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WHEN CAUSATION IS TOO "ROBUST": DISPARATE IMPACT IN THE CROSSHAIRS IN *DE REYES*

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INTRODUCTION

As Justice Kennedy recently noted, "*[d]e jure* residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life."[1] In order to effectively combat the full range of contemporary housing discrimination, including its more evolved forms, such as predatory lending[2] and discriminatory rezoning plans,[3] plaintiffs must be able to plead Fair Housing Act ("FHA") claims under the disparate impact theory.[4]

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[1] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2515 (2015) (citation omitted).

[2] *See, e.g.*, Saint-Jean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 319-20 (E.D.N.Y. 2014) (ruling that plaintiffs stated a viable FHA disparate impact claim based on the defendant-bank's predatory lending program).

[3] *See, e.g.*, Broadway Triangle Cmty. Coal. v. Bloomberg, 35 Misc. 3d 167, 168-69 (N.Y. Sup. Ct. 2011) (granting a preliminary injunction where plaintiffs plead a FHA disparate impact claim challenging the racial impact of a proposed rezoning of an industrial area).

[4] Disparate impact is particularly necessary in the urban redevelopment context because such cases typically involve nonlinear decision-making "made by diffuse municipal bodies in which individuals and groups have differing and even conflicting motivations and where a discriminatory intent may not be present." Valerie Schneider, *In Defense of Disparate*

After decades of use nationwide, disparate impact was definitively endorsed by the Supreme Court for FHA claims in 2015.[5] However, the endorsement came with a caveat—a poorly defined "robust causality requirement."[6] As detailed below, this heightened causation standard haphazardly blurs the line between disparate impact and disparate treatment, leaving plaintiffs' well-plead FHA claims in jeopardy of dismissal.

I. A BRIEF HISTORY OF THE DISPARATE IMPACT THEORY AND THE FAIR HOUSING ACT

Congress's purpose in enacting the FHA as Title VIII of the Civil Rights Act of 1968[7] was "to provide, within constitutional limitations, for fair housing throughout the United States"[8] and "promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.'"[9] In response to this ambitious statement of Congressional policy, courts have long held that the FHA "must be interpreted broadly."[10]

In an effort to afford plaintiffs the comprehensive coverage required under the FHA,[11] all eleven federal appellate courts adopted the disparate impact theory[12] over the course of four decades of FHA litigation.[13] Unlike

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Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act, 79 MO. L. REV. 539, 570 (2014). Similarly, disparate impact "presents a clear legal theory to challenge predatory lending practices," albeit with "several important limitations." Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 976 (2011).

[5] *See Inclusive Cmties.,* 135 S. Ct. at 2518-19.

[6] *Id.* at 2523.

[7] Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2015).

[8] Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977) (quoting 42 U.S.C. § 3601 (2015)).

[9] *Id.* (quoting Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973)).

[10] *Id.* (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972); Mayers v. Ridley, 465 F.2d 630, 632-35 (Wright, J., concurring) (per curiam) (en banc); Laufman v. Oakley Bldg. & Loan Co., 408 F.Supp. 489 (S.D. Ohio 1976); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 95 (1977); Griffin v. Breckinridge, 403 U.S. 88, 97 (1971)).

[11] *See Inclusive Cmties*, 135 S. Ct. at 2518-19 (noting that the "results-oriented" language and use of the term "discriminate" in § 3604(a) and § 3605(a) of the FHA "provide[] strong support for the conclusion that the FHA encompasses disparate-impact claims" (citing Smith v. City of Jackson, 544 U.S. 228, 236 (2005); Bd. of Educ. of City Sch. Dist. of N.Y. v. Harris, 444 U.S. 130, 140-41 (1979))); *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) ("The [FHA's] stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation." (citation omitted)).

