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Blowing Past Minnesota Nice: New Opportunities Arise to Utilize Disparate-Impact Theory and Practice in Twin Cities Low-Income Housing Discrimination Litigation

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BLOWING PAST MINNESOTA NICE: NEW OPPORTUNITIES ARISE TO UTILIZE DISPARATE-IMPACT THEORY AND PRACTICE IN TWIN CITIES LOW-INCOME HOUSING DISCRIMINATION LITIGATION

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What's wrong with the world today?
Things just got to get better
Sho' ain't what the leaders say
Maybe we should write a letter

Said dear Mr. Man, we don't understand
Why poor people keep struggling
But you don't lend a helping hand
Matthew 5:5 say,
The meek shall inherit the Earth.
. . .

Who told me, Mr. Man, that working round the clock
Would buy me a big house in the hood, with cigarette ads on every block?
Who told me, Mr. Man, that I got a right to moan?
How 'bout this big ol' hole in the ozone?
. . .

Listen, ain't no sense in voting, same song with a different name
Might not be in the back of the bus but it sho' feel just the same
Ain't nothing fair about welfare, ain't no assistance in aids

> Ain't nothing affirmative about your actions till the people get paid
>
> Your thousand years are up, now you gotta share the land
> Section I, the 14th Amendment says,
> No state shall deprive any person of life
> Liberty or property, without due process of law
> Mr. Man, we want to end this letter with three words
> We tired a-y'all[1]

I. INTRODUCTION

Prince's lyrics ring true today. Although prescient in 2004, before the recession set back the North and South Minneapolis neighborhoods in which he grew up, Prince addressed the growing concerns that any Legal Aid lawyer knows full well: the frustration and anger from low-income people of color, immigrants, and others struggling in the midst of desperate personal circumstances, dilapidated housing conditions, and exploitative rental practices. Housing discrimination litigation, and disparate-impact claims in particular, have struggled to make headway on these issues. Moreover, housing development policies have failed the communities they were supposed to serve,[2] making it difficult to improve existing affordable housing stock and to enable families to make real choices about where they can live.

Today, community awareness of housing conditions, rental practices, and the historic antecedents of these conditions and practices is especially acute. Still unclear is how to systemically address these problems. After decades of trying to increase housing opportunity by fighting against housing segregation, demographic statistics tell us that, overall, there has been little improvement.[3] The Twin Cities metro area remains one of the most racially segregated urban landscapes in the country.[4] Legal Aid attorneys also know from decades of representing minority families facing

1. PRINCE, *Dear Mr. Man, on* MUSICOLOGY (NPG Records 2004).

2. *See* INST. ON METRO. OPPORTUNITY, WHY ARE THE TWIN CITIES SO SEGREGATED? 6–7 (2015), https://www1.law.umn.edu/uploads/ed/00/ed00c05a000fffeb881655f2e02e9f29/Why-Are-the-Twin-Cities-So-Segregated-2-26-15.pdf.

3. *See id.* at 1 ("The concentration of black families in low-income areas has grown for over a decade; in Portland and Seattle, it has declined.").

4. *See id.*

housing discrimination that much work remains to be done in this area.[5]

One tool to combat discrimination has seen some resurgence in recent years: the disparate-impact claim brought under the federal Fair Housing Act.[6] This claim asserts that facially neutral policies of government- and private-sector actors have a discriminatory effect on minority populations.[7] This claim's use may be a particularly effective strategy in parts of the country where much of the discriminatory activity tends to be more subterranean than overt—more "Minnesota Nice" than in-your-face obvious.

This article discusses the development of fair-housing disparate-impact jurisprudence and its current resurgence in the Twin Cities. Part II sets out the types of housing discrimination issues seen in a legal aid practice in the Twin Cities.[8] Part III reviews the development of fair-housing disparate-impact cases around the nation and recent Housing and Urban Development rule promulgation governing disparate-impact order-of-proof criteria.[9] Part IV discusses the trajectory of fair-housing disparate-impact jurisprudence closer to home in the Eighth Circuit.[10] Finally, Part V assesses the current state of litigation involving disparate-impact claims in the Twin Cities and how these claims might be used in the future on behalf of Legal Aid's client communities.[11]

5. References to Legal Aid in this article reflect the experiences of legal aid attorneys at Mid-Minnesota Legal Aid in Minneapolis, Minnesota, where there has been a separate housing discrimination unit since the mid-1990s, who represent low-income people in central Minnesota in housing discrimination matters. This author's discussions with other legal aid attorneys and housing discrimination advocates around the country, however, indicate that these experiences are not unique to Minnesota nor the Twin Cities.

6. The Fair Housing Act is a federal law enacted as Title VIII of the Civil Rights Act of 1968. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–19, 3631 (2012)). Its purpose is to provide, within constitutional limits, fair housing throughout the United States. 42 U.S.C. § 3601.

7. *See Disparate Impact*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

11. *See infra* Part V.

II. HOUSING DISCRIMINATION: WHAT LEGAL AID SEES IN THE TWIN CITIES

Legal Aid staff face a relentless flood of housing discrimination complaints presented by their clients. Many of these complaints involve differential treatment based on protected class membership that is not difficult to decode. Horrific accounts of racial and sexual harassment, outright refusals to rent, and evictions—stemming from discrimination based on race, national origin, and disability—form the heart of Legal Aid's housing discrimination practice. It does not seem to matter whether the property is located in the Twin Cities' urban core or its sprawling suburban/exurban metro area: poor people from minority communities bear the brunt of discriminatory conduct in housing.[12] And, the poorer and more vulnerable the individual, the worse the effects of housing discrimination. Ironically, these are the people whom our federal and state fair-housing laws were designed to protect the most: poor, often disabled, single mothers from protected classes.[13] Indeed, one commentator writing recently about housing instability in poor urban neighborhoods in America summarized this situation as reflected in the African American community: "If incarceration had come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women. Poor black men were locked up. Poor black women [and their families] were locked out."[14]

Less outright offensive than this sort of differential treatment, but perhaps more insidious in perpetuating discrimination and segregation, are facially neutral policies sometimes used by Twin

12. *See generally* Alex M. Johnson Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595 (1995).

13. The purpose of the federal Fair Housing Act is to "ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." United States v. Parma, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981). While the Fair Housing Act only protects from discrimination on the basis of race, color, religion, sex, handicap, familial status, and national origin, many states have laws that go beyond this scope to protect against discrimination on the basis of characteristics such as income level and marital status. *See, e.g.*, MINN. STAT. § 363A.09 (2016); *see also* ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 11:1 (2012).

14. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 98 (2016).

Cities landlords and local housing authorities. Such policies result in the very exclusion that many fair-housing laws are designed to prevent. This includes rental policies that require tenants to have clean criminal records[15] and post income that is three times the rent.[16] They may also create policies, written or unwritten, that result in persons with disabilities being denied housing due to purported concerns about safety. From Legal Aid's experience, these policies have been difficult to combat legally and may very well be part of the reason housing segregation in and around the Twin Cities persists.

