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Fair Housing and the Causation Standard after Comcast

Notes/Citation Information

Robert G. Schwemm, *Fair Housing and the Causation Standard after Comcast*, 66 Villanova Law Review 63-118 (2021).

FAIR HOUSING AND THE CAUSATION STANDARD AFTER
COMCAST

ROBERT G. SCHWEMM*

ABSTRACT

The Supreme Court last term held in the *Comcast* case that “but-for” causation must be shown by plaintiffs under the 1866 Civil Rights Act’s § 1981 and also announced that this standard is the default position presumed to govern all other federal civil rights statutes. This Article deals with how *Comcast*’s but-for presumption applies to fair housing cases.

The answer is complicated, because these cases are often brought under multiple laws. For example, a Black applicant who is rejected by an apartment complex ostensibly for having inadequate income, but who believes this decision was racially motivated because the complex accepted a white tester with similar credentials, may sue under the Fair Housing Act, the 1866 Civil Rights Act’s § 1982, the Fourteenth Amendment’s Equal Protection Clause (if the complex is public housing or otherwise involves state action), and a state or local fair housing law. If the evidence shows the complex rejected the Black applicant both because of an unlawful motive (race) and a lawful one (economics), who should win? The answer depends on what causation standard applies in these laws.

The causation issue seems easy enough to resolve for claims under the 1866 Civil Rights Act’s § 1982, the companion provision of the one involved in *Comcast*, which will now also be governed by the but-for standard. But in Equal Protection Clause claims, *Comcast*’s statutory presumption does not apply, and such claims have for decades been governed by the more lenient “motivating-factor” standard. And claims under state and local fair housing laws will vary from place to place, because they are also unaffected by the *Comcast* presumption concerning federal statutes and many of them provide for more lenient causation standards.

The most difficult issue for housing discrimination cases will involve claims under the Fair Housing Act, whose “because of” prohibitions must now be taken to suggest, based on *Comcast*, a but-for standard. But a strong counterargument exists. For decades, the lower courts have rejected but-for causation in Fair Housing Act cases in favor of a more lenient standard. Moreover, this view was well-established by 1988 when Congress amended the Fair Housing Act without changing its crucial “because of” language, a fact that the Supreme Court has held may indicate

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Congress's endorsement of prior established standards. And a further complication will arise in the growing number of Fair Housing Act suits that include a retaliation claim under the statute's § 3617, which may, as in Title VII employment discrimination cases, have a different causation standard than that of the Fair Housing Act's other substantive provisions.

This Article concludes that, in multiclaim fair housing cases, courts will have to analyze the causation issue for each law separately, likely producing different results. As for the Fair Housing Act, most circuits will be bound by their precedents establishing a less-than-but-for standard, at least until an en banc decision makes a change. A circuit split on the Fair Housing Act issue seems likely, leading eventually to Supreme Court review or intervention by Congress, which, as the final authority on statutory matters, is ultimately responsible for resolving this issue.

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INTRODUCTION

ASSUME that a large apartment complex rejects a Black applicant whose economic resources do not meet its usual standards. The applicant believes that race also motivated the complex's decision because a white "tester" with a similar financial profile was accepted.¹ So, the Black applicant considers suing under the applicable antidiscrimination laws²:

- the 1968 Fair Housing Act (FHA);³
- the 1866 Civil Rights Act's (1866 Act) § 1982;⁴
- the Equal Protection Clause of the Fourteenth Amendment (applicable only if the complex is public housing or otherwise involves state action);⁵ and,
- the local state and/or municipal fair housing statute.⁶

If the proof in this suit shows that the defendant rejected the plaintiff both because of an unlawful motive (race) and a lawful one (economics), who should win? Put another way, what standard of causation applies in these laws?

This question has bedeviled antidiscrimination law for decades. (Indeed, in tort and criminal law generally, causation has been a controver-

1. For further development of this hypothetical, see *infra* text accompanying notes 199–200. Testers “are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful . . . practices.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

2. The laws listed in the text are the ones most likely to apply in this situation. Housing discrimination in other situations may also be covered by other federal statutes, such as the 1974 Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691(a) (2018) (if the case involves credit discrimination), and the 1990 Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (2018) (if the case involves disability discrimination in certain housing-related services). See ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 29:3–4 (2020) (describing ECOA and ADA cases involving housing). This Article does not deal with these other federal statutes, both because they do not apply in most housing discrimination cases and because, in outlawing practices “because of” race or another prohibited factor, they involve the same issues as the laws listed in the text.

3. 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 (2018).

4. 42 U.S.C. § 1982 (2018). Section 1982, which guarantees all citizens “the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property,” has, since *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), outlawed private as well as public racial discrimination in housing. See SCHWEMM, *supra* note 2, at ch. 27. Another provision of the 1866 Act (42 U.S.C. § 1981) guarantees all persons “the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981. Although a § 1981 claim has been asserted in some housing discrimination cases, this statute has been used primarily in employment discrimination cases, and it has rarely been significant apart from § 1982 in the housing field. See SCHWEMM, *supra* note 2, at § 27:25.

5. See *infra* Section III.B.

6. See *infra* Section III.D.

sial topic for centuries.⁷) Most civil rights statutes do not address this matter explicitly, simply declaring, as the FHA does, that certain practices are unlawful if undertaken “because of” race,⁸ thus leaving the task of defining the proper causation standard to the courts.

For its part, the Supreme Court—having addressed this issue in a number of modern employment discrimination cases⁹—issued a ruling in 2020 in *Comcast Corp. v. National Ass’n of African American-Owned Media*¹⁰ that established “but-for” causation as the proper standard for 42 U.S.C. § 1981 (the 1866 Act’s equal-contract provision)¹¹ and also declared this standard to be the general “default” position for all other civil rights statutes. Based on *Comcast’s* own approach to § 1981, however, a question remains whether its but-for standard applies to FHA claims, the question that is the primary focus of this Article. Further, *Comcast* did not purport to change the Equal Protection Clause standard set by the Court in a housing case in 1977.¹² Nor did *Comcast* bar states and localities from adopting a different standard (which some have done)¹³ or undercut Congress’s authority to set a different standard by amending particular federal antidiscrimination statutes (as was done in 1991 for Title VII’s main prohibitions of employment discrimination).¹⁴

7. *See, e.g., infra* note 26; RESTATEMENT OF TORTS §§ 431, 432, 279, 280 (AM. LAW INST. 1934) [hereinafter FIRST TORTS RESTATEMENT] (citing torts cases dealing with causation dating back to the nineteenth century); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(b) nn.26, 29–30 (3d ed. 2019) (citing criminal law cases dealing with causation from the nineteenth century). Anglo-American law’s concern with the problem of causation traces back to the works of English philosophers David Hume in the eighteenth century and John Stuart Mill in the early nineteenth century. *See, e.g.,* Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1741, 1789–90 (1985) (tracing Hume’s analysis of the meaning of causation); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 26 cmt. c (AM. LAW INST. 2010) [hereinafter THIRD TORTS RESTATEMENT] (attributing “causal-set model” definition and understanding to Mill’s interpretation of causation).

8. *See infra* notes 134–37 and accompanying text.

9. *See, e.g.,* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013) (holding that “Title VII retaliation claims must be proved according to traditional principles of but-for causation”); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (holding that, for disparate treatment claims under the 1967 Age Discrimination in Employment Act (ADEA), “a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision”); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (discussed *infra* notes 77–78 and accompanying text); Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977) (discussed *infra* notes 88–90 and accompanying text).

10. 140 S. Ct. 1009 (2020).

11. *See supra* note 4.

12. *See infra* Section II.B.2 (discussing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–67 (1977)).

13. *See infra* Section III.D.

14. *See infra* Section II.B.1. Another example is the federal-sector provision of the ADEA, which mandates that personnel actions affecting those older than 40 “shall be made free from any discrimination based on age,” 29 U.S.C. § 633a(a)

This Article examines how the causation standard of the various laws that apply in housing discrimination cases is likely to be affected by *Comcast*. Part I provides a detailed review of the *Comcast* opinion. Part II then explores the but-for causation standard favored by *Comcast* along with the three other major causation standards that are alternatives to the but-for test in discrimination cases. The heart of the Article is Part III, which applies the lessons of the earlier discussion to the FHA and other major laws that apply in most housing discrimination cases. Part IV offers predictions for how the causation issue in these cases will be resolved in the future.

I. COMCAST: BACKGROUND, HOLDING, AND ANALYTIC TECHNIQUES

The plaintiff in *Comcast* was Entertainment Studios Network (ESN), a media company owned by a Black entrepreneur that operated seven TV networks, which Comcast refused to carry.¹⁵ Comcast cited bandwidth constraints and other legitimate business reasons for this decision,¹⁶ but ESN believed they were a pretext for racial discrimination, noting that Comcast had added other channels owned by white individuals and citing a remark by a Comcast executive that allegedly showed hostility to Black-owned media. ESN sued under § 1981, alleging that Comcast violated that statute's guarantee that "[a]ll persons . . . [shall have] the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."¹⁷

The trial court dismissed the complaint, holding that it failed to adequately allege that "but for racial animus, Comcast would have contracted with ESN."¹⁸ The Ninth Circuit reversed, holding that a § 1981 complaint need only plead facts showing "that race played 'some role' in the defendant's decisionmaking process."¹⁹ The Supreme Court, in a unanimous opinion by Justice Gorsuch,²⁰ held that, to prevail under § 1981, "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right."²¹

(2018), and which the Court held, shortly after *Comcast*, does not require proof of but-for causation. See *Babb v. Wilkie*, 140 S. Ct. 1168 (2020).

15. *Comcast*, 140 S. Ct. at 1013.

16. *See id.*

17. *Id.* (first alteration in original) (quoting 42 U.S.C. § 1981(a)).

18. *Id.*

19. *Id.* (quoting Nat'l Ass'n of African Am.-Owned Media v. Comcast Corp., 743 F. App'x 106, 107 (9th Cir. 2018)).

20. *Id.* at 1012–19. Justice Ginsburg filed a concurring opinion, noting that "I have previously explained that a strict but-for causation standard is ill suited to discrimination cases and inconsistent with tort principles. I recognize, however, that our precedent now establishes this form of causation as a 'default rul[e]' in the present context." *Id.* at 1019 n.1 (Ginsburg, J., concurring) (citation omitted). She thus joined the Court's opinion. *Id.* at 1019.

21. *Id.* at 1019. *Comcast* made clear that but-for causation, as an "essential element[]" of a § 1981 claim, "remain[s] constant through the life of the lawsuit," i.e., it must be pled in the complaint to survive a motion to dismiss as well as proven at trial. *Id.* at 1014, 1019. For more on this point, see *infra* note 257 and accompanying text.

The Court's analysis began with the statement that "[i]t is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation."²² According to the *Comcast* opinion, this but-for standard "supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action . . . includ[ing] when it comes to federal antidiscrimination laws like § 1981."²³

Then the Court, recognizing that "most rules bear their exceptions," examined "the statute's text, its history, and our precedent" for "clues" to determine whether "§ 1981 follows the general [but-for] rule."²⁴ This process also included a review of the 1866 Act's purpose²⁵ and the common law standards that existed at the time of the statute's enactment.²⁶

Next, Justice Gorsuch rejected the plaintiff's argument that Title VII's lighter "a motivating factor" standard should be used in § 1981 cases.²⁷ According to *Comcast*, "a critical examination of Title VII's history reveals more than a few reasons to be wary of any invitation to import its motivating factor test into § 1981."²⁸ This history included the Court's 1989 decision favoring the motivating-factor test in the *Price Waterhouse* case and Congress's 1991 amendments to Title VII adopting a version of this standard.²⁹ But, *Comcast* concluded, the differences between Title VII and

22. *Comcast*, 140 S. Ct. at 1014 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013) (citing RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1984))); *see also infra* notes 44–46.

23. *Comcast*, 140 S. Ct. at 1014 (citation omitted) (first citing *Nassar*, 570 U.S. at 346–47; then citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176–77 (2009)).

24. *Id.* at 1014; *see also id.* at 1015 (noting that § 1981's text, while not expressly discussing causation, is "suggestive" of a but-for causation test by its focus on how a defendant responds to whites compared to nonwhites); *id.* at 1015–16 (noting, with respect to § 1981's structure and history, that the statute makes no explicit provision for a private cause of action and that another provision in the 1866 Act uses "on account of" (suggesting but-for causation)); *id.* at 1016–17 (noting, with respect to precedents, that the Court's description of § 1981 in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975) as barring discrimination "on the basis of race" suggests a but-for causation standard, that the Court's § 1981 decision in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388 (1982) used "language—because of—often associated with but-for causation," and that the Court's prior cases dealing with § 1981's neighboring provision (§ 1982) barring discrimination "because of" race or color suggests that § 1981 should be similarly construed).

25. *Id.* at 1015 (noting that Congress's purpose in the 1866 Act was "to vindicate the rights of former slaves").

26. *Id.* at 1016 (noting that "while there were exceptions, the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit," and citing various cases and law review articles).

27. *Id.* at 1017.

28. *Id.*

29. *Id.* For more on the *Price Waterhouse* decision and the 1991 amendments, *see infra* notes 74–78 and accompanying text.

§ 1981 were so great that the former's causation standard should not apply in § 1981 claims.³⁰

Finally, *Comcast* dismissed the plaintiff's suggestion that § 1981's causation standard should be affected by the burden-shifting method of proving discrimination established by the Court in the *McDonnell Douglas* case and its progeny.³¹ Justice Gorsuch characterized the *McDonnell Douglas* system as "a product of Title VII practice" and opined that, "[w]hether or not *McDonnell Douglas* has some useful role to play in § 1981 cases, it does not mention the motivating factor test, let alone endorse its use."³² Indeed, according to *Comcast*, *McDonnell Douglas* simply "did not address causation standards."³³

Having thus examined "[a]ll the traditional tools of statutory interpretation," Justice Gorsuch concluded that "§ 1981 follows the usual rules, not any exception."³⁴ Thus, *Comcast* held that a § 1981 plaintiff "bears the burden of showing that race was a but-for cause of its injury."³⁵

II. THE MEANING OF BUT-FOR AND ALTERNATIVE CAUSATION STANDARDS

This Part describes the four causation standards that are "most commonly used" in the law.³⁶ *Comcast's* favored but-for standard is discussed in the first Section, followed by a review of the three other main alternatives (i.e., the "a motivating factor," "primary motive," and "sole motive" tests).

A. *The But-For Standard*

The "but-for" causation standard "is among the law's most widespread and intuitive."³⁷ The *Comcast* opinion did not explain what but-for causation means and ultimately did not even pass on whether the plaintiff's complaint adequately stated a § 1981 claim under this standard, remand-

30. *Comcast*, 140 S. Ct. at 1018.

31. *Id.* at 1019. According to *Comcast*, the proof scheme established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny "suppl[ies] a tool for assessing claims . . . when the plaintiff relies on indirect proof of discrimination" in which "once a plaintiff establishes a prima facie case of race discrimination through indirect proof, the defendant bears the burden of producing a race-neutral explanation for its action, after which the plaintiff may challenge that explanation as pretextual." *Id.* For more on the *McDonnell Douglas* framework for proving discrimination, see *infra* notes 278–84 and accompanying text.

32. *Comcast*, 140 S. Ct. at 1019.

33. *Id.*

34. *Id.*; see also *id.* at 1013 (concluding that "looking to this particular statute's text and legislative history, we see no evidence of an exception").

35. *Id.* at 1014; see also *supra* note 21 and accompanying text.

36. See Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1134 (2018).

37. *Id.* at 1138.

ing that question for the Ninth Circuit to decide.³⁸ But *Comcast* did regularly describe but-for causation as the traditional torts standard³⁹ and cited with approval a number of the Court’s employment discrimination precedents that had discussed this standard.⁴⁰

In one of these cases, *University of Texas Southwestern Medical Center v. Nassar*,⁴¹ the Court held that Title VII retaliation claims “must be proved according to traditional principles of but-for causation.”⁴² Justice Kennedy’s opinion described this standard as requiring “the plaintiff to show ‘that the harm would not have occurred’ in the absence of—that is, but for—the defendant’s conduct.”⁴³ Here, the *Nassar* opinion cited all three versions of the *Restatement of Torts*,⁴⁴ the latest of which had recently described but-for causation as expressing the concept that “an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred.”⁴⁵ Thus, according to *Nassar*, “an action ‘is not regarded

38. *Comcast*, 140 S. Ct. at 1019. On remand, the Ninth Circuit remanded the case to the district court for further proceedings consistent with *Comcast*. See Nat’l Ass’n of African Am.-Owned Media v. Comcast Corp., 804 F. App’x 709 (9th Cir. 2020).

39. *Comcast*, 140 S. Ct. at 1016 (citing to torts cases and treatises from the 1866 Act’s era).

40. *Id.* at 1014 (referencing *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338, 346–47 (2013) and *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) for the proposition that the “ancient and simple ‘but-for’ common law causation test . . . supplies the ‘default’ or ‘background’ rule against which Congress is normally presumed to have legislated when creating its own new causes of action”).

41. 570 U.S. 338 (2013).

42. *Id.* at 360.

43. *Id.* at 346–47 (quoting THIRD TORTS RESTATEMENT, *supra* note 7, at § 431 cmt. a); see also COMM. ON CIV. PATTERN JURY INSTRUCTIONS DIST. JUDGES ASS’N FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) 11.5.B (2020) [hereinafter FIFTH CIRCUIT INSTRUCTIONS], <http://www.lb5.uscourts.gov/juryinstructions/> [<https://perma.cc/LN5S-MJ6G>] (directing the jury to determine, in model jury instructions reflecting this standard for Title VII retaliation claims, whether the defendant’s challenged adverse action against the plaintiff “would not have occurred in the absence of—but-for—[plaintiff’s protected activity]”).

44. See *Nassar*, 570 U.S. at 347 (first citing FIRST TORTS RESTATEMENT, *supra* note 7, at §§ 431, 432, 279, 280; then citing RESTATEMENT (SECOND) OF TORTS § 432(1) (AM. LAW INST. 1965) [hereinafter SECOND TORTS RESTATEMENT]; and then citing THIRD TORTS RESTATEMENT, *supra* note 7, at § 27). For more on the *Restatements of Torts*, see *infra* notes 154–58 and accompanying text.