[12] Over the course of decades of FHA litigation, courts have used the terms "disparate

disparate treatment liability, which requires a showing of discriminatory intent, the disparate impact theory prohibits "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities."[14] Accordingly, a wider range of conduct is actionable under disparate impact than disparate treatment, as the latter can make it "virtually impossible to enforce antidiscrimination laws, since it can be very easy to conceal a discriminatory purpose behind neutral-sounding rules."[15] Fundamentally, a prima facie case of discrimination is established under the disparate impact theory by showing that "the challenged practice of the defendant 'actually or predictably results in racial discrimination; in other words that it has a discriminatory effect.'"[16]

Although disparate impact "has been used far less in FHA cases than in the employment discrimination field under Title VII,"[17] the theory has been applied in a wide variety of fair housing cases. For example, plaintiffs have used the disparate impact theory to successfully prevent the development of housing projects that would have caused disproportionate harm to Black residents and a segregative impact on the greater community,[18] halt an urban renewal project that would have had the effect of removing virtually all Black families from a neighborhood,[19] and challenge predatory lending practices that targeted elderly, unmarried women home improvement loan borrowers.[20]

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impact," "disparate effect," and "discriminatory effect" interchangeably. *See, e.g.*, *Inclusive Cmties.*, 135 S. Ct. at 2518 ("[T]he FHA encompasses disparate-impact claims."); *Huntington Branch, NAACP.*, 844 F.2d at 934 ("The [FHA's] stated purpose to end discrimination requires a discriminatory effect standard . . . ."); Matarese v. Archstone Pentagon City, 761 F. Supp. 2d 346, 363 (E.D. Va. 2011) ("[P]laintiffs must show that a specific policy caused a significant disparate effect on a protected group.").

[13] See Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 106 n.6 (2015), for a complete list of when each federal circuit adopted the disparate impact theory for FHA claims.

[14] Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (explaining the difference between disparate treatment and disparate impact in the Title VII context).

[15] John E. Theuman, Annotation, *Evidence of Discriminatory Effect Alone as Sufficient to Prove, or to Establish Prima Facie Case of, Violation of Fair Housing Act (42 U.S.C. §§ 3601 et seq.)*, 100 A.L.R. Fed. 97, § 2(a) (1990).

[16] *See Huntington Branch, NAACP*, 844 F.2d at 934 (quoting United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974)).

[17] Schwemm, *supra* note 13, at 107.

[18] *See Huntington Branch, NAACP*, 844 F.2d at 937-38.

[19] *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977) ("[B]y the time urban renewal clearance was completed and the surrounding blocks reconstructed, virtually no black families were to be found in the area.").

[20] *See* Matthews v. New Century Mortg. Corp., 185 F. Supp. 2d 874, 886-87 (S.D. Ohio 2002).

In a conclusive endorsement of the theory of liability, the United States Department of Housing and Urban Development ("HUD"), which is statutorily tasked with administering and enforcing the FHA,[21] "formalize[d] its long-held recognition" of disparate impact in 2013.[22]

II. THE DISPARATE IMPACT CAUSATION RULE IN *INCLUSIVE COMMUNITIES*

Even though courts have applied the disparate impact theory in FHA cases since the mid-1970s,[23] the Supreme Court did not definitively rule that disparate impact was applicable under §§ 3604(a) and 3605 of the FHA until the 2015 case *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*[24] In that case, the Inclusive Communities Project ("ICP"), a Texas-based nonprofit, accused the Texas Department of Housing and Community Affairs ("TDHCA"), Texas's state housing agency, of reinforcing segregation in the Dallas area by using location selection criteria that favored placing federally assisted housing projects in predominantly Black inner-city areas over white suburban neighborhoods.[25]

The trial court held that TDHCA's selection criteria, though not shown to have been prompted by discriminatory intent,[26] did have an unjustified disparate racial impact in violation of the Fair Housing Act.[27] Specifically, the court found that the defendants had failed to "meet their burden of proving that there are no less discriminatory alternatives" that could have been adopted "that would enable TDHCA's interest to be served with less discriminatory impact."[28] On appeal, the Fifth Circuit upheld the district

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[21] Fair Housing Act, 42 U.S.C. § 3608(a) (2012); *see* Fair Housing Act, 42 U.S.C. § 3612 (2012) (delineating the administrative complaint process overseen by HUD's Secretary); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (noting that HUD's interpretations of the FHA are "entitled to great weight" (citation omitted)).

