plead sufficiently because that information is solely in the hands of the defendants and not available through public resources or informal investigation.'"[222] While Green's observation—and the concern about access to digitally stored information that spurred changes to the FRCP—pertains to civil litigation generally, it is particularly relevant to FHA litigation alleging discrimination involving a defendant's use of a proprietary algorithm, some knowledge of which will often be necessary to satisfactorily address all five elements at the pleading stage.

Courts may adapt discovery timing and practices in light of the characteristics of particular domains of litigation. In securities litigation, for example, there are specific policies disfavoring early discovery. The Private Securities Litigation Reform Act of 1995 (PSLRA) states that "[i]n any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party."[223]

It is also possible to find court decisions disfavoring discovery at the pleading stage when a dispositive motion is pending. To take one example, the Eleventh Circuit wrote in 1997 that "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should, however, be resolved before discovery begins."[224] It is also important to be mindful of the Supreme Court's *dicta* in *Iqbal* explaining that the "short and plain statement"[225] rule of federal pleading "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[226] However, under the 2020 Disparate Impact Rule, questions related to the legal sufficiency of an FHA disparate impact claim will often be inseparable from questions about the merits of a claim. Thus, the reasoning for the cautions against overly permissive discovery articulated by the Eleventh Circuit and the Supreme Court in *Iqbal* cannot easily be applied in FHA disparate

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and because staying discovery would prejudice the Defendants, the Court will deny the Motion to Stay." *Id.*

222. David A. Green, *The Fallacy of Liberal Discovery: Litigating Employment. Discrimination Cases in the E-Discovery Age*, 44 CAP. U. L. REV. 693, 721 (2016) (citing THE DUKE CONFERENCE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (LegalPub.com, Inc. ed/. 2015)).

223. Private Securities Litigation Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

224. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997).

225. FED. R. CIV. P. 8(a)(2).

226. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

impact cases that will be brought under the 2020 Disparate Impact Rule.

B. Implications for Discovery

Unsubstantiated conclusions should not be sufficient to survive a motion to dismiss or to "unlock the doors" of broad and excessively costly discovery. However, when FHA claims involve proprietary algorithms, it will be crucial to provide sufficient early discovery to give plaintiffs the information needed to survive a motion to dismiss. It is more reflective of the letter and spirit of the language in Rule 26 requiring consideration of the "importance of discovery in resolving the issue."[227]

Absent access to early discovery, the combination of the proprietary nature of an algorithm with the highly specific pleading requirements under the 2020 Disparate Impact Rule can amount to a perfect storm disfavoring plaintiffs. On the one hand, compliance with the rule requires plaintiffs to satisfy a set of conditions that, if interpreted strictly, can depend on information about the challenged algorithm. On the other hand, some of that information may be protected by trade secret law, and therefore not in the public domain.

How should courts determine the extent of discovery permissible at the pleading stage? Under the 2020 Disparate Impact Rule, an FHA disparate impact case starts with a plaintiff's "allegation that a specific, identifiable policy or practice has a discriminatory effect."[228] A plaintiff must also use this "policy or practice" as the basis to sufficiently plead facts supporting the five elements of the pleading stage burden.[229]

Absent additional context, the text of the 2020 Disparate Impact Rule could be interpreted in a manner that would change the pleading stage of FHA disparate impact litigation from a gatekeeping process, designed to avoid advancement of obviously unviable claims, to a *de facto* assessment of the merits of a case based on highly specific requirements. But there *is* plenty of additional context, including but not limited to *Twombly/Iqbal*: Reading the 2020 Disparate Impact Rule in a manner consistent with broader jurisprudence on pleading-stage burdens requires an interpretation of the five elements that does not erect insurmountable hurdles for plaintiffs attempting to challenge discrimination arising due to complex and/or proprietary

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227. FED. R. CIV. P. 26(b)(1).

228. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,332 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100) (Proposed 24 C.F.R. § 100.500(b)).

229. The "policy" is specifically recited in four of the five elements and indirectly implicated in the fifth, which relates to the disparate impact caused by the "policy."

algorithms. In other words, the 2020 Disparate Impact Rule must be interpreted in a manner that would allow meritorious plaintiffs to satisfy the five elements of the pleading stage burden and survive a motion to dismiss using information that could be gathered either without any discovery or with limited, narrowly tailored discovery.

