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Proving Disparate Impact in Fair Housing Cases After *Inclusive Communities*

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PROVING DISPARATE IMPACT IN FAIR HOUSING CASES AFTER *INCLUSIVE COMMUNITIES*

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Disparate-impact claims under the federal Fair Housing Act ("FHA") are now a well-established part of housing discrimination law, having been recognized for decades by the lower courts and recently endorsed by the Supreme Court in Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc. The Court in Inclusive Communities *saw the impact theory as a way of bolstering the FHA's "role in moving the Nation toward a more integrated society," but it also set forth certain "cautionary standards" to guard against "abusive" impact claims. Under these standards, which are similar to those adopted in a 2013 HUD regulation and those long used in Title VII employment discrimination cases, a FHA-impact plaintiff must prove that a defendant's challenged policy causes a disparate impact on a racial minority or other FHA-protected group, and then, if the defendant establishes a legitimate interest for its policy, the plaintiff may still prevail by showing that a less discriminatory alternative would serve this interest.*

In the first stage, Inclusive Communities *instructs courts to "examine with care" the plaintiff's proof in order to facilitate the "prompt resolution" of FHA-impact claims before trial. But, apart from the analogy to Title VII, neither* Inclusive Communities *nor HUD has provided any guidance for determining what such evidence should entail. Furthermore, lower-court decisions in FHA-impact cases before* Inclusive Communities *rarely followed the Title VII methodology and often used inconsistent techniques in evaluating the relevant data. This Article provides the guidance needed for evaluating a plaintiff's proof in this crucial prima-facie-case stage of a FHA-impact claim.*

The Article first reviews the law governing proof in disparate-impact cases and identifies the data sets available to establish disparate impact in FHA cases. It then shows how these legal principles and available data should be used in the most frequently pursued types of FHA-impact claims, i.e., those involving a landlord's screening devices and those challenging a municipality's restrictions on affordable housing.

Implicit throughout the discussion are two themes: (1) that certain approaches to proving disparate impact in FHA cases are problematic; and

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(2) that, given the correct legal and statistical principles and the data available, certain types of housing-impact claims may be harder to prove than others. Based on these insights, the Article shows that the promise of Inclusive Communities*—that FHA-based impact claims may help break down arbitrary barriers to a more integrated society—will take some serious effort to fulfill.*

Introduction

Disparate-impact claims under the federal Fair Housing Act ("FHA")[1] are now a well-established part of housing discrimination law. Such claims have been recognized by the lower courts since the 1970s,[2] and last year the Supreme Court endorsed these claims in

1. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968). The FHA, as amended, is codified at 42 U.S.C. §§ 3601–3619 (2012).
2. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.[3]

The *Inclusive Communities* opinion saw the impact theory as a way of bolstering the FHA's "role in moving the Nation toward a more integrated society,"[4] but the Court also set forth certain "cautionary standards" to guard against "abusive" FHA impact claims.[5] These standards, which are similar to those adopted in a 2013 regulation promulgated by the U.S. Department of Housing and Urban Development ("HUD"),[6] tie the proper handling of FHA impact claims to their counterpart under the federal employment discrimination law, Title VII of the 1964 Civil Rights Act.[7] Under these standards, the plaintiff must prove that a defendant's challenged policy causes a disparate impact on a racial minority or other FHA-protected group, and then, if the defendant establishes a legitimate interest for its policy, the plaintiff may still prevail by showing that a less discriminatory alternative would serve this interest.[8]

This Article provides guidance for evaluating a plaintiff's proof in the first stage of a FHA impact claim. *Inclusive Communities* instructs courts to "examine with care" the proof at this "prima facie case" stage in order to facilitate the "prompt resolution" of FHA-impact claims.[9] Thus, according to the Court, a plaintiff who fails to produce appropriate statistical evidence faces pre-trial dismissal, perhaps as early as the pleading stage.[10] But, apart from the analogy to

3. 135 S. Ct. 2507 (2015).

4. *Id.* at 2526.

5. *Id.* at 2524.

6. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (promulgating 24 C.F.R. § 100.500). As the agency primarily responsible for administering the FHA, *see* 42 U.S.C. § 3608(a), HUD's regulations interpreting the FHA are entitled to substantial deference. *See* Meyers v. Holley, 537 U.S. 280, 287–88 (2003) (citing Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

7. *See Inclusive Cmtys.*, 135 S. Ct. at 2522–24. Title VII is codified at 42 U.S.C. § 2000e.

8. *See infra* notes 26–29 and accompanying text.

9. *Inclusive Cmtys.*, 135 S. Ct. at 2523.

10. *See id.* at 2523–24. Post-*Inclusive Communities* decisions dismissing FHA-impact claims at the pleading stage include Boykin v. Fenty, 650 F. App'x. 42, 44 (D.C. Cir. 2016); Gomez v. Quicken Loans, Inc., 629 F. App'x. 799, 802 (9th Cir. 2015); Glenn v. Wells Fargo Bank, N.A., 2016 WL 3570274, at *6 (D. Md. July 1, 2016); Cobb Cty. v. Bank of Am. Corp., No. 1:15-CV-04081-LMM, 2016 WL 2937467, at *12–13 (N.D. Ga. May 2, 2016); Ellis v. City of Minneapolis, No. 14-cv-3045, 2016 WL 1222227, at *5-7 (D. Minn. Mar. 28, 2016); Ellis v. City of Minneapolis, No. 14–cv–3045, 2015 WL 5009341, at *9–12 (D. Minn. Aug. 24, 2015); Merritt v. Countrywide, No. 09–cv–01179–BLF, 2015 WL 5542992, at *18 (N.D. Cal. Sept. 17, 2015).

Title VII, neither *Inclusive Communities* nor HUD has provided any guidance for determining what such evidence should entail.[11] Furthermore, lower-court decisions in FHA-impact cases before *Inclusive Communities* rarely followed the methodology used in Title VII cases and, worse, often used erroneous or inconsistent techniques for evaluating the relevant data.[12]

Part I of this Article reviews the law governing proof in disparate-impact cases, noting both Title VII principles and FHA precedents. Part II then identifies the types of data that are available to establish disparate impact in FHA cases. In Part III, we show how the legal principles and the data available should be used in different types of FHA impact claims, dealing primarily with two situations: (A) a landlord's screening devices (e.g., refusing to rent to persons with criminal records or those using Section 8 vouchers); and (B) a municipality's zoning-based restrictions on housing developments of particular value to minorities.

Implicit throughout the discussion are two themes: (1) that certain approaches to proving disparate impact in FHA cases are problematic; and (2) that, given the appropriate legal and statistical principles and the available data, certain types of housing-impact claims will be harder to prove than others. Based on these insights, we conclude that the promise of *Inclusive Communities*—that FHA-based impact claims may help break down arbitrary barriers to a more integrated society—may not always be easy to fulfill.

I.
Principles for Proving Disparate Impact in FHA Cases

A. *FHA-Effect Law: Distinguishing Disparate-Impact from Perpetuation-of-Segregation Claims*

HUD's 2013 regulation endorsing discriminatory-effect claims under the FHA recognized that a challenged practice may have an illegal effect in either of two ways: "(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."[13] These two separate theories had earlier been rec-

11. *See Inclusive Cmtys.*, 135 S. Ct. at 2526 (remanding without commenting on the evidence); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11468–69.

12. *See infra* notes 84–85, 94–97 and accompanying texts.

13. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11469 (describing 24 C.F.R. § 100.500(a) (2016)).

ognized by numerous courts,[14] which, along with HUD, agreed that a FHA plaintiff may present evidence supporting both types of discriminatory-effect claims in a single case.[15]

Historically, most perpetuation-of-segregation claims have been made against municipal defendants accused of blocking integrated housing developments in predominantly white areas.[16] Unlike disparate-impact claims, segregative-effect claims may challenge a particular action or decision of the defendant as well as an across-the-board policy or practice.[17] Statistical evidence is the key to proving both types of claims, but the focus of this evidence differs, with disparate-impact claims requiring a comparison of how a challenged policy affects different groups while segregative-effect claims focus on how a challenged action affects residential segregation in the area.[18]

The Supreme Court's 2015 decision in *Inclusive Communities* endorsed FHA disparate-impact claims, but did not deal with—indeed, barely mentioned—the segregative-effect theory.[19] Furthermore, this theory, unlike disparate impact, has no clear analog in Title VII law.[20] This is not to say that segregative-effect claims are now on shaky ground. To the contrary, based on the 2013 HUD regulation and *Inclusive Communities*' recognition that the FHA is designed to foster integration,[21] such claims have a strong foundation.[22] Still, because

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14. *See* cases cited in ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 10:7 n.1 (2016).

15. *See, e.g.*, cases cited in *id.* § 10:5 n.3, para. 1; case described *infra* note 22.

16. *See* cases cited *supra* note 14; *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11469 (noting that "the perpetuation of segregation theory of liability has been utilized by private developers and others to challenge practices that frustrated affordable housing development in nearly all-white communities and thus has aided attempts to promote integration [citing cases]").

17. *See infra* note 33 and accompanying text.

18. *See* cases cited in SCHWEMM, *supra* note 14, § 10:5 n.3, para. 1; case described *infra* note 22.

19. *See Inclusive Cmtys.*, 135 S. Ct. at 2516–25 (dealing only with the question of whether disparate-impact claims are cognizable under the FHA); *id*. at 2522 (noting that while the FHA does not "force housing authorities to reorder their priorities," it does aim "to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation").

20. *Cf*. Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 273–78 (2004) (describing the undeveloped state of Title VII law regarding hiring programs designed to create a diverse work force).

21. *See Inclusive Cmtys.*, 135 S. Ct. at 2521–22, 2525–26 (recognizing FHA's goal of integration); *see also id*. at 2519, 2522 (citing with approval a prominent perpetuation-of-segregation precedent, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988)).

22. For an appellate decision after *Inclusive Communities* that upheld a perpetuation-of-segregation claim along with a disparate-impact claim in a FHA-based chal-

our focus here is disparate-impact claims and the proof needed to support them, we leave to another day the proof requirements in segregative-effect claims.[23]

B. Basic Framework of a FHA Disparate-Impact Claim: The Three Steps

The standards that govern FHA disparate-impact claims are established by the Supreme Court's 2015 decision in *Inclusive Communities* and HUD's 2013 regulation.[24] Both use the same basic three-part burden-shifting framework for these claims, and their articulations of the applicable standards are nearly identical.[25]

Under both *Inclusive Communities* and the HUD regulation, disparate-impact cases are to be analyzed in three steps.[26] First, the plaintiff has the initial burden of establishing a prima facie case of disparate impact.[27] Second, if the plaintiff proves a prima facie case, the burden shifts to the defendant to prove that its challenged policy is "necessary to achieve a valid interest."[28] Third, if the defendant satisfies this burden, then the plaintiff may still establish liability by proving that the defendant's interest could be served by a policy that has a less discriminatory effect.[29]

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lenge to a municipality's blocking of a proposed integrated housing development, see Anderson Group, LLC v. City of Saratoga Springs, 805 F.3d. 34, 49–50 (2d Cir. 2015).

23. For more on proof regimes in perpetuation-of-segregation claims, see Schwemm, *supra* note 14, § 10:7.

24. *See supra* notes 3, 6.

25. The standards are identical except for a slight difference in the wording of the defendant's burden in Step Two. *See infra* note 28 and accompanying text. This slight semantic variation may not signal any real substantive difference, because both HUD and *Inclusive Communities* state that the defendant's burden here is analogous to the comparable burden of an employer in a Title VII impact case. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470; *Inclusive Cmtys.*, 135 S. Ct. at 2522–23.

26. *See* 24 C.F.R. § 100.500(c)(1) (2016); *Inclusive Cmtys.*, 135 S. Ct. at 2523.

27. *See* 24 C.F.R. § 100.500(c)(1); *Inclusive Cmtys.*, 135 S. Ct. at 2523.

28. *See Inclusive Cmtys.*, 135 S. Ct. at 2523. The HUD regulation articulates this burden as the defendant having to prove that "the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(c)(2). For more on the standards governing this step, see *infra* note 49 and accompanying text.

29. *See* 24 C.F.R. § 100.500(c)(3); *Inclusive Cmtys.*, 135 S. Ct. at 2515; *see also* Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 617–19 (2d Cir. 2016) (holding that prior Second Circuit precedent putting the burden of proof in this step on the defendant must be abrogated in light of the HUD regulation's determination to put this burden on the plaintiff).

According to HUD, the plaintiff's proffered less discriminatory alternative must serve the defendant's articulated interest, "must be supported by evidence, and may

1. Step One

In Step One, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect."[30] This requires three elements: (1) identifying a particular policy or practice of the defendant that is being challenged; (2) showing a sufficiently large disparity in how this policy affects a class of persons protected by the FHA compared with others; and (3) proving that this disparity is actually caused by the defendant's challenged policy.[31] This Article focuses on the statistical proof required in the second element—the principles of which are discussed in Part I.C—but we here briefly describe the first and third elements.

The plaintiff's first task is to identify a specific neutral policy or practice used by the defendant to limit housing opportunities.[32] Because disparate-impact claims challenge only generally applicable policies, this theory is not appropriate for claims that are based on a defendant's single act or decision.[33] Furthermore, the challenged policy must be neither discriminatory on its face nor applied in a discriminatory manner, for these situations would present claims of intentional discrimination.[34] A variety of policies and practices have been challenged in FHA disparate-impact claims, including:

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not be hypothetical or speculative." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11473.

30. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11482.

31. *See id*. at 11468–69; *Inclusive Cmtys.*, 135 S. Ct. at 2523–24.

32. *See, e.g.*, L & F Homes and Dev., L.L.C. v. City of Gulfport, Miss., 538 F. App'x. 395, 400–01 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1038 (2014); Gallagher v. Magner, 619 F.3d 823, 834 (8th Cir. 2010); 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 680–81 (D.C. Cir. 2006); Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 574–75 (2d Cir. 2003); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996).

33. *See, e.g.*, McCulloch v. Town of Milan, 559 F. App'x. 96, 99 (2d Cir. 2014); *L & F Homes*, 538 F. App'x. at 400–01; Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 53 (2d Cir. 2002); *Simms*, 83 F.3d at 1555; Ventura Vill., Inc. v. City of Minneapolis, 318 F. Supp. 2d 822, 827–28 (D. Minn. 2004), *aff'd*, 419 F.3d 725 (8th Cir. 2005); *see also Inclusive Cmtys.*, 135 S. Ct. at 2523 (noting that a "one-time decision may not be a policy at all" for disparate-impact purposes), *on remand* No. 3:08-CV-0546-D, 2016 WL 4494322, at * 5–7 (N.D. Tex. Aug. 26, 2016) (ruling against plaintiff's impact claim in part because it did not challenge a specific, facially neutral policy of the defendant); *cf*. *Mhany Mgmt*., 819 F.3d at 619 (upholding FHA-impact claim, in suit prompted by defendants' blocking of plaintiffs' proposed housing development, as properly challenging a general zoning "policy" as opposed to a single, isolated zoning "decision").

34. *See, e.g.*, Gomez v. Quicken Loans, Inc., 629 F. App'x. 799, 802 (9th Cir. 2015); Larkin v. State of Mich. Dep't of Soc. Servs., 89 F.3d 285, 289–90 (6th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491, 1500–01 (10th Cir. 1995); *see*

- residency preferences and similar techniques used by housing officials and private landlords to favor people with local ties over "outsiders";[35]
- screening devices used by landlords to limit units based on applicants' source of income, citizenship status, prior criminal record, or other criteria that disproportionately harm minorities or people with disabilities;[36]
- exclusionary zoning and other land-use restrictions that limit housing proposals of particular value to racial minorities or people with disabilities;[37]

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also Reg'l Econ. Cmty., 294 F.3d at 52–53 (noting that disparate-impact analysis "examines a facially neutral policy or practice" and plaintiffs must be challenging "outwardly neutral practices").

This is not to say that it would be inappropriate for a FHA plaintiff to pursue both disparate impact and intentional discrimination ("disparate treatment") claims in the same case—*see, e.g.*, Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470 (noting that a FHA "plaintiff may bring a claim alleging either or both intent and effect as alternative theories of liability")—but only that the court in such a case should deal with each of these claims according to its own proper analytical framework. *See, e.g.*, Ave. 6E Inv., L.L.C. v. City of Yuma, 818 F.3d 493, 503–13 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 295 (2016) (analyzing intent and impact claims separately in FHA-based exclusionary zoning case). According to the *Bangerter* opinion: "A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group. Disparate treatment analysis, on the other hand, involves differential treatment of similarly situated persons or groups." *Bangerter*, 46 F.3d at 1501 (quoting Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988)); *cf.* Vill. of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 265 (1977) (noting, in housing discrimination case based on the Equal Protection Clause, that disparate-impact evidence would be relevant in proving intentional discrimination).

35. *See, e.g.*, Fair Hous. Justice Ctr. v. Edgewater Park Owners Co-op., Inc., No. 10 CV 912(RPP), 2012 WL 762323, at *10–11 (S.D.N.Y. Mar. 9, 2012); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 56–64 (D. Mass. 2002); United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 729–32 (S.D. Ala. 1980).

36. *See, e.g.*, Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248–51 (9th Cir. 1997) (discussing source of income); L.C. v. Lefrak Org., Inc., 987 F. Supp. 2d 391, 402 (S.D.N.Y. 2013) (discussing source of income); Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1194–97 (M.D. Ala. 2011), *vacated as moot on other grounds by* Cent. Ala. Fair Hous. Ctr. v. Comm'r, No. 11-16114-CC, 2013 WL 2372302 (11th Cir. May 17, 2013) (discussing citizenship status); Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 154-55 (S.D.N.Y. 1989) (discussing proportion of income to rent).

37. *See, e.g.*, *Ave. 6E Inv*., 818 F.3d at 509–13 (discussing national origin); *Mhany Mgmt.*, 819 F.3d at 616–20 (discussing race and national origin); *Huntington Branch*, 844 F.2d at 936–41 (discussing race and national origin); United States v. City of Black Jack, 508 F.2d 1179, 1184–88 (8th Cir. 1974) (discussing race); cases cited in SCHWEMM, *supra* note 14, § 11D:5, n.21 (discussing disability).

- mortgage practices that result in less favorable treatment of minorities or minority areas;[38]
- home-insurance standards that result in minorities being treated less favorably;[39] and,
- occupancy restrictions that disproportionately harm families with children.[40]

Step One's third element is causation; that is, the plaintiff must show that the proven statistical disparities are actually caused by the policy being challenged.[41] This will be easy in many cases. For example, causation is obvious when a landlord denies a unit to the plaintiff based on its policy of refusing to rent to tenants who, say, use government vouchers or have too many people in their household.[42] Some cases, however, may present difficult causation issues.[43] An example is *Inclusive Communities*, where the Supreme Court expressed some skepticism about whether the plaintiff there could show "a causal connection between the [defendant's] policy and a disparate impact—for instance, because federal law substantially limits the [defendant's] discretion."[44] As this statement implies, if factors other than the defen-

38. *See., e.g.*, Saint-Jean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 318–20 (E.D.N.Y. 2014); Adkins v. Morgan Stanley, No. 12 CV 7667(HB), 2013 WL 3835198, at *8–10 (S.D.N.Y. July 25, 2013); Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 255–59 (D. Mass. 2008).

39. *See, e.g.*, Ojo v. Farmers Grp., Inc., 600 F.3d 1205, 1207–09 (9th Cir. 2010), *as amended en banc* (Apr. 30, 2010); Viens v. Am. Empire Surplus Lines Ins. Co., 113 F. Supp. 3d 555, 571–72 (D. Conn. 2015).

40. *See, e.g.*, R.I. Comm'n for Human Rights v. Graul, 120 F. Supp. 3d 110 (D.R.I. 2015); Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., 801 F. Supp. 2d 12 (D. Conn. 2011); Fair Hous. Council of Orange Cty., Inc. v. Ayres, 855 F. Supp. 315, 317–19 (C.D. Cal. 1994); cases cited *infra* note 47.

41. *See supra* note 31 and accompanying text.

42. *See, e.g.*, *R.I. Comm'n*, 120 F. Supp. 3d at 127 n.25. Causation will also be easier to prove if the plaintiff's statistical evidence focuses on proper comparison groups. *See* Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 577 (2d Cir. 2003) (noting, after identifying the proper comparison groups, that "[s]uch a comparison identifies the handicap and allows for a causal analysis between the claim of discrimination based on the handicap in question and the facially neutral policy"). For more on the need to focus on proper comparison groups, see *infra* notes 62–63 and accompanying text.

43. *See, e.g.*, Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523–24 (2015) (noting that "a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show that this is a policy causing a disparate impact [in part] because . . . of the multiple factors that go into investment decisions about where to construct or renovate housing units"). On remand, the trial court ruled against the plaintiff's impact claim, in part because of the absence of this causation element. *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. and Cmty. Affairs, No. 3:08-CV-0546-D, 2016 WL 4494322, at *8–9 (N.D. Tex. Aug. 26, 2016).

44. *Inclusive Cmtys.*, 135 S. Ct. at 2524.

dant's challenged policy have caused the statistical disparities identified, then the plaintiff's prima facie case would fail.[45]

2. *Steps Two and Three*

If a plaintiff prevails in Step One, Step Two requires the defendant to prove that its challenged policy is needed to advance a legitimate interest.[46] Some defendants in FHA-impact cases have succeeded in carrying this burden,[47] while others have failed.[48] Taken together, the cases show only that each case is unique, and HUD has made clear that this issue "requires a case-specific, fact-based inquiry."[49]

If a defendant satisfies its Step Two burden, the plaintiff may still prevail in Step Three by proving that the defendant's interests "could be served by another practice that has a less discriminatory effect."[50] For purposes of this Article, the most interesting part of Step Three will be proving that the suggested alternative is less discriminatory,

45. *See also* Quad Enters. Co., LLC v. Town of Southold, 369 F. App'x. 202, 206 (2d Cir. 2010) (noting, in affirming defeat of impact claim, that "[s]imply proffering evidence that there is a shortage of handicapped-accessible housing in the Town of Southold compared to its handicapped population does not show that the neutral policy at issue is the cause"); Edwards v. Johnston Cty. Health Dep't, 885 F.2d 1215, 1223 (4th Cir. 1989) (noting, in affirming dismissal of impact claim, that plaintiffs only alleged statistical disparities and not also that defendants' challenged policy affected the groups compared unequally). For recent decisions that have dismissed FHA-impact claims for failing to adequately allege causation under *Inclusive Communities*, see Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 412 (Mass. 2016); Ellis v. City of Minneapolis, No. 14-CV-3045 SRN/JJK, 2015 WL 5009341, at *10 (D. Minn. Aug. 24, 2015); Ellis v. City of Minneapolis, No. 14-CV-3045 (SRN/SER), 2016 WL 1222227, at *6–7 (D. Minn. Mar. 28, 2016).

46. *See supra* note 28 and accompanying text.

47. This has been particularly true in occupancy-standard cases. *See* Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 747–50 (9th Cir. 1996); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1254–57 (10th Cir. 1995); United States v. Hillhaven Corp., 960 F. Supp. 259, 263 (D. Utah 1997); United States v. Weiss, 847 F. Supp. 819, 830-31 (D. Nev. 1994).

48. *See, e.g.*, Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 741–42 (8th Cir. 2005); Fair Hous. Council of Orange Cty., Inc. v. Ayres, 855 F. Supp. 315, 318–19 (C.D. Cal. 1994); Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 155–58 (S.D.N.Y. 1989).

49. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470; *see also id*. at 11471 (referring to this issue as "fact-specific" and one that "must be determined on a case-by-case basis" and is "very fact intensive"). Thus, HUD has declined to endorse any "examples of tenant screening criteria such as rental history, credit checks, income verification, and court records that would be presumed to qualify as legally sufficient justifications." *Id*.