What can we do to meet clients' needs and make headway against facially neutral housing practices that continue to perpetuate long-standing patterns of segregation? One tool may be the recently revitalized fair-housing claim that alleges disparate impact, a theory of liability that does not depend on proving discriminatory intent. As this article describes, advocates' historical experiences with bringing these sorts of claims have been a mixed bag, to say the least. In Legal Aid's experience, many judges have not been kind to these claims. Consequently, it has been difficult for advocates practicing in this area to discern the legal standards for the order of proof that will result in success, not to mention the statistical presentations that would be persuasive to triers of fact or appellate reviewers. However, developments in disparate-impact jurisprudence and federal rulemaking have now made order-of-proof methodology much clearer. Fair-housing advocates, as a result, can more realistically assess the prospects of using disparate impact as an additional tool to address more systemic manifestations of housing discrimination affecting client communities.

15. *Cf.* Samuel M. Johnson, *Your "Permanent Record" Under Minnesota's Expungement Laws: The Process and Opportunities for Change*, HENNEPIN LAW., July/Aug. 2016, at 8, 8 n.1. ("[A]s many as one in four Minnesotans have a criminal record . . . .").

16. *Cf.* MINN. STAT. § 504B.175 (2016) (showing that Minnesota law puts no maximum limitation on the amount a landlord may require a tenant to pay to secure a lease).

III. THE SUPREME COURT'S 2015 STAMP OF APPROVAL FOR FAIR-HOUSING DISPARATE-IMPACT CLAIMS' COGNIZABILITY IN *TEXAS DEPARTMENT OF HOUSING & COMMUNITY AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT, INC.*

Part of the difficulty in bringing a successful disparate-impact case under the Fair Housing Act comes from the expansive language of the statute itself, which makes it challenging to prove discriminatory intent. The Fair Housing Act of 1968 ("FHA" or "Fair Housing Act") was enacted to ban various housing practices, such as: refusing to sell or rent real property; imposing unfair terms or conditions in a sale or tenancy; using discriminatory advertisements or statements; misrepresenting the availability of housing; "blockbusting"[17]; failing to provide equal housing opportunities for persons with disabilities; and coercing, intimidating, threatening, or interfering with the exercise of fair-housing rights.[18] The statute's causation language banned discrimination in these substantive areas "because of" race, color, national origin, religion, and sex[19] and, in 1988, handicap and familial status.[20]

Congress did not define "because of," although applicability of the FHA to unfair housing practices has been fairly straightforward when discriminatory intent was clear.[21] In contrast, FHA protections are more difficult to obtain when a landlord acts with innocent motives, but his or her conduct results in discriminatory effects.[22] In

17. "Blockbusting [is a] real estate practice in which brokers encourage owners to list their homes for sale by exploiting fears of racial change within their neighborhood." Dmitri Melhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1145 (1998).

18. *See* 42 U.S.C. § 3604 (2012); SCHWEMM, *supra* note 13, § 4:4.

19. *See* Fair Housing Act, 42 U.S.C. § 3604(a) (1968) (refusal to sell or rent); *id.* § 3604(b) (discrimination in terms or conditions of sale or rental); *id.* § 3604(d) (misrepresentations of housing availability); *id.* § 3604(f)(1) (failure to sell or rent to persons with handicap); *id.* § 3604(f)(2) (discrimination against persons with handicap in terms or conditions of sale or rental); *id.* § 3605(a) (discrimination by persons in real estate business).

20. *See* Fair Housing Act of 1988, Pub. L. No. 100-430, § 9(b), 102 Stat. 1622 (1988).

21. *See* SCHWEMM, *supra* note 13, § 10:1 (noting the phrase "because of" identifies whether a housing practice is unlawful: "it would apply when the sole reason for a defendant's action is the race, color, religion, sex, disability, familial status, or national origin of the person dealt with").

22. *See id.*; *see also* Vill. of Arlington Heights v. Metro. Housing Dev., 429 U.S.

general, courts allow fair-housing cases based on disparate-impact claims to proceed, at least past the pleadings stage, by borrowing from landmark Supreme Court decisions on employment discrimination such as *Griggs v. Duke Power Co.*[23]

In the past decade, housing advocates embraced the disparate impact doctrine as a tool to target neighborhood segregation, and the federal government developed a disparate-impact rule recognizing disparate-impact claims under the FHA. As such, much has transpired in disparate-impact litigation across the country in recent years. Much of the impetus for using disparate impact as a tool to combat residential housing segregation, particularly in the rental market, has come from significant housing discrimination cases brought in places like New Jersey and Texas.[24] Moreover, the Department of Housing and Urban Development has done its part to support fair-housing enforcement by promulgating its disparate-impact rule,[25] which sets out the preferred order of proof for disparate-impact claims.[26] After years of uncertainty regarding the viability of bringing disparate-impact claims under the FHA, the Supreme Court finally settled the issue of fair-housing disparate-impact claim cognizability and the validity of the federal disparate-impact rule in 2015 in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*[27] It is necessary to explore the development of the disparate impact doctrine before turning to the treatment of fair-housing disparate-impact claims in the Eighth Circuit.

252 (1977) (discussing a real estate developer who alleged that the refusal of local officials to re-zone a housing tract from single-family to multi-family was racially discriminatory and not simply motivated by a desire to protect property values).

23. 401 U.S. 424 (1971). See SCHWEMM, *supra* note 13, §§ 10:4–7, 10:29–58, for a comprehensive examination of how housing discrimination disparate-impact case decisions have developed since the 1960s. Recent scholarship likewise summarizes the evolution of the Fair Housing Act, its implementation of federal regulations, and disparate-impact jurisprudence. *See, e.g.*, Eric W.M. Bain, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434 (2012).

24. *See, e.g.*, Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011); Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312 (N.D. Tex. 2012).

25. *See* William F. Fuller, *What's HUD Got to do With it? How HUD's Disparate Impact Rule May Save the Fair Housing Act's Disparate Impact Standard*, 83 FORDHAM L. REV. 2047 (2015).

26. *Id.*

27. 135 S. Ct. 2507 (2015).

A. *New Jersey Legal Aid Defends Fair-Housing Rights for Low-Income Residents in* Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly

The *Mount Holly* case arose out of redevelopment plans hatched in 2000.[28] The plan involved the demolition of housing primarily occupied by poor African American and Hispanic residents.[29] Three hundred twenty-nine homes comprised of two-story solid brick buildings built in the 1950s, an adjacent playground, and a community center were destroyed.[30] Half of these homes were rental properties.[31] These homes were to be replaced by "significantly more expensive housing units" in the overall township gentrification scheme.[32] The planning process itself adversely impacted residents; while plan development puttered along in fits and starts for several years, the neighborhood gradually emptied out.[33]

The resulting class action lawsuit, including disparate-impact claims, was brought on behalf of the local low-income housing rights association.[34] The plaintiffs were represented by New Jersey Legal Services and assisted by the AARP Foundation Litigation and private counsel.[35] The lawsuit then wended its way through state court, and the anti-discrimination claims—which had not been ripe for adjudication in state court—were refiled in federal court.[36] Motions to dismiss were converted into motions for summary judgment and then dismissed; the federal district court judge found the evidence presented no prima facie case and identified no alternative course of action with lesser impact.[37] On appeal to the Third Circuit, the court reversed the summary judgment grant and found that prima facie standards for proving disparate impact had been "misapplied" in the earlier stages of litigation and all reasonable inferences had not been drawn in the plaintiffs' favor.[38]

28. *See Mount Holly*, 658 F.3d at 377.
29. *Id.*
30. *Id.* at 378.
31. *Id.*
32. *Id.*
33. *See id.* at 378–80.
34. *Id.*
35. *Id.* at 377.
36. *See id.* at 380–81.
37. *Id.* at 381.
38. *Id.* at 377.