1. Does Inseparability Apply in FHA Disparate Impact Cases?

In considering what types of information might be necessary to state (and later amend) a claim, it is worth noting an amendment to Title VII of the Civil Rights Act of 1964 made pursuant to the Civil Rights Act of 1991.[230] The amended statute, which as with the rest of Title VII pertains to discrimination in employment, not housing, relates to the burden of proof for a "complaining party."[231] The statute states that:

> [T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.[232]

As previously discussed, aspects of an algorithm that amount to a discriminatory "policy" may come in various forms, including in the input data or in the internal processes of the algorithm. In some cases, whether or not particular forms of input data are responsible for an observed disparate outcome for a particular group will be dependent upon the manner in which those inputs are used by the algorithm. If a particular input gives rise to a disparate impact, it might not be possible to distinctly identify whether the "policy" at fault is the manner in which that input was considered, or the consideration of the input in the first instance. A defendant's use of a proprietary algorithm can therefore qualify as the sort of policy that cannot be separated for analysis.[233] In that case, rather than alleging that a *specific* aspect of an algorithm or a failure to properly oversee an algorithm is

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230. Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991).

231. 42 U.S.C. § 2000(e)(l) (2018). The "complaining party" is the "[Equal Employment Opportunity] Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter." *Id.*

232. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2018).

233. *See* Munoz v. Orr, 200 F.3d 291 (5th Cir. 2000) (recognizing the challenge of separability regarding whether "the promotion system used by the Air Force for civilian employees has a disparate impact on Hispanic males"). The Fifth Circuit wrote that "where a promotion system uses tightly integrated and overlapping criteria, it may be difficult as a practical matter for plaintiffs to isolate the particular step responsible for the observed discrimination." *Id.* at 304.

the cause of a disparate impact, plaintiffs could allege the five pleading stage elements with regard to the entirety of an algorithm.

Title VII of the Civil Rights Act of 1964 addresses employment. Yet it has long been understood that Title VII frameworks can serve as models for addressing antidiscrimination in other domains.[234] The lack of an analogous provision in the text of the FHA is not surprising given that it was added to Title VII in 1991, well before *Inclusive Communities* in 2015 settled the question of whether disparate impact claims were justiciable under the FHA. Moreover, Congress passed these amendments to Title VII in direct response to the 1989 *Wards Cove* ruling, which addressed employment discrimination and has been cited as guidance for interpreting disparate impact claims under the FHA.[235] Therefore, it is entirely reasonable to conclude that FHA disparate impact plaintiffs should also be permitted to challenge the entire decision-making process—in this case, the entire algorithm—as one overall policy or practice, where the various elements of the algorithm cannot be separated for analysis.[236]

There is also a separate question of whether utilizing what might be called an inseparability provision in FHA disparate impact cases would actually prove useful in the context of the 2020 Disparate Impact Rule. While an inseparability argument is likely to alleviate concerns for plaintiffs who feel they lack enough information to allege a sufficiently specific policy in their complaint, it is unlikely to remedy

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234. *See, e.g.*, A.H.D.C. v. City of Fresno, No. CIV-F-97-5498 OWW, 2004 U.S. Dist. LEXIS 31200 at *42 (E.D. Cal. Mar. 9, 2004) (explaining that "[a]fter *Washington v. Davis* distinguished equal protection cases from the analysis required under the Fair Housing Act, courts began utilizing Title VII standards governing discriminatory impact and discriminatory treatment cases under Title VIII.") (citation omitted); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 545 (2015) (holding "that disparate-impact claims are cognizable under the Fair Housing Act upon considering . . . the Court's interpretation of similar language in Title VII and the ADEA."); *See also* United States v. Starrett, 840 F.2d 1096 (2d Cir. 1988); Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988); Grieger v. Sheets, No. 87 C 6567, 1989 U.S. Dist. LEXIS 3906 (N.D. Ill. Apr. 7, 1989); Resident Advisory Board v. Rizzo, 564 F.2d 126 (3rd Cir. 1977); Reeves v. Carrollsburg Condominium Unit Owners Association, No. 96-2495(RMU), 1997 U.S. Dist. LEXIS 21762 (D.D.C. Dec. 18, 1997).