50. 24 C.F.R. § 100.500(c)(3). For more on the standards governing this step, see *supra* note 29.

i.e., data must be presented showing that the disparate impact here is less than in Step One.[51]

C. Principles and Problems in the Statistical Proof of Impact

1. Basic Principles

Assuming that a facially neutral policy is identified,[52] the plaintiff must present statistical evidence showing that this policy has a greater impact on a protected class than it does on others.[53] Perhaps because FHA-impact claims have challenged a variety of different policies and practices,[54] courts have eschewed any single test for evaluating statistical evidence in housing cases,[55] instead requiring only that the plaintiff "offer proof of disproportionate impact measured in a plausible way."[56] Still, enough appellate decisions have ruled on the adequacy of the plaintiff's evidence in these cases to establish "certain guidelines."[57]

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51. *See, e.g.*, *infra* notes 242–47 and accompanying text (describing the difficulty for a plaintiff who has challenged a landlord's rule barring tenants with a criminal record in proving that a narrower exclusionary rule would be less discriminatory).

52. *See supra* notes 32–40 and accompanying text.

53. *See, e.g.*, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382–85 (3d Cir. 2011); Schwarz v. City of Treasure Island, 544 F.3d 1201, 1217–18 (11th Cir. 2008); Khalil v. Farash Corp., 277 F. App'x. 81, 84 (2d Cir. 2008); Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1286 (11th Cir. 2006); 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 680–81 (D.C. Cir. 2006); Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 575–78 (2d Cir. 2003); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1253 (10th Cir. 1995); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987–88 (4th Cir. 1984). While some opinions have stated that "there may be cases where statistics are not necessary," *Tsombanidis*, 352 F.3d at 576, these statements have invariably been made in *dicta* as part of a holding that the plaintiff's evidence failed. *See, e.g.*, *Tsombanidis*, 352 F.3d at 577 (quoting Gamble v. City of Escondido, 104 F.3d 300, 307 n.2 (9th Cir. 1997)); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996).

54. *See supra* notes 35–40 and accompanying text.

55. *See, e.g.*, *Mt. Holly*, 658 F.3d at 382; Bonasera v. City of Norcross, 342 F. App'x. 581, 585 (11th Cir. 2009) (citing *Hallmark Developers*, 466 F.3d at 1286); Langlois v. Abington Hous. Auth., 207 F.3d 43, 50 (1st Cir. 2000); *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11468 ("Whether a particular practice results in a discriminatory effect is a fact-specific inquiry. Given the numerous and varied practices and wide variety of private and governmental entities covered by the Act, it would be impossible to specify in the rule the showing that would be required to demonstrate a discriminatory effect in each of these contexts."). HUD specifically noted that its regulation was not designed "to describe how data and statistics may be used in the application of the [impact] standard" nor did it provide "a codification of how data and statistics may be used in the application of the standard." *Id*. at 11468.

56. *Mt. Holly*, 658 F.3d at 382.

57. *Hallmark Developers*, 466 F.3d at 1286.

These guidelines include four requirements. First, the plaintiff's statistics must focus on "the subset of the population affected by the challenged policy."[58] This affected population will vary depending on the nature of the case. For example, if the defendant's policy is being challenged for demolishing or causing evictions in a particular housing complex, only those persons residing therein would be affected.[59] On the other hand, if the challenged policy is a landlord's screening device or a municipality's blocking of a proposed development, a much larger group is affected (e.g., all persons who make up the potential market for this housing).[60] Even in a single case, the affected group may vary depending on whether the challenged policy has both a future impact (e.g., who will live in this project in the future) and a backward-looking impact (e.g., who was injured in the past as a result of this policy).[61]

Second, within the affected population, the plaintiff's statistics must focus on "appropriate comparison groups" in order to show how the challenged policy hurts a protected class more than others.[62] It is not enough to show a policy's negative impact on a protected class (e.g., that the policy blocked a housing project for disabled persons). The plaintiff must also show that others were less harmed by the pol-

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58. Reinhart v. Lincoln Cty., 482 F.3d 1225, 1230 (10th Cir. 2007); *see also Hallmark Developers*, 466 F.3d at 1286–87 (holding that "the appropriate inquiry is into the impact on the total group to which a policy or decision applies").

59. *See, e.g.*, appellate cases described *infra* note 86 and accompanying text.

60. *See, e.g.*, cases cited *infra* note 70; *Hallmark Developers*, 466 F.3d at 1286–87 (citing various FHA decisions in support of the proposition that the affected-population focus here should be on those area residents eligible for subsidized housing). For more on the problem of defining the proper local housing market, see *infra* Part I.C.2.a.

61. *Cf*. Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 64 (D. Mass. 2002) (focusing on different affected groups depending on whether the relief sought looks forward (e.g., injunctive relief) or backward (e.g., damages)).

62. *See* Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 576–77 (2d Cir. 2003) (holding, after noting that disparate-impact claims require a proper comparison between two groups showing that the defendant's policy imposes a greater impact on a protected class, that the plaintiffs' proof failed because they improperly compared disabled versus non-disabled persons instead of recovering addicts versus all others); *see also* Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1253 (10th Cir. 1995) (holding plaintiff's proof inadequate because it used inappropriate comparable groups); Hayden Lake Recreational Water & Sewer Dist. v. Haydenview Cottage, LLC, 835 F. Supp. 2d 965, 980–81 (D. Idaho 2011) (relying on *Tsombanidis* in holding that plaintiff failed to establish a prima facie case of disparate impact by focusing exclusively on how defendant's policy impacted two facilities for disabled persons without also showing how that policy impacted similarly situated facilities for non-disabled persons).

icy. It is *disparate* impact, not just impact, that the FHA is concerned with here.[63]

Third, the statistical comparison should generally show the relative percentages of protected versus non-protected class members affected by the policy, as opposed to the absolute numbers of the groups affected.[64] To illustrate why absolute numbers are not the proper focus, consider the example of a "No Criminal Record" policy imposed by a landlord in a heavily white area (e.g., Boise, Idaho): given the area's demographics, this policy might well screen out more whites than blacks in absolute numbers, but this fact would not be probative of whether the policy has a *disproportionate* impact based on race (e.g., the percentage of blacks with criminal records might well be higher than that of whites in the area).[65]

Finally, the disparity in the relative impact on the two groups must be sizeable. Courts have made clear that the FHA, like Title VII, only bars practices with "significant" discriminatory effects,[66] and nu-

63. *See generally Tsombanidis*, 352 F.3d at 577 (noting, before ultimately holding plaintiffs' impact proof inadequate, that: "In this case, plaintiffs might have been able to meet their burden by providing statistical evidence (1) that *x*% of all of the [protected-class members] in West Haven need (or have good reason) to live in the 'group settings' prohibited by the facially neutral fire regulations at issue, (2) that *y*% of all of the [non-protected-class members] in West Haven need (or have good reason) to live in such group settings prohibited by the fire regulations, and, crucially, (3) that *x* is significantly greater than *y*.").

64. *See, e.g.*, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 383 (3d Cir. 2011); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 565 (N.D. Tex. 2000); *see also supra* note 63 (describing *Tsombanidis*, 352 F.3d at 577).

65. Assume that in Boise—a city with a population of about 207,000, of whom 89.0% (84,230) are white and 1.5% (3,105) are black—100 blacks and 1000 whites have criminal records and thus would be excluded by this policy (i.e., far fewer blacks than whites are excluded). Search Results for Boise, Idaho, *QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/16/1608830.html (last visited Nov. 12, 2016). Still, blacks would be *disproportionately* excluded, because the policy would screen out 0.0322% of Boise's blacks (100 ÷ 3105 (3105=1.5% of the total population)) and 0.0054% of its whites (1000 ÷ 184,230 (184,230=89.0% of the total population)); that is, blacks would be excluded at a rate of nearly six times that of whites (i.e., 0.0322% ÷ 0.0054% = 5.96). For an additional example, see Appendix A.

In certain special circumstances, using absolute numbers along with percentages may be helpful in evaluating a FHA-impact claim. *See* Appendix A.

66. *See, e.g.*, Schwarz v. City of Treasure Island, 544 F.3d 1201, 1217 (11th Cir. 2008); Budnick v. Town of Carefree, 518 F.3d 1109, 1118–19 (9th Cir. 2008); Reinhart v. Lincoln Cty., 482 F.3d 1225, 1229 (10th Cir. 2007); Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740–41 (8th Cir. 2005) (quoting Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir.2003)); *Tsombanidis*, 352 F.3d at 575; Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Southend Neigh-

merous FHA decisions have held that the evidence did not show a large enough disparity to satisfy the plaintiff's burden of proof.[67] For more on this significant-size requirement, see *infra* Part I.C.2.c.

2. *Problems*

a. *Local-Versus-National Data and Identifying the Relevant Housing Market*

Although a few FHA-impact cases have been brought against national mortgage providers and home-insurance companies,[68] the vast majority have challenged policies of landlords, housing officials, or municipalities that operate only in a local area.[69] As a result, courts have generally found statistical evidence of impact to be more persuasive when it relates to the particular apartment complex, agency, or municipality whose action is being challenged, or at least the metropolitan area where the defendant operates, as opposed to national data.[70] According to an influential 1995 Tenth Circuit opinion that rejected the use of national data to support an impact claim against a local housing provider, statistical evidence in such cases should generally focus on "the narrowly defined area in question."[71]

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borhood Imp. Ass'n v. St. Clair Cty., 743 F.2d 1207, 1209 (7th Cir. 1984); cases cited *infra* note 67.

67. *See, e.g.*, Ungar v. N.Y.C. Hous. Auth., 363 F. App'x. 53, 55–56 (2d Cir. 2010); Bonasera v. City of Norcross, 342 F. App'x. 581, 585 (11th Cir. 2009); Bonvillian v. Lawler-Wood Hous., LLC, 242 F. App'x. 159, 160 (5th Cir. 2007); Arthur v. City of Toledo, 782 F.2d 565, 576 (6th Cir. 1986); *see also* SCHWEMM, *supra* note 14, § 10:6, n.20 (citing numerous other FHA cases in which the plaintiff's statistical proof of impact was held inadequate).

For cases holding that the plaintiff's evidence did show a large enough disparity to establish a prima facie case, see cases cited *infra* notes 99–100.

68. *See* cases cited *supra* notes 38–39 and *infra* note 131.

69. *See, e.g.*, cases cited *infra* notes 70–72, 77.

70. *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 929 (2d Cir. 1988), *aff'd per curiam,* 488 U.S. 15 (1988) (focusing on statistics for the defendant-town and that town's existing housing projects); *City of Toledo*, 782 F.2d at 576 (relying on census data for low-income households eligible for the proposed program in Toledo); Smith v. Town of Clarkton, 682 F.2d 1055, 1060–65 (4th Cir. 1982) (discussing racial distribution of the defendant-town and its surrounding county); Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982) (focusing on the challenged practice's impact on the racial-group percentages in Los Angeles); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3rd Cir.1977) (focusing on racial discrimination in Philadelphia and in the area served by the Philadelphia Housing Authority).

71. Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1251–52 (10th Cir. 1995) (citing cases). According to the majority opinion in *Mountain Side*:

> In this case, the appropriate comparables must focus on the local housing market and local family statistics. The farther removed from local statistics the plaintiffs venture, the weaker their evidence becomes. There is no

This view has led some courts to borrow a concept from Title VII law and opine that, if a particular housing project is involved, its "applicant flow" data should be used.[72] However, unlike employment cases where race-based information on actual applicants and those selected and rejected may be available,[73] such "applicant flow" data are rarely available in housing cases.[74] In most FHA cases, plaintiffs have only been able to provide statistics on the housing market surrounding the particular project.[75]

Defining the proper local housing market has proved surprisingly difficult in FHA-impact cases. First, there is no well-accepted understanding of the geographic size for such a market,[76] and different

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> dispute about the veracity of the [HUD] Secretary's finding of discriminatory effect on the national level. However, this national level discriminatory effect . . . is so far removed from the local arena that it is of little weight in our analysis.

Id. at 1253. The dissent criticized this approach, finding it appropriate to rely on national statistics absent evidence showing that the defendant's market was dramatically different from the national average. *Id*. at 1257–58.

72. *See Bonasera*, 342 F. App'x. at 585 ("[S]tatistics based on the general population [should] bear a proven relationship to the actual applicant flow.") (quoting Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1286 (11th Cir. 2006)); *see also Huntington Branch*, 844 F.2d at 938 n.11 (noting that Title VII case law "requires some showing that statistics based on the general population bear a proven relationship to the actual applicant flow").

73. *See, e.g.*, Paige v. California, 291 F.3d 1141, 1145–47 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (July 18, 2002); Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1313–14 (10th Cir. 1999). *See generally* RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES 207 (2013) (noting that, in Title VII impact cases, "courts have expressed a preference for actual applicant data, when unbiased and available").

74. Some government-assisted housing programs do maintain race-based data. *See infra* notes 132–33 and accompanying text. However, private landlords, unlike their employer-counterparts under Title VII, *see supra* note 73 and accompanying text, are not required to keep, much less make public, data on the race or other protected-class status of residents or applicants. Indeed, if a private landlord were discovered to be identifying applicants by race, this might be seen as evidence of its likely engagement in intentional discrimination. *See, e.g.*, Seaton v. Sky Realty Co., 372 F. Supp. 1322, 1324 (N.D. Ill. 1972), *aff'd*, 491 F.2d 634 (7th Cir. 1974).

75. The purpose of identifying a particular local housing market is to help generate appropriate data on existing residential patterns to analyze those groups affected by a defendant's challenged policy. The size of a chosen market area needs to be large enough to encompass a significant representation of the residential patterns for all of the groups used in the analysis. This, in turn, requires consideration of the individual conditions involved in a particular case.

76. For example, HUD, in setting fair market rents for its Section 8 programs, has historically defined market areas geographically by using metropolitan areas and nonmetropolitan counties, but has recently determined that it may be more appropriate, in some circumstances, to use smaller areas (e.g., ZIP codes). *See* Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in

courts have chosen to look at areas as small as a few census tracks to as large as an entire metropolitan region or even a state.[77] Second, the market for a particular project is affected by the rents or prices it will charge.[78] These are not trivial matters. The size of the disparate impact attributable to a defendant's action may vary substantially with the geographic area chosen.[79] Further, data on the protected-class demographics of a particular geographic area may simply not exist.[80]

In these uncertain circumstances, a plaintiff may have to offer evidence about several alternative market areas and try to show that a disparate impact exists in all of these. FHA cases do make clear that if "applicant flow" or other narrowly defined data are not available, then area population statistics may suffice, at least if these two measures appear to be related.[81] And if a FHA plaintiff can show that "applicant flow" and local data are not available, then national statistics may be used.[82]

Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs, 81 Fed. Reg. 80567 (Nov. 16, 2016).

77. *See, e.g.*, *Hallmark Developers*, 466 F.3d at 1286–88 (choosing to focus, in challenge to county's rejection of a large development with affordable housing, on only a few census tracts surrounding the development rather than larger areas such as Fulton County or the entire Atlanta metropolitan area); R.I. Comm'n for Human Rights v. Graul, 120 F. Supp. 3d 110, 125 & n.22 (D.R.I. 2015) (using state-wide data based on the large size of defendant's development and evidence that residents came from "all over"); Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., 801 F. Supp. 2d 12, 16–17 (D. Conn. 2011) (citing Second Circuit precedents approving the use of city-wide data in determining to rely, in challenge to landlord's occupancy policy, on data for the city where defendant's property was located rather than the property's census tract); *cf.* Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 269 (1977) (noting, in housing discrimination case based on the Equal Protection Clause, that the disparate impact of the defendant's action might be evaluated by comparing the racial composition of plaintiffs' proposed project to that of the overall Chicago metropolitan area).

78. For examples, see *infra* Part III.B.

79. Generally, the smaller the area chosen, the smaller the disparate impact. *See, e.g.*, *Hallmark Developers*, 466 F.3d at 1286–88 (showing that impact's size is much lower in the few-census-tracts area chosen than in the larger areas offered by the plaintiff).

80. For examples, see *infra* Part III.

81. *See supra* note 72.

82. *See* Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1253 (10th Cir. 1995) (noting that "[i]n some cases national statistics may be the appropriate comparable population," but opining that "those cases are the rare exception"); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (holding in Title VII case that where "there was no reason to suppose" that local and national statistics differed markedly, it was appropriate for the district court to rely on national statistics to conclude that defendant's practice has a disparate impact).

b. Alternative Comparative Methodologies

Courts in FHA-impact cases have used a variety of methodologies—which may produce strikingly different results—in comparing how a challenged policy affects protected versus non-protected classes. One clearly appropriate approach would be to follow Title VII law,[83] which often focuses on statistics showing that a job test is passed by a relatively smaller percentage of plaintiff's protected class than by the non-protected group (e.g., among those otherwise qualified, 50% of blacks versus 90% of whites pass the test).[84] This exact method has not been used in FHA cases, however, because it is usually impossible to find race-based data on actual applicants for a defendant's housing.[85]

A variation on this method that has been used in FHA cases is to focus only on the group of persons disqualified by the challenged policy and show that this group includes a greater percentage of protected versus non-protected class members (e.g., 50% of blacks versus 10% of whites are excluded by the policy). For example, in one of the earliest appellate decisions to uphold impact-based proof against a private landlord, the Fourth Circuit in 1984 held that disparate impact was established by statistics showing that the defendant's policy resulted in eviction notices being sent to 54.3% of its nonwhite tenants but only 14.1% of the white tenants.[86]

Another comparative method used in FHA impact cases is to show that the proportion of the protected class adversely affected by the challenged policy is higher than their portion of the overall popula-

83. *See supra* note 25.

84. *See* Paetzold & Willborn, *supra* note 73, § 5:6 (describing this methodology).

85. *See supra* note 74 and accompanying text.

86. Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987–88 (4th Cir. 1984). Other appellate decisions employing this method include Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011) (holding that a prima facie case of disparate impact was established by data showing that 22.54% of African-American households and 32.31% of Hispanic households would be affected by the challenged housing demolition, compared to only 2.73% of white households); Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 734, 741–42 (8th Cir. 2005) (affirming finding that defendant's planned demolition of low-income housing units, almost all of which were occupied by African-Americans, "established a disproportionate impact on minority class members whether we examine the relevant waiting list population, the income-eligible population, or the actual Charleston Apartment Tenants"); *see also* Greater New Orleans Fair Hous. v. St. Bernard Parish, 641 F. Supp. 2d 563, 567 (E.D. La. 2009) (finding disparate impact, in decision cited with approval by the Supreme Court in *Inclusive Communities*, 135 S. Ct. at 2522, where defendant's moratorium on multifamily housing construction reduced the supply of rental units in the area in which 51.7% of blacks resided versus 25.0% of whites).

tion (e.g., 50% of those adversely affected are black while blacks make up only 10% of the local population). Such a comparison measures how the defendant's policy contributes to an "under-representation" of the protected class living in the area.[87] In FHA cases, this method has been held by some appellate courts to satisfy the plaintiff's initial burden,[88] although most of these cases have involved challenges to municipal restrictions on affordable housing that allegedly perpetuated segregation.[89]

For disparate-impact claims, this method has some drawbacks. First, because it only compares measures involving the protected class, it does not address whether there is a *disparate* impact vis-à-vis the non-protected class. To show a disparity, an additional set of comparable measures for the non-protected class would have to be identified; for example, in a rental case where 50% of black potential renters are

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87. In other civil rights contexts, this has sometimes been referred to as "disproportional representation." *See, e.g.*, Julia Lamber et al., *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 Hastings L.J. 553, 590–92 (1983).

88. *See* Gallagher v. Magner, 619 F.3d 823, 834 (8th Cir. 2010) (holding that defendant-City's policy of aggressive housing code enforcement that allegedly decreased the supply of affordable housing opportunities was shown to have a disproportionate adverse impact on African-Americans based on census data showing that approximately 61% of the population seeking such housing was African-American while African-Americans made up only 11.7% of the City's population); Smith v. Town of Clarkton, 682 F.2d 1055, 1060–61, 1065 (4th Cir. 1982) (holding, in a challenge to defendant's withdrawal from low-income housing authority, that a prima facie case was shown where 56% of all poverty-level families were African-American and 69.2% of all African-American families were eligible for low-income housing, but African-Americans made up only 40% of the general population); *see also* Ungar v. N.Y.C. Hous. Auth., 363 F. App'x. 53, 55–56 (2d Cir. 2010) (holding against impact-based challenge to defendant's tenant selection plan where plaintiffs' religious group, which accounted for 2.4%–5.0% of the selected tenants, were not shown to be underrepresented because their percentage of the overall applicant pool was not shown); Hack v. President and Fellows of Yale Coll., 237 F.3d 81, 90–91 (2d Cir. 2000) (holding that plaintiffs failed to allege that the private defendant's rental policy "has resulted in or predictably will result in under-representation" of plaintiffs' religious group); *cf*. Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 269 (1977) (noting that the impact of the defendant's decision "does arguably bear more heavily on racial minorities" because they constituted 40% of the group of low-income persons harmed in the area versus 18% of the overall area population).

For opinions seeming to endorse *both* this "under-representation" method and other methods (e.g., the one identified earlier *supra* note 86 and accompanying text), see Reinhart v. Lincoln Cty., 482 F.3d 1225, 1229–32 (10th Cir. 2007); Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1286 (11th Cir. 2006); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988), *aff'd per curiam,* 488 U.S. 15 (1988); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 57–58 (D. Mass. 2002).

89. As noted above, this perpetuation-of-segregation theory is a well-recognized method of establishing FHA liability, but it is different from the disparate-impact theory. *See supra* Part I.A.

disqualified by the challenged policy versus blacks accounting for 10% of all renters, it would be necessary also to show that the proportion of whites disqualified by this policy versus their part of the whole rental market is lower (e.g., 50% of white potential renters are disqualified versus whites accounting for 90% of all renters). Second, unlike the earlier-described methods, this method's results will vary depending on the number and size of different minority groups in the area.[90] In addition, the basic theory of this method may produce anomalous results in some small-number situations.[91]

A variation on this method may be used when the case challenges a change in the defendant's policies (e.g., a landlord's imposition of a more restrictive credit-score policy). Here, the comparison focuses on the proportions of the protected class affected before and after defendant's implementation of the change (e.g., the share of all black renters disqualified before the change was 20% while this figure rises to 50% after the change). As in the method previously described, it would be necessary here to compare these differences to those of the non-protected group (e.g., to show that whites are less affected by the change).

A final comparative methodology used in some FHA cases is to show that the proportion of protected-class members adversely affected by the challenged practice is higher than the proportion of all persons in the general population adversely affected (e.g., while only 10% of the entire population is adversely affected, 50% of this adversely-affected group is black). Some FHA appellate decisions have accepted such proof,[92] but all involved challenges to municipal actions that allegedly reduced the area's supply of affordable housing.

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90. Appendix B provides a further explanation and demonstration of this phenomenon.

91. Consider the example of a landlord who rents only to professional basketball players. This policy would, indeed, satisfy the method described in the text, because it would exclude an overwhelming proportion of the black population (over 99%, despite blacks constituting little more than 10% of the overall population). However, it would not have a disparate impact on blacks because, presumably, the policy would also exclude an even higher percentage of the white population. *See, e.g.*, *Reinhart*, 482 F.3d at 1230 n.2 (noting that, where a challenged practice eliminates a lower percentage of the protected class than of the non-protected class, this is "hardly a disparate impact on the protected group").

92. *See Gallagher*, 619 F.3d at 834 (noting the plaintiff's showing that 52% of minority-headed renter households were income-qualified for affordable housing, compared to 32% of all renter households); *Huntington Branch*, 844 F.2d at 938 (holding that challenged zoning decision that prevented affordable housing had a substantial adverse impact where 24% of African-American families needed subsidized housing compared to only 7% of all Huntington families).