The reversal allowed the disparate-impact claims to proceed, pendant on further development of the factual record, and preserved the possibility for future remedies.[39]

The Township filed for certiorari with the United States Supreme Court for further review of the disparate-impact claims, which was subsequently granted on the issue of the cognizability of disparate-impact claims brought under the Fair Housing Act.[40] The parties settled the case a few weeks before oral argument, scheduled for early December 2013, and the Supreme Court dismissed the case two days later.[41] The parties settled mainly due to housing advocates' concerns about how the Fair Housing Act's disparate-impact liability would fare at the Supreme Court given the Court's political make-up at the time.[42]

Although *Mount Holly* stopped short of Supreme Court clarification about the feasibility of disparate-impact claims, the Department of Housing and Urban Development ("HUD"), the federal agency primarily responsible for enforcing the Fair Housing Act, moved forward with its own interpretation of disparate impact. HUD completed promulgating its discriminatory effect rulemaking procedures just before certiorari was granted in *Mount Holly*.[43] The promulgation of the HUD rule, as well as other disparate-impact litigation brought around the country, later culminated in a Supreme Court decision on disparate impact.[44]

B. HUD Disparate-Impact Rule: Promulgated to Clarify and Standardize Disparate-Impact Order-of-Proof Test

HUD's new 2013 rule formalized its interpretation of discriminatory effects liability under the Fair Housing Act.[45] The

39. *See id.* at 387.

40. Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824, 2824 (2013) (mem.).

41. *See* Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (2013) (mem.).

42. Interview with Susan Ann Silverstein, Esq., in Minneapolis, Minn. (Feb. 15, 2013).

43. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

44. *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 313–14 (N.D. Tex. 2012).

45. *See generally* Fuller, *supra* note 25.

hope was that the rule would resolve minor variations on how disparate impact was applied around the country, provide for "consistent and predictable application of the test on a national basis," and offer "clarity to persons seeking housing and persons engaged in housing transactions as to how to assess potential claims involving discriminatory effects."[46]

The new HUD disparate-impact rule set out the long-standing three-step burden-shifting test for establishing liability:

> (1) [Complainant] has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.[47]
> (2) Once [complainant] satisfies [this prima facie] burden of proof . . . defendant has the burden of proving that the challenged practice is necessary to achieve one or more [of its] substantial, legitimate, nondiscriminatory interests . . . .
> (3) If . . . defendant satisfies [its] burden of proof . . . [complainant] may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.[48]

HUD assessed this allocation of the burden of proof as "the fairest and most reasonable approach" to resolving claims.[49] An added advantage was its consistency with the discriminatory effects standards codified by Congress for employment discrimination cases,[50] as well as criteria used for discriminatory effects in lending cases under the Equal Credit Opportunity Act.[51] Factually similar claims were now treated the same way, no matter which civil rights law governed the case, reducing confusion and promoting more

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

47. HUD defined this as follows: "[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a) (2016).

48. *Id.* § 100.500(c).

49. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,473–74.

50. *See* 42 U.S.C. 2000e-2(k) (1972).

51. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,474.

consistent decisionmaking by finders of fact.[52] HUD's new rule was quickly put to the test by the Supreme Court in a very different sort of fair-housing case—one seeking to affect the dispersal of low-income housing funding.

C. *Housing Advocates in Dallas, Texas, Challenge Low-Income Housing Tax Credit Allocation in* Inclusive Communities Project, Inc. v. Texas Department of Housing & Community Affairs

Dallas's Inclusive Communities Project ("DICP") joined the significant disparate-impact litigation activities nationwide with its 2008 lawsuit against Texas state housing authorities.[53] In its suit, DICP challenged the allocation of tax credits to developers under the Low Income Housing Tax Credit ("LIHTC") program.[54] The parties alleged that tax credits were disproportionately allocated to housing projects in racially segregated, economically distressed areas and were insufficiently allocated to white suburbs with better education and employment opportunities.[55] The case went through bench trial proceedings, and the federal district court found that plaintiffs had proved disparate impact liability.[56]

On appeal, the state argued that burden-of-proof standards had been incorrectly applied by the trial court; the Fifth Circuit agreed and reversed the finding of liability on the disparate-impact claim and remanded the case for application of order-of-proof standards set out in the new HUD disparate-impact rule.[57] On appeal, the Supreme Court granted certiorari regarding the cognizability of disparate-impact claims under the Fair Housing Act and the differing order-of-proof criteria.[58]

Affirming the Fifth Circuit's decision, Justice Kennedy, writing for the 5-4 majority, endorsed the use of disparate-impact claims in carrying out the Fair Housing Act's goal to increase racial

52. *See id.*

53. *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 313–14 (N.D. Tex. 2012), *rev'd*, 747 F.3d 275 (5th Cir. 2014), *aff'd and remanded sub nom.* Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

54. *Id.* at 314.

55. *Id.* at 314–15.

56. *Id.* at 313–14, 321.

57. *Inclusive Cmtys.*, 747 F.3d 275.

58. Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 46 (2015) (mem.).

integration in American society, putting a Supreme Court imprimatur on HUD's new disparate-impact rule.[59] He noted that disparate-impact theory "plays an important role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[60]

Clearly troubled by this novel challenge to a state tax credit allocation program, however, Justice Kennedy set out some "cautionary standards" that should be taken into account when evaluating disparate-impact claims.[61] He opined that fair housing enforcement should not displace "valid government policies" but rather should more appropriately focus on the "remov[al of] artificial, arbitrary, and unnecessary barriers."[62] One commentator summarized the Court's limitations as follows:

> Thus, a plaintiff's mere showing of racial imbalance would "not, without more, establish a prima facie case of disparate impact," and a plaintiff must prove a "robust" causal connection between the defendant's challenged practice and any statistical disparities. Even if these elements are shown, a defendant could still prevail by proving that its challenged policy is "necessary to achieve a valid interest." Finally, with respect to the less-discriminatory-alternative phase of [a Fair Housing Act] impact claim, the [Inclusive Communities] opinion indicated agreement with HUD's regulation that this burden should be placed on the plaintiff.[63]

Highlighting cases it believed to be worthier applications of disparate-impact liability—such as racially exclusionary zoning practices in predominantly white suburbs—the Court appeared skeptical about the prospects for the case's success on remand.[64]

59. Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

60. *Id.* at 2511–12.