45. THIRD TORTS RESTATEMENT, *supra* note 7, at § 26 cmt. b. Also, according to this *Restatement*, a but-for cause need only be a necessary, not a sufficient, condition for the outcome. See *id.* § 26 cmt. j (describing what must be established as “the but-for or necessary condition standard of this Section”). Further:

An actor’s tortious conduct need only be a factual cause of the other’s harm. The existence of other causes of the harm does not affect whether specified tortious conduct was a necessary condition for the harm to occur. . . . [S]o long as the harm would not have occurred absent the tortious conduct, the tortious conduct is a factual cause. Recognition of multiple causes does not require modifying or abandoning the but-for

as a cause of an event if the particular event would have occurred without it.’”⁴⁶

Further, in an earlier Title VII case in which Justice Kennedy advocated for the but-for standard,⁴⁷ he wrote that this would mean that “the motive in question made a difference to the outcome.”⁴⁸ The key to but-for causation, therefore, is showing that an impermissible motive “made a difference” in the defendant’s treatment of the plaintiff.⁴⁹ By contrast, a motive that “did not make a difference to the outcome” would not be a but-for cause.⁵⁰ Under this standard, “[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it.”⁵¹ Thus, according to Justice Kennedy, in an intent-based job claim under a statute barring “because of” discrimination, no “violation has occurred where [an impermissible motive] made no difference to the outcome.”⁵²

The Court provided further insights into the but-for test in two decisions handed down shortly after *Comcast*. The first, *Babb v. Wilkie*,⁵³ held

standard in this Section. Tortious conduct by an actor need be only one of the causes of another’s harm.

Id. § 26 cmt. c. The *Third Restatement* also adopted this same standard for cases involving “multiple sufficient causes.” *See id.* § 27 (“If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”).

46. *Nassar*, 570 U.S. at 347 (quoting W. KEETON ET AL., *LAW OF TORTS* 265 (5th ed. 1984)). This provision of the *Keeton* treatise was also quoted with approval by the Court in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176–77 (2009) and by Justice Kennedy in his dissent in the *Price Waterhouse* case. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting).

47. *Price Waterhouse*, 490 U.S. at 295 (Kennedy, J., dissenting) (opining that the plaintiff here should lose, because illegal discrimination “was not a but-for cause of the [defendant’s] decision”).

48. *Id.* at 281.

49. *Id.* at 287 n.3 (internal quotation marks omitted); *see also id.* at 284 (commenting that but-for causation is satisfied “whenever, either by itself or in combination with other factors, it [an impermissible factor] made a difference to the decision. Discrimination need[s] . . . [to be] merely a necessary element of the set of factors that caused the decision.”).

50. *See id.* at 287 n.3.

51. *Id.* at 282 (alteration in original) (quoting KEETON ET AL., *supra* note 46, at 265); *see also id.* at 284 n.2 (opining that no liability exists under but-for causation where the legitimate or the illegitimate reason standing alone would have produced the defendant’s decision because “the same decision would have been made had the illegitimate reason never been considered”). For model jury instructions in but-for discrimination cases that direct the factfinders’ attention to whether the defendant’s challenge action would have occurred without the illegitimate motive, *see* COMM. ON MODEL CIV. JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT, MODEL CIVIL JURY INSTRUCTIONS 5.1.7 (2019) [hereinafter *THIRD CIRCUIT INSTRUCTIONS*], <https://www.ca3.uscourts.gov/model-jury-instructions> [<https://perma.cc/H2VQ-34XB>] (providing jury instruction for Title VII-retaliation claim); *id.* at 8.1.1 (providing jury instruction for ADEA claim).

52. *Price Waterhouse*, 490 U.S. at 285.

53. 140 S. Ct. 1168 (2020).

that a less-demanding causation standard than the but-for test applies to the Age Discrimination in Employment Act's (ADEA) federal-employment provision.⁵⁴ Justice Alito's opinion for eight members of the Court provided a hypothetical designed to show how the but-for standard would apply in this type of case.⁵⁵ The hypothetical posited a job promotion case in which two competing candidates—one (A) younger than 40, and thus not protected by the ADEA, and the other (B) older than 40, and thus in the protected class—were first evaluated using non-discriminatory standards (with A receiving a score of 90 and B a score of 85), and then B being assessed a discriminatory penalty of 5 points because of age, giving B a final score of 80.⁵⁶ If the promotion goes to A as the higher scoring candidate, this case demonstrates—according to *Babb*—how different causation standards would change the result: under a “free from any discrimination” standard, B would win because she was treated less favorably (docked 5 points when the younger candidate was not) based on her age; but B would lose under the but-for standard because age was not “a but-for cause of the decision to promote employee A” since the 5-point illegal “difference in treatment did not affect the outcome” (i.e., A would have won with a score of 90 over B's 85 based on purely legitimate considerations).⁵⁷

A few months later in *Bostock v. Clayton County*,⁵⁸ the Court held that discrimination based on homosexuality or transgender status violates Title VII's “because of sex” prohibition.⁵⁹ Justice Gorsuch's opinion in *Bostock* assumed that a basic intent claim under Title VII is governed by the but-for causation standard,⁶⁰ and he commented extensively on what this standard means. According to *Bostock*, but-for causation “is established whenever a particular outcome would not have happened ‘but for’ the purported cause. In other words, a but-for test directs us to change one

54. *Id.* at 1171 (construing 29 U.S.C. § 633a(a) (2018)). For a further discussion of this provision, see *supra* note 14.

55. *Id.* at 1174.

56. *See id.*

57. *Id.*

58. 140 S. Ct. 1731 (2020).

59. *Id.* at 1737, 1754.

60. *Id.* at 1739 (noting that Title VII's “‘because of’ test incorporates the ‘simple’ and ‘traditional’ standard of but-for causation” (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 360 (2013))). Justice Gorsuch did recognize that the 1991 amendments to Title VII (*see infra* notes 74–76 and accompanying text)

allow a plaintiff to prevail merely by showing that a protected trait like sex was a “motivating factor” in a defendant's challenged employment practice. Under this more forgiving standard, liability can sometimes follow even if sex wasn't a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII.

Id. at 1739–40 (citations omitted).

thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”⁶¹ The *Bostock* opinion made clear that the but-for standard is far more lenient than either the “solely because of” standard (under which “actions taken ‘because of’ the confluence of multiple factors do not violate the law”) or the “primarily because of” standard (which would “indicate that the prohibited factor had to be the main cause of the defendant’s challenged employment decision”).⁶²

Noting that events often “have multiple but-for causes,”⁶³ Justice Gorsuch described the but-for test as “a sweeping standard.”⁶⁴ Under this test, he pointed out, a Title VII defendant “cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex [or other prohibited factor] was one but-for cause of that decision, that is enough to trigger the law.”⁶⁵ Put another way: “An employer violates Title VII when it intentionally fires an individual employee *based in part* on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision.”⁶⁶

In summary, the but-for test requires, as the most recent *Restatement of Torts* observed in 2010, a “counterfactual inquiry” in which “[o]ne must ask what would have occurred if the actor had not engaged in the tortious conduct.”⁶⁷ This is consistent with the opinions in *Nassar* and *Bostock*⁶⁸ as well as *Comcast*, where Justice Gorsuch pointed out that § 1981’s guarantee of the “‘same right . . . as is enjoyed by white citizens’ directs our attention to the counterfactual—what would have happened if the plaintiff had been white?” and that this focus “fits naturally with the ordinary rule that a plaintiff must prove but-for causation.”⁶⁹

61. *Id.* at 1739 (citation omitted); *see also id.* at 1741 (“[I]f changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.”).

62. *Id.* at 1739; *see also id.* at 1744 (noting that, under Title VII’s but-for standard, “the plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action”).

63. *Id.* at 1739.

64. *Id.*; *see also id.* at 1740 (referring again to the but-for standard as “sweeping”).

65. *Id.* at 1739.

66. *Id.* at 1741 (emphasis added).

67. THIRD TORTS RESTATEMENT, *supra* note 7, at § 26 cmt. e; *see also id.* (describing this section’s causation standard as “invok[ing] a hypothetical inquiry,” and noting that “[i]t is always necessary to determine what would have happened in a world without the tortious conduct”). According to this *Restatement*, answering this counterfactual inquiry will be easy in some cases, but in others “may pose difficult problems of proof.” *Id.*

68. *See supra*, respectively, note 46 and accompanying text (*Nassar*), note 61 and accompanying text (*Bostock*).

69. *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020).

B. *Alternative Standards*

1. “A Motivating Factor”

The main alternative to the but-for standard of causation in civil rights cases has been the “a motivating factor” standard. This easier standard has, since 1977, governed claims under the Equal Protection Clause.⁷⁰ It was also applied to Title VII employment discrimination claims by the Supreme Court’s *Price Waterhouse* decision in 1989 and then by Congress in amendments made to that statute in 1991. As the *Price Waterhouse* plurality opinion shows, the “a motivating factor” standard is sometimes articulated in different ways, such as “a motivating part,” “played a part,” and “played a role.”⁷¹

As these phrases suggest, this standard can produce liability if an illegal motive prompted the defendant’s action in *any* way or, as some model jury instructions express the concept, “contributed” to the defendant’s decision.⁷² Thus, this standard is “the most favorable motive standard for plaintiffs since it triggers liability for any [illegal] Motive at all, even a very small one, alongside a much stronger [non-illegal] Motive.”⁷³

In the 1991 amendments to Title VII, Congress kept the statute’s basic “because of” standard for identifying prohibited conduct⁷⁴ but provided that “an unlawful employment practice is established when the complaining party demonstrates that race [or other prohibited factor] was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”⁷⁵ A related amendment provided that, for a claim proven under this “a motivating factor” standard, a defendant could avoid damages, reinstatement, and other relief (except for a general in-

70. See *infra* Section III.B. The “a motivating factor” standard was also used, at least prior to *Comcast*, in cases under Title IX’s prohibition of “on the basis of sex” discrimination by educational institutions, 20 U.S.C. § 1681(a) (2018). See *infra* note 116.

71. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (twice), 252, 258 (1989) (plurality opinion) (“a motivating part”); *id.* at 238, 245, 246, 247 n.12 (twice), 252 n.14, 255 (“played a part” or “play a part”); *id.* at 237, 257 (“played a role”). According to Professor Katz, the Court in *Price Waterhouse* “used over twenty different labels to describe the causation requirement in [Title VII].” Martin Katz, *A Rosetta Stone for Causation*, 127 YALE L.J.F. 877, 878–79 (2018).

72. See, e.g., COMM. ON PATTERN CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR., FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.01 cmts. b, c (2017) [hereinafter SEVENTH CIRCUIT INSTRUCTIONS], <http://www.ca7.uscourts.gov/pattern-jury-instructions/pattern-jury.htm> [<https://perma.cc/SH7A-M42K>] (commenting that the “motivating factor” standard can be conveyed in an instruction providing that the plaintiff’s protected class must have “contributed to Defendant’s decision”); see also *id.* at § 4.02(d) (suggesting, for an ADA mixed-motive claim, an instruction providing that “[a] motivating factor is something that contributed to Defendant’s decision”).

73. Verstein, *supra* note 36, at 1141.

74. See 42 U.S.C. § 2000e–2(a) (2018); see also *supra* note 59 and accompanying text.

75. 42 U.S.C. § 2000e–2(m) (emphasis added).

junction and attorney's fees) by proving that it "would have taken the same action in the absence of the impermissible motivating factor."⁷⁶

The 1991 amendments replaced the Supreme Court's 1989 interpretation of Title VII's "because of" language in *Price Waterhouse v. Hopkins*.⁷⁷ There, the Court, based on a four-justice plurality and two concurrences, held that a Title VII plaintiff could prevail by showing that a prohibited factor (there, gender) "played a motivating part in an employment decision," but a defendant could avoid liability entirely by proving that "it would have made the same decision even if it had not taken the plaintiff's gender into account."⁷⁸

This two-step approach to causation was, as a majority of the Justices in *Price Waterhouse* noted,⁷⁹ similar to the one adopted by the Court for constitution-based claims in two 1977 decisions: *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁸⁰ and *Mt. Healthy City School District Board of Education v. Doyle*.⁸¹ (By 1999, the Court, in a race discrimination case, described the *Arlington Heights*–*Mt. Healthy* framework for analyzing constitution-based claims as "well-established."⁸²)

In *Arlington Heights*, the Court ruled against an Equal Protection Clause challenge to a municipality's zoning decision blocking a subsidized housing proposal, on the ground that the plaintiffs failed to prove this decision was motivated by a discriminatory racial purpose.⁸³ Such a showing, according to *Arlington Heights*, "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes . . . or even that a particular purpose was the 'dominant' or 'primary'

76. *Id.* § 2000e–5(g)(2)(B). The defendant's burden here, as described in *Comcast*, is to "invoke lack of but-for causation as an affirmative defense, but only to stave off damages and reinstatement, not liability in general." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020); *see also* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 362–63 (2020) (describing the same-decision affirmative defense after the 1991 amendments as having been "demoted . . . to a limitation on plaintiff's remedies rather than negating defendant's liability").

77. 490 U.S. 228 (1989).

78. *Id.* at 258 (plurality opinion); *see also id.* at 244–45 (same); *id.* at 258–60 (White, J., concurring); *id.* at 268–69 (O'Connor, J., concurring). Prior to *Price Waterhouse*, the standard-of-causation issue in Title VII cases had "left the Circuits in disarray." *Id.* at 238 n.2 (plurality opinion) (describing various appellate decisions and their different approaches).

79. *See id.* at 248 (plurality opinion) (citing *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977)); *id.* at 258–60 (White, J., concurring) (same); *id.* at 267–69 (O'Connor, J., concurring) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

80. 429 U.S. 252 (1977).

81. 429 U.S. 274 (1977).

82. *Texas v. Lesage*, 528 U.S. 18, 20 (1999) (per curiam). For post-*Arlington Heights* decisions applying this framework in constitution-based challenges to municipal actions that block housing projects, *see* SCHWEMM, *supra* note 2, at § 28:2 n.26, para. 2.

83. *Arlington Heights*, 429 U.S. at 268–71.

one.”⁸⁴ Rather, the standard requires only “proof that a discriminatory purpose has been a *motivating factor* in the decision.”⁸⁵ The Court further instructed that proving the defendant’s decision “was motivated in part by a racially discriminatory purpose” would not necessarily invalidate it, but would shift “to the [defendant] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.”⁸⁶ If the defendant met this burden, its decision would not have been unlawful.⁸⁷

In *Mt. Healthy*, the plaintiff was an untenured school teacher who was not rehired, in part because of his exercise of First Amendment rights and in part because of permissible reasons. The Court rejected a causation rule that focused “solely on whether protected conduct played a part, ‘substantial’ or otherwise, in the decision not to rehire.”⁸⁸ Rather, the plaintiff’s initial burden is to show that his constitutionally protected conduct “was a ‘substantial factor’—or to put it in other words, that it was a ‘motivating factor’ in the [defendant’s] decision not to rehire him.”⁸⁹ Once a plaintiff carries this burden, *Mt. Healthy* held that the defendant could prevail if it shows “that it would have reached the same decision as to [plaintiff’s] reemployment even in the absence of the protected conduct.”⁹⁰

84. *Id.* at 265.

85. *Id.* at 265–66 (emphasis added).

86. *Id.* at 270 n.21.

87. *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977)).

88. *Mt. Healthy*, 429 U.S. at 285.

89. *Id.* at 287 (footnote omitted) (citing *Arlington Heights* in support of the “a motivating factor” phrase); see also COMM. ON MODEL JURY INSTRUCTIONS FOR THE DIST. COURT OF THE EIGHTH CIRCUIT, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 13.40 (2020) [hereinafter EIGHTH CIRCUIT INSTRUCTIONS], <https://ecf.mowd.uscourts.gov/jmi/REV5.0CivilJuryInstructions.pdf> [<https://perma.cc/G88P-5GQT>] (using the “a motivating factor”/“played a part” standard in model jury instruction for First Amendment retaliation claims).

90. *Mt. Healthy*, 429 U.S. at 287; see also EIGHTH CIRCUIT INSTRUCTIONS, *supra* note 89, at § 13.40 (providing, in model jury instruction for First Amendment retaliation claims, that the defendant should prevail “if it has been proved that the defendant would have [discharged] the plaintiff regardless of” his/her protected speech (alteration in original)). Another model jury instruction for such a claim provides that the plaintiff’s protected speech must be shown to be “a reason” (not “the only reason”) for the defendant’s conduct and that, if plaintiff proves this and the other necessary elements of such a claim,

then you must consider whether Defendant has proved by a preponderance of the evidence that there were other reasons that would have led Defendant to [*alleged retaliatory conduct*] even if Plaintiff had not [*describe protected speech or conduct*]. If you find that Defendant proved this by a preponderance of the evidence, then you must decide for Defendant. If you find that Defendant did not prove this by a preponderance of the evidence, then you must decide for Plaintiff, and consider the issue of damages.

SEVENTH CIRCUIT INSTRUCTIONS, *supra* note 72, at § 6.02 (alterations in original).

Thus, for constitutional claims, *Mt. Healthy* and *Arlington Heights* establish a two-step approach—like *Price Waterhouse* did briefly for Title VII claims—that uses the “a motivating factor” standard for the plaintiff’s initial burden, but ultimately allows the defendant to prevail by proving the absence of but-for causation. This system—now used in Title VII claims to allow defendants not to defeat liability but to stave off certain types of relief—essentially takes “the burden of proving but-for causation from the plaintiff and hand[s] it to the defendant as an affirmative defense.”⁹¹

2. *The “Substantial-Factor” and “Primary-Factor” Tests*

The “substantial-factor” and “primary-factor” standards seek to assess the relative importance of the unlawful motive in a multi-motive case and impose liability only if the former played an important role. As this Section shows, however, these two tests differ greatly from one another. And courts have not adopted either of these causation standards for major civil rights laws, although some have used the “substantial” language in such cases, including a few involving fair housing.

One point of disagreement between the plurality and the two concurrences in *Price Waterhouse* was the concurrences’ view that a Title VII plaintiff’s burden in a mixed-motive case was “to show that the unlawful motive was a *substantial* factor in the adverse employment action.”⁹² As noted above, the 1991 Congress chose instead the “a motivating factor” standard for Title VII,⁹³ and no other civil rights statute explicitly uses the “substantial factor” test.⁹⁴

The substantial-factor test has a long, but ultimately unsuccessful, history. Its main function was “to permit the factfinder to decide that factual cause existed when there were multiple sufficient causes.”⁹⁵ The substantial-factor test was used in the original *Restatement of Torts* in 1934 and in the second version in 1965,⁹⁶ but the latest version in 2010 abandoned it.⁹⁷ The *Third Restatement’s* rationale was that, in applying the desired but-for standard in multiple-cause cases, courts had often misused the substantial-factor test, sometimes imposing “a more rigorous standard” and some-

91. *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

92. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 259 (White, J., concurring); *accord id.* at 265 (O’Connor, J., concurring) (describing a Title VII plaintiff’s burden as having to show that “an illegitimate criterion was a *substantial* factor in an adverse employment decision”).

93. *See supra* notes 74–76 and accompanying text.

94. *See* Verstein, *supra* note 36, at 1170 (identifying three types of constitution-based claims and numerous non-civil rights areas of law that use the substantial-factor test (which the author calls the “primary-factor” standard)).