The FHA methods described in this section have one common element: all start with a base pool of data on persons who are otherwise qualified for the housing involved, and the differences in the comparison groups used are geared to the particular type of claim presented. The point here is not that one method is right and the others wrong, or even that these are the only methods that might be used, but rather that courts have chosen them because they appear to fit the specific cases being litigated. Whatever situation is presented, the key to sound disparate impact analysis is picking a comparative method or methods that suit the particular claim and facts of the case.

c. The "Significant" Disparity Requirement: Selection-Versus-Rejection Rates

The first approach identified in the previous section as used in FHA cases relies on the same basic methodology generally used in Title VII-impact cases, which compares the percentage of protected-class members (e.g., blacks) who pass the defendant's challenged job test to the comparable percentage of the non-protected class (e.g., whites).[93] A long used rule-of-thumb in Title VII cases is that if the resulting ratio of these two percentages is less than four-fifths (0.80), then the plaintiff's burden of showing a significant disparity is satisfied.[94]

93. *See* PAETZOLD & WILLBORN, *supra* note 73, § 5:6 (describing this methodology). Focusing on relative selection rates dates back to the Supreme Court's foundational decision on Title VII impact-based claims—Griggs v. Duke Power Co., 401 U.S. 424 (1971)—whose view that whites fared better than blacks on defendant's job requirements was supported by noting the relative pass rates of these two groups. *Id.* at 430 n.6; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (describing the plaintiff's post-*Griggs* burden as having to show that "the tests in question *select* applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants" (emphasis supplied)).

94. *See* 29 C.F.R. § 1607.4(D) (2016) (EEOC's guidelines originally adopted in 1979; *see* Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996 (Mar. 2, 1979)); *see also* PAETZOLD & WILLBORN, *supra* note 73, § 5:6 (describing the four-fifths rule); Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 995 n.3 (1988) (describing the EEOC's adoption of this four-fifths standard as an "enforcement rule," but also noting technical criticisms of this standard and concluding that it only provides "a rule of thumb for the courts"). Because the four-fifths standard is just "a rule of thumb," some courts have found a large enough impact even where the selection ratio was above 0.80. *See, e.g.*, Jones v. City of Boston, 752 F.3d 38, 48-53 (1st Cir. 2014); Stagi v. Nat'l R.R. Passenger Corp., 391 F. App'x. 133, 144–48 (3d Cir. 2010). On the other hand, in cases where the affected population is quite small, the four-fifths rule may unfairly result in a finding of a significant impact. *See, e.g.*, Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 783–84 (2009); Eubanks v. Pickens-Bond Const. Co., 635 F.2d 1341, 1347–51 (8th Cir. 1980).

This approach, which focuses on relative *selection* rates as opposed to relative *rejection* rates, has occasionally been used in housing cases,[95] but FHA decisions have far more often focused on relative rejection rates.[96] However, the distinction between using selection versus rejection rates is not important from a methodological standpoint. Both seek to measure the size of the disparate impact. Further, it is easy to translate one method's results into the other's and therefore possible to use the equivalent of Title VII's "four-fifths" rule to measure the size of the disparate impact shown by comparative rejection rates in FHA cases.

Using rejection rates would require inversion of the selection-rate standard, with the plaintiff having to show that the relative disparity ratio is a higher, instead of a lower, number (i.e., something over 5/4 (1.25) would correspond to the under 4/5 (0.80) standard used for selection rates).[97] Appendix C provides a detailed analysis of the mathematical relationship of the selection-rate and rejection-rate methods.

While this methodology is sound, the judicial recognition of the 1.25 standard in FHA cases is limited and certainly does not have anywhere near the established pedigree that Title VII's 0.80 standard does for acceptance rates.[98] As far as FHA precedents, all that can be said is that the major appellate decisions finding a large enough difference in rejection rates to satisfy the plaintiff's burden have all involved disparity ratios well above 1.25.[99]

To illustrate the four-fifths rule: if a job test is passed by 20 out of the 50 black applicants (40%) and 60 out of the 100 white applicants (60%), the selection ratio for blacks versus whites is 40%/60% or 0.67, which, being under 0.80, would be low enough to satisfy the plaintiff's burden of showing a significant disparate impact against blacks.

95. *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 50 (1st Cir. 2000).

96. *See* cases cited *supra* notes 86, 88, and *infra* notes 98–99.

97. *See* R.I. Comm'n for Human Rights v. Graul, 120 F. Supp. 3d 110, 126 n.23 (D.R.I. 2015) ("Based on this application of the inverse of the Four-Fifths Rule, any disparity ratio [using rejection rates] greater than 1.25 would be defined as having a substantive disparate impact.").

To illustrate using similar figures to those in the illustration in note 94 *supra*: if a housing policy results in rejection of 30 out of the 50 black applicants (60%) and 40 out of the 100 white applicants (40%), the rejection ratio for blacks versus whites would be 60%/40% or 1.50, which, being over 1.25, would be high enough to satisfy the plaintiff's burden of showing a significant disparate impact against blacks.

98. The one decision we have found that explicitly refers to the 1.25 standard is a 2015 district court opinion where the plaintiff's evidence showed "extremely large" disparity ratios of 4.55, 6.92, and 14.25. *See R, I. Comm'n*, 120 F. Supp. 3d at 126.

99. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011) (showing, based on data described *supra* text accompanying note 86, that the black percentage harmed was over seven times that of whites (22% versus 3%) and the Latino percentage harmed was over ten times that of whites

d. Sample-Generated Data, Estimates, and the Problem of Confidence Levels

As noted above, some housing policies (e.g., those resulting in evictions) affect only current tenants whose actual demographics may be identified, thus making application of the statistical principles discussed in Part I.C.1 a fairly straightforward matter.[100] A more typical situation—and one that involves additional statistical issues—occurs when the challenged policy (e.g., a landlord's screening device for future tenants) affects all those in the market for this housing, thus requiring an attempt to gauge the demographics of this market.

In the latter type of case, the data available are often based on samples of the desired population and thus are only estimates of that population. For example, the U.S. Census may provide the racial breakdown of the population for a particular city, but most of these census figures are generated by taking samples of that city's population.[101]

Data based on samples are subject to random error, i.e., the sample may not accurately represent the actual population studied. To take account of this random error, statistical tests have been developed that measure how confident one may be that the sample data accurately reflect the actual figures.[102] Such tests establish a measure of confidence (say, 95%), which shows how probable it is that the sample

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(32% versus 3%)); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977) (showing that the harmed group was 85% black); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, (2d Cir. 1988), *aff'd per curiam,* 488 U.S. 15 (1988) (showing, based on data described *supra* note 92, that the black percentage harmed was over three times that of whites (24% versus 7%)); Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988) (showing that minorities were twice as likely as whites to be in the harmed group); Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010) (described *supra* notes 88 and 92); Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982) (showing, based on data described *supra* note 88, that the black percentage harmed was almost four times that of whites (54% versus 14%)); and Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729 (8th Cir. 2005) (showing, based on data described *supra* note 86, that blacks accounted for almost all of those affected).

100. *See supra* appellate decisions cited in note 86.

101. *See infra* Part II.A. The decennial census is a 100% count of the population and several other factors.

102. Such tests "come in various technical forms, including multiple regressions, t-test, Z-tests, the chi-square test, and the Fisher exact test." Peresie, *supra* note 94, at 785.

Aside from random error, a sample may have systematic biases. An example is a telephone survey that only samples households with a land line; because cell phones are more common for younger households, this flaw may result in a systemic bias against a representative inclusion of younger households. While the statistical tests described here can account for random error, they cannot account for these other types of biases.

reflects the real population (95% meaning that the range of error in the sample will include the true value 95 times out of 100).[103]

For example, in a FHA case that requires data about a city's racial make-up, assume that the census data show the city's population to be 60% whites, 30% blacks, and 10% others. In order to convey the real percentages based on these sample-generated figures, it is necessary to calculate a confidence interval for each figure (e.g., the real value for whites would be 60% plus or minus 4%). This is based on a standard deviation for that figure (e.g., for whites, one would calculate a confidence interval that is 1.96 standard deviations above and below the 60% figure in order to be 95% confident that this 60% figure falls within a range that includes the real white percentage).[104]

These concepts, though complicated in theory, have long been familiar in election polls and television ratings, and they have also been used for decades in Title VII litigation.[105] Courts generally accept a confidence level of 95% as being statistically "significant."[106] Thus, in the previous paragraph's example, data showing that whites account for 60% of the population should be subjected to statistical tests that produce at least a 95% confidence level. Furthermore, a separate confidence level must be generated for each of the groups compared (e.g., one for whites and one for blacks). This requires a FHA plaintiff who is trying to show that a challenged policy harms a greater proportion of blacks than whites to compare confidence levels of each

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103. The range of errors around an estimate vary depending on the size of the sample: the smaller the sample, the larger the chance of error. *See* Appendix A for examples of how these differences affect statistical tests.

For example, data about a large city generated by a 1,000-person sample would produce a larger range of error than that based on a 10,000-person sample. Both samples might estimate that the city has 60% whites and 30% blacks, but the confidence one could have that these are close to the actual values in the population would be lower for the smaller sample.

104. In round terms, a 95% confidence level corresponds to about two standard deviations, a 99% confidence level to about three standard deviations, and a 90% confidence level to about 1.65 standard deviations. *See* JOHN E. FREUND & GARY A. SIMON, MODERN ELEMENTARY STATISTICS 312 (8th ed. 1992).

105. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308–11 (1977) (approving use of such statistical analysis to prove a Title VII violation).

106. *See, e.g.*, *id.* at 309 n.14, 311 n.17 (opining that a disparity is statistically significant where it is more than two standard deviations from the expected values (which corresponds to a 95% confidence level, *see supra* note 104)).

Note regarding the term "significant": this section's discussion of tests that show whether the data presented is statistically "significant" should not be confused with the use of the word "significant" in the previous section to determine whether the size of the disparity ratio shown is large enough to satisfy the plaintiff's burden of proving a prima facie case. *See supra* notes 66–67 and accompanying text.

group.[107] As a rule of thumb, the disparity can be seen as statistically significant if the confidence levels of the two groups are mutually exclusive (i.e., when graphed, they do not intersect).[108]

II.
Data Sources for Proving FHA-Impact Claims

As noted in Part I's discussion of legal principles and further demonstrated in Part III's application of those principles, it is important in each FHA-impact case to determine what is the best data available to fit the analysis required for that particular case. This Part II identifies—and describes some of the advantages and disadvantages of—the most commonly used sources of data for proving these impact claims. The data sources reviewed here are: (A) two from the Census Bureau; (B) home-loan data maintained by the Federal Financial Institutions Examination Council; (C) those available from HUD and local public housing agencies; and (D) miscellaneous other sources, including private records and research aids.

A. Census Bureau

1. American Community Survey ("ACS")

In older FHA-impact cases, housing data from the U.S. Census Bureau's decennial reports were commonly used, but more modern times have seen the Bureau create the ACS, which produces more up-to-date data during each decade. The ACS offers two basic sets of tables:

- 1-Year tables that provide annual housing information from a sample with data for a large number of cities and counties as well as states, metropolitan areas, and the nation; and,
- merged 3-Year and 5-Year data that include detailed tables at smaller geographic levels, with the 5-Year tables going down to the block group level within census tracts.[109]

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107. As noted above, *supra* notes 83–86 and accompanying text, the most common method of proving FHA-impact claims is to focus on a simple difference-of-percentages comparison. In other cases, more complex statistical tests may be used, such as regression equations that control for selected factors. While the statistical tests used may be different, the concept is essentially the same; that is, statistical significance is based on measures related to a confidence level around a test value.

108. For an example of this, see *infra* Part III.A.1.c.i. While this graphing comparison of the confidence ranges provides a helpful visualization of the mathematics involved, it is not a valid test of statistical significance. Thus, the actual statistical test should always be relied on.

109. *See FactFinder*, U.S. Census Bureau, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Nov. 12, 2016).

The 1-Year tables have the smallest samples, while the merged 3-Year and 5-Year tables have much larger samples. The latter thus provide more reliable details but require adjustments for changes in economic conditions from year to year, while the single-year tables provide the most current data but only for larger areas.

These ACS sources can yield more than 2,000 pre-formatted tables with demographic, financial, and housing data for a single geographic area. For example, the following table from the 2010-2014 ACS provides data on the employment and disability status of people in the United States.

ACS Table C18120: Employment Status by Disability Status
Universe: Civilian noninstitutionalized population 18 to 64 years
2010-2014 American Community Survey 5-Year Estimates

	United States	
	Estimate	Margin of Error
Total:	193,574,369	+/-9,411
In the labor force:	148,743,241	+/-101,412
Employed:	135,293,448	+/-119,194
With a disability	6,632,448	+/-15,301
No disability	128,661,000	+/-121,990
Unemployed:	13,449,793	+/-36,423
With a disability	1,486,847	+/-9,493
No disability	11,962,946	+/-34,288
Not in labor force:	44,831,128	+/-105,155
With a disability	11,583,766	+/-42,503
No disability	33,247,362	+/-70,967

There are, however, gaps in the ACS data that might limit their value in some types of FHA-impact cases. For example, there are no tables:

- with the gender of all household heads by "tenure,"[110] a gap that may be important for gender discrimination cases and for familial status cases involving female heads of household;
- showing the number of persons in a household combined with the presence of children, which would be important in familial status cases such as those challenging occupancy-restriction policies;[111] and,
- with household race/ethnicity information broken down by income and tenure, which may be useful in controlling for income in race/ethnicity cases.

110. "Tenure" here distinguishes renters from homeowners.
111. *See supra* note 40 and accompanying text; *infra* Part III.A.2.a.

2. *Public Use Microdata Samples ("PUMS")*

PUMS provides samples of the individual respondent's answers to over 200 questions, including those dealing with race, ethnicity, ancestry, citizenship, primary language, income and source, housing characteristics such as home value or rent, household size, presence of children, and disability status.[112] The 1-Year PUMS provides a 1% sample of households; the 3-Year PUMS provides a 3% sample of households from 3 years of merged data with inflation adjustments; and the 5-Year PUMS provides a 5% sample of households from 5 years of merged data with inflation adjustments. A general description of the PUMS files and how to use them are found in the "README" file that accompanies the PUMS data.[113]

PUMS data can yield almost any kind of breakdown or combination of breakdowns (cross tabulations) from its data fields. This is especially helpful when the ACS pre-formatted tables do not provide what is needed.[114] Appendix D contains a list of the subject areas for the 2014 PUMS.

PUMS data are provided in two sets. One has an individual record for each household's housing data, and the other has a record for each person within the household (for population data). In some types of FHA-impact cases, the housing and population files need to be linked together.[115]

One drawback of PUMS for FHA cases is that, in order to protect the identity of individual respondents, its smallest geographic area

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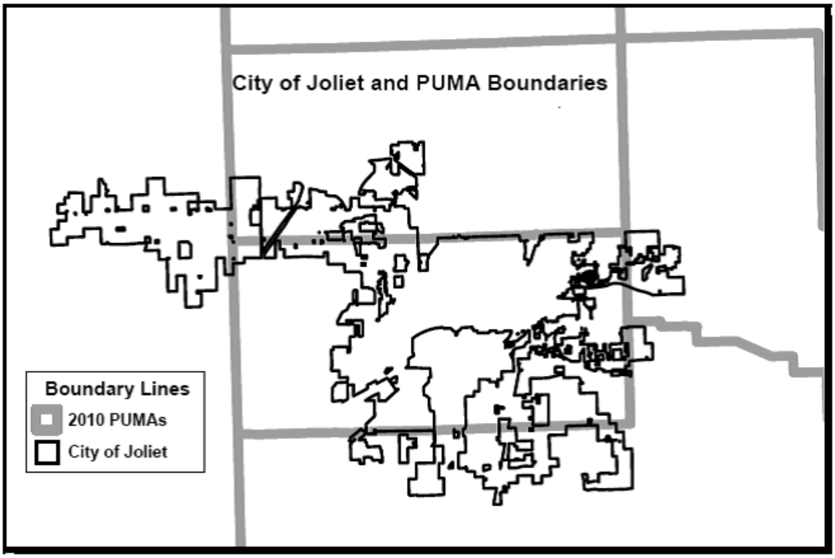
112. *See PUMS Data*, U.S. CENSUS BUREAU, http://www.census.gov/programs-surveys/acs/data/pums.html (last visited Nov. 12, 2016) (providing links to documents that list all the variables and codes used in the file—the data dictionary—and definitions of each variable).

113. *See id*. This document also indicates that estimates from PUMS files are subject to various random errors due to the complex sampling design. Directions provided by the Census Bureau for each data set include statistical methods for accounting for the random errors involved. For an example for the 2015 1-Year PUMS data, see U.S. CENSUS BUREAU, AM. CMTY. SURVEY, ACCURACY OF THE DATA 21–27 (2015), https://www2.census.gov/programs-surveys/acs/tech_docs/accuracy/ACS_Accuracy_of_Data_2015.pdf.

114. The PUMS estimates may differ slightly from those reported in the ACS tables for the same desired piece of information (e.g., a city's housing stock). For example, the estimate for the total number of occupied housing units in Washington, D.C., from the 2014 PUMS (277,377) is close, but not identical to, the estimate from the ACS tables (277,378); also, there are some larger variations by different subcategories, and the ACS data include several thousand rental units where the households do not pay cash rent. *See* ACS Tables 25003, 25003B, and 25003H (providing, respectively, the tenure data for Washington, D.C., as a whole and for black and white households); 2014 PUMS data (providing PUMAs 00101-00105).

115. For an example, see *infra* Part III.A.1.c.iv.

available is a Public Use Microdata Area ("PUMA"), which matches parts of counties or whole counties with at least 100,000 people.[116] Thus, PUMAs often do not match city or other local boundaries, as seen in the following example for Joliet, Illinois.[117]



B. *Home Mortgage Disclosure Act ("HMDA") Data*

HMDA data, which are administered by the U.S. Consumer Financial Protection Bureau ("CFPB"),[118] provide individual applicant records on an annual basis for single-family and multi-family mortgage loans. Yearly reports on these elements are required from virtually every major mortgage lender (excluding only some small

116. For some municipalities that are the central city of a metropolitan area of well over 100,000 people, one or more PUMAs may match or reasonably approximate the boundaries of the central city; that is, the PUMAs can be added together to closely match an entire central city. On the other hand, for many central cities of 100,000 or more, smaller metropolitan areas, rural areas, and areas outside of the central city of a major metropolitan area, the PUMA boundaries may not match the boundaries of a defined housing market so well. This is one reason to use different data sources, such as the ACS's preformatted tables, to test whether demonstrated disparate impacts are dependent upon a particular local geographic area. If they are, the plaintiff's justification for choosing a particular market area will become important. *See supra* Part I.C.2.a.

117. For examples of PUMAs that do match city boundaries, see *infra* Parts III.A.1.c.iv (Washington, D.C.) and III.B.2.b (Newport News, Virginia).

118. HMDA, which was enacted in 1975 and is codified at 12 U.S.C. §§ 2801 *et seq*., was administered by the Federal Reserve Board until the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Title 10, Subtitle H, Section 1094 (1) of Pub. L. 111-203, 124 Stat. 1376, transferred this responsibility to the CFPB.

depository lenders and other lenders that make few mortgage loans).[119] The public may access the HMDA data from two different government websites.[120] These data disclose the individual lender's identification, loan amount, high-cost-loan thresholds, geographic-area identifiers, and selected MSA and census-tract characteristics. Additionally, HMDA provides data on the loan type, property type, loan decision, applicant income and characteristics, type of purchaser, reasons for denial, and other selected data in a coded format.[121] Appendix E contains a HMDA loan-application code sheet.

The HMDA data may be used not only in cases alleging mortgage discrimination, but also in some home-sale cases (as demonstrated in Part III).[122] Further, the CFPB has issued regulations requiring covered lenders to collect additional fields of data beginning in 2018,[123] which should make the HMDA data even more useful in FHA cases that require assessing race-based access to the home buying and mortgage markets.[124]

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119. *See* Home Mortgage Disclosure (Regulation C), 12 C.F.R. §§ 1003.2–1003.3 (2016); *see also* FED. FIN. INST. REGULATORY COUNCIL ("FFIEC"), A GUIDE TO HMDA REPORTING: GETTING IT RIGHT (Jan. 2013) and related update letters, *available at* https://www.ffiec.gov/hmda/guide.htm (FFIEC is a formal interagency body empowered to prescribe uniform principles and standards for agencies like the CFPB that regulate financial institutions). Letters by the Federal Reserve Board for the 2014 data and the CFPB for later years provide updates to the 2013 *Guide* defining the asset threshold and lending activities for a covered lender.

120. *See HMDA & PMIC Data Products*, FFIEC, http://www.ffiec.gov/hmda/hmdaproducts.htm (last visited Oct. 20, 2016) (providing, through the FFIEC, a series of HMDA reports for individual lenders and metropolitan areas as well as a version of the raw HMDA data and a software program to extract the data); *Home Mortgage Disclosure Act*, CFPB, http://www.consumerfinance.gov/hmda/explore (last visited Oct. 20, 2016) (providing a CFPB website where the public may extract and export elements of the HMDA data).

121. *See* Home Mortgage Disclosure (Regulation C), 12 C.F.R. § 1003.4 (2016); *see also* FFIEC, *supra* note 119.

122. *See infra* Part III.B.3. Because HMDA data contain the census-tract locations of loan applications and loans made, they can also be used to identify patterns of racial or ethnic concentrations in local areas, which might be useful in segregative-effect cases as well. *See supra* Part I.A.

123. For the CFPB's final rule on the additional HMDA data to be collected and its commentary thereon, see Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128 (Oct. 28, 2015). The new data fields include the value of the subject property and the number of housing units. Some of these elements relate to risk assessment (e.g., credit scores), while others could produce information on the costs of loans (e.g., the fees charged for the loan that are not related to the risk assessment taken into account in the interest rate itself).

124. However, the CFPB has not yet indicated which of the newly required fields will be disclosed to the public or in what format. *See id.*, 80 Fed. Reg. at 66132–34. Using this expanded HMDA data more extensively in FHA-impact claims depends upon the range and format that the CFPB uses to disclose these new data elements.

Like PUMS data, HMDA data can be broken down by many different elements. Thus, for example, HMDA data may be used to compare mortgage lenders' denial rates for minority and white applicants in a particular market by selected applicant and loan characteristics,[125] thereby identifying those lenders that might be targets for further investigation because their loan decisions have been significantly less favorable for protected-class members.[126] For example, such targeting can be focused more precisely by comparing groups such as higher-income blacks and lower-income whites, where higher rejection rates for blacks would seem less likely, especially if the patterns for an individual lender were significantly different than those in the overall market area.

However, there are gaps in the HMDA data that limit their use in proving FHA claims. For example, these data do not measure many characteristics that a lender might legitimately consider in evaluating applicants (e.g., their indebtedness, assets, employment, and credit history),[127] which means that a showing of race-based disparities in a lender's rejections rates cannot alone prove illegal discrimination.[128]

Further, the HMDA data contain no direct information on the underwriting standards used by lenders,[129] which means that a mortgage provider's specific policies cannot be identified; this is problematic for FHA-impact cases, which usually must focus on isolated policies rather than a lender's entire underwriting system.[130] Thus, even if a mortgage provider's denial rates are much higher for blacks than

125. *See supra* note 121 and accompanying text.

126. *See* Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 389 (2010).

127. Put another way, the HMDA data do not provide detailed information about evaluating risk. Also, lenders may provide data on a voluntary basis on categories for the reasons a loan was denied, but the categories are broad and several may be indicated. The CFPB's recent revision of HMDA disclosure requirements, *see* Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128, will soon mandate reporting additional risk-assessment factors such as credit scores, but whether and how this additional information is made available to the public has not yet been determined. *Id.*

128. *See* Schwemm & Taren, *supra* note 126, at 388.

129. Note, however, that lenders using underwriting standards provided by Federal Housing Administration ("FHAdm"), VA, Fannie Mae, or Freddie Mac are bound by general rules for those loans or required to use particular approved automated underwriting systems.

130. *See supra* notes 32–33 and accompanying text. Because underwriting rules and standards are often proprietary (i.e., they are not made available to the public), a would-be FHA plaintiff may have a hard time, even at the complaint stage, identifying a specific policy of a defendant-lender to challenge. In addition, underwriting typically applies several standards to determine risk, so that one may need to separate out the effects of different standards. This can be particularly difficult when the provider

whites compared to other area lenders, the HMDA data could not answer the question of whether this is because of a particular policy, a set of policies, intentional discrimination, or some other factors. Because of these limitations, the race-based differences revealed in the HMDA data have generally been used more to identify specific lenders worthy of further investigation than to establish the elements of a prima facie case of disparate impact.