61. *Id.* at 2524.

62. *Id.* at 2522, 2524 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

63. Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 111 (2015) (quoting *Inclusive Cmtys.*, 135 S. Ct. at 2514, 2523, 2524).

64. *Id.* At the time, the plaintiffs' challenge to Texas's tax credit allocation was a novel disparate impact challenge. *Inclusive Cmtys.*, 135 S. Ct. at 2522.

The majority's concern about what sorts of fair-housing disparate-impact cases would be brought in the wake of *Inclusive Communities* was echoed and underscored by that case's dissenting justices.[65] Indeed, Justice Alito's sternly worded dissent (joined by Chief Justice Roberts and Justices Scalia and Thomas) pinpointed the "rats" he sought to avoid on behalf of impoverished communities everywhere.[66] Interestingly enough, the case that apparently fueled Justice Alito's ire was one that emanated from the Eighth Circuit, *Gallagher v. Magner*, which involved a challenge to St. Paul's housing code enforcement program brought by adversely affected local landlords on behalf of their poor and minority tenants.[67] A theory of liability that could produce a case like *Gallagher* (discussed in the next section), was, to Justice Alito, a blanket reason to deny disparate-impact liability to all aspiring litigants: "Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit."[68]

Amongst discussion of how disparate-impact liability would now fare at the Supreme Court and speculation about how HUD might react in the wake of *Inclusive Communities*, fair-housing practitioners are left somewhere in the middle. On the positive side, no longer do any precious litigation resources need to be spent arguing the basic validity of disparate-impact claims under the Fair Housing Act. Less certain, however, is how disparate-impact litigation will fare for the more creative disparate impact theories of liability that have been put to use in recent years, particularly when applied to challenge various kinds of government-sponsored low-income housing programs. In the Eighth Circuit, the overall amount of jurisprudence analyzing fair-housing disparate-impact claims is relatively small. However, enough can be extracted to give fair-housing practitioners a sense of how various kinds of cases will fare going forward.

65. *See Inclusive Cmtys.*, 135 S. Ct. at 2526 (Thomas, J., dissenting); *id.* at 2532 (Alito, J., dissenting).

66. *Id.* at 2532 (Alito, J., dissenting) (citing a Minnesota federal district court case in which landlords who sought to exterminate their buildings of rats were sued under a theory of disparate impact) ("No one wants to live in a rat's nest.").

67. *See* 619 F.3d 823 (8th Cir. 2010).

68. *Inclusive Cmtys.*, 135 S. Ct. at 2532 (Alito, J., dissenting).

IV. UNDERSTANDING THE TRAJECTORY OF JURISPRUDENCE IN THE CONTEXT OF DISPARATE-IMPACT LITIGATION AND ITS JUDICIAL TREATMENT IN THE EIGHTH CIRCUIT: PAST AND PRESENT

The Eighth Circuit is no stranger to lawsuits brought by public-interest housing advocates addressing the age-old problem of housing segregation within its regional confines. This Part will discuss the development of disparate-impact lawsuits brought under the Fair Housing Act from the early 1970s to the present day and how the Supreme Court has evolved in developing doctrine and criteria for analyzing claims in this area. This Part will conclude with how this jurisprudence may be affected by the new HUD rule and the Supreme Court's warnings regarding future disparate-impact liability under the Fair Housing Act in *Inclusive Communities*.

A. *1974:* United States v. City of Black Jack

The most notable example of disparate-impact jurisprudence's long history in the Eighth Circuit is Judge Heaney's[69] thoughtful and resolute opinion in 1974.[70] This opinion reversed a Missouri federal judge's dismissal of fair-housing disparate-impact claims in *United States v. City of Black Jack*.[71] Given the racially divided times we live in, it is worth spending time to lay out the factual circumstances giving rise to the case. The City of Black Jack is a first-ring suburb of St. Louis, Missouri. This is a region of the country where deeply entrenched patterns of housing segregation and acute racial tensions continue to this day.[72] In the late 1960s, one proposed solution to these problems was a planned housing development in an area previously governed by St. Louis County.[73]

69. In 1991, I had the honor of getting to know Judge Heaney, who had given over his visiting chambers in St. Paul to the newly appointed Judge Loken and his staff. As a member of Judge Loken's staff, I spent a fair amount of time with Judge Heaney himself in those first few months; my memories of him include his warmth and gentle wit, and unfailing graciousness to all.

70. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *reh'g denied*, (1975).

71. *Id.*

72. *See* Daniel Marans, *Why Missouri Has Become the Heart of Racial Tension In America*, THE HUFFINGTON POST (Nov. 16, 2015, 1:04 PM), http://www.huffingtonpost.com/entry/ferguson-mizzou-missouri-racial-tension_us_564736e2e4b08cda3488f34d.

73. *See City of Black Jack*, 508 F.2d at 1182.

The county adopted a master plan for municipal development in this area in 1965.[74] By 1970, the area was still largely undeveloped and remained focused on single-family homes.[75]

In 1969, the Inter Religious Center for Urban Affairs (ICUA) entered the picture when it began planning "alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis."[76] ICUA's foray into the City of Black Jack came in the form of a federally subsidized 108-unit townhouse development in a previously unsettled part of the municipality called "Park View Heights."[77] Predictably, surrounding white communities mounted a "swift and active" opposition to the project.[78] Despite HUD's green light for project funding, local opposition coalesced in petitions to the St. Louis County Council that resulted in an abrupt scuttling of the project and a city ordinance that prohibited multiple-family dwellings in the area.[79]

HUD struck back with a lawsuit claiming the city ordinance violated the recently enacted Fair Housing Act and asserted race-based claims of illegal housing discrimination under both differential treatment and disparate-impact theories.[80] The U.S. District Court for the Eastern District of Missouri allowed the claims past the pleading stage but dismissed the case and found that no violation had been proven under either theory of liability.[81]

On appeal, the Eighth Circuit judges sitting on the panel were Judges Heaney, Bright, and Ross.[82] In a unanimous decision, the court reversed the dismissal and allowed the case to go forward under a disparate-impact theory of liability.[83] The Eighth Circuit's ruling would stand, as the Supreme Court denied the subsequent petition for certiorari.[84]

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 1182, 1186–87.
79. *Id.* at 1183.
80. United States v. City of Black Jack, 372 F. Supp. 319 (E.D. Mo. 1974).
81. *Id.* at 327.
82. *Id.*
83. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied sub nom.* City of Blackjack v. United States, 422 U.S. 1042 (1975) (mem.), *reh'g denied*, 423 U.S. 884 (1975) (mem.).
84. *City of Blackjack*, 422 U.S. 1042.