[22] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460-01 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2013)).

[23] *See, e.g.*, United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974); Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970); Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 930-31 (2d Cir. 1968).

[24] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2510 (2015).

[25] *Id.* at 2514.

[26] Inclusive Cmties. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 319-21 (N.D. Tex. 2012).

[27] *Id.* at 331.

[28] *Id.*

court's disparate impact finding, but ruled in favor of TDHCA concerning the shifting of the burden of proof, choosing to follow the 2013 HUD regulations, which were issued after the district court's decision.[29]

At the Supreme Court, the issue was "whether disparate-impact claims are cognizable under the Fair Housing Act."[30] In a 5-4 decision penned by Justice Kennedy, the Court held definitively that disparate impact claims could be brought under § 3604(a) and § 3605 of the FHA.[31] The Court noted that the language of these provisions of the FHA closely tracked similar language in other civil rights statutes that had earlier been interpreted to include an impact standard.[32] In its narrow endorsement of disparate impact claims under the FHA in *Inclusive Communities*, the Supreme Court went on to identify some "cautionary standards" for disparate impact claims.[33] The Court's apparent goal was to limit FHA disparate impact—as it previously had for Title VII claims[34]—only to apply to government or private policies that can be described as "'artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[35] Accordingly, the Court in *Inclusive Communities* included a causation rule that can be best summarized as follows: the plaintiffs bear the burden of alleging facts showing that the "challenged

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[29] Inclusive Cmties. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282-83 (5th Cir. 2014) (citing 24 C.F.R. § 100.500 (2013)); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460-01 (Feb. 15, 2013)). The Fifth Circuit held that according to 24 C.F.R. § 100.500, the burden shifting functions as follows: (1) "a plaintiff must prove a prima facie case of discrimination by showing that a challenged practice causes a discriminatory effect"; (2) "[i]f the plaintiff makes a prima facie case, the defendant must then prove 'that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests'"; (3) "[i]f the defendant meets its burden, the plaintiff must then show that the defendant's interests could be served by another practice that has a less discriminatory effect." *Inclusive Cmties.*, 747 F.3d. at 282.

[30] *Inclusive Cmties.*, 135 S. Ct. at 2513.

[31] *See id.* at 2518-22. In contrast, the lengthy dissenting opinion stated that the Court's disparate impact jurisprudence was "erroneous from its inception." *Id.* at 2532 (Thomas, J., dissenting).

[32] *See id*. at 2516-19 (majority opinion) (comparing §§ 3604(a) and 3605 of the FHA to Title VII of the Civil Rights Act and the Age Discrimination in Employment Act).

[33] *Id*. at 2524.

[34] For example, in *Griggs v. Duke Power Co*., the Court noted that Title VII "does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." 401 U.S. 424, 430-31 (1971); *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012). Instead, "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs*, 401 U.S. at 431.

[35] *Inclusive Cmties.*, 135 S. Ct. at 2522 (quoting *Griggs*, 401 U.S. at 431).

practice caused or predictably will cause a discriminatory effect."[36] In disparate impact cases arising from a statistical disparity, this causal connection must be established by pointing to a "defendant's policy or policies causing that disparity."[37]

In its brief discussion of the causation standard, the Court borrowed from the 1989 Title VII case, *Wards Cove Packing Co. v. Atonio*, to note that a "*robust causality requirement* ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create."[38] The Court reasoned that this "robust" causation requirement is further necessary to ensure that "defendants do not resort to the use of racial quotas" to avoid liability for statistical disparities.[39] The opinion urged courts to carefully examine disparate impact plaintiffs' showings because a plaintiff who fails to "produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact."[40]