95. THIRD TORTS RESTATEMENT, *supra* note 7, at § 26 cmt. j.

96. *See id.* (first citing FIRST TORTS RESTATEMENT, *supra* note 7, at §§ 431–432; then citing SECOND TORTS RESTATEMENT, *supra* note 44, at §§ 431–432).

97. *See id.*

times “a more lenient” one than but-for causation required.⁹⁸ In short, “the substantial-factor rubric tends to obscure, rather than to assist, explanation and clarification.”⁹⁹

Modern civil rights decisions see little practical difference between the motivating-factor and substantial-factor standards. As noted above, the Supreme Court’s opinion in *Mt. Healthy* seemed to equate these standards or at least elide their differences.¹⁰⁰ Further, while some FHA cases from the Fifth Circuit have employed a phrase similar to the substantial-factor standard,¹⁰¹ that court has also used the motivating-factor standard regularly without using a “substantial”-like adjective.¹⁰² (And most other appellate courts have generally avoided the “substantial” language in FHA cases.¹⁰³) In any event, no reported fair housing case has ever held that a defendant, shown to have been motivated in part by an impermissible factor, could avoid liability on the ground that that factor was not a “substantial” one in the defendant’s decision.

The “primary-factor” standard is quite different. This standard is used in mixed-motive cases (i.e., those where the defendant is shown to have had both illegal and legitimate motives), and liability turns on “which one *predominated* over the other. . . . [A] mixed motive defendant is given whatever legal treatment is owing to her weightier motive; the lesser mo-

98. *Id.*

99. *Id.*

100. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (reiterating and quoting text accompanying *supra* note 89); *see also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1988) (plurality opinion) (describing the plaintiff’s burden in *Mt. Healthy* as having to show that “his constitutionally protected speech was a ‘substantial’ or ‘motivating factor’” in the defendant’s challenged action); NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 9.9 (2020) [hereinafter NINTH CIRCUIT INSTRUCTIONS], https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Instructions_2020_12.pdf [<https://perma.cc/7HCR-DLJY>] (providing, in model jury instruction regarding the causation standard in First Amendment retaliation cases, that the plaintiff must prove that his speech was “a substantial or motivating factor for the adverse employment action”).

101. *See infra* Appendix, Fifth Circuit.

102. *See* *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (unlawful if race “was a consideration and played some role”); *Payne v. Bracher*, 582 F.2d 17, 18 (5th Cir. 1978) (race may not be considered “in any way”).

103. *See infra* Appendix. The Fourth Circuit did use the “an important element” phrase in an early FHA case, *see* *Stevens v. Dobs, Inc.*, 483 F.2d 82, 84 (4th Cir. 1973), but has since used the “a motivating factor” standard. *See* *Hadeed v. Abraham*, 103 F. App’x 706, 707 (4th Cir. 2004). The First Circuit used the “a substantial factor” phrase in a 1993 FHA-disability case, *see* *Casa Marie, Inc. v. Superior Court of P.R.*, 988 F.2d 252, 269 (1st Cir. 1993), but only by way of eschewing the sole-factor test, citing therefor decisions by the Fourth and Sixth Circuits, *see id.*, which have since generally embraced the “a motivating factor” standard. *See infra* Appendix, Fourth Circuit, Sixth Circuit. The Second Circuit, in a 2006 FHA-disability case, used the “a significant factor” phrase, *see* *Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002), but otherwise has chosen phrases like “one motivating factor” or “motivated at least in part.” *See infra* Appendix, Second Circuit.

tive, regardless of whether it was itself necessary or sufficient for action, is ultimately disregarded.”¹⁰⁴

Thus, the primary-factor standard is more demanding than the but-for test.¹⁰⁵ No fair housing case has ever employed the primary-factor standard,¹⁰⁶ nor is it used in Title VII cases or in most other civil rights contexts.¹⁰⁷

3. “Sole-Factor” Test

The “sole-factor” or “sole-motive” causation standard is the most restrictive, directing that defendants should always win mixed-motive cases.¹⁰⁸ The Supreme Court has noted that this rigid test is much more demanding than the but-for standard that *Comcast* has now declared to be the default test for civil right statutes.¹⁰⁹

The sole-factor standard is rarely used in federal civil rights statutes.¹¹⁰ It is called for by the explicit statutory language used in § 504 of

104. Verstein, *supra* note 36, at 1134–36.

105. See THIRD TORTS RESTATEMENT, *supra* note 7, at § 26 cmt. 1 (noting that under § 26’s but-for test, “the plaintiff need not prove that the defendant’s tortious conduct was the predominant or primary cause of the harm”).

106. See *infra* Appendix.

107. See *supra* notes 62 and accompanying text, 84 and accompanying text. Cf. Verstein, *supra* note 36, at 1134 (noting that the primary-motive test is used in race-based redistricting claims under the Equal Protection Clause); *id.* at 1136 (identifying other areas of the law, mostly involving business litigation, in which the primary-motive standard is used); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020) (providing example of a non-civil rights statute in which Congress has provided for a “primarily because of” causation standard (citing 22 U.S.C. § 2688 (2018))).

108. See Verstein, *supra* note 36, at 1140.

109. See, e.g., *supra* note 62 and accompanying text (discussing *Bostock*, 140 S. Ct. at 1741); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 284 (1989) (Kennedy, J., dissenting) (“No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. . . . [S]ex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause.”); THIRD TORTS RESTATEMENT, *supra* note 7, at § 26 cmt. c (“That a party’s tortious conduct need only be a [but-for] cause of the plaintiff’s harm and not the sole cause is well recognized and accepted in every jurisdiction.”); EIGHTH CIRCUIT INSTRUCTIONS, *supra* note 89, at § 6.40 and § 11.41 (“‘But-for’ does not require that [age/race] was the only reason for the decision made by the defendant.”); accord FIFTH CIRCUIT INSTRUCTIONS, *supra* note 43, at 11.5.B.

110. See e.g., *Price Waterhouse*, 490 U.S. at 241 n.7 (plurality opinion) (noting that the 1964 Congress, in enacting Title VII, “rejected an amendment that would have placed the word ‘solely’ in front of the words ‘because of’”); see also *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 n.1 (6th Cir. 2015) (noting the Sixth Circuit’s rejection of the sole-causation requirement in intentional discrimination claims under the ADA). Cf. *Bostock*, 140 S. Ct. at 1739 (first citing 11 U.S.C. § 525 (2018); then citing 16 U.S.C. § 511 (2018)) (providing examples of non-civil rights statutes in which Congress has provided for a “solely” causation standard); Ver-

the 1973 Rehabilitation Act, which outlaws disability discrimination in programs that receive federal financial assistance.¹¹¹

The Rehabilitation Act’s “sole cause” standard is a bit of an anachronism in that it is not used even in other disability statutes, such as the 1990 Americans with Disabilities Act¹¹² and the FHA’s disability provisions.¹¹³ Thus, while the Rehabilitation Act has been relied on in some housing cases,¹¹⁴ it has rarely been of independent importance in such cases since 1988 when the FHA was amended to outlaw disability discrimination.¹¹⁵ And, of course, in housing cases involving race and other non-disability types of discrimination, the Rehabilitation Act and its sole-factor standard would not be involved.¹¹⁶

III. APPLICATION TO FAIR HOUSING CASES

This Part examines which causation standard should govern each of the four laws identified at the beginning of this Article as most likely applicable in a housing discrimination case.¹¹⁷ The two laws that seem easiest

stein, *supra* note 36, at 1140–41 (identifying various non-civil rights areas of law where the sole-motive standard is used).

111. See 29 U.S.C. § 794(a) (2018) (barring such programs from discriminating against an otherwise qualified individual with a disability “solely by reason of her or his disability”).

112. See 42 U.S.C. § 12132 (2018) (providing that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity”).

113. See § 3604(f)(1) (making it unlawful to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of” a disability); *id.* § 3604(f)(2) (making it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of” a disability).

114. See SCHWEMM, *supra* note 2, at § 29:3 n.6 (gathering cases).

115. See *id.* § 29:3 nn.8–12 and accompanying text.

116. Statutes comparable to the Rehabilitation Act also ban discrimination in federally assisted programs on the basis of race, color, and national origin, see Title VI of the 1964 Civil Rights Act, § 2000d, and in educational programs based on sex. See Title IX of the 1972 Education Amendments Act, 20 U.S.C. § 1681(a) (2018). These statutes do not use the Rehabilitation Act’s “solely” language to describe their prohibited practices, nor have courts interpreted them to require sole-factor causation. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., concurring) (opining that Title VI bars racial discrimination to the same extent as does the Equal Protection Clause, which a year earlier had been held to require only motivating-factor causation, see *supra* notes 83–87 and accompanying text); *id.* at 418 (Stevens, J., concurring) (concluding that Title VI means that “[r]ace cannot be the basis of excluding anyone from participation in a federally funded program”); *Doe v. Univ. of Scis.*, 961 F.3d 203, 209 (3d Cir. 2020) (noting that Title IX bars university action when sex “is a motivating factor in the decision” (quoting *Doe v. Columbia Univ.*, 831 F.3d 46, 53 (2d Cir. 2016))); see also *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020) (opining, in post-*Comcast* decision, that Title IX employs a but-for causation standard).

117. See *supra* notes 2–6 and accompanying text.

to analyze—the 1866 Act’s § 1982 and the Equal Protection Clause—are dealt with in Sections III.A and III.B, respectively. The Fair Housing Act presents the most challenging issues and is discussed in Section III.C. Section III.D covers state and local fair housing laws, which may explicitly resolve the causation issue or leave it to judicial interpretation. Section E discusses when the causation issue may arise in litigation and how its resolution may affect fair housing cases. Finally, Section III.F summarizes the conclusions reached in the earlier Sections and also discusses the issue of potential jury confusion in future housing discrimination cases brought under multiple laws that may have different causation standards.

A. § 1982

Until *Comcast*, courts generally had held that the proof standards in housing discrimination claims under the 1866 Civil Rights Act’s equal-property-rights provision (42 U.S.C. § 1982)¹¹⁸ followed those applied in intent-based claims under the FHA, i.e., that a violation required only a showing that race was one of the defendant’s motivations.¹¹⁹ Now, however, based on *Comcast’s* adoption of the but-for causation standard for claims under the “neighboring provision” of § 1981¹²⁰ and its recognition, based on prior Supreme Court precedent, that § 1981 and § 1982 are to be “construed . . . similarly,”¹²¹ there can be no doubt that § 1982 claims will be subject to the same but-for standard.¹²²

B. Equal Protection

The causation standard for Equal Protection Clause challenges to zoning and other government actions that allegedly deprive minorities of equal housing opportunities was established by the Supreme Court de-

118. See *supra* note 4 and accompanying text.

119. See SCHWEMM, *supra* note 2, at § 27:19 nn.1–2, 4 and accompanying text.

120. *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020) (describing § 1982 as a “neighboring provision” of § 1981).

121. *Id.* (citing *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 447 (2008)); see also *id.* at 1017 (noting that the *Comcast* plaintiff “offers no compelling reason to read two such similar statutes [§ 1981 and § 1982] so differently”).

122. See *id.* at 1016 (suggesting *Buchanan v. Warley*, 245 U.S. 60, 78–79 (1917) held that a § 1982 claim arises “when a citizen is not allowed ‘to acquire property . . . because of color’” (emphasis added by *Comcast*), and noting that the “because of” phrase is “often associated with but-for causation” (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013))). A separate question is whether *Comcast’s* apparent skepticism of the *McDonnell Douglas* framework for evaluating proof of intentional racial discrimination in § 1981 cases, see *supra* notes 31–32 and accompanying text (discussing *Comcast*, 140 S. Ct. at 1019), will require courts to revisit this issue in § 1982 housing discrimination cases. Prior to *Comcast*, lower courts in § 1982 housing cases had frequently held that the *McDonnell Douglas* approach could be used to prove improper motive. See SCHWEMM, *supra* note 2, at § 27:19 n.3 (gathering cases). That understanding has continued in post-*Comcast* decisions that have considered the issue. See *Peet v. Morfitt*, No. 17-CV-1870 (ECT/TNL), 2020 WL 3871497, at *6 (D. Minn. July 9, 2020). Cf. *infra* note 282 (same, regarding post-*Comcast* FHA cases).

cedes ago in the *Arlington Heights* case and is described in Section II.B.2.¹²³ Because *Comcast* dealt only with adopting but-for causation as the default position for interpreting statutes passed by Congress,¹²⁴ it has no effect on constitutional claims. Indeed, in a decision shortly after *Comcast*, the Court reiterated that *Arlington Heights*'s motivating-factor standard continues to control constitutional claims.¹²⁵ Thus, housing discrimination claims based on the Equal Protection Clause remain governed by a standard that allows plaintiffs to prevail by showing motivating-factor causation unless the defendant affirmatively proves the absence of but-for causation.¹²⁶

C. Fair Housing Act

1. Overview

The current FHA bans housing discrimination based on race and six other factors¹²⁷ and is the result primarily of two statutes: the original law passed in 1968¹²⁸ and the 1988 Fair Housing Amendments Act (FHAA).¹²⁹ The FHA provides for enforcement through private lawsuits, administrative complaints to the Department of Housing and Urban Development (HUD), and actions by the Justice Department.¹³⁰ HUD is also given other enforcement authority¹³¹ and, pursuant to a provision added by the FHAA, may issue regulations interpreting the FHA.¹³² The FHAA also requires that HUD refer administrative complaints to a state or local agency if that agency operates under a law that is substantially equivalent to the FHA,¹³³ and, as discussed later in Section III.D, these state and local

123. See *supra* notes 83–87 and accompanying text.

124. See *supra* note 23 and accompanying text.

125. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (holding that to plead an equal protection claim of racial animus, “a plaintiff must raise a plausible inference that an ‘invidious discriminatory purpose was a motivating factor’ in the relevant decision” (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977))).

126. See *supra* notes 83–91 and accompanying text.

127. See 42 U.S.C. §§ 3603–3607, 3617 (2018). The original statute outlawed discrimination based on race, color, national origin, and religion (see SCHWEMM, *supra* note 2, at § 11C:1 n.1 and accompanying text), sex was added in 1974 (see *id.* at § 11C:1 n.3 and accompanying text), and “handicap” (disability) and “familial status” (children) were added by the 1988 Fair Housing Amendments (see *id.* at § 5:3 n.3 and accompanying text).

128. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

129. An Act to Amend Title VIII of the Civil Rights Act of 1968, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

130. See 42 U.S.C. §§ 3613 (private lawsuits), 3610–3612 (complaints to HUD), 3614 (Justice Department actions).

131. See *id.* §§ 3608–3609, 3616a.

132. See *id.* § 3614a.

133. See *id.* § 3610(f). For more on these state and local laws and the causation standard under them, see *infra* Section III.D.

fair housing laws may be invoked along with or independently of the FHA in judicial proceedings.

The FHA contains numerous substantive prohibitions, the most important of which—§ 3604(a) and § 3604(b)—outlaw discrimination “because of” a prohibited factor in, respectively, housing sales and rentals, and the terms, condition, privileges, services, and facilities thereof.¹³⁴ Additional provisions ban ads, notices, and statements that indicate discrimination “based on” a prohibited factor (§ 3604(c))¹³⁵ and discrimination “because of” such a factor in home financing and other real-estate-related transactions (§ 3605).¹³⁶ A separate provision (§ 3617) outlaws interference with persons “on account of” their having exercised FHA substantive rights along with retaliation for asserting those rights.¹³⁷

The causation-standard issue in cases like *Comcast* is confined to claims of intentional discrimination (disparate treatment),¹³⁸ so it is worth noting here that a number of FHA claims do not require such proof. These include: (1) disparate-impact claims, which the Supreme Court rec-

134. 42 U.S.C. §§ 3604(a), § 3604(b). Similarly worded prohibitions against disability discrimination are contained in *id.* § 3604(f)(1)–(2). The prohibitions in these provisions account for the majority of FHA claims filed with HUD and state and local agencies. *See, e.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., 2017 OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS 16 tbl.2.2 (2018) [hereinafter 2017 HUD REPORT] (reporting that, of all such claims filed in 2017, “discriminatory terms, conditions, privileges, or services and facilities” were alleged in 68.9% (5,640 claims), “discriminatory refusal[s] to rent” were alleged in 29.5% (2,414 claims), and “discriminatory refusal[s] to sell” were alleged in 1.8% (148 claims)).

135. 42 U.S.C. § 3604(c).

136. *Id.* § 3605. Other provisions ban discriminatory misrepresentations of availability “because of” a prohibited factor (§ 3604(d)), “blockbusting” (§ 3604(e)), and denials of brokerage services “on account of” a discriminatory factor (§ 3606). These provisions, unlike § 3604(a) and § 3604(b), have rarely produced judicial decisions dealing with their causation standard, but it is a fair assumption that their “because of” and “on account of” language should be interpreted as having the same causation standard as the one that governs the “because of” phrases in § 3604(a) and § 3604(b). *See Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) (noting the rule of statutory construction that provides: “‘In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning’ across a statute” (quoting *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019))); *Scialabba v. Cuellar de Osoria*, 573 U.S. 41, 60 (2014) (“[W]ords repeated in different parts of the same statute generally have the same meaning” (alteration in original) (quoting *Law v. Siegel*, 571 U.S. 415, 422 (2014))).

137. § 3617. For more on this provision, see *infra* Section III.C.3. Another FHA provision (§ 3608) mandates that HUD and other federal agencies administer their housing programs in a manner affirmatively to further fair housing, but this provision does not provide for private enforcement. *See SCHWEMM, supra* note 2, at § 21:7 n.6 and accompanying text.

138. Claims under § 1981, like the one in *Comcast*, may challenge only intentional discrimination. *See Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 382–91 (1982); *see also Sullivan, supra* note 76, at 368 (noting that “most employment discrimination claims are ‘disparate treatment’ cases” in which the plaintiff’s ability to fully recover depends on showing but-for causation).

ognized in 2015 are appropriate under § 3604(a) and § 3605;¹³⁹ (2) § 3604(c) claims challenging discriminatory ads, notices, and statements;¹⁴⁰ and (3) disability claims under § 3604(f)(3) that involve a defendant's failure to make reasonable accommodations, allow reasonable modifications, and provide accessibility features in certain multi-family housing.¹⁴¹

The next Section deals with intent-based claims under the FHA's § 3604(a), § 3604(b), and other "because of" provisions, and a concluding Section discusses FHA-retaliation claims under § 3617. In considering these provisions, recall *Comcast's* interpretive methodology as described above in Part II: Justice Gorsuch's opinion began by adopting the but-for test as the "default" or "background" rule for causation in civil rights statutes¹⁴² and then considered "[a]ll traditional tools of statutory construction" to determine if § 1981 should be excepted from this general rule.¹⁴³ These interpretive tools included the 1866 Act's text, history, and purpose, the Court's precedents dealing with this statute, the statute's modern amendments, and its relationship to Title VII of the 1964 Civil Rights Act.¹⁴⁴

The Court's methodology in *Comcast*, like its other modern causation cases, shows an insistence that each statute be judged individually in determining its proper causation standard.¹⁴⁵ As we shall see, applying *Comcast's* interpreting techniques to the FHA yields conflicting signals.

139. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518–25 (2015). Prior to this decision, lower courts had upheld disparate-impact claims in a wide range of FHA cases. See, e.g., *id.* at 2519. Some of these cases, along with others decided after *Inclusive Communities*, have upheld disparate-impact claims based on FHA provisions other than § 3604(a) and § 3605. See, e.g., *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1201, 1203 (9th Cir. 2010) (noting that § 3604(b) "has been interpreted to prohibit . . . disparate-impact discrimination" (citing *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745–46 (9th Cir.1996))); *Sams v. Ga W. Gate, LLC*, No. CV415-282, 2017 WL 436281, at *5 (S.D. Ga. Jan. 30, 2017) (upholding disparate-impact claim based on § 3604(b)).

140. See SCHWEMM, *supra* note 2, at §§ 15:3 n.4, 15:6 nn.18–21, 15:8 n.2 (gathering cases holding that a § 3604(c) violation does not require proof of an intent to discriminate).

141. See § 3604(f)(3)(A)–(C); SCHWEMM, *supra* note 2, at §§ 11D:8 n.5, 11D:9 n.5 (gathering cases holding that, respectively, § 3604(f)(3)(B) and 3604(f)(3)(C) violations do not require proof of intentional discrimination).

142. See *supra* note 23 and accompanying text (quoting *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020)).

143. See *supra* note 34 and accompanying text (quoting *Comcast*, 140 S. Ct. at 1019).

144. See *supra* notes 23–34 and accompanying text.

145. In addition to *Comcast*, see *supra* note 14 (describing the post-*Comcast* decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020)); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (cautioning, in ruling on the proper causation standard for ADEA claims in pre-*Comcast* decision, that "we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination'" (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008))).

2. *The FHA's Main Substantive Provisions*

a. Factors Favoring the But-For Standard

The FHA's main substantive prohibitions are now, like all other civil rights statutes, subject to *Comcast's* determination that the but-for standard supplies "the 'default' or 'background' rule against which Congress is normally presumed to have legislated."¹⁴⁶ Further, the text of these provisions, which ban discrimination "because of" or "based on" a prohibited factor,¹⁴⁷ are terms that, according to *Comcast*, the Court has "often held indicate a but-for causation requirement."¹⁴⁸

A third factor that supports this standard is the common law as it existed when the FHA was enacted. The *Comcast* opinion bolstered its decision that the but-for standard controls § 1981 claims by noting the presumption "that Congress legislates against the backdrop of the common law,"¹⁴⁹ and that, with a few exceptions, "the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit."¹⁵⁰ *Comcast* cited *Nassar* for the former proposition and did so again in support of its view that "textbook tort law" requires a plaintiff to prove but-for causation.¹⁵¹ For its part, *Nassar* cited a 1984 treatise for this proposition¹⁵² and explained the meaning of but-for causation by referencing all three iterations of the *Restatement of Torts*.¹⁵³

The *Restatement of Torts* was first published in 1934, a second version came out in 1965, and the most recent in 2010.¹⁵⁴ Restatements are intended to reflect the common law "as it presently stands."¹⁵⁵ All three *Restatements of Torts* embraced the but-for test as their basic causation standard,¹⁵⁶ although the *Third Torts Restatement* did adopt different language

146. See *supra* note 23 and accompanying text (quoting *Comcast*, 140 S. Ct. at 1014).

147. See *supra* notes 134–46 and accompanying text.

148. *Comcast*, 140 S. Ct. at 1015 (citing *Gross*, 557 U.S. at 176–77).

149. *Id.* at 1016. Prior to *Comcast*, the Court had applied a similar presumption to the FHA. See *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (noting that "the Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules").

150. *Comcast*, 140 S. Ct. at 1016 (citing cases and articles from the 1866 era).

151. See *id.* at 1014.

152. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013).

153. See *id.*

154. See, respectively, FIRST TORTS RESTATEMENT, *supra* note 7, SECOND TORTS RESTATEMENT, *supra* note 44, and THIRD TORTS RESTATEMENT, *supra* note 7.

155. See AM. LAW INST., FREQUENTLY ASKED QUESTIONS ("Restatements are primarily addressed to courts. They . . . reflect the law as it presently stands or might appropriately be stated by a court."), <https://www.ali.org/publications/frequently-asked-questions> [<https://perma.cc/9BWR-DZ3P>] (last visited Jan. 14, 2021).

156. See THIRD TORTS RESTATEMENT, *supra* note 7, at § 26 cmt. b (noting that this *Restatement's* basic causation standard in § 26—that "factual cause" is a prerequisite for liability and that "[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct"—is "familarly referred to as the

in describing this standard.¹⁵⁷ This adjustment in phrasing signaled some important changes,¹⁵⁸ but it did not alter the fact that but-for causation has been the dominant common-law standard, not only in the late nineteenth and early twentieth centuries but also in 1968, when the FHA was enacted, and in 1988 when the FHAA re-enacted the statute's "because of" language to define its key substantive prohibitions.¹⁵⁹

b. Factors Favoring a More Lenient Standard

In contrast to the statute reviewed in *Comcast*, the FHA has a number of features that suggest an exception from the but-for test in favor of a more lenient causation standard. These include the FHA's history, purpose, and their relationship to Title VII and, perhaps most importantly, Congress's 1988 amendments to the FHA.

The *Comcast* opinion was at pains to contrast § 1981's history and purpose with those of Title VII. As Justice Gorsuch put it, "we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard."¹⁶⁰

The FHA is much more akin to Title VII than to the 1866 Act.¹⁶¹ The FHA was enacted only four years after Title VII, adopted Title VII's basic

'but-for' test," and that this same standard was included by way of a comment in the First and Second Restatements (citing § 431 cmt. a in both of these *Restatements*)).

157. Compare THIRD TORTS RESTATEMENT, *supra* note 7, at § 26 (establishing "factual cause" as a prerequisite for liability and providing that "[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct"), with FIRST TORTS RESTATEMENT, *supra* note 7, at § 431 (providing that an actor's conduct "is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no other rule of law relieving the actor from liability"), and SECOND TORTS RESTATEMENT, *supra* note 44, at § 431 (same).

158. See, e.g., *supra* notes 96–99 and accompanying text.

159. See *supra* notes 3, 128 (enactment of 1968 Act), 129 (enactment 1988 Act amending 1968 Act); see also *supra* notes 134–37 and accompanying text (discussing FHA's "because of" language).

160. The full quote is as follows:

Title VII was enacted in 1964; this Court recognized its motivating factor test in 1989; and Congress replaced that rule with its own version two years later. Meanwhile, § 1981 dates back to 1866 and has never said a word about motivating factors. So we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard.

Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1018 (2020).

161. See, e.g., *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2511 (2015) (noting the similarity of "the central purpose of the FHA" with that of Title VII's, both of which were "enacted to eradicate discriminatory practices within a sector of the Nation's economy"); *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 413 (1968) (describing § 1982 as "not a comprehensive open housing law [i]n sharp contrast to the Fair Housing [Act]," and noting various ways in which the FHA is broader than § 1982).

“because of” language to describe its unlawful practices, and has often been interpreted in accord with Title VII precedents.¹⁶²

Further, the FHA’s purposes are significantly broader¹⁶³ than those of the 1866 Act identified in *Comcast*.¹⁶⁴ The Supreme Court, in its first review of the FHA in *Trafficante v. Metropolitan Life Insurance Co.*,¹⁶⁵ announced that this statute carries out a “policy that Congress considered to be of the highest priority.”¹⁶⁶ According to *Trafficante*, this policy is reflected in the FHA’s “broad and inclusive” language¹⁶⁷ and can be served “only by a generous construction” of the statute.¹⁶⁸ These themes have regularly been reiterated by the Court in subsequent FHA cases.¹⁶⁹

The Congress that adopted the 1988 amendments to the FHA was intent upon strengthening the statute.¹⁷⁰ It is inconceivable that that Congress intended to adopt a stricter causation standard for FHA plaintiffs than, say, the one the Supreme Court had endorsed in 1977 for housing claims under the Equal Protection Clause in the *Arlington Heights* case.¹⁷¹

162. See, e.g., *Inclusive Cmty.*, 135 S. Ct. at 2516–18; *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); SCHWEMM, *supra* note 2, at § 7:4 n.4 (gathering cases).

163. See *infra* notes 166–69 and accompanying text (describing the FHA’s broad purposes); 42 U.S.C. § 3601 (2018) (announcing, in the FHA’s first section, that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States”).

164. See *supra* note 25 and accompanying text.

165. 409 U.S. 205 (1972).

166. *Id.* at 211. As *Trafficante* noted, the FHA’s chief sponsor in the Senate announced, in what has become the most important statement of the law’s purpose in its legislative history, that the FHA was designed “to replace the ghettos ‘by truly integrated and balanced living patterns.’” *Id.* (quoting remarks of Senator Mondale (114 Cong. Rec. 3422 (1968))).

167. *Id.* at 209.

168. *Id.* at 212.

169. See *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (reaffirming *Trafficante*’s recognition of the FHA’s “broad and inclusive compass” and thus its entitlement to a “generous construction”); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (noting “the broad remedial intent of Congress in the Act”); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 93 (1979) (noting that the FHA “broadly prohibits discrimination in housing throughout the Nation”); see also *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525–26 (2015) (“The FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘[o]ur Nation is moving toward two societies, one Black, one white—separate and unequal.’ The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.” (alteration in original) (citation omitted) (quoting NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS I (1968))).

170. See SCHWEMM, *supra* note 2, at §§ 24:2 nn.9–18, 25:3 nn.4–7 and accompanying text (describing changes made to strengthen the FHA’s enforcement scheme by the 1988 FHAA and their legislative history); see also *City of Oakland v. Wells Fargo & Co.*, 972 F.3d 1112, 1127 (9th Cir. 2020) (“Undoubtedly, when Congress revisited the FHA in 1988, it expanded its reach and reiterated its broad and inclusive purpose.”).

171. See *supra* notes 83–87 and accompanying text.

And the 1988 FHAA was passed just a year before the Court's majority adopted a similarly generous standard for Title VII's "because of" claims in the *Price Waterhouse* case.¹⁷²

The FHAA's strongest support for applying a more lenient causation standard than the but-for test lies in its acceptance of lower court decisions endorsing an easier standard prior to 1988. During the twenty years of FHA litigation that preceded the 1988 FHAA, all of the courts of appeals that considered this issue in FHA cases rejected but-for causation in favor of a lighter standard.¹⁷³ These courts included the Second, Fifth, Sixth, Seventh, and Eighth Circuits, all of which adopted some form of the "a motivating factor" standard.¹⁷⁴

In passing the 1988 FHAA, Congress made many important changes to the statute (e.g., by adding disability and families with children to the prohibited bases and by strengthening all three of the FHA's enforcement methods),¹⁷⁵ but it did not address the causation issue. Rather, Congress simply left intact the basic "because of" language of the FHA's key substantive provisions.¹⁷⁶

This is significant. By not changing the FHA's key causation language, the 1988 Congress may be understood to have endorsed the unanimous lower courts' views on this issue. This same interpretive technique was a key to the Supreme Court's decision in 2015 holding that the FHA included a disparate-impact theory of liability.¹⁷⁷ There, Justice Kennedy's opinion for the Court concluded: "Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§ [3604(a) and 3605] is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability."¹⁷⁸ Indeed, in 1988, the consensus

172. See *supra* notes 77–78 and accompanying text.

173. See *infra* Appendix (listing cases by circuit).

174. See *infra* Appendix. As noted above, the Fifth Circuit's decisions sometimes used this standard and sometimes used the "a significant factor" phrase. See *supra* notes 101–02 and accompanying text. The Fourth Circuit produced one pre-1988 decision that used the phrase "an important element" but has since adopted the "a motivating factor" standard. See *supra* note 103.

175. See SCHWEMM, *supra* note 2, at § 5:3.

176. The 1988 FHAA did make some substantive changes to § 3605, but did not change its "because of" causation standard. See SCHWEMM, *supra* note 2, at § 18:1, nn.5–11 and accompanying text.

177. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (noting, in endorsing the disparate-impact theory of liability under the FHA, that "it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988").

178. *Id.* For this proposition, Justice Kennedy cited, *inter alia*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 322 (2012), and *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 336 (1934) (explaining that, where the appellate courts had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, "[t]his is persuasive that the construction adopted

view on the causation issue was stronger than it was on the disparate-impact issue.¹⁷⁹ And the Supreme Court's determination to adopt but-for as the default causation standard for civil rights statutes did not arise until well after the 1988 FHAA.¹⁸⁰

As a result, in post-1988 decisions on the FHA causation issue, the appellate courts have continued unanimously to adhere to a less than but-for standard, with the Third, Fourth, Ninth, and Eleventh Circuits joining their predecessors in adopting the "a motivating factor" test.¹⁸¹ Particularly noteworthy among the more modern decisions is *Mhany Management, Inc. v. County of Nassau*,¹⁸² where the Second Circuit adhered to its precedent in keeping the "motivated in part" standard, holding the Supreme Court's intervening decision in *Gross v. FBL Financial Services, Inc.*¹⁸³ inapplicable to FHA claims.¹⁸⁴

c. The HUD-Interpretation Factor

In contrast to the 1866 Act, the FHA, like Title VII, provides for the statute's enforcement and interpretation by a federal agency. As a result, the views of HUD—the agency primarily responsible for enforcing the FHA—have long been accorded substantial deference by the Supreme Court in interpreting this statute.¹⁸⁵

HUD, however, said virtually nothing about the FHA's causation standard before the 1988 FHAA.¹⁸⁶ Nor has the agency put forth any defini-

by the [lower federal] courts has been acceptable to the legislative arm of the government"). Two years after *Inclusive Communities*, the Court used this same interpretive technique in its most recent decision dealing with the FHA. *See Bank of Am. Corp. v. Miami*, 137 S. Ct. 1296, 1303–04 (2017) (noting that "in 1988, when Congress amended the FHA, it retained without significant change the definition of 'person aggrieved' that this Court had broadly construed. Indeed, Congress 'was aware of' our precedent and 'made a considered judgment to retain the relevant statutory text'" (citation omitted) (quoting *Inclusive Cmty.*, 135 S. Ct. 2507 (2015))).

179. Compare *supra* notes 173–74 and accompanying text (causation standard), with *Inclusive Cmty.*, 135 S. Ct. at 2538–39 (Alito, J., dissenting) (contending that the disparate-impact issue was not well-settled in 1988).

180. The Court's earliest suggestion that but-for causation should be the default standard for civil rights statutes was in 2009 in the *Gross* case. *See supra* note 9.

181. *See infra* Appendix.

182. 819 F.3d 581 (2d Cir. 2016).

183. 557 U.S. 167 (2009).

184. *Mhany*, 819 F.3d at 616. For a description of *Mhany's* rationale for this decision, see *infra* notes 303–08 and accompanying text.

185. *See Meyer v. Holley*, 537 U.S. 280, 287–88 (2003); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 107 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972). *See generally* SCHWEMM, *supra* note 2, at § 7:5 (describing judicial deference to HUD's views on the FHA's meaning).

186. Because the 1988 FHAA created both the HUD–Administrative Law Judges (ALJ) system for resolving FHA administrative complaints and authorized HUD to issue FHA regulations, see SCHWEMM, *supra* note 2, at § 24:2, § 7:5 nn.6–11 and accompanying text, neither HUD–ALJ decisions nor general HUD regulations interpreting the FHA were available before the 1988 FHAA.

tive statement on this issue since then, although, as we shall see, HUD has signaled in various ways that it favors a more lenient standard than the but-for test.

After the 1988 FHAA, some FHA decisions by HUD Administrative Law Judges (ALJ) addressed the causation issue. In the first post-FHAA administrative decision, HUD's Chief ALJ Alan Heifetz in 1989 imposed liability based on the "play a part" standard, commenting that the complaining party "need not prove that race was the sole factor motivating Respondent . . . [but] need only show by a preponderance of the evidence that race is one of the factors that motivated Respondent in his dealings with Complainants."¹⁸⁷ A year later, another HUD ALJ cited this decision in support of the proposition that the FHA's causation standard did not require proof that "racial animus was the sole motivating force behind the challenged conduct," but only that "racial considerations were a significant factor in the Respondent's behavior."¹⁸⁸

In the next two years, separate decisions by a third ALJ and Chief Judge Heifetz concluded that the *Price Waterhouse* approach, though set aside by Congress for purposes of Title VII claims, should govern the FHA "because of" claims.¹⁸⁹ In both cases, the ALJs found that the proof showed the challenged conduct was motivated at least in part by a prohibited factor, thus shifting to the respondent the burden of proving that it would have taken the same action without this consideration.¹⁹⁰ (In one case, the respondent lost for failing to meet this burden;¹⁹¹ in the other,

187. *HUD v. Blackwell*, 1989 WL 386958, at *8 (HUD ALJ Dec. 21, 1989), enforced, 908 F.2d 864 (11th Cir. 1990). In support of his adoption of this "one of the factors" standard, Judge Heifetz cited three court decisions (the Second Circuit's *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042 (2d Cir. 1979), the Fifth Circuit's *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978), and an Ohio district judge's *Pollitt v. Bramel*, 669 F. Supp. 172, 176 (S.D. Ohio 1987)). See *Blackwell*, 1989 WL 386958, at *8.

188. *HUD v. Narlis*, 1990 WL 456961, at *3 (HUD ALJ Sept. 11, 1990). In addition to *Blackwell*, the ALJ opinion in *Narlis* cited for this proposition three Fifth Circuit decisions from before the 1988 FHAA. See *id.*

189. See *HUD v. Rollhaus*, 1991 WL 442790, at *2 (HUD ALJ Dec. 9, 1991) (dealing with claims under § 3604(a) and § 3604(b)); *HUD v. Denton*, 1992 WL 406537, at *7–8 (HUD ALJ Feb. 7, 1992) (same). In the *Denton* case, the evidence showed that the respondent landlord evicted a family in part because of the number of children in the family (an illegal consideration) and in part because of numerous instances of misconduct by the family (a legitimate consideration). Chief ALJ Heifetz held that the FHA's causation standard should be governed by *Price Waterhouse*.

While Congress has overruled the specific result in *Price Waterhouse*, the Civil Rights Act of 1991 did not address the *Price Waterhouse* Court's analysis for determining liability in a mixed motive case where the language of a statute proscribes conduct "because of" certain unlawful factors. Under the circumstances, I conclude that the causation analysis formulated in *Price Waterhouse* remains apt for Fair Housing Act cases. *Denton*, 1992 WL 406537, at *8.