235. *See, e.g.*, HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,291, 60,308, 60,320 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

236. HUD may have a different view. In the Supplementary Notes accompanying the publication of the 2020 Disparate Impact Rule, HUD wrote that "Wards Cove is an old case, it remains persuasive authority, specifically with respect to the Fair Housing Act, which, unlike Title VII, has not had intervening amendments." HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,308. Thus, HUD appears to believe that the 1991 amendments to the Civil Rights Act, which pertain to employment, should not play any role in informing or shaping disparate impact law in relation to housing.

other hurdles to plausibly pleading a claim of disparate impact under the proposed rule. For example, the "artificial, arbitrary, and unnecessary" element of the pleading stage burden will remain difficult to allege, even when a plaintiff can invoke inseparability.

What would it mean to sufficiently plead facts supporting that the use of an algorithm in its entirety is an "artificial, arbitrary, and unnecessary" policy? Where an algorithm has been validated as an "accurate" prediction tool (however "accurate" may be defined), defendants will be able to offer a rebuttal—perhaps meritorious, perhaps not—that the algorithm, in its entirety, is *not* artificial or arbitrary.[237] On that basis, a defendant could move to have the case dismissed for failure to state a claim.[238] A plaintiff may be able to more easily identify a specific discriminatory policy by analyzing an algorithm as a whole. But it will remain challenging to satisfy other elements of the pleading stage burden without access to *any* discovery. Thus, the question of when, and to what extent discovery is conducted will be of central importance.

2. Discovery and Amended Pleadings

If all of the relevant information about an algorithm is public, it may be possible for a plaintiff to use a combination of publicly available data and independent analysis of the algorithm to satisfy the pleading stage burden. However, when the algorithm is proprietary, a plaintiff may need access to non-public information, and therefore to some degree of discovery. Of course, a defendant has little incentive to accommodate early discovery requests, and may choose to file a motion to stay discovery while a motion to dismiss is pending.

Discussions of the potential value and role of early discovery are not new. In a 2010 law review article discussing the post-*Twombly/Iqbal* landscape, Suzette Malveaux addressed the importance of early discovery in civil rights cases. Malveaux argued for "narrow, targeted plausibility discovery at the pleadings stage to ensure that the transsubstantive application of the [Federal] Rules [of Civil Procedure] does not work an injustice against those cases involving informational inequities."[239] She further noted that "[t]here are several models of pre-merits discovery from which courts can draw guidance. The Supreme Court has long recognized the

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237. Questions may remain regarding the *necessity* of using that particular algorithm, but as previously explained, the 2020 Disparate Impact Rule requires a showing of all three.

238. FED. R. CIV. P. 12(b)(6) provides that a defendant can allege "failure to state a claim upon which relief can be granted" as grounds for a motion to dismiss.

239. Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 108 (2010).

propriety and importance of discovery in resolving a variety of non-merits threshold matters, including class certification, qualified immunity, and jurisdiction."[240]

Other legal scholars have taken similar stances. For example, Arthur Miller suggests a procedure "by which the district court authorizes a modicum of factual exploration before taking definitive action on the request for dismissal," and notes that "[d]iscovery would focus solely on what is necessary to meet the plausibility requirement."[241] Robert Bone outlines "a promising hybrid approach targeting informational asymmetry, one that addresses . . . the informed-defendant cases with a system of limited discovery prior to a merits review."[242] In describing this approach, Bone notes that "at least one trial judge has indicated a willingness to use this approach to address the information-access problems raised by *Twombly's* plausibility standard."[243] But he also cautions that "an approach allowing limited discovery must be designed carefully to limit error and process costs."[244]

Another approach—and the one that this Article favors—is to leverage the fact that in practice, the boundaries between the different phases of litigation are not always distinct. While the "pleading stage" is often presumed to be a distinct, early phase of litigation that precedes discovery, in fact pleadings can be altered at all stages of litigation—even, under some circumstances, during and after trial.[245] The FRCP specifically contemplates revised pleadings throughout litigation. In particular, Rule 15 provides that:

> A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.[246]

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240. *Id.* at 108.

241. Arthur Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 108 (2010).

242. Robert Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 935 (2009).

243. *Id.* at 933 (citing In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1032-33 (N.D. Cal. 2007)).

244. *Id.*

245. FED. R. CIV. P. 15(b).

246. FED. R. CIV. P. 15(a)(1). Rule 15 also provides for "supplemental" (as opposed to "amended") pleadings, though only in relation to events occurring after the date of the original pleading: "On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense." FED. R. CIV. P. 15(d).

Rule 15 also provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."[247] This provides the opportunity to create a road map to satisfy the pleading requirements under the 2020 Disparate Impact Rule.