For FHA-impact claims, the HMDA data work best when a lender's specific policy has been identified and seems unlikely to be related to the risk of the loan. One example would be a policy against making loans of less than a certain amount (say, $150,000) in a market where minority households are more likely than whites to apply for mortgages below this level.[131] Another example would be a lender's policy of not providing loans guaranteed by the VA or the Federal Housing Administration.

C. *HUD and Public Housing Agencies*

HUD provides a range of data from its own records and research and from the compilation of reports filed by local housing agencies. These include: (a) data on area fair market rents and on income limits for housing-assistance programs; and (b) data on the characteristics of residents of HUD-assisted housing.[132] The latter can be reported for individual public housing agencies, cities, counties, and states as well as by individual programs, and include categories for race/ethnicity, age, gender, and presence of children, as well as income and source of income data.[133] HUD also provides its own version of PUMS data, although with only 15 pieces of data and the state as the lowest geo-

is using an automated underwriting process that involves complex logistics (sometimes referred to as the "black box" to indicate its lack of transparency).

131. Similar policies imposed by home insurers (e.g., not insuring homes with a value of under $150,000) might also be the target of FHA-impact challenges, as might those that decline to insure or provide less coverage for older homes or for landlords who rent to Section 8 voucher holders. *See, e.g.*, Jones v. Travelers Cas. Ins. Co. of Am., No. C–13–02390 LHK, 2015 WL 5091908, at *4 (N.D. Cal. May 7, 2015). The data sources and the methods reviewed above could be used to assess such impact-based claims. *See also infra* III.A.1 (dealing with discrimination against Section 8 voucher holders).

132. *See Picture of Subsidized Housing*, U.S. DEP'T OF HOUS. & URBAN DEV., http://www.huduser.gov/portal/datasets/picture/yearlydata.html (last visited Oct. 3, 2016); *see also Housing Choice Voucher Program*, D.C. HOUS. AUTH., http://www.dchousing.org/topic.aspx?topid=2 (last visited Oct. 3, 2016) .

133. Some of these data are given in actual counts, while others are in whole percentages within a category. Also, some agencies fail to report, or report inconsistent or partial data.

graphical level.[134] HUD also collects data on the performance of Federal Housing Administration loans by lender/servicer and area.[135]

Public housing agencies that administer HUD-assisted programs often maintain data on their waiting lists that include some demographic information. While such information is generally not available from HUD, it may be found in a local agency's reports or through Freedom-of-Information-Act requests directed to the agency.[136]

D. Other Sources and a Suggestion

Other local public records that might be potentially helpful in FHA-impact cases include foreclosures, building inspections, sewer and water service records (for access to services), waste sites (for location of hazards), and zoning and building codes.

Private entities, including potential FHA defendants, may maintain data on such topics as mortgage servicing and foreclosures; multiple listing service records; occupancy records; underwriting standards; loan origination and servicing files; coded maps; marketing plans; training materials; and pricing policies.

University-based sociologists and demographers and other private researchers have created various types of "segregation indexes," which are commonly used to produce a single "score" that shows the extent of residential segregation in an area.[137] Using maps to show segregation levels has become more common in recent years, as mapping software has increased in availability and sophistication;[138] map-

134. *See Data Sets*, U.S. DEP'T OF HOUS. & URBAN DEV., http://www.huduser.gov/portal/datasets (last visited Oct. 3, 2016).

135. *See id*.

136. *See, e.g.*, OFF. OF PUB. & INDIAN AFF., U.S. DEP'T OF HOUS. & URBAN DEV., FINAL — PHA Agency Plan: ANNUAL AGENCY PLAN FOR FISCAL YEAR 2016 (Dec. 30, 2015), http://www1.nyc.gov/assets/nycha/downloads/pdf/FY16-Revised-Final-Annual-Plan-12-30-15.pdf; *Housing Choice Voucher Program*, *supra* note 132.

137. The most common is the Dissimilarity Index, which calculates a value from 0.0 (for perfect balance of racial/ethnic populations) to 1.0 (for total segregation). *See, e.g.*, Douglas S. Massey & Nancy A. Denton, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 20 (1993) (describing the "index of dissimilarity" as reflecting "the percentage of blacks who would have to move to achieve an 'even' residential pattern—one where every neighborhood replicates the racial composition of the city").

138. *See, e.g.*, Affirmatively Furthering Fair Housing Assessment Tool: Announcement of Final Approved Document, 80 Fed. Reg. 81840 (Dec. 31, 2015) (requiring local governments that receive certain HUD grants to include, as part of their periodic Assessment-of-Fair-Housing planning process, a series of demographic maps linked to different jurisdictions and geographic areas); *see also* Matthew Bloch et al., *Mapping Segregation*, N.Y. TIMES (July 8, 2015), http://www.nytimes.com/interactive/2015/07/08/us/census-race-map.html (showing demographic maps covering the New York City area). Such maps for other jurisdictions are also available. *See Affirmatively*

ping may be especially revealing when used in conjunction with the different segregation indexes, although it, too, can show different patterns based on the geographic areas selected.[139] These methods of showing segregation are used primarily in FHA-perpetuation-of-segregation claims, but they may also provide interesting background in FHA-impact cases.[140]

Finally, we suggest that those pursuing FHA-impact litigation develop their own data-analysis template (e.g., an Excel workbook) into which the major public data sources identified in this Part II can be imported, reorganized, and tabulated. As shown above, each of these data sources may be helpful—or not—in different types of FHA claims. Formulas can be generated to select particular data from these sources, with applied controls for relevant conditions. Other formulas, and even preformatted tables, can be linked to the group tabulations to run basic statistical tests. Finally, the data analysis can be re-evaluated in terms of the checklist for FHA-impact cases set forth at the beginning of Part III to assess the strengths and weaknesses of particular cases and to be able to respond to anticipated defenses.

III.
Application

This part applies the principles identified in Part I and the data sources reviewed in Part II to various types of FHA-impact cases, focusing on two general situations: (A) a landlord's screening devices; and (B) a municipality's refusal to allow housing opportunities of particular value to FHA-protected classes. These two types of cases cover most of the impact-based claims that have been brought under the FHA.[141]

Furthering Fair Housing Tool, U.S. Dep't of Hous. & Urban Dev., http://egis.hud.gov/affht/ (last visited Oct. 3, 2016).

139. In general, the larger the area used, the less clear the racial separations appear to be. For example, if an entire city with equal minority and white populations is presented as a single area, there would appear to be no segregation whatsoever, even though a map of census tracts might show that all the minorities lived in a single part of the city. The same distortions apply, albeit to a lesser extent, when using smaller areas such as census blocks, block groups, census tracts, or ZIP codes.

140. *See supra* Part I.B for a description of the differences between FHA-effect cases based on perpetuation of segregation and those based on disparate impact.

141. *See supra* notes 35–37, 40 and accompanying text.

There have been others, particularly in the mortgage and home-insurance areas. *See supra* notes 38–39 and accompanying text. To the extent that mortgage lenders and home insurers seek to avoid the risk of non-payment by providing their services based on formal underwriting policies, they may be expected to defend their policies against a FHA-impact challenge by arguing that they reflect legitimate risks posed by

Whatever the challenged policy is, the basic analytic approach for *all* FHA-impact cases follows the same steps. These are to:

- identify the group of persons affected by this policy;
- identify, within the affected group, the protected-class group;
- identify a proper comparison group;
- identify the useful data sources concerning the protected-class group and the group it is being compared to;
- run the numbers to produce a proper statistical comparison of these two groups, and test these numbers for statistical significance; and,
- determine whether the comparison disfavors the protected class in a large enough way to establish a significant disparate impact.

A. *Landlords' Screening Devices*

This section deals with a number of screening devices imposed by housing providers, whether private landlords or public housing agencies. We first focus on one from the private market: barring persons who use government housing subsidies such as Section 8 vouchers, which may impact minorities more than whites. The same analytic approach may be applied to other screening rules, and some of these, including those that disproportionately impact other FHA-protected classes (e.g., people with disabilities and families with children) are dealt with in subsection 2.[142] Throughout this section, we explore the use of different data sources and comparative methods, thereby seeking to shed light on the full range of both substantive and technical issues that a FHA-impact plaintiff should consider in trying to establish a sound prima facie case.

Virtually all private landlords and public housing authorities do some screening of would-be tenants. Screening standards often focus on the applicants' ability to meet the financial and other requirements of tenancy, which include not damaging the property or causing problems with other tenants.[143] As noted above in Part I.C.1, if new

applicants. Because such risk-based policies raise special issues not ordinarily encountered in FHA-impact cases, we leave their analysis for another day.

142. *See infra* Part III.A.2.a, b; *see also supra* notes 35–36 and accompanying text (dealing with challenges to screening devices that, *inter alia*, favor persons with local ties over outsiders and require specified types of income or a certain minimum income-to-rent ratio).

143. *See, e.g.*, CAL. APARTMENT ASS'N, CRIMINAL BACKGROUND CHECKS: DECIDING WHETHER TO ADD CRIMINAL CHECKS TO YOUR SCREENING PROCESS 1 (2005), http://www.naylornetwork.com/CAA-NWL/assets/documents2/criminal%20background%20checks.pdf (noting that the goal of all tenant-screening criteria

screening standards are applied retroactively to current tenants who are then threatened with eviction, the targeted group is these identifiable tenants, and the necessary statistical comparisons discussed in Part I.C are relatively easy to apply.[144] We focus here on the harder problem of how screening standards apply to future applicants, which will require statistical evidence about the much larger group of all potential tenants.

1. "No Section 8" Policy: A Race-Based Challenge

The Housing Choice Voucher ("HCV") program—also called "Section 8" after the provision in the original 1974 authorizing statute[145]—is HUD's largest subsidy program, serving some 2.2 million low-income households.[146] The HVC program provides these households with a rent supplement that allows them to access a broad range of housing choices that they could not afford using just their own resources.[147]

Individuals apply for a voucher from the local public housing authority, which screens them for eligibility,[148] and, if they are found

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is "to select the resident who is most likely to pay the rent on time and the least likely to damage the premises or cause problems with other residents"); Evans v. UDR, Inc., 644 F. Supp. 2d 675, 683 (E.D.N.C. 2009) (noting that landlords' screening policies focusing on income requirements are based on concerns that an individual "would potentially default on the lease by failing to make payments, exposing the landlord to monetary losses").

144. *See* appellate cases cited *supra* note 86 and accompanying text.

145. *See* 42 U.S.C. § 1437f (codifying the relevant portions of the 1974 Housing and Community Development Act, as amended).

146. *See Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Nov. 19, 2016).

147. HUD uses data on prevailing rent levels in local markets to set Fair Market Rents ("FMRs"). *See supra* note 76. These rents are designed to cover the prevailing rent levels for all but the top 20% of the rental market, based on unit size. Voucher holders may rent units that fall within the FMR limits, though there are some limited exceptions to both the percentage of income a household may pay from its own income and the FMR levels in a particular area. *See Housing Choice Vouchers Fact Sheet*, *supra* note 146.

148. Eligibility for the HCV program depends primarily on household income. HUD sets income limits based on the number of persons in the household, with the limit for a household of four persons providing a general measure. HUD also divides eligible households into two categories. The first is those with incomes less than 30% of the HUD-defined area median income; these are defined as Extremely-Low Income ("ELI") households, and 75% of the vouchers are targeted for them. The second tier is for households that have incomes less than 50% of the area median; these are defined as Very-Low Income ("VLI") households. *See generally Housing Choice Vouchers Fact Sheet*, *supra* note 146. For example, in Washington, D.C. in 2014, the ELI limit for a four-person household was $31,100, with highest income limit for a household of eight or more being $42,400; the VLI category for a four-person household was

qualified, issues them a voucher or puts them on a waiting list (often necessitated because participating housing authorities receive funding for only a limited number of vouchers from HUD). Persons who obtain a voucher seek housing on their own, paying not more than 30% of their income for rent, with the remainder paid for by the voucher.[149]

Nationwide, voucher holders are disproportionately minorities: in 2013, 48% were black, and 15% were Latino.[150] The racial/ethnic distribution of voucher holders, however, varies considerably across the country.[151]

Federal law bars discrimination against voucher holders in certain government-assisted housing,[152] but not by other landlords, and from the program's inception, many housing providers have refused to deal with voucher holders. This "No Section 8" screening device has been the target of a number of FHA-based impact challenges,[153] but none has resulted in a judicial decision that includes a detailed analysis of whether the plaintiff's proof established a prima facie case of disparate impact.[154] For purposes of the following illustration, we vis-

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$53,500, with the highest income limit for a household of eight or more being $70,650.

149. *See id.* (providing general rules and exceptions).

150. *See Picture of Subsidized Households*, *supra* note 132.

151. For a report listing the characteristics of voucher holders by individual housing authority, see OFF. OF POL'Y DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANT AND NEIGHBORHOOD WELFARE 101 app. B-1 (2003), https://www.huduser.gov/publications/pdf/location_paper.pdf ("Appendix B-1: Age And Race/Ethnicity Of The HCV Population In Each Of The 50 Largest MSAs").

152. *See, e.g.*, 26 U.S.C. § 42(h)(6)(B)(iv), 26 C.F.R. § 1.42-5(c)(1)(xi) (barring discrimination against voucher holders in the Low Income Housing Tax Credit program).

153. *See, e.g.,* Wadley v. Park at Landmark, LP, 264 F. App'x. 279 (4th Cir. 2008); Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro Hum. Rels. Comm'n, 508 F.3d 366 (6th Cir. 2007); Crossroads Residents v. MSP Crossroads Apartments LLC, No. CV 16-233 ADM/KMM, 2016 WL 3661146, at *7–8 (D. Minn. July 5, 2016).

Twelve states and a number of localities (including the District of Columbia) have fair housing laws that ban discrimination against voucher holders, and other states and localities ban, more generally, all types of source-of-income discrimination. *See* SCHWEMM, *supra* note 14, § 30:3 n.3. In these places, a FHA-impact claim would not be necessary to challenge a "No Section 8" policy. In a case within such an area, a FHA-impact claim could be brought along with a supplemental state law claim that would not need impact evidence. *See, e.g.*, L.C. v. Lefrak Organization, Inc., 987 F. Supp. 2d 391, 403–05 (S.D.N.Y. 2013).

154. *Cf.* Jones v. Travelers Cas. Ins. Co. of Am., No. C–13–02390 LHK, 2015 WL 5091908, at *4 (N.D. Cal. May 7, 2015) (denying defendant's summary judgment motion in FHA-impact challenge to its policy of not insuring landlords with Section 8 tenants on the ground that plaintiffs' statistical evidence, which was not described in the opinion, was sufficient to show that this policy had a disparate impact on various protected classes).

ualize a large private apartment complex located in Washington, D.C., that has a "No Section 8" policy.

a. *Identifying the Affected Group and Groups to be Compared*

The first step is to identify the group affected by this policy. The short answer is potential applicants at the landlord's complex, but how should "potential" be defined? The challenged policy disqualifies HCV holders, and the FHA-impact issue will be whether this group disproportionately includes one or more protected classes, specifically here whether blacks are disproportionately rejected by this policy.

Typically, the groups to be compared would be black potential applicants versus white potential applicants.[155] In the most common form of FHA disparate-impact analysis,[156] the comparison would be between the percentage of blacks who use Section 8 vouchers versus the percentage of whites who use these vouchers.

Due to the lack of adequate affordable housing for low-income households, a local voucher program will often have a waiting list of households that have met the basic HCV qualifications and will receive a voucher when one becomes available.[157] Thus, the waiting list is the most helpful source of data on the racial profile of potential HCV applicants in the market. Indeed, because this list contains people's names, individuals excluded by a no-voucher policy can be identified.[158]

Defining a reasonable market area for the analysis is also a critical part of the case.[159] Here, that area chosen is the District of Columbia ("D.C."), because the landlord is located there and also because

155. We sometimes refer to whites in this context as the "control group." Choosing a proper control group for the comparisons would be based on a general assessment of the racial and ethnic distribution of households within the housing market chosen for the case. Occasionally, these considerations might lead to choosing a control group other than whites (e.g., Hispanics).

156. *See supra* notes 83–86 and accompanying text.

157. While existing voucher holders are allowed to return to the market and seek a new apartment, the most common situation is an applicant from the waiting list securing a voucher and entering the market. Also, the number of vouchers used by individual housing authorities may be reduced by local budget constraints or increased if existing public housing units are demolished or otherwise lost and vouchers are provided to the displacees (who would then more closely reflect the racial profiles of current public housing residents).

158. In tight housing markets, some private landlords may also maintain a waiting list, but there is no public source for these data. Even if a landlord has his or her own waiting list, a "No Section 8" policy would impose a harm on voucher holders, because they would be excluded from even getting on this list.

159. *See supra* notes 76–80 and accompanying text.

the households on the waiting list will likely be seeking housing within D.C.[160]

b. Identifying the Data Sources

Different sources of data have their own strengths and weaknesses for a plaintiff seeking to establish a prima facie case of disparate impact. Many of these are explored in this section.

As noted earlier,[161] HUD produces annual data on the characteristics of subsidized households by different geographic areas and by different programs, including HCV. These data are accessible online[162] and can be used to determine the racial composition of existing HCV households.

Two sources of data specifically relate to HCV households: (1) those currently using vouchers; and (2) those on a local housing authority's waiting list.[163] As noted earlier in this section, a waiting list, if it exists, provides the most valuable data on the households seeking units in the current market. Both HUD data on current voucher holders and local agencies' waiting-list data include information on the households' race.

Because there are no public data showing the race of households seeking apartments in most housing markets, Census Bureau data on current renters' profiles are typically used to approximate this information.[164] Here, data from Census Bureau reports may be used to represent the racial profile of the D.C. rental market.

As noted in Part II.A.1, the Census Bureau's ACS produces annual sets of housing data that are accessible online. The ACS's preformatted tables include data on renter households by race, showing the number of black and white (non-Hispanic) households renting in D.C. According to the 2014 ACS data, D.C. has 164,886 occupied rental units, with 79,761 occupied by black households and 59,241

160. Section 8 vouchers are "portable," which means that they may be used outside the area of the local public housing authority that issued them. *See* Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50564 (Aug. 20, 2015) (to be codified at 24 C.F.R. pt. 982). This means that a voucher obtained in D.C. may be used not only in D.C., but also in suburban Maryland or Virginia or indeed in other parts of the country. Still, most HCV holders use their vouchers only in the city where they currently live.

161. *See supra* note 132 and accompanying text.

162. *See* websites cited *supra* note 132.

163. *See supra* note 136 and accompanying text.

164. As in most forms of estimation in the social sciences, these data serve as the base from which future patterns are predicted. Moreover, courts generally take judicial notice of Census Bureau data. *See, e.g.*, Hollinger v. Home State Mut. Ins. Co., 654 F.3d 564, 571–72 (5th Cir. 2011).

occupied by whites.[165] Because D.C. is a sizeable rental market (with 168,886 rental units reported in the 2014 ACS), the ACS 1-year data should provide a large enough sample for most sound disparate-impact tests.

These data will be matched with the Section 8 waiting-list and occupancy data for D.C.[166] The D.C. Housing Authority's data show that there are 11,000 households in D.C. currently renting with Section 8 vouchers; the 2014 HUD data indicate that 95% of these households (10,450) are black and 2% (220) are white. The waiting-list data show that there are 25,000 households on the D.C. waiting list; of these, 93% (23,250) are black and 2% (500) are white.

c. *Identifying Racial Disparities: Alternative Methodologies and their Applications*

Here we provide five examples of how to use the available data to show disparate impact. The first four use the most commonly employed method of comparison in FHA-impact cases (i.e., comparing blacks disqualified by a "No Section 8" policy versus their white counterparts); the fifth compares blacks harmed by this policy to the overall black population in the area.[167]

i. *Comparing Black and White Renter Households on the HCV Waiting List*

The goal here is to compare the percentages of black and white renter households that are disqualified by the challenged policy, using the D.C. Housing Authority's HCV waiting list. The black percentage is produced by dividing the number of black households on this waiting list by the number of black households in the overall D.C. rental market (derived from the ACS data); these figures are: 23,250 ÷ 79,761 = 29.15%. The white percentage is calculated by dividing the number of white households on the waiting list by the number of

165. See the 2014 ACS 1-Year data on housing tenure and race for D.C., Table B25003 for all households, Table B25003B for black households, and Table B25003H for white households. For both the HCV and Census Bureau data, a black household is defined as having a head of household who is black or African American alone and a white household is defined as having a head of household who is white alone and not Hispanic.

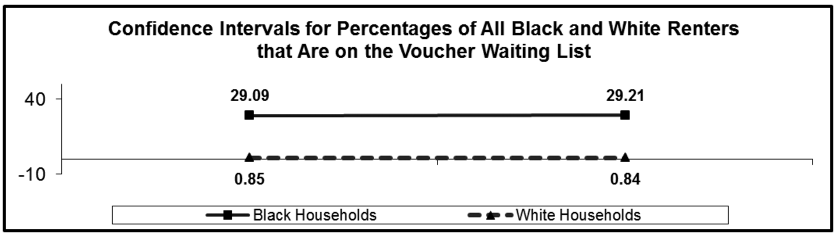
166. For many public housing authorities, their most recently available Section 8 data are from 2014. Unfortunately, the D.C. Housing Authority's latest Section 8 data are from 2012, but it is a fair assumption that these data approximate those for 2014; we make this assumption here.

167. *See supra* notes 83–86 and accompanying text for a description of the first method, and notes 87–89 and accompanying text for a description of the second.

white households in the D.C. market; these figures are: 500 ÷ 59,241 = 0.84%. The results establish a large black-white disparity ratio of 34.7 (29.15% ÷ 0.84%), which indicates that black households are more than 34 times as likely to be negatively impacted by the challenged policy as white households. This is far above the standards found sufficient in previous FHA-impact cases to establish a prima facie case.[168]

In order to account for random error in both the Census Bureau data and the data for D.C.'s HCV waiting list, a test should be run for the statistically significant differences of the black and white percentages.[169] As discussed in Part I.C.2.d,[170] this would show whether the confidence intervals for the two percentages are independent of each other.

In order to apply a test for statistically significant differences, a standard error is calculated based on the Census Bureau's instructions on how to estimate the standard error for the ACS data.[171] A confidence level of 95% requires confidence intervals that are 1.96 standard deviations around the percentages, but to be more conservative, we'll choose a 99% confidence level, which requires a confidence interval that is 2.576 standard deviations. Using this higher confidence level, the confidence interval for the percentage of black renters on the waiting list ranges from 29.09% to 29.21%, and the confidence interval for the percentage of white renters on the waiting list ranges from 0.85% to 0.84%.[172] The chart below compares these confidence intervals.



168. *See supra* notes 98–99 and accompanying text.

169. While waiting-list data are typically not reported as a sample, they are likely to contain random mistakes. Out of a sense of caution, therefore, and to provide a conservative measure of the differences in the percentages, we treat the waiting-list data as having the same random error as the Census Bureau data.

170. *See supra* notes 107–08 and accompanying text.

171. *See supra* Part I.C.2.d.

172. While the calculated range is used here for illustrative purposes and to calculate a test score, such percentages are effectively equal to zero.

As the chart shows, there is no overlap between the two confidence intervals. The test for statistically significant differences in the two percentages produces a Z-Score that reflects the level of significance in standard deviations. To meet the 99% level, the Z-Score would have to be equal to or greater than 2.576; here, the Z-Score is 873.72, well above the required level.

This would seem sufficient to establish a prima facie case of disparate impact. There are, however, some practical and statistical problems that relate to this method of testing. First, there is no requirement that the households on a HVC waiting list reside in the jurisdiction at that time. Here, this means that the households on D.C.'s waiting list do not necessarily represent the renter households in the D.C. market. Second, and perhaps more serious, is the fact that the number of households on the waiting list is not a fixed standard, but is determined internally by each individual housing authority.[173] Because the black and white percentages previously used were calculated from the numbers of black and white households on the waiting list, those percentages could be changed by the local housing authority's decisions about when to open or close the waiting list and how many households to include on the list.

ii. Comparing Black and White Renter Households Currently Using Vouchers

Another approach would be to use the racial profiles of D.C.'s existing voucher holders, as contrasted with the previous part's use of waiting-list profiles. (As noted earlier, some places may not have waiting lists, and even for those that do, like D.C., looking at current voucher users would help to confirm or discredit the waiting-list method.) Data on the profiles of existing voucher holders would be compared to the current profile of households occupying rental units in D.C. Here, 10,450 of D.C.'s 11,000 current HCV holders are black (95%), while 220 of these households are white (2%).