190. See *Rollhaus*, 1991 WL 442790, at *3–4; *Denton*, 1992 WL 406537, at *6.

191. See *Rollhaus*, 1991 WL 442790, at *6.

the respondent met this burden and won.¹⁹²) Whatever the merits of this approach—and some courts also adopted it in post-1988 FHAA decisions¹⁹³—it joins the unanimous view of the lower courts that a standard more lenient than but-for causation governs FHA “because of” claims.

HUD also recognized the possibility that *Price Waterhouse* might control FHA mixed-motive cases in an internal handbook published in 1998.¹⁹⁴ This document, which was designed to guide HUD’s fair housing staff and which remains in place today, concluded that “the modern view of this [mixed-motive] issue must take into account the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*.”¹⁹⁵

A final piece of evidence that HUD disagrees with the but-for test lies in one of its FHA regulations and that regulation’s relation to the Supreme Court’s discussion of causation standards in the post-*Comcast* case of *Babb v. Wilkie*.¹⁹⁶ The HUD regulation, which the agency promulgated in

192. See *Denton*, 1992 WL 406537, at *5–8. In *Denton*, Chief Judge Heifetz did go on to find a § 3604(c) violation based on the respondent-landlord’s eviction notice having included a statement indicating discrimination based on familial status. But no relief was awarded for this violation, as Judge Heifetz found that none of the complainants’ claimed injuries resulted from this statement as opposed to the eviction itself. See *id.* at *9–10.

193. See, e.g., *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 613 (2d Cir. 2016); *United States v. Big D Enters., Inc.*, 184 F.3d 924, 931–32 (8th Cir. 1999); *Cato v. Jilek*, 779 F. Supp. 937, 943–44 (N.D. Ill. 1991).

194. See HUD, TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK 8024.01 (1998), <https://www.hud.gov/sites/documents/8024IC2FHEH.PDF> [<https://perma.cc/8NSH-QHW3>].

195. *Id.* at 2-23. This Handbook then observed:

Applying *Price Waterhouse* to fair housing cases would mean that a complainant in a mixed-motive case will be able to shift the burden of persuasion to the respondent by showing that the challenged housing practice was motivated at least in part by an unlawful consideration. The respondent will then be liable unless it proves by a preponderance of the evidence that it would have taken the same action even in the absence of this unlawful consideration. . . .

The outcome will usually turn on whether the respondent has consistently acted on the basis of this [claimed legitimate] criteria by applying it to all of the other applicants and/or tenants he has dealt with, and not just members of the complainant’s protected class.

This means that generally the key to resolving mixed-motive cases will be the same type of comparative evidence that is often the key in analyzing single-motive cases Thus, if the respondent in a mixed-motive case has regularly been guided by his claimed legitimate reason in dealing with people who are not in the complainant’s protected class, then it may well be believed that he would have treated the complainant in the same way he did even in the absence of her protected-class status. On the other hand, if the claimed excuse has been ignored for other persons, the respondent will be hard pressed to show that he would have relied on it alone to reject the complainant.

Id. at 2-24 to 2-26.

196. *Babb v. Wilkie*, 140 S. Ct. 1168 (2020) (discussed *supra* notes 53–57 and accompanying text).

1989, interprets the prohibitions of the FHA's § 3604(a) to bar landlords and other housing providers from using different income or other rental requirements because of race or other FHA-prohibited factor.¹⁹⁷

Consider this mandate in light of the hypothetical that began this Article,¹⁹⁸ as expanded to include facts based roughly on the employment hypothetical set forth in *Babb*¹⁹⁹: that is, that the rental complex's basic screening procedures require applicants to have a monthly income of three times the rent (which is \$1,000) and then picks the higher income candidate among those meeting this standard, but the complex also has a "secret" discriminatory policy that Black applicants need to have income of four times the rent. The Black and white applicants have monthly incomes of, respectively, \$3,200 and \$3,400 (i.e., both meet the basic non-discriminatory requirement, but the white is the stronger candidate). Applying all of its policies, the complex chooses the white applicant.

Whether this conduct violates § 3604(a)'s ban on refusals to rent "because of" race would depend, according to the *Babb* opinion, on which causation standard that law uses, with the Black applicant's claim losing under a but-for test but winning under a "free from any discrimination" standard.²⁰⁰ The HUD regulation clearly provides for liability because the complex has used "different qualification criteria . . . or rental standards . . . , such as income standards . . . or other requirements, because of race."²⁰¹ In other words, HUD's long-standing § 3604(a) regulation interprets the statute to forbid conduct that *Babb* concluded would only be outlawed under a causation standard more lenient than the but-for test.²⁰²

197. See 24 C.F.R. § 100.60(b)(4) (2020). The full text of this regulation states that § 3604(a)-prohibited actions include: "Using different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis or sale or rental approval procedures or other requirements, because of race, color, religion, sex, handicap, familial status, or national origin." *Id.*

198. See *supra* text accompanying note 1.

199. See *supra* text accompanying notes 54–57.

200. See *supra* text accompanying note 57.

201. 24 C.F.R. § 100.60(b)(4) (quoted in full *supra* note 197). In addition, if the complex has communicated its discriminatory policy to any of its agents or employees, the complex would also violate HUD's regulation interpreting the FHA's § 3604(c). See 24 C.F.R. § 100.75(c)(2) (providing that § 3604(c) violations include "[e]xpressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons").

202. The conclusion that the conduct described in the enhanced hypothetical should produce liability under § 3604(a) also demonstrates the analytic need to separate two causation issues that the *Comcast* and *Babb* opinions sometimes conflate: (1) whether race caused the defendant's conduct; and (2) whether the defendant's conduct caused injury to the plaintiff in the form of a lost housing unit. (The answers in the hypothetical are "Yes" to the former and "No" to the latter.) The second issue deals with what constitutes cognizable injuries under the FHA. Understanding the distinction between the liability and proper-relief issues is the insight that Congress brought to Title VII claims in the 1991 amendments after

To summarize, the HUD sources reviewed in this Section support the factors discussed in the previous Section favoring a more lenient standard than the but-for test. Those factors, particularly the 1988 Congress's endorsement of such a standard in the FHAA, apparently led HUD in a number of post-1988 pronouncements to conclude that a FHA plaintiff should prevail, or at least carry its initial burden under a system similar to *Price Waterhouse*, by satisfying the "any motivating factor" standard.

3. *Retaliation and Other § 3617 Claims*

Even if § 3604(a) and other FHA substantive provisions have a more lenient standard than but-for causation as discussed in the previous Sections, a separate analysis is required for the FHA's anti-interference provision in § 3617. The need for this separate analysis is demonstrated by the Supreme Court's 2013 *Nassar* decision,²⁰³ which held that claims under Title VII's anti-retaliation provision²⁰⁴ are subject to the more stringent but-for causation standard than claims under that statute's basic substantive provisions.²⁰⁵

Price Waterhouse, which provided for liability, but only limited relief, where a plaintiff satisfies the "motivating factor" causation test but the defendant proves it would have acted the same without a discriminatory motive. See *supra* notes 75–76 and accompanying text.

203. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

204. 42 U.S.C. § 2000e-3(a) (2018); see also Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (dealing with § 2000e-3a's anti-retaliation provision). In pertinent part, § 2000e-3(a) makes it unlawful

for an employer to discriminate against any of his employees or applicants for employment . . . , because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C. § 2000e-3(a).

205. See *Nassar*, 570 U.S. at 360. Title VII also contains a special anti-retaliation provision dealing exclusively with federal-sector employment that uses a causation standard worded differently from § 2000e-3a's "because" language. See 42 U.S.C. § 2000e-16a (providing, in pertinent part, that "[a]ll personnel actions affecting employees or applicants for [most federal] employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin" (emphasis added)). This causation language closely resembles the ADEA's antidiscrimination provision dealing with federal-sector employment, see 29 U.S.C. § 633a (providing, in pertinent part, that "[a]ll personnel actions affecting employees or applicants for [most federal] employment who are at least 40 years of age . . . shall be made free from any discrimination based on age" (emphasis added)), which the Supreme Court, shortly after *Comcast*, interpreted to impose a less stringent causation standard than the but-for test. See *Babb v. Wilkie*, 140 S. Ct. 1168, 1171 (2020) (discussed *supra* notes 53–57 and accompanying text). Because of their textual differences regarding the causation standard, these federal-sector employment provisions seem irrelevant to *Nassar*'s continuing viability as the authoritative interpretation of Title VII's basic anti-retaliation provision in 42 U.S.C. § 2000e-3a and similarly irrelevant to a post-*Comcast* interpretation of the FHA's § 3617.

How does *Nassar*—and now *Comcast*—affect § 3617 claims? This provision, which is located toward the end of the FHA apart from the statute’s main prohibitions in §§ 3603–3606, makes it unlawful

to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of [the FHA].²⁰⁶

Section 3617 was enacted as part of the original 1968 FHA, but that statute did not authorize its enforcement through the FHA’s regular litigation methods,²⁰⁷ providing instead that “[t]his section may be enforced by appropriate civil action.”²⁰⁸ Based on this language, a number of § 3617 claims were brought in the FHA’s first two decades.²⁰⁹ Then, in the 1988 FHAA, Congress deleted this phrase and made § 3617 enforceable through the FHA’s regular methods, while also re-enacting this section’s substantive commands without change.²¹⁰

Case law during the 1968–1988 period demonstrated, as HUD observed in 1989, that § 3617 bans “a broad range of activities.”²¹¹ Prohibited conduct includes violent acts such as the firebombing of a Black family’s house²¹² and a variety of less coercive types of interference done “on account of” one’s exercise of FHA rights;²¹³ the latter category includes, according to numerous court decisions and HUD’s § 3617 regulation, retaliatory conduct similar to that outlawed by Title VII’s anti-retaliation provision.²¹⁴

Section 3617, like its Title VII counterpart, is a stand-alone source of legal rights and responsibilities.²¹⁵ Thus, although some housing prac-

206. 42 U.S.C. § 3617 (2018).

207. See SCHWEMM, *supra* note 2, at § 20:1 nn.3–4 and accompanying text.

208. See 42 U.S.C. § 3617 (1982 & Supp. 1987).

209. See, e.g., cases cited in SCHWEMM, *supra* note 2, at § 20:1 n.4 para. 2.

210. See *id.* at § 20:1 n.4 and accompanying text (referring to Pub. L. 100-430 § 5(a)).

211. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3257, 3257 (Jan. 23, 1989); see also *United States v. Am. Inst. of Real Estate Appraisers of Nat. Ass’n of Realtors*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (noting in 1977 that § 3617 has been “broadly applied to reach all practices which have the effect of interfering with the exercise of” FHA rights).

212. See *Stirgus v. Benoit*, 720 F. Supp. 119, 123 (N.D. Ill. 1989); other cases cited in SCHWEMM, *supra* note 2, at § 20:3 nn.4–5.

213. See SCHWEMM, *supra* note 2, at § 20:2 nn.6–12 and accompanying text.

214. See *id.* at § 20:5 nn. 4–5 (gathering cases); 24 C.F.R. § 100.400(c)(5)–(6) (2017) (HUD regulation).

215. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–67 (2006) (interpreting Title VII’s anti-retaliation provision separately from the statute’s other substantive provisions); see also *supra* notes 41–42 and accompanying text

tices may violate both § 3617 and another FHA provision,²¹⁶ other types of § 3617-violative conduct (e.g., the firing of an apartment manager for helping a minority prospect)²¹⁷ may not be barred elsewhere in the FHA.²¹⁸

The same is true for retaliation. For example, if a Black tenant sues her landlord for violating § 3604(b) by allegedly charging higher rent to minorities than whites, and if the landlord responds by evicting the complaining tenant, then the landlord has violated § 3617. This is true even if the landlord is ultimately found innocent of racial discrimination with respect to the rental charges, because its eviction of the tenant was, in the words of § 3617, “on account of [the tenant’s] having exercised” her right to file a fair housing complaint.²¹⁹ The distinction between the § 3604(b) claim and the § 3617-retaliation claim is, as the Supreme Court’s Title VII precedents put it, between “status-based discrimination” (focusing on who the plaintiff is) and “conduct-based discrimination” (focusing on what the plaintiff did).²²⁰

Clearly, then, § 3617’s mandate is independent of a defendant’s potential liability under §§ 3604–3606. And even when § 3617 and another FHA provision cover the same situation, the § 3617 claim must be analyzed separately and according to its own governing law.²²¹

After the 1988 FHAA, the number of § 3617 complaints grew substantially, to the point that they now make up the fourth largest category of FHA complaints.²²² Some of these § 3617 claims allege retaliation, while

(discussing *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013)).

216. See *Bloch v. Frischholz*, 587 F.3d 771, 781 (7th Cir. 2009) (en banc); other cases cited in SCHWEMM, *supra* note 2, at § 20:2 nn.21–23.

217. See, e.g., *Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975). In *Smith*, the earliest appellate decision to deal with § 3617, the Ninth Circuit observed:

Section 3617 does not necessarily deal with a discriminatory housing practice, or with the landlord, financier or brokerage service guilty of such practice. It deals with a situation where no discriminatory housing practice may have occurred at all because the would-be [tenant’s] . . . rights have actually been respected by persons who suffer consequent retaliation.

Id. at 1164. For other cases upholding § 3617 claims in similar situations, see SCHWEMM, *supra* note 2, at § 20:4 nn.5–8.

218. See SCHWEMM, *supra* note 2, at § 20:2 nn.19–20 and accompanying text.

219. See *supra* text accompanying note 206 (quoting 42 U.S.C. § 3617 (2018)).

220. See *Nassar*, 570 U.S. at 342, 347–48; *Burlington Northern*, 548 U.S. at 63; see also *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 868 (7th Cir. 2018) (“Like all anti-retaliation provisions, [§ 3617] provides protections not because of who people are, but because of what they do” (citing *Burlington Northern*, 548 U.S. at 63)), *cert. dismissed*, 139 S. Ct. 1249 (2019).

221. See cases cited in SCHWEMM, *supra* note 2, at § 20:2 n.28.

222. See 2017 HUD REPORT, *supra* note 134, at 16 tbl.2.2 (reporting that, of all the FHA complaints filed with HUD and state and local fair housing agencies in 2017, “discriminatory acts” under § 3617 were alleged in 17.8% (1,456 complaints), making it the fourth largest category of all such complaints).

others allege non-retaliatory interference with fair housing rights.²²³ As to the interference claims, courts generally require proof that the defendant's conduct was motivated by race or other FHA-protected trait.²²⁴

As to § 3617-retaliation claims, courts have followed Title VII case law in requiring three elements for such a claim, i.e., that: (1) the plaintiff engaged in some FHA-protected activity; (2) the defendant took some adverse action against the plaintiff; and (3) a causal connection existed between (1) and (2).²²⁵ The causation element requires an analysis of why the defendant acted as he did. Thus, as in Title VII cases, a required element of § 3617-retaliation claims is a showing that the defendant's adverse treatment of the plaintiff was motivated by the plaintiff's protected activity.²²⁶

But “a showing” based on which causation standard? In Title VII cases since 2013, *Nassar* has required but-for causation. *Nassar*'s rationale was that Title VII's retaliation provision outlaws action undertaken “because” of the plaintiff's protected activity, and that such language generally requires but-for causation.²²⁷ For its part, § 3617 bans interference with a person's housing rights that HUD and the courts have interpreted to mean “because of” causation²²⁸ and also uses “on account of” to describe its other prohibited practices,²²⁹ a phrase that is—according to *Nassar*—also associated with but-for causation.²³⁰ This, plus *Comcast*'s view that but-for causation is the presumed standard for all civil rights stat-

223. See *id.* at 15 tbl.2.1 (reporting that, of the 1,456 FHA complaints filed with HUD and state and local fair housing agencies in 2017 that alleged § 3617 violations, 834 alleged “retaliation” covered by § 3617).

224. See *East-Miller v. Lake Cty. Highway Dep't*, 421 F.3d 558, 562–63 (7th Cir. 2005); other cases cited in SCHWEMM, *supra* note 2, at § 20:3 n.17; see also 24 C.F.R. § 100.400(c)(1)–(3) (2017) (providing, in HUD's § 3617 regulation, that this provision covers certain behavior undertaken “because of” the race or other protected trait of the targeted person). In *East-Miller*, the Seventh Circuit held, with respect to a claim based on § 3617's second category—conduct undertaken “on account of [plaintiff's] having exercised or enjoyed” a right under §§ 3603–3606—that “a showing of intentional discrimination is an essential element” of such a claim. *East-Miller*, 421 F.3d at 563. And the Seventh Circuit approved “the district court's assessment of the proper elements of a prima facie case” for this claim, including that “[d]efendants were motivated in part by an intent to discriminate” or their conduct produced a disparate impact. *Id.* at 562–63.

225. See *Wetzel*, 901 F.3d at 868; other cases cited in SCHWEMM, *supra* note 2, at § 20:5 n.6.

226. See cases cited in SCHWEMM, *supra* note 2, at § 20:5 n.10.

227. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350, 352 (2013); *supra* notes 204–05.

228. See *supra* note 224.

229. See *supra* text accompanying note 206 (quoting 42 U.S.C. § 3617 (2018)).

230. See *Nassar*, 570 U.S. at 350 (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)); see also *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (citing *Gross* for the proposition that the term “on account of” has “often been held to indicate but-for causation”).

utes,²³¹ suggests that the but-for standard should apply to FHA retaliation claims and to § 3617 claims generally.

The strong counterargument made above for the FHA's other substantive provisions—which relies heavily on the 1988 Congress's approval in the FHAA of prior cases endorsing the motivating-factor causation standard²³²—is weaker here. The few reported decisions that dealt with § 3617 claims in the pre-1988 period rarely touched on its proper causation standard.²³³ Certainly, no lower court consensus on this issue had emerged prior to the 1988 FHAA, much less one that endorsed a lighter than but-for standard.²³⁴ Nor had HUD opined in any authoritative way on this issue;²³⁵ indeed, HUD's 1989 regulation dealing with § 3617—presumably reflecting prior case law—used the “because of” or “because” language that is generally associated with but-for causation.²³⁶

Still, the 1988 FHAA does support one argument for applying a less stringent standard than the but-for test in § 3617 claims: this is, that the 1988 Congress's determination to continue using similar causation language in § 3617 as in the FHA's other prohibitions was presumably intended to equate § 3617's causation standard with that of these other provisions (i.e., a more-lenient-than but-for standard).²³⁷ Indeed, in § 3617 cases decided after the 1988 FHAA, three appellate courts have articulated a more lenient standard than but-for causation, albeit in dicta.²³⁸ After *Comcast*, however, the issue must be considered unresolved,

231. See *supra* note 23 and accompanying text.

232. See *supra* Section III.C.2.b.

233. The principal § 3617 decisions reported before 1988 did not discuss the causation issue and indeed often did not discuss the § 3617 claim separately from claims under the FHA's other substantive provisions. See, e.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974). During this time, one district court case that included a § 3617 claim did mention the causation issue in passing. See *infra* note 234.

