

2012

# Another Missed Opportunity to Fix Discrimination in Discrimination Law

Eric W.M. Bain

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## Recommended Citation

Bain, Eric W. M. (2012) "Another Missed Opportunity to Fix Discrimination in Discrimination Law," *William Mitchell Law Review*: Vol. 38: Iss. 4, Article 1.

Available at: <http://open.mitchellhamline.edu/wmlr/vol38/iss4/1>

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## ANOTHER MISSED OPPORTUNITY TO FIX DISCRIMINATION IN DISCRIMINATION LAW

Eric W.M. Bain<sup>†</sup>

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Fair housing and safe housing are not often thought of as competing goals, but they can be in terms of the Fair Housing Act (FHA) and municipal housing codes. Conflict can arise where cities enforce their housing codes against properties that house

lower-income tenants. Such tenants, in many communities, tend to be racial minorities that are protected classes under the FHA. Housing code enforcement can make property management more expensive, which can result in higher rents that may price out these tenants.

On one hand, cities argue that housing codes must be strictly enforced to ensure the safety of residents.<sup>1</sup> But on the other hand, landlords and tenants argue that to further fair housing, code enforcement must not inadvertently discriminate against low-income properties that are often home to protected classes.<sup>2</sup>

Absent any intentional discrimination in housing code enforcement, the key to any fair housing suit in the context of this article is disparate impact, which finds discrimination where a policy has a disproportionate adverse effect on a protected class.<sup>3</sup>

The doctrine of disparate impact is in an unsettled state because the FHA statute does not expressly mention it,<sup>4</sup> even though every federal circuit recognizes it.<sup>5</sup> But the circuits are split

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1. *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 993, 999 (D. Minn. 2008), *aff'd in part, rev'd in part sub nom. Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010) (noting that even the plaintiffs did not dispute that “enforcement of the housing code is necessary to achieving [the] objectives” of the City to “keep[] the City clean, and housing habitable, and mak[e] . . . [its] neighborhoods the safest and most livable of any in Minnesota.”); *see also* Petitioners’ Reply Brief at 5, *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (No. 10-1032), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/Petitioners-Reply-10-1032-Magner.pdf> (including the City of St. Paul’s argument that landlords should not be allowed to use the FHA to avoid compliance with housing codes and “rent dilapidated and unsafe housing to minorities”).

2. *Steinhauser*, 595 F. Supp. 2d at 995, 997 (noting that the plaintiffs claimed that “enforcement of the housing code, which is stricter than the . . . [federal Housing Quality Standards], has a disparate impact on African-Americans because compliance with the housing code increases the costs of low-income housing and African-Americans make up a disproportionate percentage of low-income tenants”).

3. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 10:6 (2011), *available at* WL, Housing Discrimination Law and Litigation § 10:6 (“The key questions in [a disparate impact] case will then be whether the impact of the defendant’s policy or practice is significantly greater on a class of persons protected by the Fair Housing Act than it is on nonprotected class members, and if so, whether the defendant has provided a sufficiently strong justification for using this policy or practice to overcome the prima facie case that the plaintiff’s showing of disparate impact has created.”).

4. ROBERT G. SCHWEMM & SARA K. PRATT, NATIONAL FAIR HOUSING ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 9 (2009), *available at* <http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf>.

5. *Id.* at 3.

as to the applicable standard for disparate impact claims.<sup>6</sup>

Adding to the confusion, the U.S. Supreme Court has largely stayed out of the matter.<sup>7</sup> In the last twenty-five years, the Supreme Court has missed three opportunities to conclusively decide whether the FHA includes a disparate impact standard and to define a sensible test. In 1988, the Court reserved judgment on the disparate impact issue in *Town of Huntington v. Huntington Branch, NAACP*.<sup>8</sup> And in 2003, the Court nearly had an opportunity in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,<sup>9</sup> but the disparate impact claim was dropped after certiorari was granted.

In November 2011, the Court decided to take up the issue by granting certiorari<sup>10</sup> for the City of St. Paul, Minnesota from an Eighth Circuit case, *Gallagher v. Magner*.<sup>11</sup> The two questions presented in the petition for certiorari were: (1) whether disparate impact claims are cognizable under the FHA; and (2) if such claims are cognizable, how they should be analyzed.<sup>12</sup> But in February 2012, the City of St. Paul withdrew its petition, resulting in yet another missed opportunity for the Court to decide on the disparate impact issue in housing discrimination law.<sup>13</sup> As a consequence, the question of whether the Supreme Court will recognize disparate impact claims under the FHA will continue to go unanswered and the circuit split on the application of a disparate impact standard will continue for the foreseeable future.

The first part of this article will trace the background of disparate impact and the FHA.<sup>14</sup> The second part will provide an

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6. Brief for Int'l Municipal Lawyers Ass'n as Amici Curiae Supporting Petitioners at 2, *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (No. 10-1032), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/05/Brief-05-19-11-154207.pdf>.

7. SCHWEMM & PRATT, *supra* note 4, at 4.

8. 488 U.S. 15 (1988).

9. 538 U.S. 188 (2003).

10. *Magner v. Gallagher*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

11. *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *reh'g en banc denied reh'g denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), and *cert. dismissed*, 132 S. Ct. 1306 (2012).

12. Petition for Writ of Certiorari at i, *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (No. 10-1032), available at <http://www.justalandlord.com/wp-content/uploads/2011/02/1102-Petition-for-Writ-of-Certiorari.pdf>, *dismissed*, 132 S. Ct. 1306 (2012).

13. See No. 10-1032, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm> (last visited Apr. 1, 2012).

14. See *infra* Part I.

overview of *Gallagher*.<sup>15</sup> The third part of this article will discuss the current problems with disparate impact under the FHA.<sup>16</sup> The fourth part will recommend how the Court, if ever given the chance, should rule by providing legal and policy reasons for recognition of disparate impact under the FHA, as well as some suggested considerations.<sup>17</sup> The article will conclude with a recommendation that disparate impact under the FHA should be defined similarly to disparate impact in the employment discrimination context as established in *Griggs v. Duke Power Co.*<sup>18</sup>

## I. DISPARATE IMPACT AND THE FHA

### A. History of the FHA

#### 1. Need for the FHA

Prior to the FHA, segregated housing in the United States persisted because of racially restrictive zoning regulations and covenants, segregated public housing projects, realtors steering minorities away from white neighborhoods, and voluntary segregation.<sup>19</sup> White flight only made matters worse.<sup>20</sup>

Senator Walter Mondale, who introduced the original FHA bill, argued that it was “necessary to eliminate discriminatory practices of property owners, real estate brokers, builders, and home financiers.”<sup>21</sup> Mondale intended the FHA to replace the ghettos “by truly integrated and balanced living patterns.”<sup>22</sup>

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15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See *infra* Part V.

19. Rebecca Tracy Rotem, Note, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal From the Section 8 Voucher Program*, 78 FORDHAM L. REV. 1971, 1975 (2010).

20. *White Flight*, WIKIPEDIA, [http://en.wikipedia.org/wiki/White\\_flight](http://en.wikipedia.org/wiki/White_flight) (last visited Apr. 1, 2012).

21. *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984) (citing 114 CONG. REC. S2272–84 (daily ed. Feb. 6, 1968)).

22. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968)).

## 2. *Building Support for the FHA*

Ultimately, the FHA was passed as Title VIII of the Civil Rights Act of 1968.<sup>23</sup> But two years prior to its passage, the issue of fair housing languished in Congress.<sup>24</sup> It was a divisive issue, “prompt[ing] the most vicious mail [President Lyndon B. Johnson] received on any subject.”<sup>25</sup>

The lobbying efforts of two men turned the tide, however. The first was Senator Edward Brooke, the first African-American Senator to be elected by popular vote.<sup>26</sup> Partnering with Senator Edward Kennedy, Senator Brooke spoke of his personal experience returning from World War II and being denied housing for his family due to his race.<sup>27</sup> Incidentally, a similar problem was reoccurring with the Vietnam War. In particular, wartime casualties fell disproportionately on racial minorities and the families of fallen soldiers of color were being denied housing due to their race.<sup>28</sup>

The second individual was Martin Luther King, Jr., who became closely associated with fair housing legislation because he organized the Chicago open housing marches, which occurred in 1966.<sup>29</sup> As of March 1968, according to President Johnson’s special assistant for domestic affairs, there was “no hope” of passage of the FHA in the House.<sup>30</sup> But President Johnson used King’s assassination as an opportunity to finally push the fair housing bill

23. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801–19, 82 Stat. 73, 81–89 (codified as amended at 42 U.S.C. §§3601–19 (2006)).