The Court used an example from the private real estate development context to demonstrate the causation requirement in action. "[A] plaintiff challenging the decision of a private developer to construct a new building in one location rather than another," the Court explained, may find it "difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units."[41] The Court then warned that, on remand, "if the ICP cannot show a causal connection between the [TDHCA's] policy and a disparate impact—for instance, because federal law substantially limits [TDHCA's] discretion—that should result in dismissal of this case."[42] Put simply, the plaintiff's

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[36] *Id.* at 2514 (quoting 24 CFR § 100.500(c)(1)).

[37] *Id.* at 2523.

[38] *Id.* (alteration in original) (emphasis added) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)).

[39] *Id.* at 2512. Justice Kennedy's aversion to the use of "racial quotas" in this case continues federal courts' decades-long debate over the use of quotas for treatment of members of a particular protected class. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2418, 2432-33 (2013); Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("[A] race-conscious [university] admissions program cannot use a quota system . . . ."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978) (plurality opinion) (striking down a specific university admissions quota system which excluded all white applicants from consideration for a fixed number of seats); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1339-40 (2d Cir. 1973) (affirming 15% quota for Black and Puerto Rican police officer hiring); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (en banc) (ordering that a one to two ratio would be appropriate and in effect until 20 qualified minority persons were hired).

[40] *Inclusive Cmties.*, 135 S. Ct. at 2523.

[41] *Id*. at 2523-24.

[42] *Id.* at 2524 (citing Inclusive Cmties. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 283-84 (5th Cir. 2014) (Jones, J., concurring)).

prima facie case will fail if factors other than the defendant's challenged policy caused the statistical disparities at issue.

On remand, the district court applied the Supreme Court's newly-articulated disparate impact burden of proof and dismissed ICP's disparate impact claim for failure to prove a prima facie case.[43] First, the court determined that the *Inclusive Communities* plaintiff "failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact."[44] Instead, ICP identified the "cumulative effects" of TDHCA's decision-making process over a multi-year period."[45] Such a "generalized policy of discretion" is insufficient to prove disparate impact.[46]

The district court also rejected ICP's disparate impact claim on causation grounds. According to the court, ICP did not prove that TDHCA's policy of allowing discretion in its allocating tax credits caused a statistically significant racial disparity in the distribution of low income tax credit units.[47] "Put differently," ICP was unable to demonstrate that, had TDHCA *not* been permitted to exercise any discretion when allocating tax credits, "there would be no, or significantly less, disparity in the location of [low income housing tax credit] units."[48]

ICP critically failed to prove what the unit distribution would have been had the defendant not exercised any discretion in the housing project distribution process.[49] Nor did ICP account for "other potential causes of the statistical disparity," including "the preference under federal law for placement of [low income housing tax credit] properties in low-income communities," and "the actions, policies, or preferences of third parties like Congress, the Texas Legislature, developers, and local communities that impact the location of [the] units."[50] ICP also attempted to causally link TDHCA's exercise of discretion to a cumulative statistical disparity.[51] In

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[43] Inclusive Cmties. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 3:08-CV-0546-D, 2016 WL 4494322, at *1 (N.D. Tex. Aug. 26, 2016).

[44] *Id*. at *6.

[45] *Id*.

[46] *Id.*

[47] *Id.* at *8.

[48] *Id.*

[49] *Inclusive Cmties.*, 2016 WL 4494322, at *8.

[50] *Id.* at *9. The plaintiff did argue that "the existing statistical disparity cannot be caused by the federal preference for placement of LIHTC properties in low-income communities because the statistical disparity predated the federal preference" and "the uncontested facts rule out the possibility that either third parties or other factors are causing the perpetuation of segregation." *Id.* However, this remained insufficient in light of "the multiple factors that go into investment decisions about where to construct or renovate housing units," *id.* (quoting Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2524 (2015)).