Running the same test for the difference in percentages at the 99% level of confidence, 13.10% of the black D.C. renter households would be affected, while 0.37% of the white renter households would be. As with the waiting-list analysis, the resulting disparity ratio is extremely large – 35.41 – indicating that black households are over 35 times more likely to be negatively impacted by the challenged policy

173. The need for a waiting list is related to the practical consideration of having enough people on the list to satisfy the recurring openings for new vouchers. Thus, for example, D.C. may choose to limit its waiting list to no more than twice the number of voucher-occupied units.

than white households. The Z-Score would be 708.03, which means that the percentages are different statistically above the 99% level of confidence.

The waiting-list method and the current-user method each have some strengths and weaknesses. While these two methods produce similar results in D.C., there may be marked differences in the racial distributions for these methods in other parts of the country. Where this is so, we would argue that the waiting-list data should be used, because it better reflects the likely rental applicants in the local housing market.[174] Still, the weakness represented by discretionary changes in the numbers on the waiting list counsel against placing total reliance on this approach.

iii. Comparing Black and White Households Eligible for the HCV Program Using Preformatted Census Tables

Another method for assessing the challenged policy's disparate impact is to compare the populations of black and white households that are eligible for vouchers. This group of potential voucher holders is larger than the waiting-list and current-user groups (examined in i and ii), because it includes all those who are eligible, not just those who have applied.

As noted earlier, the basic eligibility standard for receiving a voucher is household income.[175] The preformatted ACS tables include tables with the number of households reporting annual income in sixteen ranges (from less than $10,000 to $200,000 or more). There are separate tables for different racial groups and Hispanics, which can be used to assess racial disparities in income.

The ACS income tables do not break down households by their size, and thus the breaks in the income ranges do not match those for the voucher program's income-eligibility limits. This problem may be diminished by running comparisons for each of the different ACS income ranges; to the extent that significant disparities exist for all the income ranges up to the eligibility limits, the data would justify con-

174. Housing authorities have some discretion in setting local preferences for different types of households, such as homeless families or persons with disabilities. Along with changes in the overall racial and ethnic patterns in the local area, this might weigh in favor of using the waiting list.
175. *See supra* note 148.

cluding that there is a disparate impact on households eligible for vouchers.[176]

The table below shows the disparity ratios for black versus white households based on the 2014 ACS tables for D.C. The underlined income ranges indicate the best fit for the ELI limit of $31,100 and the VLI limit of $53,500 for four-person households.[177] The disparity ratios are above 1.25 across all of the income ranges through the highest ELI limit of $42,400. The first disparity ratio below 1.25 is in the range that includes the highest income limit for VLI households with eight or more persons, but there are few such households of any race in D.C.[178]

District of Columbia Black to White Income Ranges for Households
2014 American Community Survey - Tables B19100B and B19100H

Income Ranges	Percent of All Black Households	Percent of All White Households	Disparity Ratio
Less than $10,000	17.68	4.77	3.71
$10,000 to $14,999	5.81	1.84	3.15
$15,000 to $19,999	6.30	0.89	7.07
$20,000 to $24,999	6.34	1.58	4.02
$25,000 to $29,999	5.01	1.30	3.85
<u>$30,000 to $34,999</u>	4.82	1.74	2.78
$35,000 to $39,999	3.14	1.48	2.13
$40,000 to $44,999	5.20	2.16	2.41
<u>$45,000 to $49,999</u>	3.20	1.49	2.14
$50,000 to $59,999	5.74	3.88	1.48
$60,000 to $74,999	8.32	7.81	1.06
$75,000 to $99,999	10.32	12.84	0.80
$100,000 to $124,999	6.74	11.69	0.58
$125,000 to $149,999	3.08	8.48	0.36
$150,000 to $199,999	3.72	13.69	0.27
$200,000 or More	4.58	24.37	0.19

176. If some of the income categories are quite small and this affects the statistical tests, the analysis should consider whether there is a consistent pattern of high disparity ratios above 1.25 across the income ranges.

177. For descriptions of the "ELI" and "VLI" concepts and for the fact that four-person households are often used as a general measure in evaluating income-eligibility limits, see *supra* note 148.

178. The highest category for household size in the ACS preformatted tables is seven or more persons. The ACS 2014 data for D.C. (Table B25009) indicate that less than 0.75% of the households have seven or more persons.

The individual significance tests could be run in each range or the ranges could be grouped to fit the general income-eligibility limits. To illustrate, the following table shows calculations for the disparity ratios and significance test Z-Scores for all households with incomes less than $25,000, less than $35,000 (a surrogate for the generic ELI limit), and less than $50,000 (a surrogate for the VLI generic limit). The results are in the following table. The disparity ratios are all above 3.0, and the Z-Scores are well above the level required for a 99% level of confidence.[179] These data indicate a statistically significant difference in income levels for white and black households in D.C., especially for incomes that fall within the HUD definitions of ELI and VLI households.

District of Columbia Black to White Income Levels for Households
2014 American Community Survey - Tables B19100B and B19100H

Income Ranges	Percent of All Black Households	Percent of All White Households	Disparity Ratio	Significance Test Z Scores
Less than $25,000	36.14	9.08	3.98	13.80
Less than $35,000	45.97	12.12	3.79	15.60
Less than $50,000	57.51	17.24	3.34	17.06

The ACS also provides comparable tables for income by race for family households (i.e., those where the occupants are related by blood or marriage and regardless of the presence of children). The ACS tables that report households by type and presence of children (Table B25115, for example) show that just under 8% of D.C. households are female-headed with children. D.C.'s voucher data indicate that 39% of voucher households are female-headed with children.[180]

The following table shows the test results using the family data. The pattern is somewhat different from the pattern for all households,

179. The calculations for defining error terms for combined ranges and for the test for statistically significant differences in proportions were made using directions from the Census Bureau's "Accuracy of the Data" for the 2014 ACS.

180. This may suggest that statistical tests should be run on the racial data for income ranges for families, because these results may be somewhat more representative of the comparable market for voucher holders. However, while the "family" census category includes children, it also includes households that have no children (e.g., married couples with no children and households with related persons none of whom are the occupants' children).

but with roughly comparable high levels of statistical significance in the Z-Scores. The percentage of households that fall within each of the ranges is smaller for families. On the other hand, the disparity ratios by race are considerably greater for families than for all households. In either case, the relevant data show a significant disparate impact; that is, the change in the definition of households does not eliminate the sizeable differences by race.

District of Columbia Black to White Income Levels for Families
2014 American Community Survey - Tables B19101B and B19101H

Income Ranges	Percent of Black Family Households	Percent of White Family Households	Disparity Ratio	Significance Test Z Scores
Less than $25,000	29.27	2.22	13.16	12.41
Less than $35,000	38.48	4.07	9.46	14.02
Less than $50,000	49.43	5.96	8.29	16.85

iv. Comparing Black and White Households Eligible for Vouchers Using the PUMS Data

The different methods of assessing racial disparities discussed so far have used preformatted ACS tables and have provided a range of conclusions that generally reveal a significant race-based disparate impact, but they were also limited by the specific categories and data chosen by the Census Bureau for these tables. As described in Part II.A.2, the PUMS data provide a different Census Bureau resource that can be used to develop estimates with more detailed controls for defining the most appropriate comparison groups.

In the case of D.C., there are five PUMAs that include the city and are coterminous with D.C.'s boundaries. Therefore, the five-PUMA market area is exactly the same as the city boundaries used in the preformatted tables.[181]

The characteristics of the housing units can be refined in the statistical tests. In the ACS preformatted tables, rental households include a significant number of units that are not owner-occupied but where the tenant does not actually pay rent. The PUMS data can "clean up" the definition of the rental market by limiting it to house-

181. *Cf. supra* notes 116–17 (explaining that this is not always the case).

holds that actually pay rent, making the market definition more compatible with the actual operation of a particular landlord-defendant.

This more precise definition produces a lower estimate of the total rental units within D.C. (from the ASC's 164,886 to PUMS's 158,996). The PUMS definition also produces a smaller estimate of black households in the full D.C. market compared to the ACS's (72,784 versus 79,761).[182] This is due in part to the fact that the ACS tables by race include blacks who are also Hispanic, while the PUMS data count only blacks who are black alone and not also Hispanic, making the racial category parallel to that for whites. These refinements reduce the estimated percentage of black renter households to 45.78% of the D.C. market compared to the ACS estimate of 48.37%. Because the percent of black households on D.C.'s voucher waiting list remains the same (93%), the disparity ratio increases somewhat (to 2.03). The Z-Score remains extremely significant at 17.27.

Refining the data for comparing blacks on the HCV waiting list (or those using vouchers) may generally result in relatively minor variations in the statistical tests. The PUMS data offer an opportunity to match households to the actual income-eligibility limits, adjusting for the number of occupants. This flexibility represents a significant advantage over the ACS data, which is locked into preformatted ranges. The 2014 PUMS data for D.C. can be used to code each individual record for paying rent and for household income below the voucher income-eligibility levels based on the size of the household. This allows a comparison of the percentages of eligible black and white ELI and VLI households based on the actual income limits.

The PUMS data produce estimates that 48.83% of black renters and 11.58% of white renters are ELI households. The test for statistically significant differences in proportions are run using the 99% level of confidence and estimating standard errors according to the Census Bureau's directions for the use of the PUMS data. The Z-Score is 7.50, well above that required for a 99% confidence level. The disparity ratio is 4.22, meaning that black households are more than four times as likely to be eligible for the HCV program as white households. These data represent a potentially stronger showing of disparate impact both by focusing on renters rather than on all households and by restricting the households to those who are actually income-eligible based on household size. This is valuable because the data indicate

182. *See supra* note 114 (showing that, in D.C., the estimate for the total number of occupied housing units from the 2014 PUMS (277,377) is close to the estimate from the ACS tables (277,378)).

that 84% of the existing voucher holders in D.C. fall within the ELI threshold.[183]

v. Comparing Black Households on the HCV Waiting List (or Currently Using Vouchers) to Black Households in the General Rental Market

Another option would be to compare the percentage of black households on the HCV waiting list (or currently using vouchers) to the percentage of black households in the general market, a comparative method commonly used in FHA land-use cases and some other FHA-impact cases as well.[184]

In the tests using data on the waiting list or current voucher holders, the percentage of blacks in the population estimated to be on the waiting list or using vouchers was based on the actual number of households on the waiting list or using vouchers. These percentages could change significantly if the actual number of persons on the waiting list or using vouchers changed. Calculating a percentage of the full waiting list or pool of voucher holders that are black, on the other hand, will produce a figure that is much less likely to change with changes in the numbers of those on the waiting list or using vouchers. In part, this is because the economic, political, social, legal, and regulatory factors and practices that contribute to the individual decisions reflected in the overall patterns of those applying for and receiving vouchers is not dependent upon the actual numbers on the waiting list or using vouchers. The profile of households eligible and actually applying for vouchers is likely to be similar whether the waiting list is restricted to a few hundred households or expanded to include several thousand.[185]

For example, for the waiting list data for Washington, 93% of the households were black. If the list is reduced by half from 25,000 to 12,500, but the forces that contribute to those applying for vouchers and being placed on the waiting list are the same, then we would expect half as many blacks (23,250 reduced to 11,625) and also half as many whites (500 reduced to 250) to be on the waiting list. The result

183. A test can also be run for households in the market meeting the VLI threshold. The base percentage for black households is 66.15% and for white households is 18.35%. The Z-Score is 9.24. The disparity ratio is 3.60, meaning that even at this higher income threshold, black households are more than three-and-a-half times as likely as whites to meet HUD's VLI standard.

184. *See supra* notes 87–89 and accompanying text.

185. This is also true of the racial patterns in the ACS sample that are used to estimate the profile of the general rental market.

would still be that 93% of those on the waiting list are black (11,625 ÷ 12,500 = 93%).[186]

Therefore, an advantage of comparing the percentage of blacks on the waiting list to the percentage of black households in the general market is that this comparison takes advantage of the likelihood that the waiting list is a good indicator of the potential applicants who will seek to use HCVs in the general market. This comparison suffers less from differences in the size of the waiting list and does not suffer from the conceptual problem related to the assumption that the households on the waiting list are currently part of the D.C. general rental market. The waiting list represents households that are likely to apply for apartments regardless of where they currently live. Meanwhile, the ACS data represent a sound estimate of the current profile of renters in the market.

This method begins with the percentage of black households on the waiting list; this is 93% (23,250 ÷ 25,000).[187] This 93% figure is compared to the percentage of all renter households in the market. The ACS 2014 data indicate that there are 79,761 black renter households in D.C. compared to a total of 164,886 total rental households, producing a figure of 48.37% (79,761 ÷ 164,886).

The result is a disparity ratio of 1.91 (93% ÷ 48.73%), indicating that black households are almost twice as likely to be on the voucher waiting list as they are to be in the overall market.[188] Conceptually, it provides a reasonable estimate of the extent to which black renter households are disproportionately concentrated among those on the voucher waiting list.

As with the previously described methods, confidence intervals should be calculated around these two percentages using standard formulas and the Census Bureau's directions for calculating random error in the ACS data. Using the 99% confidence level, the confidence interval for the percentage of black households on the reduced voucher waiting list ranges from 91.69% to 94.31%; the confidence interval for the percentage of black households in the overall D.C. rental market ranges from 46.02 to 50.72. The Z-Score is extremely high (at 42.71). Even if a reduced waiting list of 2,500 households is used, the results

186. Increasing or decreasing the number of households on the waiting list or using vouchers may produce estimates with smaller or larger standard error terms, *see supra* note 103, but the general patterns (e.g., the percentages of blacks or whites) are likely to remain roughly the same.

187. *See supra* Chart 1 in Part III.A.1.c.i.

188. This is a conservative measure, because the percentage of black households in the overall market includes black households on the voucher list.

of the test are statistically significant, so long as the proportion of households that are black remains at 93%.

Similar results are produced by comparing the percentage of black households using vouchers to the percentage of black renters in the overall market. Here, 95% of the voucher holders are black (10,450 of 11,000 total voucher holders) compared to the estimated 48.37% of the overall rental market. Applying the same methods for estimating the standard errors and confidence intervals for a 99% confidence level, the Z-Score for the test is high (at 49.86), and the disparity ratio is 1.96.

The disparity ratios using this comparative method are much smaller than those produced by the black-versus-white methods discussed earlier. This is partly a mathematical artifact based on the overall percentage of black households in the rental market. Because this percentage is so large in D.C., the disparity ratio produced by the current method cannot be extremely large, even when close to all the households on the waiting list are black. In the previous methods, because the percentage of the full rental market represented by households assumed to be on the waiting list or those using vouchers is small, the disparity ratios will be quite high whenever blacks represent a great majority of those on the waiting list.

d. Choosing Which Comparative Method to Use

The previous section's exploration of several alternative methods for showing the disparate impact of a landlord's "No Section 8" policy suggests that using the PUMS data is the best approach among the data sources available. PUMS allows one to define the market and the particular racial households to fit the conditions of the HCV program and the nature of the D.C. market in such a case. However, similar claims in other parts of the country, especially where the PUMS areas do not fit the market area defined for the case, may find that using ACS data and other comparative methods are as good or better. Focusing on a single method, however well it seems to fit the particulars of the case, involves a risk that the court may not be convinced by this lone approach. Using multiple methods, multiple sets of data, and different definitions of the market area can show that changes in the measures and reasonable changes in the definition of the market will not eliminate the racial disparities.

The different methods explored here for this one hypothetical provide a base for commenting on how different data sources and methods might be applied in FHA challenges to other types of screening policies. Some of these are reviewed next in Part III.A.2.

2. *Other Screening Devices and FHA-Impact Challenges*

This section examines how statistical evidence might be presented to support a FHA-impact challenge to a variety of landlord screening policies that might disproportionately harm a protected class. The policies and protected classes discussed are:

- maximum occupancy restrictions—families with children;
- source-of-income restrictions—disability;
- minimum credit-score requirements—race and national origin;
- “No Criminal Record” policy—race and national origin;
- eviction for domestic-violence incidents—sex; and,
- English-language requirements—national origin.

a. *Maximum Occupancy Restrictions—Families with Children*

Ever since the FHA’s 1988 amendments banned discrimination against families with children, a major portion of the litigation in this area has involved challenges to landlords’ occupancy policies.[189] Typically, such a policy takes the form of restricting units of a certain size to households with fewer than a certain number. For example, a policy of refusing to rent one-bedroom units to more than two persons would disqualify a couple with a baby (and all other three-or-more groups), and a couple in such an apartment would be required to leave if they had a child (as would two people who took in another adult).

The FHA-impact issue is whether such an occupancy restriction disqualifies households with children at a significantly higher rate than those without children in the relevant housing market. The analysis that follows is based on a recent ruling in favor of a FHA-impact challenge to a Rhode Island landlord’s two-person-per-bedroom policy as applied to a couple with a newborn baby.[190]

The first step is to identify the housing market for the defendant-landlord’s complex. This has both a geographic component (e.g., the market for a landlord’s complex near Providence, Rhode Island, may be defined as the entire state because the state is so small) and a rental-charge component (e.g., the landlord here charged $900–$1050

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189. *See, e.g.*, cases cited *supra* notes 40 and 47. *See generally* U.S. DEP’T OF HOUS. & URBAN DEV., ANNUAL REPORT ON FAIR HOUSING: FY 2012-2013, 18–19 (2014), http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf (reporting that about 15% of FHA complaints in the 2010-2013 period alleged familial status discrimination).

190. *See* R.I. Comm’n for Human Rights v. Graul, 120 F. Supp. 3d 110, 124–26 (D.R.I. 2015). This ruling relied heavily on a report by a co-author of this Article. *See id*. at 126–28.

for one-bedroom units and $1250–$1400 for two-bedroom units for an overall range of $900–$1400).

The Census Bureau's data fit well with this problem.[191] The Bureau's data measure the presence of children in a household at the local level, and its definition of this feature is virtually identical to the FHA's definition of the protected class of "familial status."[192] Using the Bureau's PUMS data for the relevant time period,[193] disparate-impact measures can be calculated by comparing households with and without children for all households with the same number of persons (e.g., three people). This can be done for all-rent levels in the area and also for the subgroup of households paying rents in the defendant-landlord's range.

For all-rent levels, the PUMS data yield an estimate that 44,618 households with children lived in the Rhode Island market, of which 14,101 have three persons;[194] thus, the challenged policy disqualifies 31.60% of all the households with children (14,101 ÷ 44,618). The comparable figures for households without children are a total of 108,790, 7,563 of which have three persons; this means that 6.95% (7,563 ÷ 108,790) of the non-children households are excluded by the landlord's policy.

Because the PUMS data are based on sampling and thus produce random errors, it is necessary to calculate the standard of error for these percentages and test them for a certain confidence level.[195] Tests with a 99% confidence level require a confidence interval around the estimated percentage that is plus or minus 2.576 adjusted standard er-

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191. To provide a proper measure for disparate impact here requires data that are more detailed than just households with and without children; the data must also be broken down by household size. A further breakdown may also be needed by either the income of the households and/or the rent that households pay in order to match the assessment with households that are within the income and/or rent ranges of the defendant-landlord's apartment complex. The ACS tables do not provide these breakdowns, but they may be created by using the PUMS data.

192. The Census Bureau defines a family with children as a household where at least one of the occupants is a person under 18 years of age; the FHA's definition of "familial status" also focuses on having an under-18 person in the household, but it is slightly larger (e.g., it includes pregnancy). *See* 42 U.S.C. § 3602(k) (2012).

193. For a description of the PUMS data, see *supra* Part II.A.2.

194. Estimates here are based on the weighted values provided for each individual household in the PUMS sample for the 2008–2012 ACS.

195. *See supra* notes 103–08 and accompanying text; U.S. CENSUS BUREAU, 2008–2012 ACS PUMS ACCURACY OF THE DATA (2012), http://www2.census.gov/programs-surveys/acs/tech_docs/pums/accuracy/2008_2012AccuracyPUMS.pdf. Here, using the Census Bureau's formula for doing this yields an adjusted standard error deviation of 1.919 % for households with children comprising three people.

ror deviations (here totaling 4.94%);[196] this creates a confidence interval around the 31.60% percentage of 26.66% (31.60% – 4.94%) to 36.54% (31.60% + 4.94%). The same procedure is followed for the percentage of households without children that contain three persons (6.95%): the adjusted standard of error for a 99% confidence level is plus or minus 1.731%, which creates a confidence interval that ranges from 5.22% (6.95% – 1.731%) to 8.68% (6.95% + 1.731%).

There is no overlap in the two confidence intervals (i.e., the lower limit for the percentage of three-person households with children (26.66%) is higher than the upper limit for the percentage of those without (8.68%)). The Z-Score confirms that the difference in these estimated percentages is statistically significant beyond the 99% level of confidence. Therefore, these percentages can be used to calculate a disparity ratio. Here, this is 4.55 (31.60% ÷ 6.95%). This means that households with three persons are more than four and one-half times as likely to have a child compared to those with no children, which is well above the standards used to judge an actionable disparate impact.[197]

The same analysis may be done for area households that actually pay rent in the range of the defendant-landlord's units. For households with children paying rent in this $900–$1,400 range, 30.73% are estimated to have three persons; the comparable figure for households without children is 9.63%. These results are also statistically significant beyond the 99% level and produce a disparity ratio of 3.19 (30.73% ÷ 9.63%), again well above the actionable standard.[198]

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196. Both the standard error and the confidence intervals are extremely sensitive to the sample size and the nature of the sampling design. *See supra* note 103. With respect to the latter, there are adjustments in the census samples to the standard error related to the complexities of the sampling design for selecting households included in the sample. These adjustments increase the standard error, which in turn increases the range of the confidence interval. All else being equal, this makes it less likely that differences in the estimated percentages for two groups will be statistically significant. For an explanation of the methods used to calculate the confidence intervals and for the specific formulas and examples of their use, see U.S. CENSUS BUREAU, *supra* note 195.

197. *See supra* notes 98–99 and accompanying text.

198. In the actual case, a similar analysis was also done for four-person and five-person households with tests that are statistically significant at more than the 99% confidence level, both for all renter households in the state and for those paying rent in the $900-$1,400 range. The results for all-state renters were disparity ratios of 14.25 for four-person households and 6.92 for five-person households; the results for state renters paying rents in the defendant-landlord's range were disparity ratios of 12.84 for four-person households and 7.65 for five-person households. Thus, the pattern of statistically significant disparities due to familial status was robust, and the magnitudes of the disparities were all extremely large.

b. Source-of-Income Restrictions—Disability

Some landlords rent only to people who have a job or other traditional source of income that produces a certain minimum monthly income (e.g., they refuse to rent to people whose principal source of income is Social Security or other government-benefit program). The FHA-impact issue presented by such a screening device is whether it disqualifies members of a FHA-protected class (e.g., persons with disabilities) at a significantly higher rate than those outside this class in the relevant housing market. The analysis that follows is based on a report by a co-author of this Article in a case brought in 2010 challenging a "Must Be Employed" policy of a landlord in Hartford, Connecticut.[199]

The first step is to identify the market for the defendant-landlord's complex. As noted elsewhere, this has a geographic component (e.g., the market for the Hartford landlord's complex may be defined geographically as Hartford County) and sometimes a rental-charge component. Fortunately, the Census Bureau provides preformatted tables with localized data on disabled versus non-disabled persons who are employed.[200] Data from the 2006 ACS for Hartford County (Table B18020) may be separated into the two categories of persons—those with a disability and those without.[201] These groups are then further divided into persons who were employed and persons who were not employed. The test is then run on these groups for all persons 16–64 years old.