24. *History of Fair Housing*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/aboutfheo/history](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo/history) (last visited Apr. 1, 2012).

25. Joseph Califano, Jr., *A Complex Partnership / MLK and LBJ Needed Each Other—and They Knew It*, ST. PAUL PIONEER PRESS, Jan. 15, 2008. Public resentment toward fair housing efforts was also felt by Martin Luther King, Jr., who remarked that when he advocated for fair housing in Chicago he had “never seen such hate—not in Mississippi or Alabama—as I see here in Chicago.” *Id.*

26. *Edward Brooke*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Edward\\_Brooke](http://en.wikipedia.org/wiki/Edward_Brooke) (last visited Apr. 1, 2012).

27. *History of Fair Housing*, *supra* note 24. Senator Brooke additionally noted that his problem was not unique—African-Americans could not move to better neighborhoods because they were “surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government practices.” 114 CONG. REC. 2526 (1968).

28. *History of Fair Housing*, *supra* note 24.

29. Monroe H. Little, Jr., *More Than a Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 IND. L. REV. 523, 534 (2008) (describing the effect of King’s marches on the passage of the fair housing bill).

30. Califano, *supra* note 25.

through Congress, as a “last tribute to King.”<sup>31</sup> Just seven days after King’s assassination on April 4, 1968,<sup>32</sup> the FHA was quickly passed without debate.<sup>33</sup>

### 3. *FHA Today*

The FHA today makes it unlawful to “discriminate against any person in the . . . sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin.”<sup>34</sup> Protection from discrimination is also extended to the handicapped in a few instances, such as in the context of advertisements<sup>35</sup> or denials of the availability of a rental dwelling.<sup>36</sup> There is no express language in the FHA requiring a showing of intent, in part because Congress thought doing so would make it too difficult to show discrimination.<sup>37</sup> There is also no express language in the statute authorizing discrimination claims based on showings of disparate impact.<sup>38</sup> Such ambiguity has opened the door for judicial interpretation.

## B. *The Roots of Disparate Impact*

### 1. *The Court’s First Recognition of Disparate Impact*

The concept of disparate impact comes from employment discrimination law. In 1971, the landmark Supreme Court opinion *Griggs v. Duke Power Co.*<sup>39</sup> interpreted Title VII of the 1964 Civil

31. *Id.*

32. Matthew Jordan Cochran, *Fairness in Disparity: Challenging the Application of Disparate Impact Theory in Fair Housing Claims Against Insurers*, 21 GEO. MASON U. CIV. RTS. L.J. 159, 161 (2011).

33. *History of Fair Housing*, *supra* note 24.

34. 42 U.S.C. § 3604(b) (2006).

35. *Id.* § 3604(c) (prohibiting, for example, rental ads that exclude applicants based on a handicap).

36. *Id.* § 3604(d) (prohibiting, for example, a landlord from expressing the unavailability of a rental dwelling to a handicapped person when it is in fact available).

37. SCHWEMM & PRATT, *supra* note 4, at 11–12 (explaining that Congress debated an amendment from Senator Baker that would have found liability under the FHA where intentional discrimination occurred, but that this amendment was defeated due to the recognition of difficulties in producing proof of intent, which would have raised the likelihood of chances for discrimination).

38. *Id.* at 9 (“The text of the FHA’s substantive provisions (§§ 3604–3606 and 3617) does not explicitly state whether impact claims are or are not cognizable.”).

39. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Rights Act<sup>40</sup> to include a discriminatory effect standard.<sup>41</sup>

In *Griggs*, a group of African-American employees in North Carolina brought suit against their employer, Duke Power Company, claiming that their employment practices violated the Civil Rights Act.<sup>42</sup>

Prior to the 1964 Civil Rights Act, Duke had a policy of relegating African-American employees to a single department, "Labor," where the highest-paying jobs paid less than the lowest-paying jobs in any of the other "white" departments.<sup>43</sup> But after the Civil Rights Act passed, Duke changed its race-based employment assignments to a policy of requiring either a high school diploma or passing a standardized general intelligence test to either be employed in, or transferred to, certain jobs, primarily ones with higher wages.<sup>44</sup>

Plaintiffs argued that degree and testing requirements disproportionately affected African-Americans because they were less likely than whites to have diplomas or pass the intelligence test. In 1960 in North Carolina, thirty-four percent of white males completed high school, compared to only twelve percent of African-American males.<sup>45</sup> Further, fifty-eight percent of whites passed Duke's standardized intelligence tests, compared to only six percent of African-Americans.<sup>46</sup>

Plaintiffs also argued that degree and testing requirements did not relate to job performance because the percentage of white employees promoted without high school diplomas was nearly the same as the percentage of non-graduates in the entire white work force.<sup>47</sup> In other words, high school graduates were no more likely than non-graduates to be promoted.

Duke, on the other hand, argued that they lacked intent to

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40. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241 (current version at 42 U.S.C. § 2000e-2 (2006)).

41. *Griggs*, 401 U.S. at 431-32 ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.").

42. *Id.* at 424.

43. *Id.* at 427.

44. *Id.* at 427-28.

45. *Id.* at 431 n.6 (citing U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CENSUS OF POPULATION:1960 VOLUME I CHARACTERISTICS OF THE POPULATION PART 35 35-167 tbl.47 (1963)).

46. *Id.*

47. *Id.* at 431-32 n.7.

discriminate against African-American employees,<sup>48</sup> and that section 703(h) of the Civil Rights Act provided for a right to condition promotions or transfers on passing certain tests.<sup>49</sup>

The Court in *Griggs* sided with plaintiffs, holding that “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”<sup>50</sup> Accordingly, Duke’s intention for implementing testing requirements was not a dispositive factor for proving or disproving employment discrimination. Instead, what mattered was the *impact* caused by the testing requirements.

The Court reasoned that Congress did not intend to prohibit testing or measuring procedures, as long as they are a “reasonable measure of job performance” and “measure the person for the job and not the person in the abstract.”<sup>51</sup> Since the diploma and testing requirements were not “significantly related to successful job performance” and disqualified African-Americans at a substantially higher rate than white applicants, Duke’s policy was held to be discriminatory in violation of Title VII of the Civil Rights Act.<sup>52</sup>

## 2. *Codification of Disparate Impact in Employment Discrimination Law*

The burden of proof in Title VII disparate impact cases was discussed by the Court in 1989 in *Wards Cove Packing Co. v. Atonio*<sup>53</sup> and codified in an amendment to the Civil Rights Act in 1991.<sup>54</sup> Under the current statute, an unlawful employment practice based on disparate impact may be established in only one of two ways: (1) the complainant demonstrates that an employment practice causes

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48. *Id.* at 432.

49. *Id.* at 433 (referring to Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(h) (2006)), which allowed the use of tests, as long as they did not discriminate based on race).

50. *Id.* at 432.

51. *Id.* at 436.

52. *Id.* at 424.

53. 490 U.S. 642, 659 (1989) (holding that defendant employer has the burden of production of showing business justification for an employment practice, while the burden of persuasion remains with the disparate-impact plaintiff).

54. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074–1077 (codified as amended at 42 U.S.C. § 2000e-2(k) (2006)). The stated purpose of the amendment was “to clarify provisions regarding disparate impact actions.” *Id.*

a disparate impact and the employer fails to show that its practice is job-related and consistent with business necessity;<sup>55</sup> or (2) if the employer refused to adopt an alternative employment practice that complainant demonstrated (in accordance with pre-*Wards Cove* law)<sup>56</sup> is less discriminatory.<sup>57</sup>

C. *Disparate Impact Evolution in Housing Discrimination Law*

1. *The Supreme Court's First FHA Decision: Trafficante v. Metro. Life Ins. Co.*

Four years after the enactment of the FHA, and just one year after *Griggs*, the Supreme Court in 1972 issued its first FHA decision in *Trafficante*.<sup>58</sup> The plaintiffs, who were tenants at an apartment complex, claimed that their landlord discriminated against non-white rental applicants.<sup>59</sup> Plaintiffs asserted that they had: (1) “lost the social benefits of living in an integrated community;” (2) “missed business and professional advantages” from not living with members of minority groups; and (3) “suffered embarrassment and economic damage in social, business, and professional activities from being ‘stigmatized’ as residents of a ‘white ghetto.’”<sup>60</sup> Further, plaintiffs argued that they had standing to bring an FHA claim because they fell under the FHA’s definition of “aggrieved persons,” which includes any person who either claims to be injured, or will be injured, by a discriminatory housing practice.<sup>61</sup>

Even though plaintiffs were not directly discriminated against by their landlord based on race, the Court found that they

55. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

56. *Id.* § 2000e-2(k)(1)(C) (overturning the standard for showing alternative practices set by *Wards Cove* by stating such demonstrations “shall be in accordance with the law as it existed on June 4, 1989,” which was the day before *Wards Cove* was decided).