Writing for the panel, Judge Heaney identified the particular demographic statistics that could be used to prove liability and put the statistics into historical context:

> The [district court's] conclusion [finding no statistical proof of discriminatory effect from the city ordinance] was in error . . . . The ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units.
>
> The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was . . . in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments.[85]

Judge Heaney went on to outline the correct order of proof to be followed on remand, starting with the requirements for a plaintiff to establish a prima facie case[86]:

> [First,] [t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[87]
>
> [Second,] [o]nce the [prima facie case is established], the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest.[88]

The court then determines whether any of these justifications rise to such a level by examining several factors:

85. *City of Black Jack*, 508 F.2d at 1186 (internal citations omitted) (quoting *City of Black Jack*, 372 F. Supp. at 326) (quoting the district court opinion's factual findings, stipulated to by the parties, regarding discriminatory intent against poor urban minorities moving out to the country).

86. *Id.* at 1184.

87. *Id.* at 1184–85 (internal quotation marks and citations omitted).

88. *Id.*

> [F]irst, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated governmental interest may be attained.[89]

Judge Heaney found the district court's discriminatory effect analysis lacking and pointed out that claims asserted in the lawsuit by the City defendant were based on incorrect information that the proposed development would impede traffic, overcrowd local schools, and devalue homes.[90] He was similarly unimpressed by other reasons advanced by the defendants and noted the lack of substance in the evidence proffered by defendants, both quantitative and qualitative.[91] The result was a remand to the district court "with instructions . . . to enter a permanent injunction . . . enjoining the enforcement of the ordinance."[92]

City of Black Jack is significant for its early endorsement of the disparate-impact burden-shifting test, which closely mirrored the discriminatory effects rule formalized by HUD twenty years later.[93] Moreover, the resulting victory for the forces of racial housing integration and development of decent, affordable housing for low-income persons was all the more meaningful because it took place in the nation's heartland; this, after all, was the same part of the country from which emanated the infamous *Dred Scott* decision more than a hundred years before.[94]

B. 2005: Eighth Circuit Preserves Low-Income Housing in Charleston Housing Authority v. USDA *and* Ventura Village, Inc. v. City of Minneapolis

Years after *City of Black Jack*, disparate-impact litigation in this region continued to focus on challenges to the development of federally funded low-income housing. Two fair-housing cases featuring disparate-impact claims were heard by the Eighth Circuit

89. *Id.* at 1187.
90. *Id.*
91. *Id.* at 1188.
92. *Id.*
93. *See* 24 C.F.R. § 100.500(c) (2013).
94. *See* Dred Scott v. Sandford, 60 U.S. 393 (1856).

in 2005 and resulted in preservation of housing for communities of racial minorities.[95]

1. *Public Housing Preserved in* Charleston Housing Authority v. USDA

In the late 1990s housing advocates in this region addressed the difficult problem of public housing redevelopment in Charleston, Missouri. A tiny town of about 5900, Charleston tips the Mississippi delta at the far southeastern corner of the state.[96] There, the local housing authority had adopted a policy of "poverty deconcentration."[97] The public housing at issue was a Section 8 building complex of fifty rental units in a cluster of twenty-two separate buildings.[98] The plan was for some of these units to be demolished; forty-six of the forty-seven occupied units were occupied by African American tenants.[99]

The resulting litigation featured most of the local and federal stakeholders in the project. One of the lawsuits was brought by the tenants and a local nonprofit to save the project and alleged disparate-impact claims, among other things.[100] At trial, the court found for the tenants on the merits, enjoined the demolition, and found Fair Housing Act disparate-impact violations based on race.[101] On appeal, Judge Melloy wrote for the panel and affirmed the district court's decision.[102] The court found that plaintiffs met their prima facie burden by demonstrating that "the objected-to action results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole."[103] Reviewing the evidentiary record, Judge Melloy noted

95. *See infra* notes 97, 110.

96. CITY OF CHARLESTON, www.charlestonmo.us (last visited Oct. 19, 2016).

97. Charleston Hous. Auth. v. USDA, 419 F.3d 729, 733 (8th Cir. 2005).

98. *Id.*

99. *Id.*

100. *Id.* at 734.

101. *Id.* at 736. Interestingly, the district court also found no evidence showing that the housing authority considered the impact of its planned action on its overwhelmingly African American tenant population, which was contrary to provisions of a governing statute enacted after the origination of the loans, 1987's Emergency Low Income Housing Preservation Act, 42 U.S.C. § 1472(c). *Id.* Coupled with the disparate-impact finding, the court concluded that the housing authority had failed to "affirmatively further fair housing." *Id.*

102. *Id.* at 733–34.

103. *Id.* at 740–41.

that no matter which relevant population was used as a comparison, the statistics presented proved the disparate impact: "[Plaintiff's] proof established a disproportionate impact upon minority class members whether we examine the relevant waiting list population, the income-eligible population, or the actual [project tenants]."[104]

Shifting the burden to the housing authority's deconcentration policy justification, Judge Melloy agreed with the district court that the policy objectives were unsupported by the evidence presented and therefore pretextual.[105] As a matter of fact, the housing authority overstated the number of low-income rental units located in the project area.[106] Crime statistics and the success of various anti-drug initiatives implemented over the years showed no actual concentration of criminal activity or drug use.[107] Housing authority records showed the project to be financially stable with "multiple sources of untapped funding" for needed improvements.[108] Judge Melloy carefully noted that it had not been the "general goal of deconcentration" that had been challenged. Rather, in this instance the statistics showed a loss of affordable housing borne almost only by African Americans. The housing authority failed to show an actual need for deconcentration and in fact had "falsely represented" the facts in its attempt to do so.[109]

The Eighth Circuit's decision in *Charleston Housing Authority* provided fair-housing advocates with valuable insights about the use of statistics in meeting prima facie disparate-impact criteria. It specifically endorsed the plaintiffs' use of statistics to demonstrate the disproportionate impact of new policies on the racial minorities making up the vast majority of that housing's tenant population. It also identified various relevant populations that could be considered in determining the disparate impact. The decision was also helpful to housing advocates who bring similar claims and refuse to accept a deconcentration policy that is pretextual and unsupported by evidence. Accordingly, *Charleston Housing Authority* should serve as a blueprint for proving disparate impact in

104. *Id.* at 741.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 741–42.
109. *Id.* at 742.

situations involving destruction of existing low-income housing properties.