[51] *Id.*

response, the court highlighted that the challenged policy changed from year to year.[52] In light of this annual policy shift, the court ruled that "ICP cannot point to a *specific* policy that caused an aggregate statistical disparity over a multi-year period."[53]

Overall, the district court's causation analysis focused on ICP's inability to prove how statistical disparities would have lessened if TDHCA had not exercised discretion in the low-income unit allocation process. It therefore appears that, following the *Inclusive Communities* Supreme Court decision, disparate impact plaintiffs must demonstrate that factors other than the policy at issue have not caused or contributed to the statistical disparity. This narrow causation rule will undoubtedly leave otherwise liable defendants off the hook and plaintiffs without recourse under the FHA.

III. *DE REYES*: A TROUBLING POST-*INCLUSIVE COMMUNITIES* CASE STUDY

The causation standard in *Inclusive Communities* was poorly defined by the Court, leaving lower courts plenty of flexibility in deciding just how robust the standard is. In at least one post-*Inclusive Communities* opinion, a court even stated that "[p]laintiffs are merely required to plead plausibly disparate impact; they are *not required to prove causation* or disparate impact through statistical evidence at the pleading stage."[54] In *De Reyes v. Waples Mobile Home Park Limited Partnership*,[55] on the other hand, the causation standard was given considerable weight.

De Reyes, an Eastern District of Virginia case before Judge T.S. Ellis, III, demonstrates precisely how the causation rule in *Inclusive Communities* can limit disparate impact liability.[56] In that case, a group of non-citizen Latino residents of Salvadoran or Bolivian national origin brought a challenge to the Waples Mobile Home Park ("the Park") policy that all adult residents must present evidence of lawful presence in the United States "as a condition of entering into or renewing a lease at the Park."[57] In mid-2015, the Park began applying the policy in question to all residents over the age of eighteen, including the plaintiffs.[58]

The defendants argued that, in order to find for the plaintiffs, the court would have to unilaterally create a new protected class of "undocumented,

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[52] *Id.*

[53] *Id.* (emphasis added).

[54] Winfield v. City of New York, No. 15 Civ. 5236, 2016 WL 6208564, at *6 (S.D.N.Y. Oct. 24, 2016) (emphasis added).

[55] De Reyes v. Waples Mobile Home Park Ltd. P'ship, 205 F. Supp. 3d 782 (E.D. Va. 2016).

[56] *See id.* at 789-93.

[57] *Id.* at 782, 785.

[58] *Id.* at 785-86.

and perhaps, illegal alien[s]."[59] Because the individual plaintiffs became unlawful or undocumented aliens "by choice," the defendants reasoned, their status as such "is not an immutable category such as race or national origin."[60] After all, only unlawful or undocumented aliens were affected by the Park's policy, not all Latino residents at large.[61]

Moreover, based on the FHA's history, the defendants claimed it would be "unsound to create a cause of action based on a protected class of aliens not lawfully present in this country."[62] The defendants pointed to a recent Eighth Circuit decision for support:

> We find no hint in the FHA's history and purpose that such a law or ordinance, *which is valid in all other respects*, violates the FHA if local statistics can be gathered to show that a disproportionate number of the adversely affected aliens are members of a particular ethnic group. In most cases today, that would of course be Latinos, but at various times in our history, and in various locales, the "disparate impact" might have been on immigrants from Ireland, Germany, Scandinavia, Italy, China, or other parts of the world. It would be illogical to impose FHA disparate impact liability based on the effect an otherwise lawful ordinance may have on a sub-group of the unprotected class of aliens not lawfully present in this country. Whatever its statutory merit in other contexts, the cause of action urged by the Keller Plaintiffs is unsound.[63]

The defendants then explicitly addressed the *Inclusive Communities* "robust causation" standard and argued that it was the plaintiffs' "status as undocumented and/or illegal aliens," rather than the Park policy, that caused the plaintiffs to be unable to enter into or renew a lease at the Park.[64] "Latinos who are legally in the United States," they noted, "are not impacted at all by the policy."[65]

In their opposition brief, the *De Reyes* plaintiffs rejected the defendant's

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[59] Memorandum in Support of Defendants' Motion to Dismiss at 2, *De Reyes*, 205 F. Supp. 3d 782 (E.D. Va. 2016) (No. 1:16-cv-563).