3. A Discovery Roadmap

As noted earlier, to successfully plead a case under the 2020 Disparate Impact Rule, an FHA plaintiff alleging algorithm-based disparate impact has to identify a "policy" and then to sufficiently plead facts supporting each of five elements:

> 1) "[t]hat the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective . . . ;"[248]
> 2) "[t]hat the challenged policy or practice has a disproportionately adverse effect on members of a protected class;"[249]
> 3) that "there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect;"[250]
> 4) that "the alleged disparity caused by the policy or practice is significant;"[251] and
> 5) that "there is a direct relation between the injury asserted and the injurious conduct alleged."[252]

To sufficiently plead facts supporting (and, after the pleading stage, to subsequently prove by a preponderance of the evidence) the five elements will require gathering information both from public sources and subsequently, through discovery, from non-public sources. The key sources of information will often include the following:

User manuals: User manuals, which will generally be publicly available, will contain instructions intended for customers or other users of the software.[253] This will normally include a description of the

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247. FED. R. CIV. P. 15(a)(2).

248. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. 60,288, 60,332 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100) (Proposed 24 C.F.R. § 100.500(b)(1)).

249. *Id.* (Proposed 24 C.F.R. § 100.500(b)(2)).

250. *Id.* (Proposed 24 C.F.R. § 100.500(b)(3)).

251. *Id.* (Proposed 24 C.F.R. § 100.500(b)(4)).

252. *Id.* (Proposed 24 C.F.R. § 100.500(b)(5)).

253. User manuals are typically written when a company creates software for its own internal use as well as when a company creates software to provide to third

inputs, the types and meanings of outputs, and an explanation of the various options and settings. There may also be a very high-level description of the algorithm itself, though the details and source code would not be included. Thus, while user manuals tend to present the algorithm as a black box, the information that they convey regarding the input, output, and options can nonetheless be useful. Moreover, it will be important for plaintiffs to be familiar with the intended use for the algorithm as described in the user manual, given that this will be a defense to liability likely invoked by defendants under the 2020 Disparate Impact Rule.

Marketing materials: While marketing materials, which include web sites, digital brochures, and presentations at events such as trade shows tend to be light on detail, they can still provide useful information, particularly regarding an algorithm's performance, reliability, accuracy, and applications.

Technical white papers: On their public-facing web sites, providers of software solutions will sometimes provide "white papers," which are informal (i.e., not peer reviewed) and somewhat technical descriptions of the product. In contrast with marketing materials, white papers typically contain some degree of technical detail about the inner structure of an algorithm.[254]

Design documents: These are proprietary documents that explain the algorithm, and therefore will be accessible to a plaintiff only through discovery. Typically, they will contain descriptions of the goals and high-level functioning of the algorithm, explanations of motivations for different aspects of the algorithm, discussions of training data and processes, flow charts, and pseudocode. (Computer programmers use pseudocode to express source code in a form that is easier for humans to read.)[255] A key advantage of design documents (including any pseudocode they might contain) is that they are generally written with the intent to document and make clear information about an algorithm. However, if the computer programmers charged with writing the source code make revisions to the algorithm as a result of testing or other changes during its development, those changes may not be reflected in the design

parties. Therefore, it will be important for plaintiffs to seek access to user manuals both when the defendant is itself the creator of the software at issue as well as when the defendant is using a solution obtained from a third party.

254. For instance, technical white papers might contain detailed flow charts of how an algorithm works, formulas used in computing the algorithm outputs, and information about the structure of the code used to implement it.

255. *See, e.g.*, *Designing an Algorithm*, BBC: BITESIZE, https://www.bbc.co.uk/bitesize/guides/z3bq7ty/revision/2 [https://perma.cc/R87G-VBA9] (last visited Dec. 1, 2020) (explaining that "[p]seudocode is not a programming language, it is a simple way of describing a set of instructions that does not have to use specific syntax").

documents. Thus, when relying on design documents, it will be necessary to confirm that they are current.

30(b)(6) depositions: Under FRCP Rule 30(b)(6), as part of discovery a litigant can issue a deposition notice to an organization which "must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf."[256] The designated deponent "must testify about information known or reasonably available to the organization,"[257] In the context of FHA disparate impact litigation, this means that a plaintiff will be able to seek depositions of persons knowledgeable about the details of the challenged algorithm. 30(b)(6) depositions can be used not only to gather detailed technical information about the workings of the algorithm, but also (e.g., when higher level managers are deposed) contextual information such as why certain design choices were made and the extent and nature of efforts to measure and eliminate bias.