2. *Neighborhood Opposition to Supportive Housing for the Disabled Defeated in* Ventura Village, Inc. v. City of Minneapolis

Also in 2005, the Eighth Circuit was called to resolve a Minneapolis neighborhood clash over city approval of publicly-funded housing for the disabled. Project for Pride in Living, a local housing developer long known for its strong voice in the fight for low-income housing, proposed a 20-unit, 128-person supportive housing facility in south-central Minneapolis.[110] This location was and is at the heart of the city's south-side African American population.[111] The purpose of the housing development was to provide much needed permanent housing and rehabilitative services for homeless families with disabled members, including those with mental illness and substance abuse problems.[112] The developer applied for and was granted a conditional use permit allowing the development, which was required because local zoning rules prohibited spacing of such supportive housing facilities too close to each other.[113] The local neighborhood association objected to another such facility and sued under the Fair Housing Act.[114] The lawsuit claimed that the city's approval of the permit was illegal housing discrimination because its waiver policy had the effect of concentrating supportive housing in a small number of densely populated urban neighborhoods and therefore perpetuated segregation of minorities and the disabled.[115] The claims did not find favor with the district court, which dismissed the action on summary judgment; the neighborhood association appealed, to no avail.[116]

In affirming the district court's decision, Judge Loken wrote for a panel that included Judge Riley and Judge Smith. The

110. Ventura Vill., Inc. v. City of Minneapolis, 419 F.3d 725, 726 (8th Cir. 2005).

111. *See Ventura Village Neighborhood*, MINN. COMPASS, http://www.mncompass.org/profiles/neighborhoods/minneapolis/ventura-village (last visited Nov. 9, 2016).

112. *Ventura Vill.*, 419 F3d at 727.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 726–27.

neighborhood association did not present sufficient evidence to prove discriminatory enforcement of the city's spacing ordinance.[117] The city approved every application for supportive housing developments in the previous ten years and more than half had been located in majority white neighborhoods, which resulted in no actual increased concentration of minority segregation.[118] Rather, Judge Loken wryly noted, "the City has taken a single race-neutral action—the grant of a waiver of its spacing requirement—that *permitted* the creation of additional supportive housing and thereby *increased* the housing available to eligible handicapped persons."[119] Judge Loken went on to note the absence of case law authority upholding fair-housing liability in instances where additional housing was created "absent proof that the action was part of a discriminatory policy or practice of refusing to approve other housing."[120] Judge Loken then concluded that even if the city's "liberal" waiver policy had increased the concentration of supportive housing, "the concentration is attributable to the independent siting decisions of private housing providers . . . not to any City action 'making unavailable' or 'denying' housing opportunities on the basis of race or disability."[121]

Despite the pro-low-income housing outcome of *Ventura Village*, it cannot be viewed as encouragement to disparate-impact theories of liability, particularly when applied to allegations that a certain housing policy increases minority population concentration in urban areas and perpetuates segregation. Rather, it underscores the importance of developing an evidentiary record clearly showing a causal connection between the housing policy complained of and any consequent disparate impact.

C. 2010: Disparate-Impact Claims Rescued in Gallagher v. Magner

The Twin Cities were again the locus of low-income housing controversy amid the rather unconventional fair-housing disparate-impact claims brought in *Gallagher v. Magner*.[122] Saint Paul landlords banded together to challenge what they considered to be the city's

117. *Id.* at 728.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. 619 F.3d 823 (8th Cir. 2010).

aggressive enforcement of its housing code.[123] They brought a cluster of lawsuits that were consolidated and heard by the federal district court.[124] The landlord plaintiffs contended that the city was enforcing its housing code more aggressively against their properties because of the disproportionately high concentration of racial minorities in their tenant population, and, even if no specific discriminatory animus was present, this had an illegal disparate impact and perpetuated racial segregation in Saint Paul.[125] In opposing defendants' motion for summary judgment, the plaintiffs apparently showered the beleaguered district court with "voluminous materials—four file boxes worth."[126] The court responded by granting summary judgment, dismissing all claims.[127] The inevitable appeal met a similar fate, except for the disparate-impact claim, which the Eighth Circuit panel reversed and remanded. [128]

Writing for the panel, Judge Melloy held that the district court's interpretation of the facially benign policy or practice at work in the city's code enforcement scheme was too narrow.[129] The court defined the plaintiff's prima facie burden as requiring a showing that "a facially neutral policy ha[d] a significant adverse impact on members of a protected minority group."[130] Importantly, the city action at issue was not a city code coming into conflict with federal housing quality standards.[131] Rather, the challenged action was the city's enforcement of the housing code along with numerous allegations, supported by record evidence, that the city had played fast and loose with the rules, issued code violations that were false, and punished property owners without prior notification or opportunity to remedy problems.[132] The court

123. *Id.* at 824.

124. *Id.*

125. *Id.*

126. *Id.* at 832 (quoting Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987, 1020 (D. Minn. 2008)) (noting the district court's "frustration" that plaintiffs had "failed to 'winnow out the relevant documents,'" and therefore "the burden of doing so fell to the Court").

127. *Id.* at 823.

128. *Id.* at 823. The panel consisted of Judges Wollman, Bye, and Melloy. *Id.*

129. *Id.* at 832.

130. *Id.* at 833 (quoting Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003)).

131. *Id.* at 834.

132. *Id.*

concluded that the evidence, at least at the summary judgment stage, sufficiently demonstrated disparate impact, specifically evidence of: (1) a shortage of affordable housing caused by the enforcement scheme; (2) the parties' stipulation that African Americans made up a disproportionate percentage of households relying on federally subsidized low-income housing in the city; and (3) increased costs to property owners from housing code enforcement.[133] All of this had, as a matter of fact, resulted in an actual loss of affordable housing in the city, as shown by government records predicting a consequent loss of affordable housing and a nearly 300% increase in vacant housing in Saint Paul in 2003–2007.[134] In so protecting the disparate-impact theory of liability asserted by the plaintiff landlords, Judge Melloy acknowledged the lack of evidence "connect[ing] the dots of . . . [the] claim" but explained that "[w]here a plaintiff demonstrates that a protected group depends on low-income housing to a greater extent than the non-protected population, other courts have found it reasonable to infer that the non-protected group will experience a disproportionate adverse effect from a policy or decision that reduces low-income housing."[135] In other words, the key to establishing a challenged policy's disparate impact through comparing levels of dependence on affordable housing by different classes of people was to show that the net result of the policy actually resulted in reduced low-income housing. This was a boon to any litigant seeking to preserve low-income housing opportunities through court action.

Moving through the rest of the disparate-impact burden-shifting analysis, the court quickly ratified the rather obvious relationship of the code enforcement scheme to the legitimate, non-discriminatory objectives of habitable, safe, and livable neighborhoods.[136] The burden then fell back on the plaintiff landlords to offer a viable alternative that satisfied the city's legitimate policy objectives while reducing the discriminatory impact of the challenged enforcement practices.[137] The plaintiffs identified previous, gentler code enforcement programs used by the city that they preferred, and this was apparently enough for

133. *Id.* at 834–35.
134. *Id.* at 835.
135. *Id.*
136. *Id.* at 837.
137. *Id.*

Judge Melloy and the Eighth Circuit panel.[138] The old programs were more collaborative in nature and had reportedly been effective enough—conclusions corroborated by record evidence of statements from a cross section of stakeholders and the city's failure to show that the discarded enforcement scheme was costlier or would fail to accomplish its policy objectives.[139] Judge Melloy's opinion concluded that disputed issues of fact existed that the old code enforcement program "generated a cooperative relationship with property owners, achieved greater code compliance, and resulted in less financial burdens on rental property owners," and that "[i]t was reasonable to infer from these facts . . . that [the old code enforcement program] would significantly reduce the impact on protected class members."[140]

Issuing the *Gallagher* decision and remanding for further proceedings on the disparate-impact claim did not, unfortunately, resolve the case, which is still pending.[141] The disparate-impact claim preserved by the Eighth Circuit was reportedly stayed pending the *Inclusive Communities* decision;[142] the case presently awaits further disposition with the district court.[143]

After *Gallagher* and the Supreme Court's criticism of *Gallagher's* disparate-impact claims in *Inclusive Communities*, it is difficult to envision a case like *Gallagher* succeeding today. Indeed, a subsequent lawsuit alleging similar disparate-impact claims—this time against the City of Minneapolis and its alleged heightened enforcement of housing inspection policies—was met with less judicial tolerance and failed to meet *Inclusive Communities'* stricter

138. *Id.* at 837–38.