[60] *Id.* at 2, 8 (citing Plyler v. Doe, 457 U.S. 202, 220 (1982)).

[61] *Id.* at 2.

[62] *Id.* at 9 (quoting Keller v. City of Fremont, 719 F.3d 931, 949 (8th Cir. 2013)).

[63] *Id.* (alteration in original) (citations omitted).

[64] Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 59, at 10-11 (citing Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2523 (2015)).

[65] *Id.* at 11.

proposition that the disparate impact claim, as plead, required the court to "create a new protected class under the FHA on the basis of citizenship or alienage."[66] Rather, the plaintiffs stressed that their complaint states "a viable claim for violation of the FHA based on race and/or national origin" tied to the "obvious disparate impact on Latinos due to the fact that the Policy explicitly targets undocumented immigrants . . . ."[67] The plaintiffs further highlighted that the FHA prohibits discrimination against "any person" and, thus, "[c]itizenship has no bearing on a person's standing to enforce his or her rights to be free from discrimination."[68]

The plaintiffs specifically addressed the causation issue using a simple "but for" argument.[69] "[B]ut for Defendants' Policy requiring original Social Security cards (or other proof of legal status)," they noted, "Plaintiffs would not be deprived of housing; they would be living peacefully in their homes, without a looming fear of being forced out."[70] Although the plaintiffs did not explicitly cite the heightened *Inclusive Communities* causation standard, they were careful to distinguish their case from other recent cases where the causal link was more attenuated.[71]

Judge Ellis, in a September 1, 2016 decision, denied the defendants' motion to dismiss the FHA claims, but also ruled that the plaintiffs could not "rely *solely* on disparate impact to satisfy the FHA's causation requirement."[72] First, the court disagreed that permitting the FHA claim to proceed "would not, as defendants contend, require the recognition of a new class—namely, illegal aliens—protected by the FHA."[73] The court then moved on to a lengthy causation analysis, which frames the defendants' core argument accordingly: "plaintiffs' disparate impact claim is inconsistent with the history and purpose of the *judicially-created* theory of disparate impact."[74]

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[66] Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 12, *De Reyes*, 205 F. Supp. 3d 782 (E.D. Va. 2016) (No. 1:16-cv-563).

[67] *Id.* at 11, 13.

[68] *Id.* at 13 (quoting 42 U.S.C. § 3604(a)).

[69] *Id.* at 18.

[70] *Id.*

[71] *Id.* at 19-20 (citing Ellis v. City of Minneapolis, No. 14 Civ. 3045, 2015 WL 5009341 (D. Minn. Aug. 24, 2015); City of Los Angeles v. Wells Fargo & Co., No. 13 Civ 09007, 2015 WL 4398858 (C.D. Cal. Jul. 17, 2015)).

[72] De Reyes v. Waples Mobile Home Park Ltd. P'ship, 205 F. Supp. 3d 782, 794 (E.D. Va. 2016).

[73] *Id.* at 788.