Source code: Source code has the advantage of conveying what an algorithm actually does. However, source code analysis in litigation poses multiple challenges. First, for a plaintiff to get access to the source code, the parties will need to negotiate a protective order, which the court must authorize. Second, the procedures for accessing source code under a protective order are typically complex. For example, the source code is often provided to a plaintiff on a single, designated computer disconnected from the internet, thus making it necessary for experts or other people working on behalf of the plaintiff to travel to the office where the computer is located. Third, and most substantively, analyzing source code can be very complex, particularly under the constraints of a typical protective order that allows an expert to read the code but not to actually run it.

It can take a large amount of time to understand the operation of the code generally, and the specific modules most relevant to the inquiry. A complicating factor is that not all of the source code provided in relation to litigation discovery requests is actually used. There might be hundreds or more individual modules of code, and it can take extensive sleuthing to determine when, if at all, a particular module is actually invoked. Additionally, the code for complex systems often contains calls to libraries developed by third parties.

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256. FED. R. CIV. P. 30(b)(6). The title of rule 30(b)(6) is "Notice or Subpoena Directed to an Organization." A notice (and not a subpoena) is used for a party to the litigation. A subpoena is used to obtain information from a non-party. For example, if the defendant licensed the algorithm under scrutiny from third party company, the plaintiff could issue a subpoena to that company in order to obtain the deposition of a person knowledgeable regarding the internal workings of the algorithm.

257. *Id.*

The source code for those libraries might be available only in executable (non-human-readable) form.

Data: Data includes both the data that were used in training the algorithm and the data created as the algorithm is run. Ideally, this would include the full set of inputs and outputs associated with "real-world" use. That said, simulation data, which would show how the algorithm works on data created or acquired for the purposes of evaluating the algorithm before its deployment, would also be of interest.

Some data may be obtainable without discovery. The list of required inputs to an algorithm will often be public. For example, a user manual for an algorithm for making home loan decisions would likely identify required inputs, such as salary, years with current employer, credit score, etc. If the inputs are known, it might be possible for the plaintiff to reconstruct the inputs by contacting people whose loan applications were approved or denied by the defendant. Of course, this process is still removed from the algorithm itself. A loan applicant will know whether his or her application was approved, but will not generally know what the algorithm's output was, or how a loan officer considered that output when making the decision. By contrast, through discovery, it may be possible to get a complete set of inputs and corresponding outputs for each decision made using an algorithm. It will also be useful to gain information regarding *where* and *how* the relevant data was collected. Questions about the statistical validity of an algorithmic model may arise if there is evidence that training data were collected from an unrepresentative sample.

It is also possible to envision scenarios where reconstructing the full set of input data is infeasible. Consider an artificial intelligence-driven algorithm for evaluating loan applications that maintains an ever-evolving set of proprietary metrics derived from broader economic data (such as interest rates, unemployment rates, etc.). If there is no "snapshot" of the proprietary metrics taken each time the algorithm is run in relation to a particular loan application, it may be impossible to recreate it later.

Through the above and other sources of information, a plaintiff will want to understand as much as possible about the answers to the following questions:

What are the inputs to the algorithm? This question seeks to identify the types of data used. Notably, it can include not only data specific to an individual, but also group-level data. To take one example, an algorithm used in relation to loan decisions, when used to evaluate an application from someone who has moved frequently in the past five years, might note that fact and use it as a basis to

consider data derived from previous applicants who had moved frequently.

How are those inputs combined within the algorithm to produce outputs? This question gets to the core of the actual algorithm. For instance, are some inputs given heavier weight than others? Perhaps some inputs alone are potentially dispositive regarding a decision (e.g., a loan algorithm might recommend denying a loan based on credit score alone if that score is below a particular threshold).