234. For a rare pre-1988 decision that alluded to § 3617's causation standard, see *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 491, 498 (S.D. Ohio 1976), which simply used the “because of race” phrase in upholding redlining claims under the FHA's §§ 3604, 3605, and 3617.

235. See *Implementation of the Fair Housing Amendments Act of 1988*, 54 Fed. Reg. 3257 (Jan. 23, 1989) (providing no mention of the causation issue in HUD commentary on § 3617's coverage).

236. See 24 C.F.R. § 100.400(c) (2017) (providing, in HUD regulation, that § 3617 covers specified behavior undertaken “because of” the race or other prohibited factor of the targeted person or “because” of the protected activity of the targeted person).

237. See *supra* note 136 (describing the maxim of statutory construction that similar phrases used in different parts of the same statute should generally be given the same meaning).

238. See *East-Miller v. Lake Cty. Highway Dep't*, 421 F.3d 558, 562–63 (7th Cir. 2005) (quoted *supra* note 224); *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991) (commenting, in upholding § 3617 race-based interference claim against neighbors, that plaintiff “has to establish that race played some role in the [neighbors'] actions” (emphasis added) (citing *United States v. Mitchell*, 580 F.2d

and trial courts have split over whether § 3617-retaliation claims should be governed by the same but-for standard that applies to such claims under Title VII.²³⁹

D. *State and Local Fair Housing Laws*

Most states and scores of localities have fair housing laws that are substantially equivalent to the FHA.²⁴⁰ Indeed, many of these laws provide broader coverage than the federal statute (e.g., by having narrower exemptions or additional protected classes),²⁴¹ which the FHA specifically authorizes.²⁴² Where such a law exists, a plaintiff can bring a claim under it along with a FHA claim in federal court based on supplemental jurisdiction,²⁴³ or both can be brought in state court because FHA claims may be asserted there.²⁴⁴

The prohibitions of most state and local fair housing laws track the language in the FHA, including the key causation-related phrases (e.g., these laws outlaw discrimination “because of” a prohibited factor).²⁴⁵ Further, many state courts have chosen to follow federal precedents in interpreting their own laws.²⁴⁶ There are, however, some noteworthy exceptions.

789, 791–92 (5th Cir.1978)); *see also* Hamm v. City of Gahanna, 109 F. App’x 744, 747 (6th Cir. 2004) (applying the motivating-factor standard in case where claims under § 3604(f) and § 3617 were treated together).

239. *Compare* Campos v. HMK Mortg., LLC, 458 F. Supp. 3d 517, 532 (N.D. Tex. 2020) (holding, based on *Nassar*, that the FHA “retaliation statute requires but-for causation”), *with* Whiting v. Albek, No. ED CV 19-1542-DMG (SHKx), 2020 WL 7382777, at *7 n.7 (C.D. Cal. Oct. 30, 2020) (applying Ninth Circuit’s pre-*Comcast* decision adopting “causal link” standard for FHA retaliation claims after finding it unclear “to what extent Title VII retaliation analysis applies to Section 3617 claims”).

240. For a list of these states and localities, see SCHWEMM, *supra* note 2, at app. C.

241. For examples of those that go beyond the FHA, see *id.* at §§ 30:2 nn.1–2 and accompanying text, 30:3.

242. *See* 42 U.S.C. § 3615 (2018); *see also* 24 C.F.R. § 115.204(h) (2020) (providing, in HUD regulation, that a state or local law’s “protection of additional prohibited bases” beyond those included in the FHA does not mean that that law is not “substantially equivalent” to the FHA for purposes of justifying referrals of FHA-agency complaints).

243. *See, e.g.*, Viens v. Am. Empire Surplus Lines Inc., 113 F. Supp. 3d 555, 559–66 (D. Conn. 2015); L.C. v. LeFrak Org., 987 F. Supp. 2d 391, 403–05 (S.D.N.Y. 2013). *See generally* 28 U.S.C. § 1367(a) (2018) (providing federal courts with supplemental jurisdiction over state-law claims that are factually related to a federal-question claim in the same case).

244. *See* 42 U.S.C. § 3613(a)(1)(A); *see also* SCHWEMM, *supra* note 2, at § 25:1 n.2 (providing examples of state-court cases in which FHA claims were asserted).

245. For citations to many of these state laws, see SCHWEMM, *supra* note 2, at § 30:3 nn.2–7.

246. *See, e.g.*, Olsen v. Stark Homes, Inc., 759 F.3d 140, 153 (2d Cir. 2014) (noting that housing discrimination claims under the New York State Human Rights Law are generally evaluated using the same framework as those under the FHA); Viens, 113 F. Supp. 3d at 561 n.3 (noting that “the Connecticut Supreme

Some state and local fair housing laws explicitly set forth more lenient causation standards. For example, California's statute provides that, in intent-based claims, "[a] person intends to discriminate if race [or other prohibited factor] is a *motivating factor* in committing a discriminatory housing practice even though other factors may have also motivated the practice."²⁴⁷ Similarly, the local ordinances in Washington, D.C. and San Francisco outlaw housing discrimination "wholly or partially" because of a prohibited factor.²⁴⁸ Other state and local laws also explicitly provide for liberal causation standards.²⁴⁹

And even if the text of a state or local law mirrors that of the FHA, a local jurisdiction is free to interpret that language more broadly than its federal counterpart.²⁵⁰ A prominent example is the New York City Human Rights Law (NYCHRL),²⁵¹ which was amended in 2005 to require that it be "construed independently from similar . . . state or federal statutes" and "liberally . . . regardless of whether federal or New York State

Court has generally interpreted the [Connecticut Fair Housing Act] in tandem with federal law"); other cases cited in SCHWEMM, *supra* note 2, at § 30:2 n.4, para. 2. Cf. Kevin J. Koai, *Judicial Federalism and Causation in State Employment Discrimination Statutes*, 119 COLUM. L. REV. 763, 780–82 (2019) (identifying states that have determined to follow federal standards in interpreting their employment discrimination laws).

247. CAL. GOV'T CODE § 12955.8 (2020) (emphasis added).

248. See D.C. CODE § 2–1402.21(a) (2020) (providing, in Washington, D.C., ordinance, that it is unlawful to discriminate "wholly or partially for a discriminatory reason based on" a prohibited factor); S.F. POLICE CODE § 3304, subd. (a) (2020) (providing, in San Francisco ordinance, that prohibited acts are those done "wholly or partially because of a person's actual or perceived race" or other prohibited factor).

249. See, e.g., *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 581–86 (Iowa 2017) (holding that Iowa's anti-retaliation provision, see IOWA CODE § 216.11(2) (2020), uses a more lenient "significant factor" causation test than the but-for standard that *Nassar* applied to Title VII-retaliation claims); *Hernandez v. Grey Wolf Drilling, L.P.*, 350 S.W.3d 281, 285 (Tex. App. 2011) (holding that *Gross's* but-for standard does not apply in age discrimination case under the Texas Commission on Human Rights Act because "the [Texas Commission on Human Rights Act] contains the 'motivating factor' language that the *Gross* majority noted was critically absent from the ADEA" (citing TEX. LAB. CODE ANN. § 21.125(a) (West 2020)); see also *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 842 (Alaska 2010) (same, regarding the Alaska Human Rights Act, ALASKA STAT. §§ 18.80.220(a)–(c) (2020)); *Schmitz v. Vill. of Breckenridge*, No. 08-14559-BC, 2009 WL 3273255, at *11–13 (E.D. Mich. Oct. 9, 2009) (same, regarding Michigan's Elliott Larsen Civil Rights Act, MICH. COMP. LAWS §§ 37.2101–37.2804 (2020)); *W. Va. Am. Water Co. v. Nagy*, No. 101229, 2011 WL 8583425, at *20 (W. Va. June 15, 2011) (declining to apply *Gross's* but-for causation standard in age discrimination case under the West Virginia Human Rights Act, W. VA. CODE §§ 5-11-1 to 5-11-21 (2020)), *superseded by statute on other grounds* by W. Va. Code § 55-7E-3 (2020).

250. See SCHWEMM, *supra* note 2, at § 30:2 n.4, para. 1 and accompanying text. See generally *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (holding that federal cases cannot be binding authority on the construction of state statutes because "state courts are the ultimate expositors of state law").

251. See N.Y.C., N.Y., ADMIN. CODE §§ 8-107(1), 8-130(a) (2020).

civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title[,] have been so construed.”²⁵² Based on this provision, the Second Circuit ruled in 2013—the same year that *Nassar* required but-for causation for Title VII-retaliation claims²⁵³—that a NYCHRL-based job retaliation claim tried in federal court requires that the plaintiff show only “that retaliation *played any part* in the employer’s decision.”²⁵⁴ Other states and localities have enacted similar broad interpretation mandates for their fair housing laws,²⁵⁵ and their state courts have relied on these mandates to interpret those laws to have a more lenient causation standard than their federal counterparts.²⁵⁶

252. *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (alteration in original) (first quoting Local Civil Rights Restoration Act of 2005, sec. 1 (codified as amended at N.Y.C., N.Y., ADMIN. CODE § 8–107(1)(a)); then quoting Local Civil Rights Restoration Act of 2005, sec. 7 (codified as amended at N.Y.C., N.Y., ADMIN. CODE § 8–107(7))).

253. See *supra* notes 41–42 and accompanying text.

254. *Mihalik*, 715 F.3d at 116 (emphasis added) (citing state-court decisions interpreting the NYCHRL); see also *id.* at 113 (holding that NYCHRL claims tried in federal court “must be analyzed separately and independently from federal and state discrimination claims”). *Mihalik* also upheld the plaintiff’s substantive claim of sex harassment under the NYCHRL on the ground that the standards for judging this claim were more liberal than Title VII’s. *Id.* at 109–12. The NYCHRL’s more liberal standards have also been applied in housing discrimination cases. See, e.g., *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 764–65 (Sup. Ct. 2013) (noting, in the course of upholding a transgender plaintiff’s disability-based housing discrimination claims under the NYCHRL and the New York State Human Rights Law, that the scope of those laws’ provisions is broader than that of comparable federal laws).

255. See, e.g., DEL. CODE ANN. tit. 6, § 4501 (2020); IOWA CODE § 216.18(1) (2020); WASH. REV. CODE § 49.60.020 (2020); W. VA. CODE § 5-11-15 (2020); WIS. STAT. § 111.31(3) (2020). For example, the Washington state law requires that the provisions of the Washington Law Against Discrimination “shall be construed liberally for the accomplishment of the purposes thereof.” WASH. REV. CODE § 49.60.020 (2020).

256. See, e.g., *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 842 (Alaska 2010) (citing ALASKA STAT. § 18.80.220 (2020)) (declining to follow *Gross*’s but-for causation standard in age discrimination case under the Alaska Human Rights Act in part because the state statute provides that it “is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination”); *Allison v. Hous. Auth. of Seattle*, 821 P.2d 34, 37–43 (Wash. 1991) (adopting, for purposes of job-retaliation claim under the Washington Law Against Discrimination, a more liberal than but-for causation standard, in part because the Washington law contains a provision requiring its “liberal construction for the accomplishment of its purposes” (see *supra* note 255)); see also *Vollemans v. Town of Wallingford*, 928 A.2d 586, 605 (Conn. App. 2007) (interpreting Connecticut Human Rights Act more favorably to plaintiff in employment discrimination case than Title VII in part based on need for this state law to “be liberally construed in favor of those whom the legislature intended to benefit”), *aff’d*, 956 A.2d 579 (Conn. 2008); *Gallaway v. Chrysler Corp.*, 306 N.W.2d 368, 371 (Mich. App. 1981) (holding, based on the view that Michigan’s civil right law “will give no sufferance to partial or limited discrimination,” that proper jury instruction in age-employment discrimination claim under this law would require a plaintiff’s verdict if illegal discrimination “played a significant role in the reason for [defendant’s action]

In short, most housing discrimination in the United States may be challenged not only through claims under the FHA and other federal laws, but also through a claim under state and/or municipal law. Further, these local laws may provide for a more plaintiff-friendly causation standard than federal law, even in those jurisdictions whose textual prohibitions use the same “because of” language as the FHA.

E. *When and How the Causation Standard Matters*

Comcast not only held that but-for causation governs § 1981 claims but also that this standard applies in all phases of a § 1981 case from pleading through trial.²⁵⁷ Thus, a § 1981 complaint must allege but-for causation in order to withstand a motion to dismiss, and the plaintiff has the burden of proving such causation to defeat summary judgment before trial, defeat judgment as a matter of law at trial, and obtain a verdict after all the evidence is presented.²⁵⁸

For fair housing plaintiffs who have been used to a more lenient standard,²⁵⁹ the pleading stage may seem to present a challenge. Under the now familiar *Iqbal-Twombly* rules for federal-court pleading, a complaint must plead facts sufficient to “state a claim to relief that is plausible on its face.”²⁶⁰ Because *Comcast* viewed but-for causation as an “essential element” of a § 1981 claim,²⁶¹ it required a § 1981 complaint to include “facts plausibly showing that racial animus was a ‘but for’ cause of the defendant’s conduct.”²⁶² As to such an element, a complaint must provide

notwithstanding the presence of other, lawful considerations that also may have contributed”).

257. See *supra* note 21 and accompanying text. In so holding, *Comcast* reversed the Ninth Circuit’s ruling below that a § 1981 complaint “must only plead facts plausibly showing that race played ‘some role’ in the defendant’s decision-making process.” *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1013 (2020). In rejecting the view that a § 1981 plaintiff should be able to overcome a motion to dismiss by pleading less than but-for causation, the Supreme Court held that § 1981 litigation is subject to the “normal” rule that “the essential elements of a claim remain constant through the life of a lawsuit.” *Id.* at 1014. This means that, in determining “what the plaintiff must plausibly allege at the outset of a lawsuit, we . . . ask what the plaintiff must prove in the trial at its end.” *Id.*

258. See *infra* notes 260–84 and accompanying text.

259. See *supra* notes 171–72 and accompanying text; *infra* Appendix.

260. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Id. (citation omitted) (quoting *Twombly*, 550 U.S. at 556).

261. *Comcast*, 140 S. Ct. at 1014.

262. *Id.* at 1013; see also *id.* at 1019 (finding “no basis for allowing a [§ 1981] complaint to survive a motion to dismiss when it fails to allege essential elements of a plaintiff’s claim”).

more than “legal conclusions,” because “recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”²⁶³

What facts must a plaintiff plead in a discrimination complaint alleging but-for causation? The Court in *Comcast* did not pass on the adequacy of the plaintiff’s complaint there,²⁶⁴ but Justice Gorsuch’s opinion did endorse the “counterfactual” understanding of what but-for causation requires in a § 1981 case, i.e., a focus on “what would have happened if the plaintiff had been white?”²⁶⁵ Presumably, this means a rejected Black plaintiff must provide a plausible factual basis for alleging that the defendant would have accepted a white person with credentials similar to the plaintiff’s.²⁶⁶ Thus, *Comcast* seems to require that discrimination plaintiffs alleging but-for causation set forth the factual basis for charging that the defendant would have favored a similarly situated white applicant.²⁶⁷

The but-for standard may be easy to meet in simple fair housing cases where the need for a white “comparable” is often supplied by pre-complaint testing.²⁶⁸ (This is the gist of the hypothetical that began this Article.²⁶⁹) In the post-*Iqbal* era, numerous FHA complaints based on testing or other evidence have survived dismissal motions and may be used as

263. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555); *see also id.* (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” (alteration in original) (citation omitted) (quoting *Twombly*, 550 U.S. at 555, 557)); *id.* at 679 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

264. *See supra* note 38 and accompanying text.

265. *Comcast*, 140 S. Ct. at 1015.

266. *Cf. Iqbal*, 556 U.S. at 682 (holding that plaintiff’s allegation of “purposeful, invidious discrimination . . . is not a plausible conclusion” in light of the Court’s finding that the defendant’s alternative assertion that his action was “likely lawful and justified by his nondiscriminatory intent” was an “obvious alternative explanation” for that action (citing *Twombly*, 550 U.S. at 567)).

267. *See* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 201 (2009) (suggesting that “the first step in most discrimination cases is for plaintiff to identify an individual of another race (or the opposite sex, etc.) who was treated more favorably than she—a ‘comparator’” (footnote omitted)); *id.* at 206 (noting that “the absence of a comparator is often fatal to [such] a claim”).

268. *See* SCHWEMM, *supra* note 2, at § 32:2; *see also id.* at §§ 32:2–32:7 (identifying other evidentiary sources of discrimination that may also be available in advance of pleading in fair housing cases). One source of such evidence that is available in a Title VII case, but not in the typical housing discrimination case, is the EEOC’s file relating to its pre-lawsuit investigation, which is required before a Title VII litigant may sue in court. *See* 42 U.S.C. § 2000e-5(f)(1) (2018) (requiring pre-lawsuit administrative proceedings); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 292 (1989) (Kennedy, J., dissenting) (opining that proving but-for causation should not be a hardship on Title VII plaintiffs in part because of the availability of “EEOC investigatory files”).

269. *See supra* note 1 and accompanying text.

models,²⁷⁰ as may successful complaints in ADEA and Title VII-retaliation cases that have been subject to the but-for standard for many years now.²⁷¹ Indeed, as *Comcast* illustrates, one danger a plaintiff may face in pleading a but-for claim is alleging *too much*, e.g., by identifying the defendant's potential legitimate reasons and then attempting to discount them.²⁷² In any event, fair housing plaintiffs who are unsure whether a particular law serving as the basis for their claim has a but-for or lesser causation standard may choose to plead that claim with alternative allegations.²⁷³

In more complicated fair housing cases (e.g., those alleging exclusionary zoning or mortgage discrimination), evidence of how the defendant treated comparable white applicants may be harder to come by, but courts in such cases have allowed other types of allegations to show intentional discrimination.²⁷⁴ Further, to the extent such claims include allegations that the defendant's challenged practice disproportionately harms minorities, that disparate-impact evidence is relevant to show that the practice was illegally motivated.²⁷⁵

At the summary judgment stage,²⁷⁶ the plaintiff has the burden of producing sufficient evidence to avoid "judgment as a matter of law" (i.e., "a reasonable jury would . . . have a legally sufficient evidentiary basis to

270. See, e.g., *Mehta v. Beaconridge Improvement Ass'n*, 432 F. App'x 614, 616–17 (7th Cir. 2011); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405–07 (7th Cir. 2010); *Boykin v. KeyCorp*, 521 F.3d 202, 214–16 (2d Cir. 2008); *Lindsay v. Yates*, 498 F.3d 434, 440 (6th Cir. 2007); see also SCHWEMM, *supra* note 2, at § 31:3 n.5 (gathering additional cases upholding post-*Iqbal* FHA complaints), app. D-3–D-32 (providing model FHA complaints).

271. See *supra* note 9 (describing Supreme Court decisions requiring but-for causation in ADEA and Title VII-retaliation claims from, respectively, 2009 and 2013).