This allows for a comparison between the percentages of persons with disabilities who are not employed and a similar percentage for non-disabled persons. The sample data from Table B18020 yields estimates that there were 59,053 persons with disabilities in Hartford County, of whom 33,659 were not employed (and thus would be disqualified by the challenged policy); the disqualified group thus accounts for 57% of all the persons with disabilities (33,659 ÷ 59,053). Applying a similar methodology for non-disabled persons yields estimates in Hartford County of 506,915 persons without disabilities, of

199. *See* Complaint, Conn. Fair Hous. Ctr., Inc. v. Rosow, No. 3:10-cv-01987-MRK (D. Conn. Dec. 17, 2010) (settled May 7, 2013) (complaint and settlement agreement on file with authors).

200. The ACS data also provide tables on disability by race and gender, but not combined with employment status. If a case required data on disability status combined with other factors (e.g., rent levels, gender, race, or familial status), one would need to use the PUMS data and create the particular combinations of groups to compare.

201. This is the same format as the 2010–2014 example (C18120 for the United States) used as an example of an ACS table. *See supra* Part II.A.1.

whom 112,366 are not employed; thus, the disqualified group accounts for 22.17% of all non-disabled persons (112,366 ÷ 506,915).

The differences are statistically significant at well beyond the 99% level. The disparity ratio is therefore 2.57 (57.00% ÷ 22.17%), which is well above the 1.25 standard for establishing a prima facie case of disparate impact.[202] The remaining questions in the case would be whether the defendant-landlord could prove a sufficient justification for its policy and, if so, whether the plaintiff could identify a less discriminatory alternative.[203]

c. *Minimum Credit-Score Requirements—Race and National Origin*[204]

Credit scores are a convenient way for lenders and other businesses to gauge an individual's creditworthiness and are regularly used by mortgage providers, home insurers, and some landlords to evaluate applicants.[205] For example, a landlord might refuse to rent to—or demand more financial security from—applicants with a FICO credit score below, say, 620.[206]

202. *See supra* notes 98–99 and accompanying text.

203. *See supra* Part I.B.2. Assuming that the landlord's legitimate concern is the prospective tenants' financial ability to pay the rent, alternatives might include requiring prospects to show their having successfully paid rent in the past, either from personal resources or from a government subsidy program.

With respect to inquiries directed to disabled prospects, HUD and other agencies have cautioned lenders about possible disability-discrimination issues raised by their questioning an applicant's use of Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). *See* CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2014–03, SOCIAL SECURITY DISABILITY INCOME VERIFICATION (NOV. 18, 2014), *http://files.consumerfinance.gov/f/201411_cfpb_bulletin_disability-income.pdf* (summarizing and providing citations to guidance on this topic from HUD, CFPB, VA, Fannie Mae, and Freddie Mac). Violation of this guidance may lead to a FHA complaint. *See* Charge of Discrimination against Bank of America (HUD Jan. 23, 2012), http://portal.hud.gov/hudportal/documents/huddoc?id=12bankofamerica508.pdf.

204. The discussion in this section also reveals grounds for possible claims based on disability and familial status. *See infra* note 209.

205. *See Credit Scores and Credit Reports: Problematic Uses and How They Worsen the Racial Economic Gap*, NAT'L CONSUMER L. CTR., (May 20, 2014), *http://www.nclc.org/national-elder-rights-training-program/housing-consumer-related-issues/credit-scores-and-credit-reports-problematic-uses-and-how-they-worsen-the-racial-economic-gap.html*.

206. The most popular credit score is Fair Isaac's "FICO," which uses a range of about 300–850. *See, e.g.*, Ann Carrns, *Is That Credit Score a FICO, or a FICO 8?*, N.Y. TIMES (May 10, 2012, 3:44 PM), http://bucks.blogs.nytimes.com/2012/05/10/is-that-credit-score-a-fico-or-a-fico-8/. About 25% of Americans' FICO scores are 620 or below, and this group is disproportionately made up of blacks and Hispanics. *See infra* note 207 (describing Freddie Mac study).

A number of studies have shown that credit scores have a discriminatory effect on racial minorities.[207] However, the data underlying these studies are not produced on a regular basis and are not broken down by local areas. Indeed, no data set is publicly available that could be used to link race and credit scores for a local housing market. Commercial services may sell aggregate credit-score data by local areas, but linking this to race (e.g., based on an area's racial make-up) is tenuous, partly because these data are often produced by ZIP codes, which are generally too large to make clear distinctions by race.

Some FHA claims have challenged the use of credit scores by mortgage lenders and home insurers,[208] but we know of no reported decision that has yet ruled on such a claim against a landlord.[209] If such a claim were to find sufficient data to establish a prima facie case of disparate impact, it might well succeed, either because the defendant-landlord could not satisfy its burden of justification or the plaintiff could show a less discriminatory alternative.[210]

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207. *See* NAT'L CONSUMER L. CTR., *supra* note 205 (citing, *inter alia*, CONSUMER FIN. PROT. BUREAU, ANALYSIS OF DIFFERENCES BETWEEN CONSUMER AND CREDITOR PURCHASED CREDIT SCORES 20 (Sept. 2012), *http://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf* (median FICO score for majority-minority areas was 34 compared to 52 for low-minority areas on 100-point scale); BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT O-13 (2007) (mean scores of blacks was half of whites (25.6 versus 54.0 on 100-point scale); FED. TRADE COMM'N., CREDIT BASED INSURANCE SCORES 3 (2007) (blacks and Hispanics are strongly over-represented in the lowest scoring categories); FREDDIE MAC, AUTOMATED UNDERWRITING: MAKING MORTGAGE LENDING SIMPLER AND FAIRER FOR AMERICA'S FAMILIES (1996) (blacks are three times as likely to have FICO scores below 620 as whites; Hispanics are twice as likely as whites to have FICO scores below 620)).

208. *See supra* note 39 (claim against home insurer using FICO).

209. For a description of the recent filing of such a case, see John Reinan, *Upmarket Changes at Richfield Complex Spark Federal Lawsuit*, MINNEAPOLIS STAR TRIB. (Feb. 4, 2016), http://www.startribune.com/upscale-changes-at-massive-richfield-apartment-complex-spark-discrimination-lawsuit/367359251/ (describing FHA suit against landlord whose screening requirements included a minimum credit score of 625 and an income of three times the rent, which allegedly would negatively impact people of color, families with children, and people with disabilities); *see also* Crossroads Residents v. MSP Crossroads Apartments LLC, No. CV 16-233 ADM/KMM, 2016 WL 3661146, at *6-9 (D. Minn. July 5, 2016) (upholding FHA-impact claims in this case that challenged numerous screening devices, but without focusing on the credit-score requirement).

210. *See supra* Part I.B.2. Because credit scores (except some recent hybrids) do not include rent payments, they are suspect as predictors for paying rent. Therefore, landlords should be able to find better alternatives to gauge an applicant's likelihood of making future payments.

d. "No Criminal Record" Policy—Race and National Origin[211]

i. Overview; U.S. Arrest-and-Incarceration Trends and their Racial Elements

As with the other screening devices discussed thus far, the group affected by a "No Criminal Record" policy is potential applicants at the landlord's apartment complex, and the FHA-impact issue is whether the people disqualified by this policy are disproportionately racial or ethnic minorities compared with whites. We will assume that the landlord is located in a large metropolitan area and thus the data sources described earlier are able to yield, as they did in the "No Section 8" example for Washington, D.C., race-based data about persons who make up the relevant housing market.[212] Thus, the key problem will be to identify race-based data on those persons disqualified by the "No Criminal Record" policy in this market.

Imprisonment rates in the United States have increased dramatically in recent decades.[213] During this period, racial and ethnic minorities have come to account for an increasing portion of those arrested and incarcerated.[214] As far as incarceration rates, African Americans

211. The data discussed in this section also reveal grounds for a possible gender-based claim. *See infra* note 219.

212. *See supra* notes 159–60 and accompanying text.

213. *See, e.g.*, Eric Holder, U.S. Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [hereinafter Holder Remarks] ("While the entire U.S. population has increased by about a third since 1980, the federal prison population has grown at an astonishing rate—by almost 800 percent."). From 1978, the number of inmates in state and federal prisons experienced a five-fold increase, reaching a peak of 1,615,487 in 2009. *See* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014 3 tbl.2 (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf [hereinafter 2014 PRISONERS] (reporting yearly increases in the total prison population from 2004 through 2009's peak, with decreases thereafter to 2014, whose total of 1,561,525 was comparable to the 2006 figure). By 2012, an estimated 100 million Americans (nearly one in three) had some type of criminal record. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS: 2012, at 3 (Jan. 2014), https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf.

214. *See, e.g.*, Holder Remarks, *supra* note 213 (noting that "young black and Latino men are disproportionately likely to become involved in our criminal justice system"). Recent data show that African Americans and Hispanics are arrested at a rate two to three times their proportion of the general population. In 2010, African Americans accounted for 28% of all arrests, UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2010, tbl.43a (2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls, even though they made up only about 14% of the overall population. U.S. CENSUS

are imprisoned at a rate over five times higher than whites;[215] in 2010, black men had an imprisonment rate that was nearly seven times higher than white men and almost three times higher than Hispanic men.[216] Hundreds of thousands of these people are released from prison every year.[217]

ii. Relevant Data Sources and their Gaps

The primary source for crime-related data in the United States is the Justice Department's Bureau of Justice Statistics ("BJS"),[218] which publishes yearly reports that provide national statistics on the number of sentenced prisoners by race, Hispanic origin, sex, and age. A recent BJS report (reflecting data at the end of 2014) shows that, of the total of 1,508,636 prisoners subject to U.S. and state correctional authorities, blacks accounted for 36% (539,500), whites for 34%

BUREAU, C201BR-06, THE BLACK POPULATION: 2010 3 (Sept. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf.

Accurate data on the number of Hispanics arrested and convicted in the United States is limited. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT n.67 (Apr. 25, 2012) [hereinafter 2012 EEOC GUIDANCE], https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. One revealing statistic, however, is that, with respect to federal drug charges in 2008, Hispanics were arrested at a rate approximately three times higher than their proportion of the general population. *Id*.

215. *See* MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 10 (Jul., 2007), http://www.sentencingproject.org/wp-content/uploads/2016/01/Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf. Seven of the states examined in this state-by-state study had a black-to-white incarceration ratio of 10-to-1 or higher. *Id.* at 11.

216. *Id.*; *see also* 2014 PRISONERS, *supra* note 213, at 15 (reporting that at yearend 2014, 2.7% of black males, 1.1% of Hispanic males, and 0.5% of white males were serving prison sentences of at least one year); Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 256, 263 (2013) (noting that the incarceration rate for black males is seven times higher than that of white males and that "Hispanic men are nearly three times as likely to be incarcerated as White men"). In some states with large minority populations, the ratios are even higher. *See id.* at 264 (noting that, in New York state prisons in 2011, 78% of the inmates were persons of color).

217. *See, e.g.*, 2014 PRISONERS, *supra* note 213, at 10 tbl.7 (reporting that 623,990 people were released from federal and state prisons in 2013 and 636,346 in 2014); *id.* at 29 app. tbls.1 & 2 (reporting similar-to-higher figures for each year dating back to 2004).

218. *See About the Bureau of Justice Statistics*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=abu (last visited Nov. 12, 2016) (noting that the BJS collects, analyzes, and disseminates information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government).

(506,600), Hispanics for 21% (326,500), and other ethnic groups for 9% (136,100).[219]

These are national figures. The BJS's reports do include data for individual states, but these figures are not broken down by race or ethnicity.[220] As noted in Part I.C.2.a, FHA-impact cases generally require local, as opposed to national, statistics to establish a prima facie case of disparate impact;[221] national data may be used if local figures are not available and no evidence suggests that the two are markedly different,[222] but these conditions will not always be present when dealing with criminal records.[223]

Another problem is that the reports discussed here deal only with prisoners, not with ex-offenders who are back in the community and seeking housing. The BJS's annual reports do provide statistics by state for released prisoners, but these are not broken down by race, ethnicity, sex, or any other category.[224] Thus, a court assessing the racial impact of a landlord's "No Criminal Record" policy would have to make the assumption that prison data carry forward and are reflected in the post-incarceration population. This is a leap that the Equal Employment Opportunity Commission ("EEOC") has been

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219. 2014 PRISONERS, *supra* note 213, at 29 app. tbl.3. In 2011, 478 of every 100,000 white men and 51 of every 100,000 white women were imprisoned, with the comparable per-100,000 figures for black men and women being, respectively, 3,023 and 129. DeVeaux, *supra* note 216, at 264. With respect to gender in 2014, men accounted for 93% of prisoners (1,402,404). 2014 PRISONERS, *supra* note 213, at 29 app. tbl.3. Not surprisingly, the BJS reports do not include information on inmates' income or net worth.

220. *See* 2014 PRISONERS, *supra* note 213, at 3 tbl.2, 30–31 app. tbls. 4–6. The state figures are, however, broken down by gender. *See id.* at 3 tbl.2, 6 tbl.4, 31 app. tbl.6.

221. *See supra* notes 70–71 and accompanying text.

222. *See supra* notes 81–82 and accompanying text.

223. Some states and larger municipalities maintain data on arrests, convictions, and incarcerated persons broken down by race, national origin, or other categories. *See, e.g.*, STATE OF NEW YORK, DEP'T OF CORRECTIONS & CMTY. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2013, at 3–11 (2013), http://www.doccs.ny.gov/Research/Reports/2013/UnderCustody_Report_2013.pdf; *see also* Alexander v. Edgewood Mgmt. Corp., No. 15-01140 (RCL), 2016 WL 5957673, at *4 (D. D.C. June 25, 2016) (upholding FHA-impact claim challenging landlord's "No Criminal Record" policy based on crime-related statistics from the Washington, D.C. metropolitan area). In these areas, presumably this more localized data would be required. Further, some localities show markedly different rates than are reflected in the national figures. *See* MAUER & KING, *supra* note 215; 2014 PRISONERS, *supra* note 213, at 4, 7–11.

224. *See* 2014 PRISONERS, *supra* note 213, at 10–11 tbl.7. The same is true for BJS's reports concerning persons who are on probation and/or parole (i.e., they do not provide race-based or other breakdowns).

willing to make in Title VII cases,[225] but it is mostly unchartered territory in FHA challenges to landlords' crime-based screening policies.

iii. Title VII Guidance and Recent HUD Pronouncements

Title VII cases challenging the racial impact of job policies excluding persons with criminal records date back to the 1970s.[226] In 1987, the EEOC issued guidance on this topic,[227] which reinforced its long-held position that "where there is evidence of adverse impact, an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII."[228] The EEOC has maintained this position ever since, including in its most recent iteration of this guidance published in 2012.[229]

The 2012 Guidance made a number of other basic points, many of which are readily transferrable to the housing field.[230] Importantly, as to proving a prima facie case of disparate impact, the EEOC concluded that "[n]ational data supports a finding that criminal record exclusions have a disparate impact based on race and national origin."[231] Were courts to apply these Title VII principles in the housing field, it is clear that a landlord's blanket exclusion of all applicants with a criminal record would face impact-based liability under the FHA.[232]

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225. *See infra* note 231 and accompanying text.

226. *See* Green v. Mo. Pac. R.R., 549 F.2d 1158 (8th Cir. 1977); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

227. *See* U.S. Equal Emp't Opportunity Comm'n, Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987), http://www.eeoc.gov/policy/docs/convict1.html.

228. *Id.*

229. With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.

2012 EEOC Guidance, *supra* note 214, at 8.

230. These include that an employer's exclusion of people with criminal records may violate Title VII based on either an intent or impact theory. *Id.* at 3. The same general idea has long been adopted in FHA cases. *See supra* note 34 para. 2.

231. 2012 EEOC Guidance, *supra* note 214, at 9. Some Title VII cases, however, have refused to accept national figures. *See* Watkins v. City of Chicago, 73 F. Supp. 2d 944, 949 (N.D. Ill. 1999) (holding that statistical evidence that blacks have higher arrest rates than whites in the general population is insufficient to established disparate impact in defendant-City's hiring); EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 751 (S.D. Fla. 1989) (holding that plaintiffs failed to make a prima facie showing of disparate impact because statistical evidence did not sufficiently focus on the relevant labor market and applicant flow data).

232. This would certainly be true if the exclusionary policy relied on arrests as well as convictions, but it would probably also be true even if only convictions were considered. *Cf.* 2012 EEOC Guidance, *supra* note 214, at 24 (advising employers to

For its part, HUD has been relatively quiet about this issue, at least until recently. HUD's commentary to its 2013 impact regulation opined only that a FHA-impact challenge to a landlord's screening of tenants with criminal records would depend "on the facts of the situation," but it did promise "to explore the issue more fully" in the future.[233] Finally, in April of 2016, HUD's General Counsel issued a paper entitled *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.*[234] This *Guidance*, which followed by a few months a HUD directive to public housing agencies and other federally assisted housing providers on the same topic,[235] adopted many of the EEOC's positions, including endorsing the use of national statistics to prove that a landlord's use of a criminal-records screening device has a disparate impact on blacks and Hispanics.[236]

"[e]liminate policies or practices that exclude people from employment based on any criminal record"); *see also infra* note 236 para. 2.

233. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11478.

234. HUD, OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (Apr. 4, 2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf [hereinafter HUD GENERAL COUNSEL GUIDANCE].

235. *See* HUD, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS: NOTICE PIH 2015–19, at 2 (Nov. 2, 2015), http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf [hereinafter HUD PHA GUIDANCE]. This directive advised that "arrest records may not be the basis for denying admission, terminating assistance or evicting tenants," and, though it did not directly address the legality of considering conviction records, did remind its addressees of "their obligation to ensure that any admissions and occupancy requirements" must comply with the FHA and suggested some "best practices" for limiting screening policies that relate to conviction records. *Id*. at 2, 5-7.

236. *See* HUD GENERAL COUNSEL GUIDANCE, *supra* note 234, at 3 ("[N]ational statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics. . . . National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.").

With respect to Step Two of a FHA impact case's analysis, see *supra* note 28 and accompanying text, this guidance also opined that a housing provider's use of arrest records would never be justified and that its blanket ban of persons with conviction records would also not be justified. *See id*. at 5–6 ("[A] housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property. . . . A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this [Step Two] burden.").

iv. Application to "No Criminal Record" Policy

As noted in Part I.C.2.b,[237] the most commonly used method of measuring disparate impact requires dividing the number of blacks disqualified by the defendant's policy by their number in the local rental market and comparing that ratio to a comparably derived ratio for whites. The problem here is that, although the numbers for these groups in the rental market may be identified, the data for black and white ex-offenders may not be available. This is because, as noted earlier, the data sources on prisoners generally focus on national statistics and also because there are no sources for the racial make-up of released prisoners.[238]

Still, it seems legitimate to infer that the great race-based disparities in national prison data would translate into similar disparities in the population of ex-offenders now a part of most local housing markets.[239] However, even if a plaintiff challenging a "No Criminal Record" policy is able to make out a prima facie case, an additional problem might arise if the defendant-landlord is able to satisfy its burden of proving a legitimate justification for this policy. This is certainly possible; it has occasionally been done by employers in comparable Title VII cases,[240] and certain housing providers may have special reasons to be concerned about renting to ex-offenders.[241]

237. *See supra* notes 83–86 and accompanying text.

238. Another potential problem might arise if the landlord in question charged high enough rents to limit its market to those in certain income ranges, because, as noted above, the data sources on prisoners, while revealing racial information, does not include income data, see *supra* note 219, and it seems at least intuitively obvious that ex-offenders, as a group, would have less wealth than those without a criminal record.

239. In a somewhat analogous vein, Judge Gertner ruled in favor of a FHA-impact claim challenging local-residency preferences by Boston-area suburbs, noting that there is an "overarching intuitive principle that compromises their case: where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants to its Section 8 program, a selection process that favors its residents *cannot but* work a disparate impact on minorities." Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 62 (D. Mass. 2002). In an earlier decision in this case involving the plaintiffs' motion for a preliminary injunction, the First Circuit approved Judge Gertner's impact finding based on how the comparative groups would "likely" or "probably" be affected by the challenged policies. *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 47–48 (1st Cir. 2000).

240. *See, e.g.*, El v. Se. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007) (upholding on public safety grounds defendant's policy of excluding all persons ever convicted of a violent crime from the job of transit driver). *See generally* 2012 EEOC GUIDANCE, *supra* note 214, at 24 (describing certain circumstances in which an employer's screening for criminal records would be justified).

241. Federal law authorizes and in some cases mandates public housing authorities to exclude tenants with specific types of criminal records. *See, e.g.*, HUD PHA GUIDANCE, *supra* note 235, at 2 n.5 (discussing PHAs' anti-drug responsibilities). Private landlords are not subject to these restrictions, but it would seem unlikely that a court

The burden would then shift back to the plaintiff to prove a less discriminatory alternative. The most obvious alternative would be to limit the landlord's rule against persons with criminal records to only certain types of crimes and/or recent time periods (e.g., only identified crimes committed within the past five years).[242] Such an approach would reflect not only federal law's mandates to public housing agencies[243] and recent HUD guidance,[244] but also the advice of some private-landlord trade associations.[245]

As noted in Part I, while the alternative of a more limited ban on persons with criminal records may sound appealing, the issue remains whether such an alternative could be shown to have "a less discriminatory effect" than a total ban.[246] This would require proof that the smaller group disqualified by this alternative would have a lower *proportion* of blacks versus whites than the group screened out by a total ban. Given the likely absence of readily available data to make such a comparison,[247] a plaintiff might well have difficulty proving that the proposed alternative has a smaller discriminatory effect.

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would impose FHA liability on a private landlord whose crime-based screening policies simply mimic those mandated by law for federally assisted housing. *See* HUD GENERAL COUNSEL GUIDANCE, *supra* note 234, at 8.

242. To the extent that the defendant's concern is that ex-offender tenants would be more likely to repeat their criminal behavior, some knowledge about recidivism tendencies is relevant. Numerous studies have concluded that recidivism rates, albeit dependent on a number of factors, generally fall dramatically after a certain numbers of years. *See, e.g.*, AM. LAW INST., MODEL PENAL CODE: SENTENCING, DISCUSSION DRAFT NO. 5, at 118 (Apr. 18, 2013) (noting that recidivism rates are relatively low for first-time parolees, who account for over 40% of prison releases every year); *id.* at 129–30 (noting "[s]harp decline in prison releasee's reoffending rates in the months and years following release" and "the decreasing long-term risks of reoffending for ex-offenders who have remained crime free for seven to nine years").

243. *See supra* note 241.

244. *See* HUD GENERAL COUNSEL GUIDANCE, *supra* note 234, at 6–7; *cf.* 2012 EEOC GUIDANCE, *supra* note 214, at 24 (providing similar advice to employers to avoid Title VII liability).

245. According to a 2005 paper published by the California Apartment Association, which provided a number of cautions for its members who were considering adding criminal background checks to their tenant screening process, such a policy:

> must be carefully designed and consistently applied . . . . Screening criteria must be narrowly tailored to avoid illegal discrimination, while also serving the [landlord's] legitimate business goals . . . . Excluding every applicant with any criminal background, without regard to the crime and its relationship to the applicant's ability to meet tenancy obligations, is likely to run afoul of fair housing laws.

CAL. APARTMENT ASS'N, *supra* note 143, at 1. *See also* Evans v. UDR, Inc., 644 F. Supp. 2d 675, 678 n.6 (E.D.N.C. 2009) (quoting private landlord's limited crime-related screening policy).

246. *See supra* note 29.

247. *See supra* notes 220–25 and accompanying text.

e. Eviction for Domestic Violence Incidents—Sex[248]

Domestic violence is a serious problem in the United States, one part of which can be the victim's loss of housing and resulting homelessness.[249] One way this may occur is for a landlord to initiate eviction proceedings against a household that is experiencing domestic violence, with the eviction including the victim as well as the abuser.[250] The first reported FHA decision involving this scenario occurred in 2005 in *Bouley v. Young-Sabourin*,[251] where the court ruled that the defendant-landlord's action constituted unlawful sex discrimination against a female tenant.[252]

Bouley was an intent-based claim, but an impact-based claim may be envisioned against a landlord that takes similar action pursuant to, say, a "zero tolerance for crime" policy, presumably designed to protect its property or other tenants. Also in recent years, some municipalities have passed ordinances requiring the eviction of tenants whose apartments have been the scene of violent incidents or whose calls for police help are perceived to be excessive.[253]

In 2011, HUD issued internal guidance on the FHA implications of these situations, which included the suggestion that a disparate-impact claim might arise "in the context of 'zero-tolerance' policies, under which the entire household is evicted for the criminal activity of

248. The data discussed in this section also reveal grounds for possible race and national origin claims. *See infra* note 254.