57. *Id.* § 2000e-2(k)(1)(A)(ii); *see also* Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118 (11th Cir. 1993) (“[E]ven after such a showing [of business necessity], the plaintiff may still overcome a proffered business necessity defense by demonstrating that there exist alternative policies with *lesser discriminatory effects* that would be comparably as effective at serving the employer’s identified business needs.” (emphasis added)).

58. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

59. *Id.* at 206–08.

60. *Id.* at 208.

61. 42 U.S.C. § 3602(i) (2006).

had standing.<sup>62</sup> The Court noted that the FHA's language is "broad and inclusive"<sup>63</sup> and should be given "generous construction."<sup>64</sup> The Court justified a broad interpretation for standing by reasoning that barriers must be removed to private suits under the FHA because private suits are the best enforcement mechanism—particularly when considering that the Department of Housing and Urban Development (HUD) does not have enforcement powers, and the Attorney General has a small staff for fair housing litigation.<sup>65</sup>

2. *The Initial Circuit Court Decision Regarding Disparate Impact Under the FHA: United States v. City of Black Jack*

Following *Griggs* (Title VII allows for showings of discriminatory effect)<sup>66</sup> and *Trafficante* (the FHA should be broadly interpreted),<sup>67</sup> the Eighth Circuit became the first federal appellate court to find an FHA violation based on disparate impact.<sup>68</sup> In *United States v. City of Black Jack*, a municipal zoning ordinance that prohibited construction of any new multifamily dwellings was challenged on the grounds that it denied persons housing on the basis of race in violation of the FHA.<sup>69</sup> At the time, Black Jack, Missouri was "virtually all white," with a black population of between one and two percent.<sup>70</sup> Neighboring St. Louis, by comparison, was about forty percent black, with a pupil population of approximately sixty-five percent in the city's school district.<sup>71</sup> Furthermore, about forty percent of black families in the area, compared to fourteen percent of white families, were living in overcrowded housing.<sup>72</sup>

Relying on *Griggs* for the proposition that Congress intended Title VII to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate

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62. *Trafficante*, 409 U.S. at 212.

63. *Id.* at 209.

64. *Id.* at 212.

65. *Id.* at 210–11.

66. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

67. *Trafficante*, 409 U.S. at 209.

68. SCHWEMM & PRATT, *supra* note 4, at 3.

69. *United States v. City of Black Jack*, 508 F.2d 1179, 1181 (8th Cir. 1974).

70. *Id.* at 1183.

71. *Id.*

72. *Id.*

on the basis of racial or other impermissible classification[s],”<sup>73</sup> the Eighth Circuit in *Black Jack* concluded that “such barriers must also give way in the field of housing.”<sup>74</sup> The court went on to declare that a prima facie case of racial discrimination may be proven with no more than a defendant’s conduct “actually or predictably result[ing] in racial discrimination; in other words, that it has a discriminatory effect . . . . Effect, and not motivation, is the touchstone . . . .”<sup>75</sup>

Under this standard, the Eighth Circuit held that the municipal zoning ordinance had a discriminatory effect because prohibiting construction of affordable multifamily dwellings would “contribute to the perpetuation of segregation in a community which was [ninety-nine] percent white.”<sup>76</sup> Since discriminatory effect had been shown, the Eighth Circuit shifted the burden to the municipal defendant “to demonstrate that its conduct was necessary to promote a compelling governmental interest.”<sup>77</sup> Because *Black Jack* could not show a compelling governmental interest, the Eighth Circuit held that the ordinance violated the FHA.<sup>78</sup>

### 3. *Development of Disparate Impact Since Black Jack*

In the years since *Black Jack*, a strong consensus has emerged among the circuit courts that the FHA includes a disparate impact standard.<sup>79</sup> Today, every circuit uses the disparate impact standard.<sup>80</sup> But, due to a lack of guidance from the Supreme

73. *Id.* at 1184 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

74. *Id.*

75. *Id.* at 1184–85.

76. *Id.* at 1186.

77. *Id.* at 1185 & n.4 (stating that this rule was drawn from “cases involving equal protection challenges”).

78. *Id.* at 1188.

79. SCHWEMM & PRATT, *supra* note 4, at 3.

80. *See, e.g.*, 2922 Sherman Ave. Tenants’ Ass’n v. District of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Pfaff v. HUD*, 88 F.3d 739, 745–46 (9th Cir. 1996); *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988), *aff’d in part per curiam*, 488 U.S. 15 (1988); *Keith v. Volpe*, 858 F.2d 467, 482–84 (9th Cir. 1988); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564

Court, the circuit courts have “developed substantively different standards” for judging FHA disparate impact claims.<sup>81</sup> In fact, three different standards have emerged among the circuits:<sup>82</sup> a “balance-of-factors test,”<sup>83</sup> a “burden-shifting analysis,”<sup>84</sup> and a “hybrid test.”<sup>85</sup>

Disparate impact under the FHA has also been adopted by HUD. In a 1993 administrative decision, for example, the HUD Secretary found that a “disparate impact, if proven, would establish a violation of the Act.”<sup>86</sup> Furthermore, HUD’s “Complaint Intake, Investigation, and Conciliation Handbook” recognizes that disparate impact may be used to show a violation of the FHA.<sup>87</sup>

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F.2d 126, 146–48 (3d Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *Black Jack*, 508 F.2d at 1184–85 (8th Cir. 1974).

81. Brief for Int’l Municipal Lawyers Ass’n, *supra* note 6, at 2.

82. *Id.* at 2–4.

83. The “balance-of-factors test” is used in the Fourth, Sixth, Seventh, and Tenth Circuits. *Id.* at 3. The following factors are considered: “(1) the strength of plaintiffs’ showing of discriminatory impact; (2) a quantum of evidence of discriminatory intent; (3) the defendant’s interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or an injunction to restrain defendants from interfering with property owners who wish to provide housing.” *Id.* (citing *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)).

84. The “burden-shifting analysis” is used in the Third, Eighth, and Ninth Circuits. *Id.* The analysis in the Third Circuit requires: “(1) plaintiff must show disparate impact; (2) defendant must establish justification for the action; and (3) defendant must prove no reasonable alternative means was available.” *Id.* (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977)). The analysis in the Eighth and Ninth Circuits is the same for the first and second prongs, but the burden for the third prong shifts to the plaintiff to show that a viable alternative means was available. *Id.* at 3–4 (citing *Rizzo*, 564 F.2d at 148).

85. The “hybrid test” is used in the First and Second Circuits. *Id.* at 4. The “hybrid test” requires that “(1) plaintiff must present a *prima facie* case of disparate impact; (2) defendant must ‘prove that its actions furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect’; (3) the court considers whether any evidence of discriminatory intent was presented; and (4) the court considers whether the plaintiff seeks affirmative relief or an injunction to restrain defendants from interfering with property owners who wish to provide housing.” *Id.* (citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988), *aff’d in part per curiam* *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988)).

86. *Sec’y of Hous. & Urban Dev. v. Mountain Side Mobile Estates P’ship, Fair Housing-Fair Lending Rep. (P-H) ¶ 25,053* (July 19, 1993), *available at* 1993 WL 307069, at \*5.

87. HUD, *FAIR HOUSING AND EQUAL OPPORTUNITY HANDBOOK: TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK* (8024.01), Part 3-5-A-1, at 3-25 (1995), *available at* <http://www.hud.gov/offices/adm/hudclips>

Although there is consensus among the circuit courts and HUD that a violation of the FHA can be shown with disparate impact, the Supreme Court has remained out of the debate.<sup>88</sup> The Court has held that a violation of the FHA can be found when discriminatory intent is shown.<sup>89</sup> But the Court has never held that an FHA violation can be found with a showing of disparate impact.<sup>90</sup>

## II. GALLAGHER V. MAGNER

The *Gallagher* case provided a great opportunity for the Court to settle the circuit split on how disparate impact is applied, if at all, under the FHA. Even though the petitioner, the City of St. Paul, requested dismissal from the Court, the case presents a real-world lens into how disparate impact has been used and suggests some limits. Therefore, the *Gallagher* case is used below to discuss disparate impact under the FHA and why the Court should recognize it someday.