272. See *supra* notes 15–17 and accompanying text (describing the *Comcast* complaint); see also *Shinabargar v. Bd. of Trs. of Univ. of D.C.*, 164 F. Supp. 3d 1, 18, 21 (D.D.C. 2016) (noting that "the plaintiff has provided such fulsome allegations and documentation that she has pleaded herself out of any inference of causation" in dismissing ADA-retaliation claim on the ground that plaintiff's "protected activity could not plausibly have caused her suspension" because her complaint showed that suspension was "for entirely separate reasons").

273. See FED. R. CIV. P. 8(d)(2) ("A party may set out 2 or more statements of a claim . . . alternatively or hypothetically, either in a single count . . . or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.").

274. See, e.g., *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 605–16 (2d Cir. 2016); *Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504–09 (9th Cir. 2016); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158–64 (9th Cir. 2013). See generally *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (describing various sources of evidence that might show intentional discrimination).

275. See *Arlington Heights*, 429 U.S. at 252. Numerous FHA cases have relied on this principle. See, e.g., *Mhany*, 819 F.3d at 606–07; *Pac. Shores*, 730 F.3d at 1166.

276. See FED. R. CIV. P. 56(b) (providing that in federal court "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery").

find for the [plaintiff]).²⁷⁷ In discrimination cases, as *Comcast* noted, plaintiffs have traditionally met this burden either with direct evidence of discrimination or by using the *McDonnell Douglas* burden-shifting framework.²⁷⁸ That framework, which the Court developed in employment discrimination cases,²⁷⁹ has also been commonly used in fair housing cases.²⁸⁰

Because the *McDonnell Douglas* framework has been used for so long in discrimination cases that employ the but-for standard,²⁸¹ a shift to this standard in housing discrimination cases would not change the traditional analysis at the summary judgment stage.²⁸² And the same would presumably be true for trial and post-trial motions that challenge the adequacy of plaintiff's proof (i.e., motions for judgment as a matter of law),²⁸³ given

277. FED. R. CIV. P. 50(a)(1), 56(a).

278. See *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (noting that *McDonnell Douglas* "sought . . . to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination" (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973))). A FHA plaintiff may defeat summary judgment based on direct or other relevant evidence of discriminatory intent without relying on the *McDonnell Douglas* framework. See, e.g., *Pac. Shores*, 730 F.3d at 1158–59 (relying on such "direct or circumstantial evidence," instead of the *McDonnell Douglas* framework, to reverse summary judgment against FHA claim and noting that, in this type of situation, a FHA plaintiff need provide "very little such evidence . . . to raise a genuine issue of fact [concerning an] indication of discriminatory motive"); see also SCHWEMM, *supra* note 2, at § 10:2 n.8 (gathering cases holding that the *McDonnell Douglas* framework need not be used when the plaintiff presents direct evidence of discrimination).

279. See *supra* notes 31–32 and accompanying text.

280. See SCHWEMM, *supra* note 2, at § 10:2 nn.25–26 and accompanying text; see also *infra* note 282.

281. See Sullivan, *supra* note 76, at 379, 380 n.106 (describing "the *McDonnell Douglas* framework [as] typically viewed as requiring but-for causation" and explaining why this is so); see also *Comcast*, 140 S. Ct. at 1019 (noting that "*McDonnell Douglas* arose in a context where but-for causation was the undisputed test"); *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 257 (3d Cir. 2017) (holding that the but-for causation standard required by *Nassar* in Title VII-retaliation claims "does not conflict with our continued application of the *McDonnell Douglas* paradigm" in such cases (internal quotation marks omitted) (quoting *Smith v. City of Allentown*, 589 F.3d 684, 691 (3d Cir. 2009))); *Smith*, 589 F.3d at 691 (same, regarding ADEA cases after *Gross* required but-for causation in them).

282. This has been the view of the courts that have considered the matter in FHA cases decided after *Comcast*. See *Giles v. Alto Partners LLLP*, 816 F. App'x 286, 288–89 (10th Cir. 2020) (applying *McDonnell Douglas* framework to evaluate FHA defendant's motion for summary judgment, after noting that this "framework is 'entrenched' in the FHA context" (quoting *Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City*, 685 F.3d 917, 919 (10th Cir. 2012)); *Peet v. Morfitt*, No. 17-cv-1870 (ECT/TNL), 2020 WL 3871497, at *7 (D. Minn. July 9, 2020) (applying *McDonnell Douglas* framework in evaluating defendant's motion for summary judgment in § 1982 case). Cf. *Campos v. HMK Mortg., LLC*, 458 F. Supp. 3d 517, 532–33 (N.D. Tex. 2020) (denying defendant's motion for summary judgment in post-*Comcast* FHA-retaliation claim based on determination that plaintiff's proof met the but-for causation standard now required for such a claim).

283. See FED. R. CIV. P. 50(a)–(b).

that the standard for evaluating such motions is the same as the summary judgment standard.²⁸⁴

Finally, fashioning appropriate jury instructions should not be difficult regardless of what causation standard applies in a fair housing claim. Model jury instructions for all of the potential standards were promulgated in many federal circuits long before *Comcast*.²⁸⁵ For example, but-for instructions were adopted after the Supreme Court required this standard for ADEA claims in *Gross* in 2009 and for Title VII-retaliation claims in *Nassar* in 2013; motivating-factor instructions were adopted for Title VII claims after Congress mandated this standard in 1991; and instructions reflecting the motivating-factor, burden-shifting system were adopted for Equal Protection Clause claims after the Court's 1977 decision in *Arlington Heights*.²⁸⁶ These instructions are designed to capture the correct causation standards and the parties' respective burdens of proof in simple, easy-to-understand language,²⁸⁷ and follow the courts' mandate not to use the *McDonnell Douglas* framework at this stage of the proceedings.²⁸⁸ Further,

284. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (“[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . .” (alterations in original) (internal quotation marks omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986))). Rule 50(a) now refers to what was then known as a “directed verdict” as a “judgment as a matter of law.” FED. R. CIV. P. 50(a).

285. Seven circuits—the First, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh—have model civil jury instructions. See PATTERN CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT 1.7 (2019), <https://libraryguides.law.marquette.edu/c.php?g=318617&p=3795763> [<https://perma.cc/T36T-9PHQ>]; THIRD CIRCUIT INSTRUCTIONS, *supra* note 51; FIFTH CIRCUIT INSTRUCTIONS, *supra* note 43; SEVENTH CIRCUIT INSTRUCTIONS, *supra* note 72; EIGHTH CIRCUIT INSTRUCTIONS, *supra* note 89; NINTH CIRCUIT INSTRUCTIONS, *supra* note 100; ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) (2020) [hereinafter ELEVENTH CIRCUIT INSTRUCTIONS], <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227> [<https://perma.cc/7NPL-265W>].

286. For but-for instructions for ADEA claims, see ELEVENTH CIRCUIT INSTRUCTIONS, *supra* note 282, at 4.10; for but-for instructions for Title VII-retaliation claims, see THIRD CIRCUIT INSTRUCTIONS, *supra* note 51, at 5.1.7, FIFTH CIRCUIT INSTRUCTIONS, *supra* note 43, at 11.5.B, SEVENTH CIRCUIT INSTRUCTIONS, *supra* note 72, at § 3.02, ELEVENTH CIRCUIT INSTRUCTIONS, *supra* note 282, at 4.22; for motivating-factor instructions for Title VII claims, see SEVENTH CIRCUIT INSTRUCTIONS, *supra* note 72, at § 3.01, ELEVENTH CIRCUIT INSTRUCTIONS, *supra* note 282, at 4.5; and for motivating-factor, burden-shifting instructions for Equal Protection Clause claims, see the instructions for First Amendment-retaliation claims, which have the same causation standard as Equal Protection claims under *Arlington Heights*, see *supra* notes 80–91, in SEVENTH CIRCUIT INSTRUCTIONS, *supra* note 72, at § 6.01, ELEVENTH CIRCUIT INSTRUCTIONS, *supra* note 282, at 5.1.

287. See, e.g., SEVENTH CIRCUIT INSTRUCTIONS, *supra* note 72, at 1 (noting that the “primary goals” of these instructions are “to state accurately the law” and “to help judges communicate more effectively with juries through the use of simple language in short declarative sentences”).

288. See, e.g., EIGHTH CIRCUIT INSTRUCTIONS, *supra* note 89, at § 5.40, Committee Comments (“It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas* . . .”); NINTH CIRCUIT INSTRUCTIONS, *supra*

in multi claim cases, separate causation instructions may be required for each claim, but potential jury confusion can be limited through particular instructions and questions for each claim.²⁸⁹

In short, *Comcast's* potential for increasing the burden on fair housing plaintiffs may not be all that great as a practical matter. Most such plaintiffs have been prepared to plead and prove but-for causation for years. And, to the extent that their FHA, constitutional, state, and local law claims may still rely on the motivating-factor or other more lenient standard after *Comcast*, they would probably be well-advised for strategic reasons to pursue these claims as if they had to satisfy the more demanding but-for standard.²⁹⁰

F. Summary: A Note on Jury Confusion

The prior sections of Part III have shown that, after *Comcast*, different causation standards are likely to be applied under the various laws that apply in a typical fair housing case alleging intentional discrimination. In particular, the but-for standard will control claims under the 1866 Civil Rights Act's § 1982; a combination of the motivating-factor and but-for standards, with a burden-shifting approach, will apply to Equal Protection Clause claims; the motivating-factor standard traditionally used for § 3604(a) and other substantive claims under the Fair Housing Act may be kept or may give way to *Comcast's* presumption favoring the but-for standard; the but-for test may be used in retaliation and other § 3617 claims under the FHA; and for state- and local-law claims, the courts will first have to determine if the relevant law explicitly provides for a particular causation standard and, if not, decide this issue on an individual-law basis that takes into account the general inclination to follow FHA precedent and the local prerogative to depart from federal standards.²⁹¹

To state the obvious, this is an untidy situation, and one in which juries might well become confused. The possibility of jury confusion, how-

note 100, at 10.0 Comment (“No *McDonnell Douglas* burden-shifting instruction should be given in Title VII cases. . . . “[I]t is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury.” (quoting *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002))).

289. See, e.g., FIFTH CIRCUIT INSTRUCTIONS, *supra* note 43, at 11.1, 11.5, 11.13, 11.15 (providing pattern jury questions for, respectively, Title VII claim, Title VII-retaliation claim, mixed-motive Title VII claim, and ADEA claim); SEVENTH CIRCUIT INSTRUCTIONS, *supra* note 72, at 4.15 (providing special verdict form for ADA-employment discrimination claim); EIGHTH CIRCUIT INSTRUCTIONS, *supra* note 89, at 5.80, 10.80, 6.80 (providing verdict forms for, respectively, Title VII claim, Title VII-retaliation claim, and ADEA claim).

290. See Sullivan, *supra* note 76, at 398–400 (noting, with respect to Title VII's motivating-factor standard, the “surprising” phenomenon that “motivating factor arguments” are not “featured more prominently in resisting employer summary judgment motions,” and concluding that this statute's motivating-factor standard has been “a noble failure” in part because of the “tactical problems” it creates for plaintiff's lawyers who also want to prove but-for causation).

291. See *supra* Section III.D.

ever, has never deterred the Supreme Court from adopting what its majority viewed as the proper causation standard for a particular civil rights law, even if that law was likely to be coupled in cases with laws using a different standard. For example, in *Price Waterhouse*,²⁹² the plurality and concurring opinions, in establishing a less than but-for standard for basic Title VII claims, ignored the point made in Justice Kennedy's dissent that this lenient standard would result in jury confusion in cases where a claim under another law was also presented.²⁹³ Some years later, Justice Kennedy's concern for jury confusion was noticeably absent in his opinion for the Court in *Nassar*,²⁹⁴ which held that but-for causation was required in Title VII-retaliation claims over a dissent that pointed out such claims would often be brought together with a substantive Title VII claim using a lesser standard.²⁹⁵ This history suggests that, for purposes of fair housing litigation, the potential for jury confusion is unlikely to be much of an argument against what otherwise would be viewed as the proper causation standard for a particular law, even if that law is often asserted with others as part of a multicount complaint.

Nor should it. By now, courts have developed a good deal of experience in Title VII and other civil rights areas where multiple causation standards are present in the same case. The solution, as shown in model jury instructions adopted in many of the circuits, is to provide for a separate causation charge for each law and to use verdict forms that require the jury to answer appropriate questions for each law and its causation standard.²⁹⁶ Presumably, the same can and will be done in fair housing cases after *Comcast*.

292. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 292 (1989) (discussed *supra* notes 77–78 and accompanying text).

293. *See id.* at 292 (Kennedy, J., dissenting) (opining that the potential for jury confusion in such cases might “require a bifurcated trial” or impose on trial judges “the unenviable task of formulating a single instruction for the jury on all of the various burdens potentially involved in the case”).

294. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (discussed *supra* notes 41–46 and accompanying text).

295. *Id.* at 383 (Ginsburg, J., dissenting) (“The Court shows little regard for trial judges who must instruct juries in Title VII cases in which plaintiffs allege both status-based discrimination and retaliation. Nor is the Court concerned about the capacity of jurors to follow instructions conforming to today’s decision. Causation is a complicated concept to convey to juries in the best of circumstances. Asking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion.”). In a post-*Comcast* case, Justice Thomas made a related, albeit again-unsuccessful, argument. *See Babb v. Wilkie*, 140 S. Ct. 1168, 1181–83 (2020) (Thomas, J., dissenting) (criticizing the Court’s adoption of a more lenient than but-for standard for the ADEA’s federal-sector provision for failing “to grapple with the sheer unworkability of its rule” and “unnecessarily risk[ing] imposing hardship on those tasked with managing thousands of employees within our numerous federal agencies”).

296. *See supra* note 286 and accompanying text.

IV. THOUGHTS FOR THE FUTURE: A COMING DIVIDE AND THE ROLE OF CONGRESS

After *Comcast*, the most difficult causation issue in housing discrimination cases will involve FHA substantive claims²⁹⁷ and in particular whether the motivating-factor test historically endorsed by most circuits for these claims²⁹⁸ will have to be replaced by the but-for standard now presumed to govern civil rights statutes that do not explicitly provide otherwise.²⁹⁹ In 2016, the Second Circuit dealt with this issue in a pre-*Comcast* decision, *Mhany Management, Inc. v. County of Nassau*,³⁰⁰ which adhered to that circuit's motivating-factor standard based on principles that are likely also to help maintain the status quo elsewhere for some time to come.

Mhany was an exclusionary zoning case brought under the FHA's § 3604(a) in which the plaintiffs' intent claim succeeded based on the causation standards set forth in *Price Waterhouse*.³⁰¹ After a bench trial, the district court found that the challenged zoning decision "had been motivated, at least in part, by discriminatory animus" and then, proceeding to the second half of the *Price Waterhouse* analysis, determined that the defendant city would not "have taken the same action solely on the basis of its purported legitimate reasons for rezoning."³⁰² The Second Circuit affirmed, rejecting the city's *Gross*-based argument that the plaintiffs should have been required "to show that race-based animus was the but-for cause of the [zoning] shift,"³⁰³ both because this argument had not been preserved and because it failed on the merits.³⁰⁴

On the merits, *Mhany* noted that the defendants' argument for but-for causation "runs headlong into Circuit precedent"³⁰⁵ and that precedent controls here because Second Circuit panels are "bound by the decisions of prior panels until such time as they are overruled either by an en

297. See *supra* Section III.C.2.

298. See *supra* notes 173–74 and accompanying text; *infra* Appendix.

299. See *supra* note 23 and accompanying text.

300. *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016).

301. See *supra* notes 77–78 and accompanying text (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). According to the Second Circuit in *Mhany*: While this standard has been modified by statute in the context of Title VII, there is no indication it remains inapplicable to claims under the Fair Housing Act, and therefore a plaintiff bears the "burden of proof" in showing "that the adverse action was motivated, at least in part, by an impermissible reason." If the plaintiff "has sustained this burden, then the defendant can prevail if it sustains its burden of proving its affirmative defense that it would have taken the adverse action on the basis of . . . permissible reason[s] alone."

Mhany, 819 F.3d at 613 (citation omitted) (quoting *Cabrera v. Jakobovitz*, 24 F.3d 372, 383 (2d Cir. 1994)).

302. *Mhany*, 819 F.3d at 613.

303. *Id.* at 615.

304. *Id.* at 615–16.

305. *Id.* at 616 (citing *Cabrera* for the proposition that the Second Circuit has adopted the *Price Waterhouse* analysis for FHA claims).

banc panel of our Court or by the Supreme Court.”³⁰⁶ Moreover, according to *Mhany*, the but-for standard is inappropriate for FHA claims in light of the 1988 Congress’s determination to maintain that statute’s causation language at a time that “the circuits were largely in agreement” that this law is violated “if one of the motivating factors for an act was unlawful.”³⁰⁷ Thus, “[a]lthough *Gross* may cast doubt on this conclusion, by its terms, *Gross* applies only to the ADEA, and we decline to address whether *Gross* applies to the FHA in the absence of clearer guidance from the Supreme Court. . . . [We] . . . adhere to our existing precedent.”³⁰⁸ Presumably, the Second Circuit would continue to adhere to this position even after *Comcast*, which, like *Gross*, applied the but-for standard to a different statute and made no mention of the FHA.³⁰⁹

Most other circuits are likely to follow *Mhany*’s lead, at least in those that—like the Second—have previously adopted a more lenient than but-for causation standard in FHA cases. These include the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh,³¹⁰ all of which—except perhaps the Seventh—have a strong tradition of following their own precedents.³¹¹ Thus, these circuits will presumably adhere to their “moti-

306. *Id.* (quoting *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010)).

307. *Id.* (citing pre-1988 cases from the Second, Fifth, Sixth, Seventh, and Eighth Circuits). For a further exposition of this point, see *supra* notes 171–72 and accompanying text.

308. *Mhany*, 819 F.3d at 616.

309. See *supra* notes 20–35 and accompanying text.

310. See *supra* note 174 and accompanying text; *infra* Appendix.

311. See (in order of circuits): Third Circuit IOP 9.1 (“It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.”); *Norfolk & W. Ry. Co. v. Dir., Office of Worker’s Comp. Programs, U.S. Dep’t of Labor*, 5 F.3d 777, 779 (4th Cir. 1993) (“[A] panel of this court may not overrule another panel’s decision.”); *United States v. Miro*, 29 F.3d 194, 199 (5th Cir. 1994) (“When faced with conflicting panel opinions, the earlier controls our decision.”); *Castro v. United States*, 310 F.3d 900, 902 (6th Cir. 2002) (stating “a panel of this Court cannot overrule the decision of another panel”); *United States v. Wright*, 22 F.3d 787, 788 (8th Cir. 1994) (“[A] panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting en banc.”); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (“Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.”); *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) (en banc) (noting that “it is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court”); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (noting that “[t]he old Fifth followed the absolute rule that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc”). See generally CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, 16AA FED. PRAC. & PROC. JURIS., § 3981.1 (5th ed. 2019) (“[H]oldings in prior panel decisions ordinarily bind later panels of the same circuit.”). In the Seventh Circuit, a panel may take “a position which would overrule a prior decision of this court,” but only after alerting all other circuit judges in a procedure that anticipates possible en banc review. See

vating factor” standard, at least until an en banc decision changes this position. (And, of course, district courts in those circuits will be expected to follow circuit precedent.³¹²)

That leaves only the three circuits that have not yet taken a position on the FHA-causation issue—the First, Tenth, and D.C.³¹³—to decide the issue free from prior precedent. For them, the considerations laid out above in Section III.C.2 should control, which means that there are legitimate arguments both for and against a less than but-for standard.