249. *See* AM. CIVIL LIBERTIES UNION, SAFE HOMES, SAFE COMMUNITIES: A GUIDE FOR LOCAL LEADERS ON DOMESTIC VIOLENCE AND FAIR HOUSING (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-safehomes-v04_0.pdf; Brief for Am. Civil Liberties Union et al. as Amici Curiae Supporting Respondents, Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), at *21 [hereinafter ACLU Brief].

250. *See* Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 377 (2003).

251. 394 F. Supp. 2d 675 (D. Vt. 2005).

252. An earlier case based on similar facts was filed in 2001 as a result of the tenant's FHA complaint to HUD, but this case was settled without a reported opinion. *See* Consent Decree, United States *ex rel*. Alvera v. C.B.M. Group, Inc., No. 01-857-PA (D. Or., Nov. 5, 2001).

253. *See* Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1187–95 (2008). For a FHA case challenging such an ordinance as sex-based discrimination, see Briggs v. Borough of Norristown, No. 2:13-cv-02191-ER (E.D. Pa. amended complaint filed Oct. 10, 2013). The settlement in the *Briggs* case is available at https://www.aclu.org/sites/default/files/field_document/2014.09.18_-_release_and_settlement_agreement_-_fully_executed.pdf (last visited Nov. 12, 2016).

As a result of these ordinances, many landlords seek to avoid their sanctions and eliminate the problem "by evicting the unit's tenants, including victims of domestic violence who may need to reach out to police repeatedly due to the conduct of their abusers [citing authorities]." ACLU Brief, *supra* note 249, at 26.

one household member."[254] This guidance stated that "[s]tatistics show that women are overwhelmingly the victims of domestic violence [and] that discrimination against victims of domestic violence is almost always discrimination against women."[255]

While this may seem obvious, it will not always be easy to prove in a particular FHA-impact case. For one thing, the defendant's policy would presumably be not just against domestic-violence crimes, but crime in general (in which case the negatively affected group is much larger and presumably more gender-diverse). For another, the studies relied on in HUD's 2011 guidance are now quite old and reflect national, as opposed to local, data.[256]

For example, if a FHA-impact claim were to challenge a "zero tolerance for crime" policy of a landlord in, say, Lexington, Kentucky, there seem to be no data sources in this geographic area that provide gender-based statistical breakdowns for domestic-violence victims.[257] Of course, a judge might simply be willing to "notice" that a policy used to evict domestic-violence victims would disproportionately

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254. Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, HUD, to FHEO Directors on Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA) 5 (Feb. 9, 2011), http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf.

Such claims, according to this guidance, "are generally based on sex, but may also involve other protected classes, in particular race or national origin. . . . For example, African-American and Native American women experience higher rates of domestic violence than white women [citing a 2004 Bureau of Justice Statistics report]." *Id.* at 1–2.

255. *Id.* at 2. In support of this proposition, the HUD guidance cited two 2003 reports, the most pertinent of which was a report by the Bureau of Justice Statistics finding that 85% of victims of domestic violence were women. *Id.*

256. *See id.* More recent sources (from 2010–2011) are cited in ACLU Brief, *supra* note 249, at *29 n.12, but again these sources are based on only national data. In any event, those data only reflect incidents of domestic violence reported by the victims, which is to say a perhaps non-representative sub-group of all domestic-violence incidents.

257. Email from Diane Follingstad, Director, Univ. of Ky. Ctr. for Research on Violence Against Women, to Robert G. Schwemm (Feb. 11, 2016) (on file with authors). The best source would probably be the Kentucky Coalition Against Domestic Violence (KCADV), which administers and keeps statistics on 15 domestic-violence programs in the state. *See Statistics*, KCADV, http://kcadv.org/content/statistics (last visited Nov. 20, 2016). The statistics reported by the KCADV do give gender-based breakdowns for those persons served by these programs (e.g., those taken in at the programs' shelters), which show an overwhelming majority being female. However, these data are not broken down by geographic area, nor do they purport to reflect the overall population of domestic-violence victims in the state or any part thereof.

harm women,[258] but if instead the court required statistical proof of the kind usually demanded in FHA-impact cases, the plaintiff-tenant in this type of FHA-impact claim might not be able to establish a prima facie case.

f. English-Language Requirements—National Origin[259]

Some landlords require their tenants to speak English or at least have a household member who does, a screening device that has occasionally been challenged as national origin discrimination.[260] The FHA-impact issue here would be whether an English-language requirement disqualifies members of certain national origins at a significantly higher rate than others in the relevant local housing market. As in the previous example dealing with domestic violence and gender discrimination, the answer here may seem obvious—that Hispanics (i.e., those with Spanish-speaking origins) would be disproportionately harmed by this policy—but proving this may not always be easy.

The 1-Year and 5-Year ACS tables provide from 61 to 80 tables that include data on the language spoken at home. In addition, the PUMS data provide detailed information that may be helpful in assessing whether particular national origins are likely to be impacted by

258. *See supra* note 239 (describing case in which courts found that a local-preference system used by a predominantly white suburb in a racially mixed metropolitan area would disproportionately harm blacks).

259. The data discussed in this section may also reveal grounds for possible race, religion, and disability claims. *See* HUD, OFFICE OF GENERAL COUNSEL GUIDANCE ON FAIR HOUSING ACT PROTECTIONS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY 2 & n.13 (Sept. 15, 2016), http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf.

A somewhat related, but clearly distinct, issue would be presented by a national-origin challenge to a landlord's requirement of proof of U.S. citizenship or legal residency (e.g., a Social Security card). *See id*. at 3 (noting that a "requirement involving citizenship or immigration status will violate the Act when 'it has the purpose or [unjustified] effect of discriminating on the basis of national origin'"); Keller v. City of Fremont, 719 F.3d 931, 949 (8th Cir. 2013) (expressing skepticism, in one panel member's opinion, about FHA-impact challenge to municipal ordinance that restricted housing opportunities for aliens not legally in the country which allegedly disproportionately harmed Latinos).

260. *See, e.g.*, Veles v. Lindow, 243 F.3d 552 (table), 2000 WL 1807851 (9th Cir. Nov. 1, 2000) (ruling against challenge to landlord's requirement of one English-speaker in the household, both because of insufficient evidence of impact and because defendant's justification was held sufficient); Cabrera v. Alvarez, 977 F. Supp. 2d 969 (N.D. Cal. 2013) (rejecting impact claim but upholding intent claim under the FHA and upholding intent claim under Title VI against public housing authority's English-based rule); *see also* Nat'l Multi-Housing Council v. Jackson, 539 F. Supp. 2d 425 (D.D.C. 2008) (rejecting housing providers' challenge to HUD's Title VI guidance (Jan. 22, 2007) regarding tenants with Limited-English-Proficiency).

an English-language requirement.[261] The PUMS data include variables designed to identify both persons and households where people have a limited proficiency in English.[262] The PUMS variables also include questions on the language spoken at home, citizenship, immigrant status, ancestry, Hispanic or Latino origin, and race. These variables can be combined with any of the other housing or population variables to create comparison groups. Using the 5-Year PUMS data in these cases would allow basing the groupings and estimates on the largest possible sample.

B. Zoning Restrictions on Housing Developments

Zoning and other land-use policies define where and how housing may be built. Among other things, these policies directly affect the cost of housing. This, in turn, may restrict the ability of developers to provide affordable units of particular importance to racial minorities or other protected classes, thus creating potential FHA disparate-impact claims.[263] The situations discussed in this section may also include issues of residential segregation, which often relate to differences in the respective income levels of blacks and Hispanics compared to whites.

We examine below three zoning hypotheticals of increasing complexity. The use of actual places demonstrates how different sources

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261. For a description of the PUMS data, see *supra* Part II.A.2.

262. The PUMS definition of the variable for defining limited English speaking households is:

> This variable identifies households that may need English-language assistance. A "Limited English speaking household" is one in which no member 14 years old and over (1) speaks only English at home or (2) speaks a language other than English at home and speaks English "Very well." After data are collected for each person in the household, this variable is calculated by checking if all people 14 years old and older speak a language other than English. If so, the calculation checks the English-speaking ability responses to see if all people 14 years old and older speak English "Less than 'very well.'" If all household members 14 and over speak a language other than English and speak English "Less than 'very well,'" the household is considered part of this group that may be in need of English language assistance. All members of a household were included in this group, including members under 14 years old who may have spoken only English.

U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY AND PUERTO RICO COMMUNITY SURVEY: 2014 SUBJECT DEFINITIONS 46 (2014).

263. While these examples show how disparate-impact claims should be analyzed, the analysis may also serve in some cases to support intent-based claims by showing that the defendant's action caused a significant race-based disparity. *See supra* note 34 para. 2 (noting that evidence of disparate impact may show intentional discrimination).

of data may be needed to measure a zoning change's disparate impact on racial minorities. Based on the scenarios' differences, each is found to be best analyzed by using a different data source.

1. Zoning that Limits Multifamily Housing

Assume that a city (say Newport News, Virginia) re-zones a large segment of undeveloped land from a residential category that allows both single-family housing (one–two units) and a range of multifamily housing (defined as 3–49 units) to a category that allows only single-family.

a. Identifying the Affected Group and Groups to be Compared

As in all disparate-impact analyses, the first step is to identify the group that is harmed by this zoning change. Here, this would be all households that live in buildings defined by the city's zoning code as multifamily structures. Separating these households according to whether they rent or own is not necessary, because the zoning change affects the number of units in a structure, not the type of ownership (e.g., under the pre-change zoning, all of the area could be built with multifamily units that are owned condominiums or rental units).

To determine whether the zoning change has a disparate impact on blacks first requires an identification of the city's racial make-up. In the case of Newport News, the city is mostly white (53.9%), but with a large black population (42.3%).[264]

b. Identifying the Best Data Source

Census Bureau data provide race-based information on the number of units in the structures where people currently live. Because the focus here is only on households' race and the number of units in the structures where they live, the Bureau's ACS preformatted tables are sufficient; that is, they provide a breakdown of the number of units in the structure separately for blacks and whites, and therefore the additional detailed information provided in the PUMS data is not needed.[265] For Newport News, the ACS's Tables B25032B and B25032H for 2014 provide these data for, respectively, households

264. *See* American Community Survey 2014 1-Year Estimates, Table DP05 - "ACS Demographic and Housing Estimates," City of Newport News (figures are for race alone or in combination).

265. For descriptions of the ACS and PUMS data, see *supra* Part II.A.

that are black (alone) and white (alone and not Hispanic).[266] This allows for a straightforward comparison of the percentage of black and white households that live in structures with three or more units.

c. *Measuring the Racial Disparity*

The relevant ACS tables estimate that 41.62% of the 28,215 black households live in structures with 3–49 units, while 18.84% of the 32,960 white households live in such structures. Using the Census Bureau's instructions for calculating standard errors from these data, the Z-score for the test for statistically significant differences in these percentages is 5.15, which is well beyond what is required for a 99% confidence level.

Thus, the disparity ratio is 2.21 (41.62% ÷ 18.84%), which means that black households are more than twice as likely to live in these structures compared to whites and which is large enough to establish an actionable disparate impact.[267] The situation here is one where the ACS data fit the case's facts and enable an analysis that proves a prima facie case of disparate impact.

2. *Zoning that Raises the Cost of Rental Housing*

Here, assume that a municipality changes the height limits for multifamily construction, so that an apartment developer cannot build as many units on the site and will therefore have to increase monthly rents from, say, \$700–\$900 to \$1,100–\$1,300 for two-bedroom units and from \$900–\$1,100 to \$1,500–\$1,700 for three-bedroom units.

a. *Identifying the Affected Group and Groups to be Compared*

The affected households are those that rent two- and three-bedroom units in the lower rent ranges that would have been charged under the prior height limits. The increase in housing costs restricts their opportunities in the market, while households that rent at the higher rents projected after the change would have an increased supply of housing.

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266. Comparable preformatted tables are provided for other racial groups and for Hispanics and provide data based on selected ranges for the number of units in a structure. These ranges may not always fit the definitions for a particular zoning code; if not, the PUMS data might be used, at least if the geographic areas for PUMS align reasonably well with the municipal boundaries within which the zoning policy applies. For a description of this element of the PUMS data, see *supra* notes 116–17 and accompanying text.

267. *See supra* notes 98–99 and accompanying text.

Again using Newport News as an example, the Census Bureau data on income ranges by race indicate that whites typically have higher incomes than blacks.[268] Because differences in income will likely reflect differences in the ability to pay increased rents, the comparison groups are black and white rental households.

b. Identifying the Best Data Source

The principal method for measuring disparate impact requires comparison of the percentages of white and black renter households that pay rent in certain ranges.[269] The ACS's preformatted tables do not provide data on rent levels by race or ethnicity. However, the PUMS data do identify households by race and rent levels, specifically for two- and three-bedroom units.

PUMS areas ("PUMAs") often match whole counties and may roughly match large cities, but they typically do not match the boundaries of smaller municipalities. In this case, Newport News is an independent city that is not within a county.[270] PUMAs for these Virginia independent cities may match, or roughly match, the boundaries of a city when it has a population of 100,000 or more. For Newport News, the municipal boundaries align with a single PUMA.[271] Therefore, the PUMS data may be used here.

c. Measuring the Racial Disparity

The goal in this case is to measure the zoning change's comparative impact on black-versus-white renter households that pay the relevant rents. The first test compares the percentage of black renters who pay rents at the lower ranges for two- and three-bedroom units to the comparable percentage of white renters who pay rents at the higher ranges for these units. Estimates from the PUMS data indicate that Newport News has 17,904 black renter households, 3,915 of whom pay rents of $700–$900 for two-bedroom units or $900–$1,100 for three bedroom units; that is 21.87% (3,915 ÷ 17,904) of all black renters. As for the higher projected rents, the PUMS data estimate that 1,001 black renters pay $1,100–$1,300 for two-bedroom units or

268. See the 2014 ACS 1-Year data on income by race for Newport News, Table B19101B for blacks and Table B19101H for whites.

269. *See supra* notes 83–86 and accompanying text.

270. *See generally History of Consolidation*, NEWPORT NEWS, VA., https://www.nnva.gov/282/History-of-Consolidation (last visited Nov. 22, 2016).

271. Had the PUMS data not matched the city of Newport News, one might use different combinations of PUMS data for areas in and around the city to verify that the disparities are not peculiar to the finite boundaries of this one municipality.

$1,500–$1,700 for three-bedroom units; that is 5.59% (1,001 ÷ 17,904). Following the Census Bureau's instructions for calculating standard errors for the PUMS data, the Z-Score is 5.06, well above the level required for a 99% level of confidence. The disparity ratio is 3.91 (21.87% ÷ 5.59%), indicating that black households are almost four times as likely to pay rent in the lower ranges than in the higher ranges.

The question is whether this disparity is greater for blacks than whites. The PUMS data estimate that Newport News has 10,852 white renter households, 1,591 of whom pay rents of $700–$900 for two-bedroom units or $900–$1,100 for three-bedroom units; that is 14.66% (1,591 ÷ 10,852) of all white renters. For the higher rents, the PUMS data estimate that 1,189 white renters pay rents of $1,100–$1,300 for two-bedroom units or $1,500–$1,700 for three-bedroom units; that is 10.96% (1,189 ÷ 10,852). However, the statistical test for significant differences in these percentages produces a Z-Score of only 0.9, which is well below what is required for even a 95% level of confidence. Therefore, it cannot be shown that there is a statistically significant difference in the percentages of white renters based on the change in the rent levels.

Another option is to compare the net percentages of black and white households impacted by the zoning change. For both white and black renters, the percentage of households that rent at the lower ranges is greater than the percentage that rents at the higher levels. The difference between the percentage that rent at the lower ranges and the higher ranges is the net percentage of households impacted by the change.

This net change for black renter households is 16.28% (21.87% at the low ranges minus 5.59% at the high ranges). The comparable figure for whites is 3.70% (14.66% at the low ranges minus 10.96% at the high ranges). The test for the differences in these percentages produces a Z-Score of 4.19, well above the level required for a 99% level of confidence. The disparity ratio is 4.40 (16.28% ÷ 3.70%), indicating that black households are harmed by the zoning change at a rate more than four times that for whites and satisfying the standards for showing a sufficiently large disparate impact.[272] This example shows that there may be more than one way to test for a disparate impact, although each must fit the case's facts and they may not all produce a statistically significant measure of impact.

272. *See supra* notes 98–99 and accompanying text.

3. *Zoning that Raises the Cost of Homeownership*

Assume that a suburb of 25,000 people in a metropolitan area rezones a large undeveloped parcel of land zoned for single-family housing to require larger lot sizes. With the prior lot sizes, developers in the area have been building single-family homes that sell in the range of $170,000 to $225,000. Because of the cost of land, developers are now proposing that the new homes will sell in the $230,000–$285,000 range. This situation is similar to the rental case just discussed, but here the zoning change affects home prices rather than rents.

a. *Identifying the Affected Group and Groups to be Compared*

The affected households are those that purchase homes in the lower price range prior to the zoning change. The increase in housing costs restricts their opportunities in the market, while households that purchase homes at the higher price range projected after the zoning change would have an increased supply of housing.

Minneapolis provides an example of a metropolitan area with relatively small minority populations. Black households account for 17% of the 169,306 households in Minneapolis and about 11% of the 493,219 households in the larger Hennepin County area where the city is located.[273] As was true for Newport News in the previous example, black incomes tend to be lower than white incomes for both Minneapolis and Hennepin County.[274] Moreover, homeownership levels for blacks are much lower than for whites: in Minneapolis, about 21% of black households are owners, while 58% of the white households are; in Hennepin County, 24% of black households are owners, while 71% of the white households are. Viewed in terms of their share of the homeownership market, blacks represent just over 7% in Minneapolis and about 4% in Hennepin County.[275]

Are black households disproportionately harmed by this zoning change? Because the change affects home-sale prices, the base comparison groups should be taken from the market of those households that are owners. As with the Newport News rental example, the disparities to be tested are based on the differences in the share of black

273. See the 2014 ACS 1-Year data on housing tenure and race for Minneapolis and for Hennepin County, Table B25003 for all households, Table B25003B for black households, and Table B25003H for white households.

274. See the 2014 ACS 1-Year data on income by race for Minneapolis and for Hennepin County, Table B19101B for blacks, and Table B19101H for whites.

275. *See supra* notes 273–74.

and white homeowners that live at properties in the price ranges before and after the rezoning. Moreover, in order to make a reasonable estimate of the home-buying market in the near future, the comparison groups should also be focused as much as possible on current housing prices and conditions.

A market area must be identified. The area needs to be large enough to provide a sound profile of existing housing patterns for the comparisons, but the suburb here has only 25,000 persons. Given the small size of the black homeownership market, a larger area is required in order to show race-based market patterns. The Census Bureau data on homeownership by race used thus far indicate that about half of the black homeowners live in Minneapolis and the rest live outside the city in the suburbs of Hennepin County. While one might want to select multiple areas to test for the consistency of the results, Hennepin County will serve as the market area for the following analysis.

b. Identifying the Best Data Source

When the case involves a relatively small protected-class population, finding a proper data source may be problematic. The PUMS data contain codes for homeownership, race, the value of the home, and the year that the household moved in. At first glance, this would appear to provide the match needed to compare white and black households that purchased homes recently by the value of those properties.

There are 10 PUMS areas that fall within the boundaries of Hennepin County. Collectively, the 1-Year 2014 PUMS data for these PUMAs provide a large sample to work with. These data estimate that 1,101 black households own their homes and moved in within the last two years, 144 of whom have homes in the $170,000–$225,000 range and 262 of whom have homes in the $230,000–$285,000 range.

A problem arises, however, because the PUMS estimates are based on weights assigned to individual households using a complex sampling design.[276] In this case, there was only one respondent household with a weight of 144 units that produced the data for the low range and only two respondents that produced the estimate for the higher range. With estimates based on so few respondents, the PUMS data are not reliable enough to support a disparate-impact analysis.

276. The more respondents in the sample, the more accurate the estimates should be. The more detailed the screening process, however, the fewer the number of individual respondents that are used for the estimate for the screened group.

Although the base of respondents can be increased by using multiple years of PUMS data, this would introduce data from less recent home-market conditions and still might not guarantee a more reliable estimate for small groups.

Fortunately, there is another data-source option—the Home Mortgage Disclosure Act (HMDA).[277] HMDA data provide annual reports that include the loans originated for home purchases with codes for race, ethnicity, and the value of the loans. The data are not a sample, but report every individual loan made by a covered lender with codes for the state, county, and census tract for the loan.[278]

There may be some problems, however, with using the HMDA data. One is that these data do not include home purchases unless they involve mortgage loans (e.g., cash purchases are not reported), but this may be accounted for.[279] Another issue with the HMDA data is that they report the loan amount, but not the sale price. Different types of loans (conventional, FHAdm-insured, and VA) typically have different limits on the loan to-value-ratio ("LTV"). These differences can be accounted for either by marking up the loans to an estimated sale price differently for each type of loan based on market conditions and industry reports, or by using a series of different levels of markups and testing each one to ensure that these differences do not substantially affect the disparate-impact analysis.

The illustration here uses a single markup of the HMDA loans applied to the combined HMDA data for Hennepin County for 2013 and 2014. The HMDA data indicate that about 77% of the loans are conventional loans, which generally have LTVs of 80% or less, and about 23% of the loans are FHAdm-insured or VA, which often have

277. For a description of HMDA, see *supra* Part II.B.

278. As discussed in Part II.B, the vast majority of, but not all, mortgage lenders are required to report HMDA data; there are also some exemptions for reporting race and ethnicity data. *See supra* note 119 and accompanying text.

279. The effect of this gap may be estimated where there are available data from the real estate sales industry on cash sales. The PUMS data can provide some estimates from the full market, because these data have codes for owners that have a mortgage and those that do not. The level of cash sales might be estimated by reviewing the percentage of owner households that moved into their homes in the last two years with and without a mortgage. Overall, the 2014 PUMS data estimate that 22% of these homeowners do not have a mortgage. The rate appears to be lower for lower priced homes: about 17% of the owners with home-values in the \$170,000–\$225,000 did not have a mortgage, while a comparable figure for owners with values over \$300,000 is estimated at 29%. Thus, these data indicate that home purchases using mortgage loans represent roughly 80% of the overall market, while cash sales are more common for higher priced home sales.

LTVs above 90%. The calculations below assume an overall LTV of about 85% and mark up the HMDA data to estimate the sales price.[280]

c. Measuring the Racial Disparity

The HMDA data on individual originations report 29,746 first-lien home purchase loans for owner-occupants in Hennepin County. Of these loans, 23,701 (79.68%) were to whites, and 1,004 (3.38%) to blacks. The data for the 1,004 black loans allow a reasonable estimate of the share of blacks who recently purchased homes in the value ranges at issue here.

The HMDA data indicate that 319 (31.77%) of the black loans and 5,023 (21.19%) of the white loans were for home prices estimated to be in the lower range of $170,000–$225,000. These differences are statistically significant at more than the 99% level.[281] The disparity ratio is 1.50 (31.77% ÷ 21.19%).

As for higher priced houses, the HMDA data indicate that 135 (13.45%) of the black loans and 4,062 (17.14%) of the white loans were for home prices estimated to be in the higher range of $230,000–$285,000. These differences are also statistically significant at more than the 99% level. However, the disparity ratio here is only 0.78 (13.45% ÷ 17.14%), which means that a greater proportion of whites are likely to purchase in this higher range than blacks.