[74] *Id.* at 789 (emphasis added). The court's use of the term "judicially-created" to describe the disparate impact theory is reminiscent of Justice Alito's dissenting opinion in *Inclusive Communities*, which refers to the Supreme Court's embrace of disparate impact in FHA cases as "a serious mistake" unsupported by the text of the FHA itself. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2532-37

Pointing to the Supreme Court's *Inclusive Communities* robust causation standard for support, Judge Ellis stressed the "proper limited scope of disparate impact theory in the FHA context" and claimed that "to permit plaintiffs to use disparate impact in this case to establish causation results in essentially writing out of the FHA its robust causation requirement altogether."[75] Citing *Keller v. City of Freemont*,[76] the court explained, "the imposition of disparate impact liability for policies that impact Latinos *only incidentally* to the impact on illegal aliens decouples disparate impact theory from its original and central purpose"—"to target only those policies with effects that cannot fairly be explained other than as resulting at least in part 'because of' a protected characteristic."[77]

Finally, the court placed the *De Reyes* plaintiffs in the greater context of undocumented immigrants nationwide and arrived at the following startling conclusion:

> Given the current correlation between the presence of illegal aliens in the United States and the predominantly Latino national origin of the illegal alien population, it cannot fairly be said—by the existence of a disparate impact alone—that a policy targeting illegal aliens and thereby disproportionately making housing unavailable to a class of Latinos does so "because of race . . . or national origin." 42 U.S.C. § 3604(a). To hold otherwise would, as *Inclusive Communities* warns, eliminate a robust causality requirement and make defendants answer for racial disparities they did not create.[78]

The court's reasoning in *De Reyes* is troubling. Contrary to the initial media coverage describing the *Inclusive Communities* decision as the Court's endorsement of a "broad interpretation" of the FHA[79] and to calls for celebration from some housing advocates,[80] *De Reyes* demonstrates just

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(2015) (Alito, J., dissenting).

[75] *De Reyes*, 205 F. Supp. 3d at 792 (citing *Inclusive Cmties.*, 135 S. Ct. at 2523).

[76] Keller v. City of Freemont, 719 F.3d 931 (8th Cir. 2013).

[77] *De Reyes*, 205 F. Supp. 3d at 793 (emphasis added) (citations omitted).

[78] *Id.* at 793-94.

[79] *See* Adam Liptak, *Justices Back Broad Interpretation of Housing Law*, N.Y. TIMES (June 25, 2015), https://www.nytimes.com/2015/06/26/us/justices-back-broad-interpretation-of-housing-law.html [https://perma.cc/5J8Z-KEZS]; *see also* Editorial, *The Supreme Court Keeps the Fair Housing Law Effective*, N.Y. TIMES (June 25, 2015), https://www.nytimes.com/2015/06/26/opinion/the-supreme-court-keeps-the-fair-housing-law-effective.html [https://perma.cc/V2BM-9J6J].

[80] *See* Emily Badger, *Supreme Court Upholds a Key Tool Fighting Discrimination in the Housing Market*, WASH. POST: WONKBLOG (June 25, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/25/supreme-court-upholds-a-

how easily *Inclusive Communities*, as applied, can spare defendants from valid disparate impact liability.

A guiding principle behind the *Inclusive Communities* robust causality requirement was, as described in Justice Kennedy's majority opinion, to ensure that defendants do not resort to the use of "racial quotas" in FHA disparate impact cases—"a circumstance that itself raises serious constitutional concerns."[81] Although Judge Ellis did go out of his way to warn that the disparate impact theory "is racially allocative and encourages the use of quotas," this discrimination law bogeyman simply does not apply in *De Reyes*.[82] Unlike complex FHA disparate impact cases involving the segregative impact of rezoning, urban renewal, or the decisions of public housing agencies—cases where relief granted by courts is sweeping and predicated on large-scale demographic data—*De Reyes* can be remedied with a simple fix. As the plaintiffs stated: but for the Park's policy, the plaintiffs would not be living in fear of eviction and they would not be in court.[83] Accordingly, a racial quota is simply not necessary in *De Reyes*.

Moreover, if applied broadly, the rationale employed by the court in *De Reyes* would bar a wide range of valid disparate impact claims. Consider the following hypothetical. A private landlord in a typical American city has a blanket policy that forbids any individual with a criminal record from renting an apartment. The vast majority of people with criminal records in this hypothetical city, like the United States population at large, are "people of racial and ethnic minority groups, particularly African Americans."[84] Accordingly, because of their overrepresentation as individuals with criminal records, Black and Latino apartment applicants are disproportionately impacted by the landlord's policy. These applicants bring a disparate impact FHA claim against the landlord, claiming they were discriminated against on the basis of their race.