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/handbooks/fheh/80241/80241c3-1FHEH.pdf (stating that HUD's jurisdiction over a complaint requires showing a violation of the FHA either by discriminatory motive or discriminatory effect); *id.* Part 2-4-A, at 2-27 to 2-28, available at <http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80241/80241c2FH EH.pdf> (“[A] respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations. . . . These cases are sometimes called ‘discriminatory impact’ or ‘discriminatory effect’ cases, because their principal focus is on the impact or effect of the respondent’s policy rather than on his intent.”).

88. SCHWEMM & PRATT, *supra* note 4, at 4.

89. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). The Court stated that “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Id.* The Court used as precedent showings of violations under the Equal Protection Clause because no precedent for violations of the FHA existed at the time and the Court thought such precedent was an appropriate analogy for two reasons: first, the FHA similarly prohibited discrimination; and second, the Court had previously applied this rule in discrimination cases involving schools, election districting, and jury selection. *See id.* For such showings of “discriminatory intent,” the Court articulated a four-factor test: “(1) the racial impact of the decision; (2) the historical background of the decision, particularly where it reveals a series of official actions taken for invidious purposes; (3) the specific sequence of events leading up to the challenged decision—including departures from the normal procedural sequence; and (4) the legislative or administrative history—especially where there are contemporary statements by members of the decisionmaking body, or minutes of its meetings.” *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 635 (6th Cir. 2001) (citing *Arlington Heights*, 429 U.S. at 266-68), *rev’d in part, vacated in part*, 538 U.S. 188 (2003).

90. SCHWEMM & PRATT, *supra* note 4, at 4.

*A. Background Facts*

In 2003, the City of St. Paul established the Department of Neighborhood Housing and Property Improvement (DNHPI) to administer and enforce its housing code.<sup>91</sup> The mission of the DNHPI was to “keep the city clean, keep its housing habitable, and make [its] neighborhoods the safest and most livable [of] anywhere in Minnesota.”<sup>92</sup> The director of the DNHPI sought to fulfill the mission by conducting “proactive sweeps,” as requested by City District Councils,<sup>93</sup> and by responding to neighborhood complaints.<sup>94</sup> The DNHPI director drafted procedural guidelines, but since “universal application” was impossible, housing inspectors had discretion in application of their rules.<sup>95</sup>

Rental property owners brought suit against the City of St. Paul challenging the enforcement of its housing code.<sup>96</sup> These owners rented properties to low-income households, which primarily consisted of persons of protected classes (about sixty to seventy percent of their tenant base was African-American).<sup>97</sup>

*B. U.S. District Court —Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987 (2008)*

In U.S. District Court, the owners brought a number of claims against the City: (1) disparate impact and disparate treatment claims under the FHA; (2) an equal protection claim; and (3) a Racketeer Influenced and Corrupt Organizations (RICO) Act claim.<sup>98</sup> The district court ultimately granted summary

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91. *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 992 (D. Minn. 2008), *aff'd in part, rev'd in part sub nom. Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *reh'g en banc denied reh'g denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *and cert. dismissed*, 132 S. Ct. 1306 (2012).

92. *Id.* at 993.

93. The city of St. Paul has seventeen district councils responsible for “planning and advising on the physical, economic, and social development of their areas; identifying needs; initiating community programs; recruiting volunteers; and sponsoring community events.” *District Councils*, SAINTPAULMINNESOTA, <http://www.stpaul.gov/index.aspx?NID=1859> (last visited Apr. 1, 2011).

94. *Steinhauser*, 595 F. Supp. 2d at 993.

95. *Id.*

96. *Id.* at 991–92.

97. *Id.* at 995.

98. *Id.* at 992. Additional claims were brought by the owners, but the court found they either were related to the other claims or did not warrant much discussion due to unfounded assertions. *Id.*

judgment for the City of St. Paul on all claims,<sup>99</sup> but this article will focus only on the disparate impact claim.

The owners argued that the City took a “heavy enforcement” and “code to the max” approach that increased their business costs, which reduced the supply of “affordable housing” and thus had a disparate impact on racial minorities in violation of the FHA.<sup>100</sup> They cited a finding that the City’s housing code was more strict than the federal Housing Quality Standards (HQS) laid out in 24 C.F.R. § 982.401 (2010).<sup>101</sup> To support their claim of disparate impact, the owners provided evidence that a shortage of affordable housing existed in the City and that there was an increase in foreclosed buildings in the City that were disproportionately renter-occupied.<sup>102</sup> The owners conceded that the DNHPI’s objectives were “legitimate and non-discriminatory” and that enforcement was manifestly related and “necessary” to achieving such objectives, but argued that the HQS was a viable alternative to the City’s housing code.<sup>103</sup>

Conversely, the City argued that the owners had not presented a legitimate claim under the Eighth Circuit’s disparate impact standard.<sup>104</sup> Specifically, the City claimed that the owners had not shown a prima facie case because their claims of less affordable housing and more vacant homes could not be traced to enforcement of the housing code.<sup>105</sup> Further, the City argued that

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99. *Id.* at 1020–21.

100. *Id.* at 995–96.

101. *Id.* at 997 n.6. The owners cited a finding from the City’s fire department that the municipal housing code was stricter than the HQS on eighty-two percent of items compared. *Id.*

102. *Id.* at 998.

103. *Id.* at 999.

104. *Id.* at 997. The Eighth Circuit standard for determining disparate impact involves three steps that shift the burden between plaintiff and defendant. First, the plaintiff “must demonstrate that the objected-to action results in, or can be predicted to result in, a disparate impact upon protected classes compared to a relevant population.” *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902 (8th Cir. 2005). Second, if the plaintiff can show a disparate impact, then the defendant “must demonstrate that the proposed action has a ‘manifest relationship’ to . . . legitimate, non-discriminatory policy objectives and ‘is justifiable on the ground it is necessary to’ the attainment of these objectives.” *Id.* (quoting *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003)). Third, if the defendant can show a necessary means to a legitimate policy objective, then plaintiff must “show that a viable alternative means is available to achieve those legitimate policy objectives without discriminatory effects.” *Id.* at 903.

105. *Steinhauser*, 595 F. Supp. 2d at 998.

code enforcement was related to legitimate, non-discriminatory policy objectives of providing clean, safe, and livable housing.<sup>106</sup>

The court granted summary judgment for the City, holding that the owners failed to establish a disparate impact claim under the FHA for two reasons.<sup>107</sup> First, the owners failed to offer evidence of “what rents are under the City's housing code, what rents would be under the HQS, and the percentages of African-Americans and non-African-Americans who could not afford to rent in the City because the City enforced its housing code rather than the HQS.”<sup>108</sup> Second, the owners failed to show that the City's code enforcement “caused or contributed” to the affordable housing shortage or that it caused increased vacancies or foreclosures.<sup>109</sup> Rather, the owners' showings were countered with evidence that insufficient federal funding contributed to the affordable housing shortage and that foreclosures (resulting in vacancies) were caused by predatory lending practices, unforeseen life events, and increasing interest rates.<sup>110</sup>

The court found that even if the owners had shown a prima facie case, they could still not prevail on their disparate impact claim because their suggested alternative was not viable.<sup>111</sup> The HQS, as a suggested alternative to the City's housing code, was not viable because it did not regulate exterior conditions (e.g., sanitation, extermination, and lighting), which “affect the safety and cleanliness” of the City. And no evidence was shown that adopting the HQS would result in greater availability of low-income housing or rent decreases.<sup>112</sup> For these reasons, the HQS alternative would not allow the City to achieve its policy objectives without discriminatory effects.<sup>113</sup>

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106. *Id.* at 998–99.

107. *Id.* at 992.

108. *Id.* at 997–98.

109. *Id.* at 998.

110. *Id.*

111. *Id.* at 999.

112. *Id.*

113. *Id.*

C. *8th Circuit I* — Gallagher v. Magner, 619 F.3d 823 (2010)<sup>114</sup>

On appeal, the Eighth Circuit reversed summary judgment on the disparate impact claim, but affirmed on all other claims.<sup>115</sup> The court found that the owners had in fact presented a prima facie case and that the issue of a viable alternative was a fact question, which made summary judgment improper.<sup>116</sup>

In regard to the owners' prima facie case, the court concluded that enough evidence was presented to withstand summary judgment.<sup>117</sup> The owners presented evidence supporting an affordable housing shortage, racial minorities disproportionately constituting low-income households, increased costs for landlords of low-income tenants resulting from the City's code enforcement, and decreased affordable housing resulting from the City's code enforcement.<sup>118</sup> The court then inferred from this evidence that the City's code enforcement burdened the owners, which burdened the tenants, and decreased an already short supply of affordable housing, which disproportionately affected racial minorities since they were more likely to be low-income and dependent on low-income housing.<sup>119</sup> The court said that "[t]hough there is not a single document that connects the dots of [the owners'] disparate impact claim, it is enough that each analytic step is reasonable and supported by evidence."<sup>120</sup>

Further, the appellate court determined that the district court was mistaken in requiring a "before-and-after cost-of-rent comparison" because it is one way to show disparate impact, but it is "not the *only* way."<sup>121</sup>

In regard to the owners' presentation of a viable alternative to the City's code enforcement, the court concluded that there was a genuine dispute of fact and thus the issue was improperly disposed

114. It is unclear why on appeal the named plaintiff changed from Steinhauser to Gallagher, but it appears that Steinhauser was not included as a litigant on appeal.