Even in those circuits with a controlling FHA precedent, the rule that a future panel must adhere to a prior decision gives way if “an intervening U.S. Supreme Court decision” casts doubt on the prior panel’s holding.³¹⁴ As noted above, *Comcast* certainly casts doubt on those circuit decisions that applied a less than but-for causation standard in § 1982 housing discrimination claims.³¹⁵ Also, as discussed above, retaliation and other

Seventh Circuit Rule 40(e) (providing that “[a] proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted”).

312. See, e.g., *Whiting v. Albek*, No. ED CV 19-1542-DMG (SHKx), 2020 WL 7382777, at *5 (C.D. Cal. Oct. 30, 2020) (following Ninth Circuit’s pre-*Comcast* decision in holding that a FHA plaintiff need only plead “a motivating factor”); *Gilead Cmty. Servs., Inc. v. Town of Cromwell*, 432 F. Supp. 3d 46, 73 (D. Conn. 2019) (following Second Circuit’s pre-*Comcast* precedent in holding that a FHA plaintiff need only prove that discriminatory animus was “a significant factor”) *appeal withdrawn*, 2020 WL 4197302 (2d Cir. May 28, 2020). See generally *Stewart v. Donges*, 20 F.3d 380, 381 (10th Cir. 1994) (“[T]he district court was not free to disregard an order from this court.”).

313. See *infra* Appendix.

314. See *WRIGHT ET AL.*, *supra* note 311, at § 3981.1; see, e.g., *Rais v. Holder*, 768 F.3d 453, 461 (6th Cir. 2014); *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc); *Finkel v. Stratton Corp.*, 962 F.2d 169, 174–75 (2d Cir. 1992); see also *United States v. Vega-Castillo*, 548 F.3d 980, 981 (11th Cir. 2008) (Carnes, J., concurring in denial of rehearing en banc) (opining that a subsequent panel of the Eleventh Circuit can reject a prior panel decision based on an “intervening Supreme Court decision” only if the latter is “clearly on point”). In addition, a panel may diverge from circuit precedent in those rare circumstances where “newly emergent authority [e.g., from other circuits], even though not directly controlling, offers a convincing reason for believing that the earlier panel would change its course.” *WRIGHT ET AL.*, *supra* note 311, at § 3981.1; see also *Metcalf & Eddy, Inc. v. P. R. Aqueduct and Sewer Auth.*, 945 F.2d 10, 12–13 (1st Cir. 1991) (noting that this exception comes into play only “in those few instances in which newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel . . . would change its course” and “that only the most persuasive showing of collateral authority is likely to possess the power to push the door fully open”), *rev’d on other grounds*, 506 U.S. 139 (1993).

315. See *supra* Section III.A. In pre-*Comcast* fair housing cases, the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits used a less than but-for causation standard for § 1982 claims that were joined with FHA claims. See *infra* Appendix (citing in circuit-number order, *inter alia*, *Cabrera v. Jakobovitz*, 24 F.3d 372, 382–83 (2d Cir. 1994); *Stevens v. Dobs, Inc.*, 483 F.2d 82, 84 (4th Cir. 1973); *Marable v. H. Walker & Assocs.*, 644 F.2d 390, 395 (5th Cir. 1981); *Green v. Cen-*

claims under the FHA's § 3617 may now be governed by a but-for standard based on *Gross* as reinforced by *Comcast*.³¹⁶

But, for the reasons set forth in Section III.C.2, *Comcast's* endorsement of the but-for standard for 1866 Act claims and perhaps § 3617 claims does not require change in a circuit's prior determination to apply a more lenient standard in FHA-basic claims.³¹⁷ If, as the Second Circuit held in *Mhany*, the Supreme Court's decision in *Gross* does not require a change in circuit precedent on this issue,³¹⁸ the same view would apply to *Comcast* as well. Indeed, in those circuits like the Second that have previously adopted the motivating-factor standard for FHA claims, district courts in post-*Comcast* cases have continued to follow this standard.³¹⁹

Still, in circuits without a prior FHA precedent, circuit panels and district judges are free to consider the FHA causation issue in light of *Comcast's* general preference for the but-for standard. Eventually, this will also be true in other circuits through en banc reviews.

As this process unfolds, it seems likely that the lower courts will split. We live in a time when federal judges are perceived to have a political agenda that includes strong pro or con attitudes toward civil rights statutes.³²⁰ These divergent attitudes have manifested themselves in recent FHA cases, particularly those involving disparate-impact claims and stand-

ture 21, 740 F.2d 460, 464 (6th Cir. 1984); *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976)).

316. See *supra* Section III.C.3.

317. See *supra* Section III.C.2.

318. See *supra* notes 306–09 and accompanying text.

319. See *Whiting v. Albek*, No. ED CV 19-1542-DMG (SHKx), 2020 WL 7382777, at *5 (C.D. Cal. Oct. 30, 2020) (holding, based on Ninth Circuit's pre-*Comcast* decision, that a FHA plaintiff "need only plead discriminatory purpose was a 'motivating factor'" (quoting *Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016))); *Horizon House, Inc. v. E. Norriton Twp.*, No. CV 19-1252, 2020 WL 1912208, at *4–5 (E.D. Pa. Apr. 20, 2020) ("To state a disparate-treatment claim under the FHAA, a plaintiff must allege either that 'a discriminatory purpose was a *motivating factor* behind the challenged action, or that a challenged regulation is facially discriminatory.'" (emphasis added) (quoting *NHS Human Servs. v. Lower Gwynedd Twp.*, No. 11-2074, 2012 WL 170740, at *8 (E.D. Pa. Jan. 20, 2012))).

320. See, e.g., Carl Hulse, *With Wilson Confirmation, Trump and Senate Republicans Achieve a Milestone*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/trump-senate-judges-wilson.html> [https://perma.cc/7494-PDHN] (reporting on "achieving a Republican goal of filling every appeals court opening by the end of [2020]" with the Senate's confirmation of President Trump's fifty-third appellate court nominee, leaving "no vacancies among the 179 appellate judgeships authorized by Congress"); Carl Hulse, *Trump and Senate Republicans Celebrate Making the Courts More Conservative*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/us/trump-senate-republicans-courts.html> [https://perma.cc/3ZLU-ZCXF] (reporting that, in its first three years, the Trump Administration placed forty-five conservative judges on the U.S. courts of appeals, amounting to "one-quarter of all [such] appellate judges" and that "the effect of [these] appointments in making decisions is already being felt").

ing to sue in the wake of Supreme Court decisions in 2015 and 2017.³²¹ The same phenomenon will no doubt occur in future FHA cases involving the causation issue.

Ultimately, of course, the power lies in Congress to determine a civil rights statute's causation standard. The Supreme Court in the post-*Comcast* era has shown itself willing to accept a more lenient causation standard in statutes where Congress has explicitly provided therefor.³²² Thus, while the FHA causation issue will be contested in the short run in the lower courts, its ultimate resolution is likely to be determined by higher authority.

CONCLUSION

The Supreme Court's decision in *Comcast* held that the but-for causation standard applies to claims brought under the 1866 Civil Rights Act's § 1981 and also announced that this standard is presumed to govern all other federal civil rights statutes. The latter proposition indicates the Court's desire, in the wake of its decisions in 2009 and 2013 applying this standard to Age Discrimination in Employment Act and Title VII-retaliation claims, to shift to the lower courts most of the responsibility for making further statute-by-statute rulings on this issue. To provide additional guidance for this process, the Court shortly after *Comcast* endorsed a more generous causation standard in the *Babb* case for a statute that used special language to describe the required test and then, in the *Bostock* case, spelled out in some detail what the but-for standard does and does not require.

This Article deals with the application of these principles to fair housing cases and shows that this process is likely to be complicated, primarily because these cases are often brought under multiple laws. The causation issue seems easy enough to resolve for claims under the 1866 Act's § 1982, the companion provision of the one involved in *Comcast*, which will now also be governed by the but-for standard. But in housing discrimination claims against municipalities and other governmental defendants based

321. See *Bank of Am. Corp. v. Miami*, 137 S. Ct. 1296, 1303–04 (2017) (standing to sue); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 529–47 (2015) (disparate impact). The Court's decisions left much work on these issues to be done at the lower court level. As for standing, compare *City of Oakland v. Wells Fargo & Co.*, 972 F.3d 1112, 1130–36 (9th Cir. 2020) (upholding standing), and *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1271 (11th Cir. 2019) (same), *vacated on other grounds*, 140 S. Ct. 1259 (2020), with *City of Miami Gardens v. Wells Fargo & Co.*, 931 F.3d 1274, 1288 (11th Cir. 2019) (denying standing), *rehearing en banc denied*, 956 F.3d 1319, 1319–25 (11th Cir. 2020). As for disparate impact, compare *Reyes v. Waples Mobile Home Park Ltd.*, 903 F.3d 415, 429 (4th Cir. 2018) (upholding disparate-impact claim), *cert. denied*, 139 S. Ct. 2026 (2019), with *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 909 (5th Cir. 2019) (dismissing disparate-impact claim), *petition for reh'g en banc denied*, 930 F.3d 660, 660–61 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2506 (2020).

322. See *supra* notes 53–54 and accompanying text.

on the Equal Protection Clause, *Comcast's* statutory presumption does not apply and, indeed, such claims have for decades been governed by the more lenient motivating-factor standard, which the Court again endorsed in another decision shortly after *Comcast*.³²³

The most difficult issue in housing discrimination cases after *Comcast* will involve the 1968 Fair Housing Act, whose ban of practices undertaken "because of" race or other prohibited factor must now be taken to suggest, based on *Comcast's* presumption, a but-for standard. But a strong counterargument exists. For decades, the lower courts have rejected but-for causation in FHA cases in favor of a more lenient standard. Moreover, this consensus was well-established by the time of the 1988 Fair Housing Amendments Act, which, according to recent Supreme Court decisions, may indicate the 1988 Congress's endorsement of this more lenient standard when it re-enacted the FHA's causation language. Finally, using one of *Comcast's* own interpretive techniques, courts must recognize that the purpose of the 1968 FHA, as strengthened by the 1988 FHAA, is significantly broader than that of the old civil rights statute reviewed in *Comcast*.

Two other complications may also arise. First, the but-for standard, even if inappropriate for the FHA's main substantive claims, may end up governing retaliation and interference claims under that statute's § 3617, a result that the pre-*Comcast* Court endorsed for employment discrimination cases under Title VII. Second, most potential FHA plaintiffs may also sue under their state and local fair housing laws, which increasingly have provided for more generous standards than but-for causation and are unaffected by *Comcast's* presumption concerning federal statutes.

The resulting situation is untidy, but not unmanageable. In multclaim fair housing cases, courts will simply have to analyze the causation issue for each law separately and will be assisted in this effort by the availability of long-established model jury instructions that spell out the requirements of all potential causation standards. And even when only the FHA is involved, most circuits will be bound by their precedents establishing a less-than-but-for standard, at least until an en banc decision makes a change. Eventually, despite *Comcast's* apparent desire to the contrary, the Supreme Court may have to review the FHA issue, and ultimately Congress, as the final authority on statutory matters, has the responsibility for resolving it.

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

APPENDIX

FHA APPELLATE DECISIONS ADOPTING A CAUSATION
STANDARD

BEFORE AND AFTER THE 1988 FAIR HOUSING AMENDMENTS ACT (FHAA)

[listed by circuit, in chronological order, with a quoted phrase indicating the chosen standard, followed by identification of the specific FHA provision(s) claimed under (if given in the opinion) and whether a § 1982 claim was also involved]

FIRST CIRCUIT:

Before 1988 FHAA: None found.

After 1988 FHAA:

Casa Marie, Inc. v. Superior Court of P. R. for Dist. of Arecibo, 988 F.2d 252, 269 (1st Cir. 1993): “a substantial factor” / § 3604 (presumably § 3604(f) because this is a disability case).

SECOND CIRCUIT:

Before 1988 FHAA:

Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1042-43 (2d Cir. 1979): “one . . . motivating factor[]” and race may not “play any role” / § 3604(a).

After 1988 FHAA:

Cabrera v. Jakobovitz, 24 F.3d 372, 383 (2d Cir. 1994): “motivated, at least in part,” by race / specific FHA provision not given; also § 1982 claim.

Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 49 (2d Cir. 2006): “a significant factor” / § 3604(f)(1).

Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 616 (2d Cir. 2016): “motivated, at least in part, by an impermissible reason” (following *Cabrera*, 24 F.3d at 383) / § 3604(a).

THIRD CIRCUIT:

Before 1988 FHAA: None found

After 1988 FHAA:

Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 177 (3d Cir. 2005): “a motivating factor” / specific FHA provision not given (presumably § 3604(f) because this is a disability case).

431 E. Palisade Ave. Real Estate, LLC v. City of Englewood, 977 F.3d 277, 284 (3d Cir. 2020): “a motivating factor” (quoting *Wind Gap*, 421 F.3d 170 at 177)/§ 3604(f)(2).

FOURTH CIRCUIT:

Before 1988 FHAA:

Stevens v. Dobs, Inc., 483 F.2d 82, 84 (4th Cir. 1973): “an important element” / specific FHA provision not given; also § 1982 claim.

After 1988 FHAA:

Hadeed v. Abraham, 103 F. App’x 706, 707 (4th Cir. 2004): “a motivating factor” / specific FHA provision not given.

FIFTH CIRCUIT:

Before 1988 FHAA:

United States v. Pelzer Realty Co., 484 F.2d 438, 443 (5th Cir. 1973): “one significant factor” / § 3604(a)–(b).

Burris v. Wilkins, 544 F.2d 891, 891 (5th Cir. 1977): “one significant factor” (quoting *Pelzer*, 484 F.2d at 443) / specific FHA provision not given; also § 1982 claim.

Gore v. Turner, 563 F.2d 159, 167 n.5 (5th Cir. 1977): unlawful “if even one reason . . . was racially motivated” (citing *Burris*, 563 F.2d at 167 n.5) / specific FHA provision not given; also § 1982 claim.

United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978): unlawful if race “was a consideration and played some role” / § 3604(a).

Payne v. Bracher, 582 F.2d 17, 18 (5th Cir. 1978): race may not be “considered in any way” / specific FHA provision not given; also § 1982 claim.

Taylor v. Fletcher Props., Inc., 592 F.2d 244, 247 n.6 (5th Cir. 1979): “a significant factor” / § 3604(a) and (d); also § 1982 claim.

Marable v. H. Walker & Assocs., 644 F.2d 390, 395 (5th Cir. 1981): race need only be “one significant factor” / § 3604; also § 1982 claim.

Woods-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982): “Plaintiff need only prove that race was one significant factor in defendant’s dealings with them” / § 3604(a); also § 1982 claim.

Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986): “it is enough to show that race was a consideration and played some role” / § 3604(a).

After 1988 FHAA:

Simms v. First Gibraltar Bank, 83 F.3d 1546, 1556 (5th Cir. 1996): “a significant factor” / § 3604(b) and § 3605.

Artisan/Am. Corp. v. City of Alvin, 588 F.3d 291, 295 (5th Cir. 2009): “a significant factor” (citing *Simms*, 83 F.3d at 1556) / specific FHA provision not given.

Crain v. City of Selma, 952 F.3d 634, 641 (5th Cir. 2020): “a significant factor” (citing *Artisan/Am. Corp.*, 588 F.3d 291 at 295) / § 3604(b).

SIXTH CIRCUIT:

Before 1988 FHAA:

Green v. Century 21, 740 F.2d 460, 464 (6th Cir. 1984): “an effective reason” / § 3604; also § 1982 claim.

Jordan v. Dellway Villa of Tenn., Ltd., 661 F.2d 588, 594 (6th Cir. 1981): relief is mandated if “race played a part” / § 3604; also § 1982 claim.

After 1988 FHAA:

Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781, 790 (6th Cir.1996): “a motivating factor” / § 3604(f).

Hamm v. City of Gahanna, 109 F. App'x 744, 747 (6th Cir. 2004): “a motivating factor” (quoting *Smith & Lee Assocs.*, 102 F.3d at 790) / § 3604(f) and § 3617.

SEVENTH CIRCUIT:

Before 1988 FHAA:

Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 345, 349–50 (7th Cir. 1970): “an impermissible factor” / § 3604(a), (b), and (d); also § 1982 claim.

Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975): race is an “impermissible consideration,” need only play “some part” / specific FHA provision not given; also § 1982 claim.

After 1988 FHAA: None found

EIGHTH CIRCUIT:

Before 1988 FHAA:

Williams v. Matthews Co., 499 F.2d 819, 822, 826 (8th Cir. 1974): “race is an impermissible factor” / § 3604(a)-(b); also § 1982 claim.

Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976): race is an “impermissible factor” (citing *Williams*, 499 F.2d at 826) / specific FHA provision not given; also § 1982 claim.

After 1988 FHAA: None found

NINTH CIRCUIT:

Before 1988 FHAA: None found

After 1988 FHAA:

Avenue 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 504 (9th Cir. 2016): “a motivating factor” / § 3604(a).

TENTH CIRCUIT:

Before 1988 FHAA: None found

After 1988 FHAA: None found

ELEVENTH CIRCUIT:

Before 1988 FHAA: None found

But see Fifth Circuit decisions before Oct. 1, 1981, which the Eleventh Circuit adopted as binding precedent in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

After 1988 FHAA:

Sofarelli v. Pinellas County, 931 F.2d 718, 722 (11th Cir. 1991): plaintiff “has to establish that race played some role in the [defendants’] actions” / § 3617.

Woodard v. Fanboy, LLC, 298 F.3d 1261, 1264 (11th Cir. 2002): “a motivating factor” used in jury interrogatory / § 3604(b).

Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1284 (5th Cir. 2006): “a motivating factor” / § 3604(a).

Bonasera v. City of Norcross, 342 F. App’x. 581, 584 (11th Cir. 2009): “a motivating factor” / specific FHA provision not given.

DISTRICT OF COLUMBIA CIRCUIT:

Before 1988 FHAA: None found

After 1988 FHAA: None found

District Court: *Cnty. Hous. Tr. v. Dep’t of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 225 (D.D.C. 2003): “a motivating factor” / specific FHA provision not given (presumably § 3604(f) because this is a disability claim).