Still, the percentages of both whites and blacks purchasing homes in this higher range are smaller than their respective percentages at the lower price range. As with the Newport News rental example, one can calculate the percentages of black and white purchasers who would be less likely to purchase at the higher range to see if this difference is significant. The data show that 184 (18.33%) of the black purchasers would be adversely affected and 961 (4.05%) of the white purchasers would be. These differences are statistically significant at well above the 99% level. The disparity ratio is thus 4.52 (18.33% ÷ 4.05%), indicating that blacks are more than four times as likely to be adversely affected by the zoning change than whites.

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The three zoning-change examples dealt with in this section demonstrate that there are different methods and different sets of data

280. In a formal disparate-impact assessment, one would likely want to apply more than one markup estimate.

281. Although the HMDA data are not technically samples that require statistical tests for differences, subjecting this data to such a test does provide a more conservative approach and allows for some random error in reporting.

that may be used in FHA-impact challenges to evaluate various types of zoning policies. Each data set has strengths and limitations. Where possible, FHA plaintiffs would be well advised to experiment with multiple approaches that apply more than one method of analysis and more than one source of data.

Conclusion

The Supreme Court's decision in *Inclusive Communities* upheld impact claims under the Fair Housing Act and thereby sought to strengthen the FHA's role in integrating American society by removing artificial barriers to minorities' housing choices. Along with HUD's 2013 regulation endorsing FHA-impact claims, the *Inclusive Communities* decision is likely to unleash a wide variety of legal challenges to housing-limiting policies of landlords, municipalities, mortgage lenders, and others that disproportionately harm FHA-protected classes.

These claims are governed by a three-step burden-shifting approach, the first of which requires a plaintiff to prove that the defendant's policy causes disproportionate harm to a racial minority or other protected class. *Inclusive Communities* mandates that plaintiffs' claims in this first stage be carefully scrutinized and, if not based on appropriate statistical evidence, dismissed before trial.

This Article provides guidance for what such evidence should entail. After identifying the appropriate legal precedents and key data sources, we show through examples how to properly analyze the most important types of FHA-impact claims, such as those involving landlords' screening devices and those challenging local governments' restrictions on affordable housing. In working through these examples, we also suggest a generalized method for developing and presenting FHA-impact evidence that identifies the necessary steps for establishing a prima facie case and the methods for handling the various sources of relevant data.

The impact theory of liability endorsed by *Inclusive Communities* creates both great possibilities and great challenges for FHA litigation. As this Article shows, given the appropriate legal and statistical principles and the data available, certain types of these claims may be hard to prove. Thus, while the promise of *Inclusive Communities*—that FHA-impact claims can help break down arbitrary barriers to a more integrated society and enhance housing choice for all Americans—is possible to fulfill, it will take serious effort by those seeking to litigate these claims.

APPENDIX A: WHEN USING ABSOLUTE (RAW) NUMBERS MAY BE APPROPRIATE

A fundamental principle in disparate-impact cases is that the disparities shown should result from comparing the *proportions* of the groups affected by the defendant's challenged policy and not simply the raw numbers.[282] The table below shows why this is important. It presents three comparisons of the differences in the affected minority and white households. In both Sample #1 and Sample #2, 35% of the minority households and 25% of the white households are affected, thus producing a disparity ratio of 1.4 (35% ÷ 25%), which is probably high enough to establish an actionable FHA-impact claim.[283] Yet in each case, the actual number of white households affected is greater (50 white versus 35 minority in Sample #1; 500 white versus 350 minority in Sample #2).

Test of Differences in Population Percentages and Numbers Affected

	Sample #1	Sample #2	Sample #3
Number of Minority Households Affected	35	350	350,000
Total Minority Households	100	1,000	1,000,000
Percent Affected	35%	35%	35.0%
Number of White Households Affected	50	500	690,000
Total White Households	200	2,000	2,000,000
Percent Affected	25%	25%	34.5%
Disparity Ratio (Minority % / White %)	1.40	1.40	1.01
Difference in Proportion Test Z-Score	1.81	5.73	8.58
Test Value Required for Statistical Significance	1.96	1.96	1.96
Differences Statistically Different?	NO	YES	YES
Minority Households Affected at White Rate	25	250	345,000
Difference Based on Actual Minority Rate	10	100	5,000

However, there are situations where considering raw numbers along with percentages may be important in assessing a FHA-impact claim. For example, in Sample #1, the Z-Score that measures the level of differences in the proportions statistically is only 1.81, when a value of at least 1.96 is required for the 95% confidence level that is typically sought.[284] Moreover, a defendant or court may object that,

282. *See supra* notes 64–65 and accompanying text.
283. *See supra* notes 98–99 and accompanying text.
284. *See supra* notes 103–106 and accompanying text. On the other hand, slight changes in the base numbers for small samples can make a large difference in the statistical test results. Had just one more minority household been affected by the

because so few households are adversely affected, the differences are inconsequential.[285] In responding to such an objection, it is important to select the appropriate raw numbers to review. Because at least some members of every group being compared are usually affected by the challenged policy, the issue might become whether the *additional number* of minority households affected in this example is enough to justify a FHA claim.

The table's second-to-last row calculates the number of minority households that would be affected if the proportion of minority households were equal to the proportion of white households affected (i.e., there is no disparity). The difference between this number and the estimate of the actual number of minority households affected represents the estimate for the actual number of households that account for the disparity. If the white and minority households were equally affected at the white rate, then 25 minority households would be affected, instead of the sample data's indication that 35 minority households were affected. Thus, the difference that accounts for the 1.40 disparity ratio is only 10 minority households (35-25).

In an absolute sense, this number—10 households—is small, yet it represents 10% of all the minority households in the sample. Given the small size of the total minority population in Sample #1, the 10 households that account for the disparity may or may not justify a FHA claim. In Sample #2, by contrast, the minority households, which again account for 10% of the minority population and again yield a 1.4 disparity ratio, represent 100 households (i.e., ten times as many as in Sample #1), thus perhaps justifying a FHA claim.

Sample #3 represents a related, but more complicated, set of issues. The test here shows the highest level of statistical significance of all the examples, but this is largely the result of the sample's size. The actual proportions affected in Sample #3 are similar for both blacks and whites (i.e., 35.0% and 34.5%, respectively), so that the disparity ratio is only 1.01 (35.0%% ÷ 34.5%), which is well below the threshold for an actionable difference. On the other hand, the 5,000 minority households that account for the disparity is large, perhaps enough so to justify a FHA claim.

In sum, while there is no simple test or rule upon which to rely in all circumstances, a proper evaluation of the data may require consideration of the raw numbers, as well as the percentages, that account

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policy, the statistical test score would have been 1.99, which is just above the level needed for statistical significance at the 95% confidence level.

285. *See, e.g.*, Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1286 (11th Cir. 2006).

for the disparities in order to anticipate critical issues in FHA-impact cases.[286]

286. Any use of raw numbers should consider the case's context. For example, the number of Section 8 households in a particular apartment complex that might be eliminated as a result of a defendant's challenged policy may appear to be an insignificant number compared to all of the households in the local rental market, but they are likely to represent a much larger share of all of the existing Section 8 voucher holders.

APPENDIX B:
FACTORS INFLUENCING IMPACT CALCULATIONS BASED ON ALTERNATIVE COMPARISON METHODS (DISPROPORTIONATE ADVERSE IMPACT AND DISPROPORTIONAL REPRESENTATION)

As described in Part I.C.2.b,[287] the two most common methods of comparison used to evaluate how a defendant's challenged policy affects different groups in FHA-impact cases are: (1) comparing the proportion of a protected class that is affected (e.g., Hispanics) with that of a control population that is affected (e.g., whites), which is sometimes called "disproportionate adverse impact"; and (2) comparing the protected class's share of those affected by the policy to its share of the general population, which is sometimes called "disproportional representation." The former produces the same results regardless of how many other groups are in the full population, but the results of the disproportional representation method may vary depending upon: (1) the presence of other groups in the general population; and (2) different approaches to defining the proportion of the protected class affected by the policy. The following pair of tables illustrate this point.

Disproportionate Adverse Impact and Version 1 of Disproportional Representation Calculations

	Hispanic	White	Black	Total
Affected	4,000	15,000	0	19,000
Not Affected	16,000	135,000	0	151,000
Total	20,000	150,000	0	170,000

Disproportionate Adverse Impact		Disproportional Representation Version 1	
% of All Hispanics that Are Affected	20%	% of All Hispanics that Are Affected	20%
% of All Whites that Are Affected	10%	% of the Population that Is Hispanic	12%
Disparity Ratio	2.0	Disparity Ratio	1.7

Version 2 and Version 3 of Disproportional Representation Calculations

	Hispanic	White	Black	Total
Affected	4,000	15,000	40,000	59,000
Not Affected	16,000	135,000	40,000	191,000
Total	20,000	150,000	80,000	250,000

Disproportional Representation Version 2		Disproportional Representation Version 3	
% of All Hispanics that Are Affected	20%	% of Total Affected that Are Hispanic	7%
% of the Population that Is Hispanic	8%	% of the Population that Is Hispanic	8%
Disparity Ratio	2.5	Disparity Ratio	0.8

The table on the left assumes a city of 170,000 households with Hispanics and whites, but no blacks. The disproportionate adverse impact method in this table compares the proportion of Hispanics affected by the policy (4,000 out of 20,000 households = 20%) to the proportion of white households affected (15,000 out of 150,000 house-

287. *See supra* notes 83–89 and accompanying text.

holds = 10%). Dividing the Hispanic percentage by the white percentage, the disparity ratio is 2.0 (20% ÷ 10% = 2.0). This table also shows a version of the disproportional representation calculation for this city. This version compares the proportion of Hispanics affected by the policy (4,000 out of 20,000 households = 20%) to the proportion of Hispanics in the total population (20,000 ÷ 170,000 = 12%). Dividing the affected Hispanic percentage by the percentage of Hispanics in the population, the disparity ratio is 1.7 (20% ÷ 12% = 1.7 (1.67 rounded to one decimal)).

The table on the right presents the same data for Hispanics and whites, but adding 80,000 blacks to the population. Version 2 of the disproportional representation shows that the existence of an additional population affects the impact calculation. The share of the total population that is Hispanic is now reduced to 8% from 12%. This increases the disparity ratio to 2.5 (20% ÷ 8% = 2.5).

Finally, the table on the right presents an additional version of the disproportional representation method that measures the percentage of all affected households that are Hispanic. In this case, the number of affected Hispanics is divided by the number of all households affected by the challenged policy. The calculation is 4,000 affected Hispanic households ÷ 59,000 total affected households = 7% (6.78% rounded to the nearest percentage). When compared to the percentage of Hispanics in the general population, the disparity ratio is 0.8 (6.78% ÷ 8% = 0.8% (8.48% rounded to the nearest percentage)). Here, the calculations are affected by both the addition of the black population and the share of the black population that is also affected by the policy. Again, however, the disproportionate adverse impact calculation disparity ratio remains the same (2.0), because it is based purely on the percentages of Hispanics and whites affected regardless of the impact on any other groups that might exist in the general population.

In sum, the disproportional representation calculations are sensitive to the number of different groups in the population as well as the precise way that the proportion of affected protected class members is defined. In this case, different measures produced disparity ratios that vary from 0.8 to 2.5. Thus, when using this method, one needs to be sure that it fits the particulars of the case involved and also take account of the different outcomes related to different versions of the measure.

Appendix C: Translating Title VII's 4/5 Rule to a 5/4 Rule for FHA Cases

This appendix provides an analysis of the mathematical relationship between assessing the size of disparity ratios based on the selection-rate method (commonly used in Title VII cases) versus the rejection-rate method (commonly used in FHA cases).[288]

The Title VII selection-rate method compares the success rates of different groups in passing an employment test, with the question being whether a protected class has a significantly lower success rate than a control group's rate. A rule of thumb for determining significance is that the protected class's rate is less than 4/5 (0.80) that of the control group. On the other hand, FHA cases typically compare relative rejection rates, with the question being whether the rejection rate for the protected class is greater than the rate for others. Thus, the comparison in FHA cases typically uses rejection rates and calculates the inverse of the ratio used in Title VII cases.

Therefore, one way to apply Title VII's measure of significance to FHA cases is to invert (or reverse) the 4/5 ratio used for selection rates and use a 5/4 ratio (1.25) for rejection rates, with a disparity ratio of 1.25 or more indicating an actionable difference.[289] Inverting the 4/5 rule maintains the dynamics of the relationship in Title VII cases that has been accepted by the courts. Mathematically, whenever the selection rate for blacks is equal to or less than 0.8 times that of whites, the inverse ratio of the selection rates for whites to blacks will be equal to or greater than 1.25.[290]

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288. For descriptions of these methods, see *supra* notes 84–86 and accompanying text.

289. For illustrations, in addition to those discussed in the remainder of this Appendix, see *supra* note 94 para. 2 (illustrating Title VII's 4/5 rule) and note 97 para. 2 (illustrating the rejection-rate-ratio used in FHA cases).

290. This approach also provides an additional way of assessing the disparities in a FHA case. The disparity ratio—beyond its use to measure the size of the disparities—may be valuable on its own in situations where the samples used in the statistical test are so small that they may mask a large difference in affected proportions of the two groups being compared. For example, consider the data for Sample #1 in the table in Appendix A. Based on very small samples, the test shows no statistically significant difference in the proportions of white and minority households affected. However, the disparity ratio for these samples is 1.40, which exceeds the 1.25 standard and thus would indicate a significant difference based on the parallel approach used in Title VII cases. Using this disparity ratio as a supplemental measure provides some additional support for demonstrating a significant disparate impact, especially when anomalies in the standard statistical tests limit their ability to assess the disparities.

On the other hand, where extremely large samples indicate a statistically significant disparity, the disparity ratio may temper that finding. Here consider Sample #3 in

The following table presents the calculations that show the relationship between Title VII's 4/5 rule and the 5/4 inversion of this rule for FHA cases.

	Sample Selection and Rejection Rates					
	Blacks Select / Reject Col. A Col. B	Whites Select / Reject Col. C Col. D	Selection Rate Ratios Black / White (Col. A / Col. C)	Selection Rate Ratios White / Black (Col. C / Col. A)	Residual Rejection Rate Ratios Black / White (Col. B / Col. D)	Residual Rejection Rate Ratios White / Black (Col. D / Col. B)
Row 1	72 / 28	90 / 10	0.8	1.25	2.80	0.36
Row 2	60 / 40	75 / 25	0.8	1.25	1.60	0.63
Row 3	40 / 60	50 / 50	0.8	1.25	1.20	0.83
Row 4	20 / 80	25 / 75	0.8	1.25	1.07	0.94
Row 5	8 / 92	10 / 90	0.8	1.25	1.02	0.98
	Reversing the Selection and Rejection Rates for Blacks and Whites					
	Blacks Reject / Select Col. A Col. B	Whites Reject / Select Col. C Col. D	Rejection Rate Ratios Black / White (Col. A /Col. C)	Rejection Rate Ratios White / Black (Col. C / Col. A)	Residual Selection Rate Ratios Black / White (Col. B / Col. D)	Residual Selection Rate Ratios White / Black (Col. D / Col. B)
Row 1	90 / 10	72 / 28	1.25	0.8	0.36	2.80
Row 2	75 / 25	60 / 40	1.25	0.8	0.63	1.60
Row 3	50 / 50	40 / 60	1.25	0.8	0.83	1.20
Row 4	25 / 75	20 / 80	1.25	0.8	0.94	1.07
Row 5	10 / 90	8 / 92	1.25	0.8	0.98	1.02

The data in Rows 1–5 in the top section of the table to the left of the gray bar demonstrate the selection rates in a Title VII context using the 4/5 rule where selection rates are the points of the comparison.[291] In each of these five examples, there are a total of 200 applicants (100 blacks and 100 whites). The ratios of the black-to-white selection rates are all 0.8 (i.e., the disparities exactly meet the 4/5 rule), and, conversely, the white-to-black selection ratios are all 1.25.

The data in the top section of the table to the right of the gray bar reveal an important anomaly that Professors Paetzold and Willborn have pointed out concerning applying the 5/4 rule to the residual rejection rate data where the Title VII rule relates to the comparison of

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the table in Appendix A, the data for which are based on large samples and indicate an extremely high level of statistically significant differences in the percentages of minority and white households affected. These differences, however, are the result of the large size of the samples and reflect a disparity ratio of only 1.01, which indicates an almost identical proportional effect on each group. In this case, one might rely on the difference in the raw number of minorities affected to support a FHA prima facie case, as discussed in Appendix A.

291. The data in Rows 1–5 are taken from PAETZOLD & WILLBORN, *supra* note 73, at 370 (Table 8.1).

selection rates.[292] The results for the residual rejection rates do not reflect the same fixed relationships found for selection rates; that is, the black-to-white ratios are not 1.25 and the white-to-black ratios are not 0.8. Indeed, each set of ratios is different.

This indicates that the fixed mathematical relationship related to the comparison of selection rates in not symmetrical. Rather, in Title VII cases, it is a one-way relationship that only works when applied to selection rates. While all of the five examples meet the 4/5 rule for substantive differences when comparing selection rates, three of the five examples (indicated within the dotted line box) fail to meet the 5/4 rule for a ratio of 1.25 or more if one used the residual rejection rates for blacks versus whites. Conversely, these same three examples would fail to meet the less-than-80% standard for the white to black rejection rates.[293]

The bottom table exchanges the data for whites and blacks and changes the selection rates to rejection rates. Here, the rejection rates are the points of comparison. The black-to-white rejection ratios are now 1.25, and all of the white-to-black rejection ratios are 0.8, confirming that the 5/4 rule applied to rejection rates in housing cases represents the same mathematical relationship as the 4/5 rule for selection rates in employment cases. Of course, the same anomaly applies to the calculations for the ratios of the residual selection rates in housing cases. The same three examples in the dotted line box in the lower section of the table fail to meet the less-than-80% standard when comparing black to white selection rates. Conversely, these same three examples also fail to meet the 1.25-or-greater standard when comparing white to black selection rates.

This does not negate the use of either the 4/5 rule in Title VII cases or the 5/4 rule in FHA cases. It does, however, caution against applying the tests to anything other than measures for which the tests were designed. The logic for the Title VII tests is based on measuring the likelihood that different groups will achieve a positive outcome, while the measure for FHA cases is designed to assess the extent to which different groups will suffer an adverse outcome.

292. *Id*.

293. Note that while the residual rejection rates do not match the identical 0.8 and 1.25 ratios for the selection rates, the residual rejection rate ratios do fit the same relative inverse relationship. That is, whenever the black-to-white residual rejection ratios are greater than 1.25, the white-to-black residual rejection ratios are less than 0.8 (Rows 1 and 2). Conversely, whenever the black-to-white residual rejection ratios are less than 1.25, the white-to-black residual rejection ratios are greater than 0.8 (Rows 3, 4, and 5).

APPENDIX D: PUMS 2014 SUBJECT LIST

Items in the housing record include:	
Agricultural sales	Bathtub or shower
Bedrooms	Commercial use
Computer and Internet Use	Condominium fee
Cost of utilities and fuels	Family income
Fire, hazard, and flood insurance	Food Stamps/Supplemental Nutrition Assistance Program
Fuels used	Grandparent/grandchild
Household income	Household and family type
Housing costs	Limited English speaking households
Lot size	Meals included in rent
Mobile home costs	Mortgage payment
Multigenerational household	Presence and age of own children
Property taxes	Property value
Refrigerator	Rent
Residence state	Rooms
Running water	Sink
Stove	Subfamilies
Telephone	Tenure in home
Toilet	Units in structure
Unmarried partner	Vacancy status
Vehicles available	Work
Year householder moved into unit	Year structure built
Items in the person record include:	
Ability to speak English	Age
Ancestry	Citizenship and naturalization
Class of worker	Commuting to work
Disability	Educational attainment
Fertility	Field of degree
Grandparent/ grandchild	Health insurance
Hispanic origin	Hours worked
Income by type	Industry
Language spoken at home	Last week work status
Marital status and marital history	Migration
Military	Mobility status
Occupation	Place of birth
Place of work	Poverty
Race	Relationship
School enrollment	Sex
Weeks worked	Work
Year of entry	Year of naturalization

Appendix E:
Home Mortgage Disclosure Act (HMDA) Loan/ Application Register Code Sheet

Respondent ID: 10 Character Identifier

Agency:
- 1— Office of the Comptroller of the Currency (OCC)
- 2— Federal Reserve System (FRS)
- 3— Federal Deposit Insurance Corporation (FDIC)
- 5— National Credit Union Administration (NCUA)
- 7— Department of Housing and Urban Development (HUD)
- 9— Consumer Financial Protection Bureau (CFPB)

Geographic Identifier
- MSA/MD: Metropolitan Statistical Area/Metropolitan Division
- State: Two-digit FIPS state identifier
- County: Three-digit FIPS county identifier
- Tract: Census tract number

Applicant Information

Ethnicity:
- 1— Hispanic or Latino
- 2— Not Hispanic or Latino
- 3— Information not provided by applicant in mail, Internet, or telephone application
- 4— Not applicable
- 5— No co-applicant

Race:
- 1— American Indian or Alaska Native
- 2— Asian
- 3— Black or African American
- 4— Native Hawaiian or Other Pacific Islander
- 5— White
- 6— Information not provided by applicant in mail, Internet, or telephone application
- 7— Not applicable
- 8— No co-applicant

Sex:
- 1— Male
- 2— Female
- 3— Information not provided by applicant in mail, Internet, or telephone application
- 4— Not applicable
- 5— No co-applicant

Reasons for Denial (optional reporting)
- 1— Debt-to-income ratio
- 2— Employment history
- 3— Credit history
- 4— Collateral
- 5—Insufficient cash (downpayment, closing costs)
- 6— Unverifiable information
- 7— Credit application incomplete
- 8— Mortgage insurance denied
- 9— Other

Type of Purchaser
- 0— Loan was not originated or was not sold in calendar year covered by register
- 1— Fannie Mae
- 2— Ginnie Mae
- 3— Freddie Mac
- 4— Farmer Mac
- 5— Private securitization
- 6— Commercial bank, savings bank or savings association
- 7— Life insurance company, credit union, mortgage bank, or finance company
- 8— Affiliate institution
- 9— Other type of purchaser

Loan Type:
- 1—Conventional (any loan other than FHA,VA, FSA, or RHS loans)
- 2— FHA-insured (Federal Housing Administration) VA-guaranteed (Veterans Administration)
- 3— FSA/RHS (Farm Service Agency or Rural Housing Services)

Property Type:
- 1— One to four-family (other than manufactured housing)
- 2— Manufactured housing
- 3— Multifamily

Purpose of Loan:
- 1— Home purchase
- 2— Home improvement
- 3— Refinancing

Owner-Occupancy:
- 1— Owner-occupied as a principal dwelling
- 2— Not owner-occupied
- 3— Not applicable

Preapproval (home purchase loans only):
- 1— Preapproval was requested
- 2— Preapproval was not requested
- 3— Not applicable

Action Taken:
- 1— Loan originated
- 2— Application approved but not accepted
- 3— Application denied by financial institution
- 4— Application withdrawn by applicant
- 5— File closed for incompleteness
- 6— Loan purchased by financial institution
- 7—Preapproval request denied by financial institution
- 8—Preapproval request approved but not accepted (optional)

High Risk Loan Code
- 1— HOEPA loan
- 2— Not a HOEPA loan

Lien Status
- 1— Secured by a first lien
- 2— Secured by a subordinate lien
- 3— Not secured by a lien
- 4— Not applicable (purchased loans)

Census Data
- Minority Population %: percentage of minority population for census tract
- FFIEC Median Family Income: FFIEC Median family income in dollars for the MSA/MD in which the tract is located (adjusted annually)
- Tract to MSA/MD Median Family Income Percentage: of tract median family income compared to MSA/MD median family income
- Number of Owner Occupied Units: Number of dwellings, including individual condominiums, that are lived in by the owner
- Number of 1- to 4-Family units: Dwellings that are built to house fewer than 5 families

Loan Amount (In Thousands of Dollars)

Annual Percentage Rate (APR) Above High Cost Thresholds

Source: Federal Financial Institutions Examination Council
A Guide to HMDA Reporting: Getting It Right, January 1. 2013.