115. Gallagher v. Magner, 619 F.3d 823, 829 (8th Cir. 2010), *reh'g en banc denied reh'g denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), and *cert. dismissed*, 132 S. Ct. 1306 (2012).

116. *Id.* at 837.

117. *Id.* at 837.

118. *Id.* at 834–35.

119. *Id.* at 835.

120. *Id.*

121. *Id.* at 837.

of on summary judgment.<sup>122</sup> Ignored by the district court, the owners suggested the City's previous housing code enforcement program, Problem Properties 2000, (PP2000) was a viable alternative.<sup>123</sup> But there was disagreement between the City and the owners over how much reduction in impact on protected class members PP2000 would have.<sup>124</sup> The court ruled that this was a factual dispute and declined to analyze the viability of PP2000 as an alternative.<sup>125</sup>

*D. 8th Circuit II — Gallagher v. Magner, 636 F.3d 380 (2010)*

The petition for rehearing en banc and rehearing by the panel was denied, but a lengthy dissenting opinion was provided.<sup>126</sup> Two issues were suggested for analysis by the dissent. First, the basis for disparate impact analysis under the FHA should be examined.<sup>127</sup> The U.S. Supreme Court has never ruled on this matter and there has been "little consideration" in the Eighth Circuit of the basis for liability shown by disparate impact.<sup>128</sup>

Additionally, the dissent pointed to a recent Supreme Court decision that cast doubt on justifications for allowing disparate impact showings under the FHA based on *Griggs*.<sup>129</sup> In 2005, *Smith v. City of Jackson* held that disparate impact is cognizable under the Age Discrimination in Employment Act (ADEA).<sup>130</sup> The Supreme Court held that one section of the ADEA (section 4(a)(2)) allows a disparate impact standard because the statutory language is "identical" to the language of Title VII in *Griggs*,<sup>131</sup> while it also

122. *Id.* at 838.

123. *Id.* at 837.

124. *Id.* at 838.

125. *Id.*

126. *Gallagher v. Magner*, 636 F.3d 380 (8th Cir. 2010).

127. *Id.* at 381 (Colloton, J., dissenting).

128. *Id.* at 382–83.

129. *Id.*

130. *Smith v. City of Jackson*, 544 U.S. 228 (2005).

131. *Id.* at 236–38. The statutory language interpreted in *Griggs* included:  
It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971). The "identical" language of section 4(a)(2) of the ADEA (now codified at 29 U.S.C. § 623(a)(2) (2006)) declared it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment

found that another section (section 4(a)(1)) had “key textual differences” and does not include a disparate impact standard.<sup>132</sup> The problem, however, is that the statutory language in the ADEA held to not include disparate impact is similar to the language used in the FHA.<sup>133</sup>

Third, the dissent stated that if disparate impact analysis is based on the purpose of the FHA, then it is worth considering whether that purpose extends to make a city liable for aggressive housing code enforcement.<sup>134</sup> The circuit court had determined when application of disparate impact analysis was appropriate in other contexts, but this was uncharted territory and so the dissent wanted a rehearing to discuss this.<sup>135</sup>

#### *E. Petition for Certiorari*

The City submitted a petition for writ of certiorari in response to the Eighth Circuit’s decision to allow the owners’ case to proceed to trial based on its finding that sufficient evidence of disparate impact was shown.<sup>136</sup> The City argued that a circuit split over disparate impact under the FHA has resulted in inconsistent applications of the FHA across the country.<sup>137</sup> The City, explaining that landlords in Los Angeles can avoid maintenance requirements by claiming the municipality is violating the FHA, while landlords in Milwaukee cannot, argued, “[t]he FHA should not be a vehicle to allow landlords to rent dilapidated and unsafe housing to

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opportunities or otherwise adversely affect his status as an employee, because of such individual’s age . . . .” *Smith*, 544 U.S. at 233 (citation omitted).

132. *Smith*, 544 U.S. at 235–36 & n.6. The language section 4(a)(1) of the ADEA (now codified at 29 U.S.C. § 623(a)(1) (2006)) that seemingly discourages disparate impact included that it be unlawful “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . . .” *Smith*, 544 U.S. at 248–50 (O’Connor, J., concurring) (citation omitted).

133. *Gallagher*, 636 F.3d at 383 (Colloton, J., dissenting). The language of the FHA, which is similar to section 4(a)(1) of the ADEA (found to not allow disparate impact claims), provides that it is unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a) (2006).

134. *Gallagher*, 636 F.3d at 383–84 (Colloton, J., dissenting).

135. *Id.* at 384.

136. Petition for Writ of Certiorari, *supra* note 12.

137. Petitioners’ Reply Brief, *supra* note 1, at 1.

minorities.”<sup>138</sup>

The City requested that the Court determine whether or not disparate impact applies under the FHA, and if it does, that a uniform test for all circuits be advanced.<sup>139</sup> The City’s petition for certiorari was granted in November 2011,<sup>140</sup> but the City requested dismissal of its petition in February 2012.<sup>141</sup> Bowing to “pressure from civil rights and housing advocates nationwide,” St. Paul Mayor Chris Coleman revoked the City’s petition.<sup>142</sup> Mayor Coleman feared an increasingly conservative and pro-business Court would likely have delivered “Pyrrhic victory” for the City that would weaken disparate impact in civil rights enforcement.<sup>143</sup> Even the FHA’s principal sponsor, Walter Mondale, was worried the Court would find disparate impact under the FHA unconstitutional, which “would largely de-fang the Fair Housing Act.”<sup>144</sup>

Whatever the reasons, the *Gallagher* plaintiffs will still have their day in court—it will just be in federal district court rather than in front of the Supreme Court.<sup>145</sup> The unfortunate reality of the missed opportunity for the Court in *Gallagher* is that the status of disparate impact claims under the FHA and the standards that might apply to such claims remain unsettled at the national level. *Gallagher* demonstrated the need for resolution of the FHA disparate impact problem in this country. Below is a discussion of this problem, followed by recommendations for the Court when they are next faced with deciding whether FHA violations can be shown with disparate impact.

### III. PROBLEMS WITH THE CURRENT STATE OF DISPARATE IMPACT

Despite the seemingly strong consensus that a disparate impact standard exists under the FHA, the federal circuit courts disagree

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138. *Id.* at 5.

139. *Id.* at 10–11.

140. *Magner v. Gallagher*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

141. *No. 10-1032*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm> (last visited Apr. 1, 2012).

142. Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, STAR TRIB. (Feb. 10, 2012), <http://www.startribune.com/politics/national/139138084.html>.

143. *Id.*

144. *Id.*

145. *Id.*

on its application.<sup>146</sup> Case in point: the Fourth, Sixth, Seventh, and Tenth Circuits use a “balance-of-factors test”;<sup>147</sup> while the Third, Eighth, and Ninth Circuits use a “burden-shifting analysis”;<sup>148</sup> and the First and Second Circuits use a “hybrid test.”<sup>149</sup> Due to this circuit split, *Gallagher* may have been decided differently had it occurred in another circuit, even though the FHA is a federal statute that is supposed to be applied nationally. This lack of a uniform standard has caused a number of problems.

A. *Different Standards, Different Outcomes: Tenth Circuit*

Under Tenth Circuit precedent, the City of St. Paul may not have had its summary judgment motion reversed as it had in the Eighth Circuit.<sup>150</sup> In *Reinhart v. Lincoln County*, the Tenth Circuit held that plaintiffs had not established a prima facie case of disparate impact because it was insufficient “to show that (1) a regulation would increase housing costs and (2) members of a protected group tend to be less wealthy than others.”<sup>151</sup> The City of St. Paul cited *Reinhart* in arguing that the owners could not just show that enforcement of the “Housing Code increases the cost of low-income housing and that African-Americans tend to have lower incomes.”<sup>152</sup> The Eighth Circuit did not buy the City’s argument and ultimately rejected *Reinhart*, reasoning that “the existence of a significant statistical disparity, even one resulting from economic inequality, is sufficient to create a prima facie case.”<sup>153</sup> Thus, under the Tenth Circuit’s higher standard for disparate impact showings, the City likely would have had its summary judgment motion affirmed.