Does the mapping between inputs and outputs display any notable statistical disparity with respect to FHA-protected characteristics? This is particularly important, and also potentially particularly challenging because it requires making statistical conclusions. Again, using the loan application example, it is not possible to observe only one example (e.g., the loan decision made in relation to one loan applicant) and determine whether there is any statistical disparity. Plaintiffs will instead want to use the discovery process to obtain the records for hundreds or thousands of loan applicants, with the goal of accumulating a large enough sample size to draw statistically meaningful conclusions regarding disparities. Difficulties may also arise as a result of a lack of sufficient demographic data, due to the fact that collection of such data is not often encouraged—in fact, it is sometimes explicitly discouraged.[258]

Were there multiple versions of the algorithm released for commercial use, and if so, in what ways do those versions differ? Companies that provide algorithms routinely update them to improve their speed and accuracy and to add new features. When algorithm discrimination is suspected, it will be important to identify which version of the algorithm is at issue, and to ensure that the discovery process targets information about that particular algorithm. This is also an area in which defendants might, either intentionally or unwittingly, create confusion by providing information on versions of the algorithm different from the one in question. The fact of providing such information is not necessarily inappropriate. For instance, to understand the workings of version 2.0 of an algorithm, it might be necessary to first understand how version 1.0 worked. However, the presence of multiple versions, with different source code and (potentially) different documentation for each version, can increase the burden on plaintiffs aiming to focus on the subset of information obtained through discovery most relevant to the case.

Does the algorithm evolve on its own based on experience, and if so, are "snapshots" taken every time an automatic change is made?

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258. *See, e.g.,* HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(d)) ("Nothing in this part requires or encourages the collection of data with respect to race, color, religion, sex, handicap, familial status, or national origin.").

As noted previously, artificial intelligence algorithms evolve over time—sometimes over time scales as short as days or minutes. This means that there may not be a record of an algorithm as it existed at the points in time of interest in litigation. Ideally, companies that produce evolving algorithms would put in place systems that record snapshots of the algorithm each time it undergoes a change. However, while this would be valuable for internal tracking purposes it might also be viewed as a potential liability, providing a disincentive in some contexts to maintain this class of records.

What fairness metric was used in the algorithm design process to attempt to eliminate bias, and to what extent does the algorithm achieve fairness according to that metric? As discussed earlier, there is no perfect fairness metric. When designing algorithms, companies will need to choose which metric to target when aiming for fairness—knowing that in doing so they are generally foreclosing the opportunity to achieve fairness under other metrics. Defendants in algorithm discrimination cases should not be penalized for failing to do the impossible; i.e., for the fact that a plaintiff will always be able to find some metrics under which the algorithm is unfair. However, where industry standards are lacking, defendants should be required to identify the metric they chose, and to explain the rationale for that choice.

During the process of developing the algorithm, what different approaches were contemplated, and what factors led to the final decision? This question can help identify the priorities and approaches that were used in developing the algorithm, which in turn can shed light on the ways in which it might have been designed to (or learned to) produce biased outputs. To take an example in unrelated to housing, Solon Barocas and Andrew Selbst describe an algorithm used in relation to evaluating medical school applications at a school in the UK. They explain that:

> St. George's Hospital, in the United Kingdom, developed a computer program to help sort medical school applicants based on its previous admissions decisions. Those admissions decisions, it turns out, had systematically disfavored racial minorities and women with credentials otherwise equal to other applicants'. In drawing rules from biased prior decisions, St. George's Hospital unknowingly devised an automated process that possessed these very same prejudices.[259]

How does the algorithm fit into a process that also involves human-driven outcomes? This question and the immediately

259. Solon Barocas & Andrew Selbst, *Big Data's Disparate Impact*, 104 CAL. L. R. 671, 682 (2016) (citations omitted).

preceding question are particularly relevant to the requirement to show "a direct relation between the injury asserted and the injurious conduct alleged."[260] Algorithms are often used because they are fast and can lower the staffing and other costs of organizations that make decisions based on complex combinations of data. Information about how an algorithm fits into the broader context of a process that will often (though not always) have a human component will sometimes be important in identifying the types and sources of bias it may contain. In other words, to identify algorithm bias will sometimes require a holistic examination of not only the algorithm itself but the ways in which it is used by an organization.

An initial complaint will have to be filed without any discovery. However, even without discovery, information useful to constructing a complaint can be gathered using the discovery roadmap described above. One approach is for a plaintiff to assert in a complaint that the decision to use an algorithm that produces disparate outcomes is the "policy." For all of the pleading stage elements other than the first (which addresses the "arbitrary, artificial, and unnecessary" inquiry), the plaintiff can use the combination of this choice, an observed statistical disparity, and any relevant publicly available information about the algorithm and its inputs.