139. *Id.* at 838.

140. *Id.*

141. Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987, 991 (D. Minn. 2008), *aff'd in part, rev'd in part sub nom.* Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).

142. *Id.* The docket for the case (No. 04-cv-02632 in the Federal District Court of Minnesota) reads on January 30, 2015: "The case is stayed until the related Supreme Court Decision is released. A trial date will be determined in the future by Chief Judge Davis."

143. *See* Gallagher v. Magner, 636 F.3d 380, 381 (8th Cir. 2010) (denying appellant's petition for a hearing en banc). The dissent in the case noted that whether "application of disparate-impact analysis to a city's aggressive housing code enforcement is dictated by the purpose of the FHA is an important question of first impression." *Id.* at 384 (Colloton, J., dissenting).

causality standards for pleading disparate impact.[144] In *Ellis v. City of Minneapolis,* landlords (represented by the same law firm involved in the *Gallagher* case) with fourteen rental dwellings (comprising a total of thirty-five units) in inner-city Minneapolis alleged that the City's rental dwelling license scheme and its heightened standards displaced protected class families, which resulted in disparate impact.[145] In dismissing the case on the pleadings, the federal district court cited *Inclusive Communities*' "robust causality requirement" that plaintiffs must point to a defendant's policy and the purported disparity to allege facts showing a causal connection.[146] The plaintiffs' failure to allege that any tenant was displaced or that rental licenses were lost due to anything other than actual code violations at their properties did not meet disparate-impact prima facie causation requirements after *Inclusive Communities.*[147]

Accordingly, though feasibility of disparate-impact liability as a general matter is no longer in dispute, fair-housing advocates should carefully consider these judicial admonitions when considering which disparate-impact lawsuits are deserving of scarce litigation resources. The HUD disparate-impact rule, along with the added imprimatur of the *Inclusive Communities* decision, sets out basic rules of the road that all should now be able to follow. Still, advocates and courts will continue to struggle with defining where the boundary lies between upholding valid disparate-impact claims and the overregulation of actors attempting to navigate in good faith through an increasingly complex community housing landscape.

D. Statistical Proof of Disparate-Impact Claims Fails in Keller v. City of Fremont

More recently, the defeat of disparate-impact claims by the Eighth Circuit in *Keller v. City of Fremont* illustrates the perils of inadequate statistical presentation and analysis, as well as failure to correctly define the relevant comparison population.[148] In 2013,

144. Ellis v. City of Minneapolis, No. 14-CV-3045, 2016 WL 1222227 (D. Minn. Mar. 28, 2016).

145. *Id.* at *2.

146. *Id.* at *11.

147. *Id.*

148. 719 F.3d 931 (8th Cir. 2013).

fair-housing disparate-impact litigation in this region involved the expression of virulent anti-immigrant sentiment in Fremont, Nebraska, a city of about 26,000 on the Platte River just west of Omaha.[149] Voters there adopted a city ordinance that limited hiring and providing rental housing to "illegal aliens" and "unauthorized aliens."[150] Preceding the ordinance was a tripling of the city's Hispanic population over a ten-year period, from 4.3% to 11.9% of the overall city population.[151]

Some of the less savory aspects of the ordinance involved the absolute prohibition on renting to "illegal aliens" and the consequent requirement that any prospective adult renter register with city authorities by obtaining (and paying for) an occupancy license from the city.[152] The licensure process included submission of proof of immigration status.[153] Subsequent discovery of a renter's unlawful immigration status would, in and of itself, breach the lease.[154] Other enforcement mechanisms included cumbersome immigration verification processes to be done by police officers and a $100 fine to landlords, per day, per violation.[155]

Various individuals and entities allied against this measure, including a local union and the ACLU, by filing suit immediately; the collective parties challenged the ordinance on its face as unconstitutional, pre-empted by federal immigration laws, and discriminatory under the Fair Housing Act.[156] Chief Judge Laurie Camp heard the case on cross motions for summary judgment and found fair-housing violations.[157] Both sides appealed this decision and the Eighth Circuit panel hearing the case (Judges Loken, Bright, and Colloton) reversed the fair-housing ruling.[158]

Writing for the majority, with Judge Bright dissenting, Judge Loken's primary complaint about the fair-housing disparate-impact claims focused on how the relevant demographic statistics had

149. Fremont Area Chamber of Commerce, *History: Community Overview*, VILLAGEPROFILE.COM 10, 12 (2012), https://issuu.com/villageprofile/docs/fremont_ne.

150. *Keller*, 719 F.3d at 937.

151. *Id.*

152. *Id.* at 938.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 937.

157. Keller v. City of Fremont, 853 F. Supp. 2d 959, 982–83 (D. Neb. 2012).

158. *Keller*, 719 F.3d at 951.

been presented to the district court.[159] He concluded that what had been put into evidence did not meet long-standing Eighth Circuit order-of-proof standards. Specifically, plaintiffs had failed to even meet their prima facie burden:

> In this circuit, to prove a disparate-impact violation of the FHA, a plaintiff must first establish a prima facie case, that is, "that the objected-to action results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole."[160]

The identified protected class was Latinos, but no corresponding "specific disparate impact" had been identified; "simply referring to the likelihood 'that enforcing the Ordinance would result in a reduction of the Hispanic population in Fremont'" was not enough.[161] The other end of the comparison was similarly lacking: plaintiffs had apparently made "no attempt to identify the 'relevant population' to be compared, other than citing statistics showing that a large number of the City's foreign-born population came from Latin American countries."[162] Judge Loken then queried, "Is the relevant comparison the Ordinance's impact on all aliens not lawfully present, on all aliens, on all renters, or on the City's entire population? [Plaintiffs] do not tell us, and their conclusory analysis of the issue provides no answer."[163]

When examined in light of the Fair Housing Act's history and mandate to reduce segregation (primarily racial in nature), Judge Loken was reluctant to impose disparate-impact liability in a situation where individuals of a certain legal status (undocumented immigrants) were the target of an adverse action and not a specific racial or ethnic group. A disparate-impact claim solely "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," was accordingly, in a word, "unsound."[164]

159. *Id.*

160. *Id.* at 948 (citing Charleston Hous. Auth. v. USDA, 419 F.3d 729, 740–41 (8th Cir. 2005)).