Setting the *Inclusive Communities* causation standard aside for a moment, it is clear what the landlord would argue following traditional FHA jurisprudence: that the "safety of other tenants and their property" is a non-discriminatory justification for such a policy.[85] After all, "[c]ourts

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key-tool-fighting-discrimination-in-the-housing-market/ [https://perma.cc/XZ8Q-ZNQ2] (quoting Betsy Julian, President of the Inclusive Communities Project).

[81] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

[82] *De Reyes*, 205 F. Supp. 3d at 791 n.9 (citation omitted).

[83] *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss, *supra* note 66, at 18.

[84] Rebecca Oyama, Note, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening As a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 199 (2009).

[85] *Id.* at 215.

recognize residential safety as a legitimate objective."[86] The plaintiffs would then respond by showing that an alternative policy could achieve the same legitimate objective, but without the same discriminatory effect.[87]

Applying the *De Reyes* causation analysis to this hypothetical turns the disparate impact analysis on its head. Following the district court's formulation in *De Reyes*, the disparate impact on the plaintiffs as Black and Latino individuals is "incidental" to the policy's effect on all individuals with criminal records.[88] In other words, the plaintiffs themselves broke the chain of causation by being convicted of crimes in the past, effectively foreclosing any disparate impact claims stemming from their criminal record status. These hypothetical plaintiffs would therefore only have recourse under the FHA if they were able to find evidence of intentional discrimination.

In *De Reyes*, Judge Ellis ruled that the plaintiffs "must still show that the [p]olicy was instituted 'because of' race or national origin" in order to meet the robust causation standard.[89] This narrow reading of "because of" as it is written in the FHA[90] renders disparate impact moot and would find many a fan among the *Inclusive Communities* dissenters,[91] but no support in Justice Kennedy's binding majority opinion.

CONCLUSION

The distinction between the disparate impact and disparate treatment theories of liability under the Fair Housing Act "is not one of legal formalism."[92] Rather, "it expresses the Supreme Court's view that individual decisions which are not impermissibly motivated may become actionable as a pattern of exclusion emerges, even without proof of actual wrongful intent."[93] After decades of FHA practice, the Supreme Court determined that disparate impact claims are cognizable under the FHA and

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[86] *Id.* at 215-16.

[87] *Id.* at 206. In this hypothetical, the plaintiffs could follow existing EEOC guidelines from the employment discrimination context, which "serve[] to prevent individuals from being denied employment opportunities whose qualifications bear little relation to the specific criminal record," *id.* at 217-19.

[88] De Reyes v. Waples Mobile Home Park Ltd. P'ship, 205 F. Supp. 3d 782, 792 (E.D. Va. 2016)

[89] *Id.* at 794.

[90] Fair Housing Act, 42 U.S.C. § 3604(a) (2015).

[91] Justice Alito, in his dissent, argued that "because of" must be read to require discriminatory motive. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2533-37 (2015) (Alito, J., dissenting). In his separate dissenting opinion, Justice Thomas argued the same, *id*. at 2526-27 (Thomas, J., dissenting).

[92] Holder v. City of Raleigh, 867 F.2d 823, 826 (4th Cir. 1989).

[93] *Id.* (citing Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 987 (1988)).

"consistent with the FHA's central purpose."[94] Accordingly, the *Inclusive Communities* robust causality requirement must not be used by lower courts, as in *De Reyes*, to render disparate impact obsolete. To do so would violate Congress's clear understanding that such liability exists under the FHA.[95]

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[94] *Inclusive Cmties.*, 135 S. Ct. at 2521.
[95] *See id.* at 2520.