146. Petitioners’ Reply Brief, *supra* note 1, at 1; *see also* Brief for Int’l Municipal Lawyers Ass’n, *supra* note 6, at 2 (“Lacking the Court’s guidance, the Circuit Courts have developed substantively different standards against which to judge such FHA standards.”); *supra* notes 82–85.

147. *See supra* note 83.

148. *See supra* note 84.

149. *See supra* note 85.

150. Brief for Int’l Municipal Lawyers Ass’n, *supra* note 6, at 7.

151. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1230 (10th Cir. 2007).

152. *Gallagher v. Magner*, 619 F.3d 823, 836 (8th Cir. 2010), *reh’g en banc denied reh’g denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *and cert. dismissed*, 132 S. Ct. 1306 (2012).

153. *Id.* (citing *Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1180 n.23 (E.D. Va. 1995)).

*B. Different Standards, Different Outcomes: Second Circuit*

Similarly, under Second Circuit precedent, the City of St. Paul may not have lost in the Eighth Circuit. In *Tsombanidis v. West Haven Fire Department*, the Second Circuit concluded that the plaintiffs had not shown a prima facie case of disparate impact because they did not prove a quantitative or qualitative comparison between a protected class and the non-protected population.<sup>154</sup> The court reasoned that although some cases may not require statistics, “there must be some analytical mechanism to determine disproportionate impact,”<sup>155</sup> and that a “plaintiff has not met its burden if it merely raises an inference of discriminatory impact.”<sup>156</sup>

The Eighth Circuit, however, twisted the language and logic of the *Tsombanidis* decision when it allowed a lower standard for a showing of a disparate impact claim in *Gallagher*. First of all, despite the Second Circuit disallowing inferences of disparate impact,<sup>157</sup> the Eighth Circuit allowed such inferences by concluding that “[t]hough there is not a single document that connects the dots of [the owners’] disparate impact claim, it is enough that each analytic step is reasonable and supported by evidence.”<sup>158</sup> Essentially, the Eighth Circuit allowed an inference of discriminatory impact, which the Second Circuit disallows.

Secondly, while the Second Circuit requires either a quantitative or qualitative comparison between protected and non-protected classes, the Eighth Circuit similarly held that a “statistical comparison” is “not the *only* way” to show “disproportionate adverse effect.”<sup>159</sup> The Eighth Circuit in *Gallagher*, unlike the district court in *Steinhauser*, did not require that the owners provide a quantitative “before-and-after cost-of-rent comparison.”<sup>160</sup> Rather, the Eighth Circuit was satisfied that enough evidence (without a statistical comparison) was offered to withstand summary judgment.<sup>161</sup> Thus, the Eighth Circuit allowed a lower standard for disparate impact because it did not require an analytical comparison between protected and non-protected classes.

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154. *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 577–78 (2d Cir. 2003).

155. *Id.* at 576.

156. *Id.* at 575.

157. *See id.* at 575.

158. *Gallagher*, 619 F.3d at 835.

159. *Id.* at 837.

160. *Id.*

161. *Id.*

But even if the Eighth Circuit did require a qualitative comparison, the *Gallagher* owners likely would not have met the Second Circuit's standard. Such a standard would have required the *Gallagher* owners to qualitatively show that the average protected-class person in St. Paul had a greater "need" for affordable housing than the average non-protected-class person in the city.<sup>162</sup> The *Gallagher* owners presented evidence that, compared to all renter households, a majority of renters were racial minorities<sup>163</sup> and that of all those on public housing waiting lists, a majority of them were African-American.<sup>164</sup> But the owners did not show that racial minorities (a protected class) in St. Paul "need" affordable housing any more than the average low-income person (a non-protected class) in the city. Although subtle, there is a difference between showing that the average racial minority group has a greater "need" for affordable housing and just showing that a majority of renters and public housing applicants are racial minorities because there is no comparison to the racial minority population as a whole, beyond just renters and public housing applicants.

*C. Lack of a National Standard is Unfair*

Prior to revoking its petition, the City of St. Paul requested that the Court eliminate the circuit split and "harmonize the circuits" to correct this unfairness.<sup>165</sup> The City argued that the circuit split is unfair because landlords in one circuit should not be able to avoid municipal maintenance standards through disparate impact claims under the FHA (as was the case in *Gallagher*), while landlords in another circuit have to abide by them.<sup>166</sup> Additionally, the International Municipal Lawyers Association agreed with the

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162. In *Tsombanidis*, the plaintiffs were owners of a group home for recovering alcoholics that claimed it was the target of the city's discriminatory application of the fire code, which prohibited six unrelated individuals from living together unless expensive modifications were made to the home. *Tsombanidis*, 352 F.3d at 571-72. The court said that since plaintiffs did not provide any statistical comparison they could have provided a qualitative comparison showing that the average recovering alcoholic in the city had a greater need (qualitatively) for group living than does the average non-recovering alcoholic resident. *Id.* at 577.

163. *Gallagher*, 619 F.3d at 834.

164. *Id.*

165. Petitioner's Reply Brief, *supra* note 1, at 5.

166. *Id.*; see also Brief for Int'l Municipal Lawyers Ass'n, *supra* note 6, at 5-6 (arguing that while the owners' disparate impact claim was sustained in *Gallagher* in the Eighth Circuit, their claim would not have survived in the Fourth Circuit).

City and argued that “[w]ithout this [Supreme] Court’s resolution of the Circuit Court conflict the law will remain incapable of serving its intended purpose: establishing a singular anti-discrimination standard equally applicable across the country.”<sup>167</sup>

*D. Judicial Inefficiency*

The lack of a clear national standard may create judicial inefficiencies due to confusion over the appropriate analysis to apply to disparate impact claims. Dubious claims may proceed to trial and legitimate claims may be dismissed on summary judgment. Regardless of the validity of the owners’ claim in *Gallagher*, a clear standard would have avoided judicial bickering over the appropriate standard for disparate impact.<sup>168</sup> Similar situations have played out in other circuits as well.<sup>169</sup>

*E. Less Safe Housing*

Another problem is that in circuits with low standards for disparate impact showings under the FHA, municipalities may be reluctant to enforce stricter housing codes for fear that enforcement may open them up to increased litigation.<sup>170</sup> If municipalities relax enforcement of housing codes on low-income-tenant properties, which are already in poor condition, then the inevitable result is even less safe housing.<sup>171</sup> Maintaining the status quo allows the preservation of lower standards in some circuits, but establishing a national standard at some middle ground would at least raise the standard in these circuits, which would theoretically free cities up to enforce their housing codes against all properties not in compliance.

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167. Brief for Int’l Municipal Lawyers Ass’n, *supra* note 6, at 8.

168. *Gallagher*, 619 F.3d at 833–38.

169. See, e.g., *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011); *Cnty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170 (3d Cir. 2005); *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729 (8th Cir. 2005).

170. Interview with James E. Wilkinson, Attorney, Legal Aid Society of Minneapolis, in St. Paul, Minn. (July 29, 2011).

171. *Id.*

#### IV. HOW THE SUPREME COURT SHOULD SOMEDAY RULE

If ever given the opportunity, the Supreme Court should recognize disparate impact as a valid legal theory for showing violations of the FHA. Although the Eighth Circuit's decision in *Gallagher* seems to hamstring cities, disparate impact is important to fair housing and should be recognized by the Court for a number of legal and policy reasons. Eliminating disparate impact entirely would be one solution to the problem of inconsistent application. But it would be a drastic move with thin legal support and would be ignorant of numerous valid policy considerations.

##### A. *Legal Support for Disparate Impact under the FHA*

###### 1. *Similar Statutory Language between FHA and Title VII*

There is no express mention in the statutory language of the FHA that allows any discriminatory "impact" or "effect" to show a violation.<sup>172</sup> One may argue that, in the forty-year history of the FHA, Congress could have included a disparate impact standard in the language of the statute if it ever really intended or desired.

However, Title VII similarly lacked such statutory language,<sup>173</sup> but the Court in *Griggs* still found a disparate impact standard.<sup>174</sup> It is only logical that when statutes share similar language and purposes, and were enacted in close proximity to each other, "it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."<sup>175</sup> Both the FHA and Title VII were enacted for the broad purpose of reducing discrimination and were enacted only four years apart.<sup>176</sup> Further, the two statutes share strikingly similar language:

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172. SCHWEMM & PRATT, *supra* note 4, at 9.