The first element (pleading facts to support an inference that the policy is all three of "arbitrary, artificial, and unnecessary"), will often pose the greatest challenge in constructing a complaint. A plaintiff can satisfy the "unnecessary" component of the test by showing that there are other algorithms that would lead to less discriminatory outcomes. For "artificial" and "arbitrary" the plaintiff may have to cite specific information about the algorithm (such as the particular inputs used) whenever available, and explain why different choices could just as easily have been made.

A defendant can respond by invoking any of the multiple defenses provided by the 2020 Disparate Impact Rule. To maximize their odds of success, defendants will likely invoke many of the defenses, knowing that prevailing on any one or more will be sufficient. Depending on the stage of the proceeding, a defendant can also file of motion to dismiss or a motion for judgment on the pleadings. In ruling on these motions, courts will need to strike a balance. Courts should recognize the limited information available to a plaintiff pre-discovery—and even at the very earliest stages of discovery.

If the plaintiff has identified a policy and satisfied the five pleading stage elements to the greatest extent possible given the available information, the court should leave the motion pending, or deny it as

260. HUD's Implementation of the Fair Housing Act's Discriminatory Impact Standard, 85 Fed. Reg. at 60,332 (Proposed 24 C.F.R. § 100.500(b)(5)).

appropriate, and permit the case to advance to discovery. A plaintiff can then use information acquired in discovery to file an amended complaint, including a refined description of the challenged policy and each of the five elements.[261] Importantly, even a modest level of discovery could help plaintiffs provide more detail in a complaint. And once more complete discovery is conducted, a plaintiff may be able to make the much more detailed and substantive showing at trial to prove each of the five elements by a preponderance of the evidence.

While courts will need to be mindful of plaintiffs' need to access discovery, they also need to protect defendants targeted by groundless complaints. Courts must not permit plaintiffs to go on a fishing expedition. Courts will have to make context-specific judgments about whether plaintiffs have truly extracted and suitably presented the most information possible about the challenged algorithm given lack of discovery. However, when little information is available to plaintiffs upon filing an initial complaint, defendants must meet a high standard to show that a plaintiff failed to make a plausible *prima facie* case. Once discovery has begun and plaintiffs have had the opportunity to amend their complaint, courts can recalibrate.

V. CONCLUSIONS

The coming years will see a dramatic increase in the use of algorithms in the housing sector to make decisions about financing, leasing, sales, marketing, and zoning. As a result, future housing discrimination cases will often focus on the role of algorithms. However, HUD's 2020 Disparate Impact Rule lays out a complex set of pleading requirements for plaintiffs who allege algorithm-based disparate impact discrimination. This creates tensions involving the domain-specific pleading requirements, the broader precedents applying to pleadings generally from *Twombly* and *Iqbal*, and the timing of discovery including any overlaps with the timing of amended pleadings and dispositive motions.

This Article has explored these tensions and aimed to identify the specific aspects of the pleading stage burden and affirmative defenses that will lead to the most complexity in litigation. It has also explored the role of discovery, and the need to ensure that plaintiffs are not unreasonably impeded from making FHA disparate impact claims. Conversely, it also discussed protecting defendants from being subjected to costly and time-consuming fishing expeditions masquerading as discovery.

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261. Of course, an amended complaint filed by the plaintiff will open another window for a defendant to seek to have the case dismissed.

A key conclusion of the Article is that plaintiffs under the 2020 Disparate Impact Rule alleging algorithm-based discrimination need to be given a full opportunity—including through early access to discovery as needed—to acquire the information needed to plead a case. Failure to provide this opportunity would leave plaintiffs in the impossible position of being required to comply with the complex, detailed pleading standard required by the 2020 Disparate Impact Rule while lacking access to the details regarding the inner workings of the algorithm necessary to construct a successful pleading.

More generally, the combination of growth in algorithm adoption and the new disparate impact rule means that there will need to be an entirely new body of FHA case law addressing algorithm-based disparate impact. This Article has provided a framework that plaintiffs, defendants, and courts can use to ensure that litigation will be fair to both plaintiffs and defendants, and that it reflects the intent, spirit, and letter of the FHA.

Finally, while this Article has focused on algorithm discrimination in relation to housing, algorithms are also experiencing growing use in multiple other domains where bias is a longstanding concern, including employment, credit, criminal justice, and medicine. In order to realize the many potential benefits of algorithms and artificial intelligence, it will be necessary to maintain a continued focus on efforts to identify and mitigate algorithm bias. Part of that focus involves ensuring that the many antidiscrimination statutes that have been enacted over the past half century remain maximally effective in a world where algorithms are playing an increasingly common role.