173. *Id.*

174. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

175. SCHWEMM & PRATT, *supra* note 4, at 8 (quoting *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005)).

176. Title VII was passed as part of the Civil Rights Act of 1964 and Title VIII, or the FHA, was passed as part of the Civil Rights Act of 1968.

Title VII Employment Discrimination 42 U.S.C. § 2000e-2(a)	Title VIII Fair Housing Act 42 U.S.C. § 3604(a)– (b)
<p>It shall be an unlawful employment practice for an employer—</p> <p>(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or</p> <p>(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.</p>	<p>[I]t shall be unlawful—</p> <p>(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.</p> <p>(b) 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 therewith, because of race, color, religion, sex, familial status, or national origin.</p>

Given the similarities in language, purpose, and time of enactment, the Court allowing disparate impact for one statute but not for the other would be at odds with the judicial principle of consistency. Allowing disparate impact for employment discrimination cases, but not for housing discrimination cases, would be tantamount to the Court making a policy determination

that the rights of protected classes are more important in employment contexts than in housing contexts. *Gallagher* could have been the *Griggs* for housing discrimination law and the Court should therefore have held similarly given the similarities between the two statutes.

### 2. *Disparate Impact Is Not Inconsistent with the FHA*

The Court could have found in *Gallagher*, as it suggested in *Smith*, that the employment discrimination statutory language differs from housing discrimination statutory language so that disparate impact is allowed in employment cases, but perhaps not in housing cases.<sup>177</sup> The principal difference is that the word “affect” is present in employment discrimination statutory language, but no similar word is present in housing discrimination law.<sup>178</sup>

However, Robert Schwemm, a professor at the University of Kentucky College of Law, argues that the Court’s decision in *Smith* does not support the notion that disparate impact cannot be found in the language of the FHA.<sup>179</sup> He points out that the Court said the reason one section of the ADEA is inconsistent with an impact standard is because it focuses on discrimination against a “targeted individual.”<sup>180</sup> But he argues that the language of the FHA focuses on discrimination against “any person,” which “reflects a general concern with protecting all people, not just a particular individual,” so that an impact standard is not inconsistent with the FHA.<sup>181</sup> Since no conflict exists, an impact standard can be found under the FHA.

### 3. *Congress Acquiesced to Disparate Impact*

One may argue that Congress chose to codify disparate impact in employment discrimination law in 1991,<sup>182</sup> but, since it has not done the same in housing discrimination law, the Court finding otherwise would be contrary to the intent of Congress. Congress actually had a chance to codify disparate impact under the FHA

177. See *supra* notes 130–32 and accompanying text.

178. Compare 42 U.S.C. § 2000e-2 (2006), with 42 U.S.C. § 3604 (2006).

179. SCHWEMM & PRATT, *supra* note 4, at 10.

180. *Id.* (citing 29 U.S.C. § 623(a)(1) (2006) (section 4(a)(1) of the ADEA)).

181. *Id.* (citing 42 U.S.C. § 3602(d)).

182. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 105(a), 106, 107(a), 105 Stat. 1071, 1074–1076 (codified as amended at 42 U.S.C. § 2000e-2 (2006)).

when it passed amendments to the statute in 1988, but it decided otherwise.<sup>183</sup>

However, by remaining silent on the issue in 1988, Congress acquiesced to judicial interpretations of disparate impact under the FHA.<sup>184</sup> Prior to passage of the amendment that year, every federal circuit court of appeal presented with the issue had determined that the FHA included an impact standard.<sup>185</sup> Congress acquiesced because it is “presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . .”<sup>186</sup> Both the House and Senate were aware of these judicial decisions, and the House Judiciary Committee even went so far as to embrace an impact standard by rejecting an amendment that would have eliminated an impact standard and added an intent requirement.<sup>187</sup> Thus, Congress has shown that it implicitly accepts a disparate impact standard; therefore, the Court’s recognition of such a standard would not be contrary to Congress’s intent.

#### 4. *Violations of the FHA Purposely Not Limited to Showings of “Intent”*

The legislative history of the FHA demonstrates that Congress deliberately did not limit showings of violations to “intent.”<sup>188</sup> The FHA’s principal sponsor, Senator Walter Mondale, spoke twice of the Act combating “effects” of discrimination.<sup>189</sup> Additionally, during congressional debate of the FHA, a floor amendment was introduced that would have specifically included

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183. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ 6(a)–(b)(2), (e), 15, 102 Stat. 1619, 1620, 1622, 1623, 1636 (codified as amended at 42 U.S.C. § 3604 (2006)).

184. SCHWEMM & PRATT, *supra* note 4, at 12–13.

185. *Id.* at 12.

186. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); SCHWEMM & PRATT, *supra* note 4, at 12.

187. SCHWEMM & PRATT, *supra* note 4, at 12–13 (citing H.R. REP. NO. 100-711, at 89–93 (1988)).

188. *Id.* at 10–12.

189. *Id.* at 11. In explaining that the Supreme Court had prohibited explicitly racial zoning laws, Senator Mondale explained that “[l]ocal ordinances with the same effect . . . were still being enacted.” *Id.* (emphasis added) (citing 114 CONG. REC. 2669 (1968)). When advocating for passage of the FHA, Senator Mondale stated that it “seems only fair . . . that Congress should now pass a fair housing act to undo the effects” of previous governmental discrimination. *Id.* (citing 114 CONG. REC. 2669 (1968)) (emphasis added).

an intent standard.<sup>190</sup> But the amendment was defeated because the bill's supporters believed it would have made "proof of discrimination difficult in all but the most blatant cases."<sup>191</sup> Thus, Congress purposely chose to allow showings other than "intent" for FHA violations.

### 5. *Every Federal Circuit Supports Disparate Impact*

Despite differing interpretations for application, *every* circuit allows for disparate impact showings.<sup>192</sup> Such unanimous consensus among the federal circuits is a resounding endorsement that the FHA includes a disparate impact standard. The debate would be much different if the circuits were split over whether a disparate impact standard existed under the FHA. But that is not the case. All circuits agree a disparate impact standard exists.

### 6. *Administrative Agencies Support Disparate Impact*

Administrative agencies have supported an impact standard in their implementation of the FHA.<sup>193</sup> HUD has embraced an impact standard in its administration of the FHA.<sup>194</sup> Also, the Department of Justice has enforcement powers under the FHA and has urged courts to adopt an impact standard.<sup>195</sup> It is very telling that the agencies that actually administer and enforce the FHA agree that it includes a disparate impact standard.

### B. *Policy Reasons for Disparate Impact under the FHA*

#### 1. *Alternative Results in Discriminatory Housing Practices*

Excluding disparate impact showings under the FHA would likely result in required showings of "intent" for FHA violations, which would raise the standard of proof.<sup>196</sup> It is reasonable to infer that if housing discrimination is more difficult to prosecute, then it is likely that unintentionally discriminatory practices could grow.

190. SCHWEMM & PRATT, *supra* note 4, at 11 (citing 114 CONG. REC. 5214 (1968)).

191. *Id.* at 11.

192. *Id.* at 3, 6-7; *see also supra* note 80.

193. SCHWEMM & PRATT, *supra* note 4, at 13-14.

194. *See supra* notes 86-87; *see also* SCHWEMM & PRATT, *supra* note 4, at 13.

195. SCHWEMM & PRATT, *supra* note 4, at 13.

196. E-mail from Tim Thompson, President, Hous. Pres. Project, to author (Sept. 20, 2011) (on file with author).

The inevitable result is residential racial segregation, which leads to concentrations of poverty, which can lead to social problems, such as “[e]ducational and employment disadvantages, housing dilapidation, loss of commercial facilities and businesses, crime and social disorder, welfare dependency, and unwed parenthood.”<sup>197</sup> Further, residential racial segregation prevents minorities from having the mobility to live closer to employment centers, which may decrease their chances to gain and sustain jobs, as well as increase their travel time and transportation problems.<sup>198</sup>

2. *FHA Is Enforced Through Private Litigation, So Court Accessibility Requirement Should Be Low*

The FHA is enforced, by design and circumstance, primarily through private litigation, as the Supreme Court discussed in *Trafficante*.

Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, the Solicitor General says, the complainants act not only on their own behalf but also “as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.” . . . It serves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects “the very quality of their daily lives.”<sup>199</sup>

As discussed above, prohibiting a disparate impact standard would raise the standard of proof for plaintiffs to get into court.<sup>200</sup> Given that private suits are the primary enforcement mechanism for the FHA, the courtroom doors should be more open to plaintiffs with FHA claims. Recognizing a disparate impact standard achieves this goal by lowering the standard for showings of FHA violations.

197. Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 103 (1998).

198. *Id.* at 109.

199. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210–11 (1972) (citations omitted).

200. *See supra* Part IV.B.2.

### 3. *Recognizing Disparate Impact Under the FHA Is Not Exclusively For Congress*

Only Congress has constitutional authorization to make laws.<sup>201</sup> If the Court were to declare that a disparate impact standard is included under the FHA, many may accuse the Court of overstepping its bounds and “legislating from the bench.” However, in our separation of powers system it is the judiciary’s role to interpret laws passed by Congress, which may then alter provisions of the law if it disagrees with the judiciary’s interpretation.<sup>202</sup> As discussed above, in the field of employment discrimination law, the Court interpreted Title VII to include a disparate impact standard and Congress agreed by amending the statute to reflect the Court’s decision.<sup>203</sup> This shows that the path to legislation must go through Congress, but it need not begin with it. So the Court would be justified in interpreting a disparate impact standard under the FHA, just as it did in the employment discrimination context.

### 4. *The FHA and Title VII Should Not Have Differing Disparate Impact Standards*

Housing discrimination law should be brought in line with employment discrimination law. It seems fair for the Court to remain consistent with its holding in *Griggs* and allow disparate impact showings for housing discrimination, just as it does in employment discrimination cases.<sup>204</sup> Discriminating between housing law and employment law seems paradoxical and the federal circuit courts could use some guidance, in light of their current disagreement.

Theoretically, there’s no excuse for one type of discrimination law having a higher standard of proof than another. Just as equal employment makes for a healthy economy, fair housing makes for a healthy society. Voluntary residential segregation will always exist, but every step should be taken to avoid systematic segregation in housing.

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201. U.S. CONST. art. I, § 8, cl. 18.

202. 16 C.J.S. *Constitutional Law* § 221 (2011) (“The interpretation of existing statutes is a judicial function with which the legislature cannot interfere; however, the legislature has the power to alter the provisions of existing law by enacting clarifying legislation.”).

203. See *supra* Part I.B.2.

204. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

*C. Suggested Considerations for the Supreme Court in Recognizing an Impact Standard*

*1. Defining Injury Showings Could Exclude Plaintiffs with Tenuous Standing*

In general, constitutional standing requirements dictate that legitimate plaintiffs must show injury to get into court.<sup>205</sup> But in *Gallagher*, the plaintiff owners' standing was not discussed and arguably tenuous because their implied injury was that they received a disproportionate share of housing code violations, which violated the FHA because they rented to protected classes.<sup>206</sup> Are the real victims in that situation the owners or the tenants? "Injured" owners had to fix code violations and raise rents, while "injured" tenants either had to move or manage a tighter budget due to rent increases. Owners should not be allowed to manage properties out of compliance anyway, and their "injury" can always be mitigated by raising rents. So perhaps the *Gallagher* owners should not have been considered "injured."

If the Court ever decides to recognize disparate impact under the FHA, it should consider defining injury showings. It would not be fair to say that one plaintiff (i.e., an owner) has no standing simply because another plaintiff (i.e., a tenant) has a more severe injury. But it would be reasonable to stipulate that plaintiffs with standing must, at a minimum, be affected within "close proximity" by an alleged discriminatory policy or practice. In other words, plaintiffs that are only affected by a remote link to an allegedly discriminatory policy or practice will be denied standing.

*2. Distinguishing Between Public Safety and Aesthetic Housing Code Provisions*

There is a difference between housing codes that promote public health and safety and those that ensure a consistent aesthetic. Certainly, housing codes of the former type have a higher value to society than those of the latter. If the Court decides

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205. 32A AM. JUR. 2D *Federal Courts* § 592 (2011).

206. *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 992 (D. Minn. 2008), *aff'd in part, rev'd in part sub nom. Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *reh'g en banc denied reh'g denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *and cert. dismissed*, 132 S. Ct. 1306 (2012).

to recognize disparate impact under the FHA, then perhaps enforcement of the two types of housing codes should be weighted differently in disparate impact claims under the FHA.<sup>207</sup> For example, disproportionate enforcement of a housing code that regulates lawn care is more likely to be indicative of discrimination than enforcement of a housing code that regulates stairway handrails or carbon monoxide detectors.

### 3. *Distinguishing Between Positive and Negative Disparate Impacts*

Municipal policies, such as housing codes and zoning ordinances, can have both positive disparate impacts and negative disparate impacts on certain segments of the population.<sup>208</sup> For instance, the St. Paul housing code at issue in *Gallagher* was alleged by landlords to have a negative disparate impact on their tenants. But the neighbors could argue that the code enforcement had a positive disparate impact on them because dangerous and unsightly properties were forced to shape up.

If the Court were to recognize disparate impact under the FHA, it could perhaps consider balancing the positive and negative disparate impacts of a challenged policy or practice.

### 4. *Disparate Impact Analysis the Court Should Adopt*

If the Court ever recognizes disparate impact under the FHA, it should not reinvent the wheel in determining the appropriate model for analysis of disparate impact claims. Rather, the Court should remain consistent with the disparate impact analysis used under Title VII for employment discrimination claims.

The disparate impact analysis in employment discrimination law places the initial burden on the plaintiff to show a prima facie case of an employment practice causing a disparate impact on a protected class.<sup>209</sup> Once the plaintiff has established a prima facie case, the burden of persuasion then shifts to the defendant to justify the challenged business practice as “job related” and “consistent with business necessity.”<sup>210</sup> If the defendant meets this

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207. Interview with James E. Wilkinson, *supra* note 170.

208. *Id.*

209. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); 3 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 6:34 (2d ed. 2011) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

210. 42 U.S.C. § 2000e-2(k)(1)(A)(i); 3 BODENSTEINER & LEVINSON, *supra* note 209, § 6:37.

burden, the burden is then on the plaintiff to show an acceptable, alternative, and non-discriminatory business practice was available but not implemented by the defendant.<sup>211</sup>

The “burden-shifting analysis”<sup>212</sup> employed by the Eighth and Ninth Circuits should be adopted by the Court because it neatly parallels the disparate impact analysis in employment discrimination law. Further, this analysis is similar to the proposed disparate impact analysis by HUD,<sup>213</sup> which has long studied the issue and is an authoritative source whose judgment should strongly be considered because it actually administers and enforces the FHA.

## V. CONCLUSION

Disparate impact under the FHA is an area of law that has resulted in too many inconsistent applications across the country for too long. The Supreme Court, or better yet Congress, has a responsibility to provide clarity and *Gallagher v. Magner* nearly allowed the Court to do so. When the next opportunity arises, eliminating disparate impact in order to remove inconsistent applications is not the answer. Yet this is the fear that drove fair-housing advocates to pressure the City to withdraw its petition.

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211. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); 3 BODENSTEINER & LEVINSON, *supra* note 209, § 6:39 (“[T]he Act clarifies that the burden of demonstrating acceptable alternative business-practice evidence rests with the plaintiffs, not the defendants.”).

212. *See supra* note 84.

213. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70,921-01 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100). The proposed rule directs:

(c) Burdens of proof in discriminatory effects cases.

(1) A complainant, with respect to claims brought under 42 U.S.C. 3610, or a plaintiff, with respect to claims brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice causes a discriminatory effect.

(2) Once a complainant or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the complainant or plaintiff may still prevail upon demonstrating that the legitimate, nondiscriminatory interests supporting the challenged practice can be served by another practice that has a less discriminatory effect.”

*Id.* at 70,927 (emphasis omitted).

They would prefer the current problem of inconsistent application over an outright prohibition of disparate impact.<sup>214</sup> But the numerous legal and policy reasons discussed above suggest that the Court would be hard pressed to *not* recognize a disparate impact standard. Therefore, the Court should remain consistent with *Griggs*. Just as it interpreted a disparate impact standard under Title VII, the Court should do the same in regards to the FHA. Similarly, the Court should recognize the “burden-shifting” disparate impact analysis for the FHA that mirrors the disparate impact analysis used for Title VII claims. The discrimination in discrimination law must end—there is no reason for it.

Should the Court ever recognize a disparate impact standard, the aforementioned suggestions ought to be considered to afford municipalities some leeway in enforcing housing codes without enduring excessive litigation. Fostering safe communities is an important function that has been delegated to municipalities and they must be afforded some protection in carrying out their duties.

Whatever the case, disparate impact is an important legal theory that has languished schizophrenically for too long in the federal circuit courts. When next given the chance, the Court owes it an identity. When that day comes, hopefully the Court remembers its precedent and does the same thing for housing discrimination law that it did for employment discrimination law.

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214. E-mail from Tim Thompson e-mail, *supra* note 196; Interview with James E. Wilkinson, *supra* note 170.