161. *Id.* at 949.

162. *Id.*

163. *Id.*

164. *Id.* at 949. Judge Loken went on to examine the second and third steps in a disparate-impact order-of-proof analysis and found his determination on the prima facie issue "reinforced." *Id.* "[C]ities and municipalities may have both a legitimate local interest in restricting the number of unlawfully present aliens

After *Keller*, how can practitioners in this Circuit use disparate-impact claims to protect clients from such anti-immigrant policies, which are perhaps only proxies for race? Would it have made a difference if plaintiffs presented statistics accounting for which foreign-born Latinos were living in Fremont legally and which were not? What if plaintiffs had shown that these particular Latinos, born elsewhere (as opposed to the large and growing Latino population living here for generations, in some cases well before whites), were residing in Fremont legally but were adversely impacted by the rental ordinance nonetheless?

It may be that scenarios with this sort of factual and historical complexity are not the best fit for the blunter tool of disparate-impact theories of liability. This is doubly so when some of the measures taken are consistent with other areas of federal law, however anathema to political progressives. Accordingly, housing advocates will likely benefit from a more thorough examination of possible consequences before going down the disparate-impact path, especially when the case is one of first impression.

V. DISPARATE IMPACT TODAY IN THE TWIN CITIES

A. Crossroads: Disparate-Impact Claims Proceed Against Private Owners of Affordable Housing in Richfield

This year, the Minnesota federal district court denied a defendant apartment owner's motion to dismiss plaintiffs' fair-housing claims in *Crossroads Residents Organized for Stable & Secure Residencies v. MSP Crossroads Apartments LLC.*[165] The class action lawsuit alleged, among other things, disparate-impact claims under the Fair Housing Act arising out of the new owners' efforts to gentrify rental housing that had previously been a mainstay for affordable housing in the metro area.[166] Located in the first-ring suburb of Richfield, just south of Minneapolis, the apartment complex had 698 lower-rent units housing more than 2200

residing within their borders and a rational basis for enforcing a particular restriction." *Id.* Furthermore, plaintiffs identified no viable alternative means of carrying out this purpose that would not have the same discriminatory effect on "the portion of unlawfully present aliens who are Latino." *Id.*

165. No. 16-cv-233, 2016 WL 3661146, at *1 (D. Minn. July 5, 2016).

166. *Cf. id.* at *2–4 (the new owners planned to update each unit's kitchen and add new amenities in the common areas).

residents[167] and was described as "perhaps the largest source of unsubsidized affordable rental housing in the Twin Cities Region."[168] The tenant population there had historically been "generally lower income, with a significant number of ethnic minority or disabled tenants."[169]

The tenants and advocacy organization that brought the case alleged that the new owners, after purchasing the property in 2015, required tenants to apply for new leases to remain in their homes.[170] Shortly after, they dramatically raised rents and adopted exclusionary occupancy policies such as screening criteria requiring high credit scores and income three times the rent.[171] Section 8 vouchers were no longer accepted, and the combination of the higher rents and new screening criteria effectively precluded the continued residency of any tenant receiving disability-related housing funding support.[172] All this, plaintiffs claimed, adversely impacted racial minorities and disabled tenants, forcing them out of their homes.[173] Further, the change "offset virtually all of the production on new affordable housing in the Metro area in 2014," thereby setting back affordable housing production efforts.[174]

In denying the new owners' motion to dismiss the fair-housing disparate-impact claim, Judge Montgomery looked to the Supreme Court's decision in *Inclusive Communities*, as well as the HUD disparate-impact rule, "[finding] enough factual allegations [in plaintiffs' Complaint] to support an inference" that statistical analysis would show disparate impact.[175] Specific allegations that showed a plausible claim of disparate impact included allegations:

> that approximately 35 tenants relied on Section 8 vouchers and 100 tenants relied on GRH vouchers; that many if not most of these tenants belong to one or more protected classes; and that Defendants' policies will force all of these tenants to relocate. More generally, Plaintiffs

167. *Id.* at *1.
168. *Id.* at *1 (quoting plaintiffs' Complaint).
169. *Id.* at *2.
170. *Id.* at *3.
171. *Id.*
172. *Id.*
173. *Id.*
174. Press Release, Hous. Justice Cent., U.S. District Court Denies Defendants' Motion to Dismiss Plaintiffs' Fair Housing Claims Against New Owners of Crossroads Apartments in Richfield (June 6, 2016) (on file with author).
175. *Crossroads*, 2016 WL 3661146 at *6–7.

> allege that protected class members are overrepresented at the complex as compared to the surrounding area; that a high percentage of protected class members in the Twin Cities are low-income renters; and that Defendants' new rents and rental criteria pose a high hurdle for low-income renters.[176]

The success of the *Crossroads* case in surviving past the pleadings stage shows the continuing viability of the disparate-impact tool in this jurisdiction for preservation of affordable housing, especially when the demographic statistics of affected tenant populations are so striking.[177] It is not unusual for minority tenants facing the brunt of redevelopment activities to approach legal aid offices for assistance in these situations.[178] Fair-housing advocates can now respond with the heightened prospect of time consuming and expensive disparate-impact litigation in urging housing developers to keep the interests of low-income minority tenants in mind as they engage in gentrification efforts. This will hopefully spur more just and equitable community development efforts in the future.

B. The MICAH HUD Complaints: Twin Cities Nonprofit and Suburbs Challenge LIHTC Funding Allocation in HUD Complaints Alleging Claims of Disparate Impact/Failure to Affirmatively Further Fair Housing

One aspect of the current landscape in disparate-impact litigation in the Upper Midwest involves the allocation of federal LIHTC funds around the Twin Cities, which some in the fair-housing movement believe has intensified concentration of housing segregation into low-income, low-opportunity areas in the inner city.[179] The argument is that not only does federal fair-housing law require that allocation of scarce housing funding be

176. *Id.* (internal citations omitted).

177. Rigel C. Oliveri, *Disparate Impact and Integration: With* TDHCA v. Inclusive Communities *the Supreme Court Retains an Uneasy Status Quo*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 267 (2015).

178. *Id.*

179. *See* Shannon Prather, *Brooklyn Park, Brooklyn Center Accuse State of Fair-Housing Violations*, STAR TRIB. (Minneapolis, Minn.) (Sept. 20, 2014, 10:22 PM), http://www.startribune.com/brooklyn-park-brooklyn-center-accuse-state-of-fair-housing-violations/275901391/.

done in a non-discriminatory manner, it must also affirmatively further fair housing.[180]

As part of the local Twin Cities fair-housing movement, Michael Allen of Relman of Dane & Colfax in Washington, D.C., teamed up with Myron Orfield of the University of Minnesota Law School's Institute on Metropolitan Opportunity.[181] Together, they filed two complaints with HUD on behalf of various community nonprofit stakeholders: one in November 2014 (the "November Complaint")[182] and the other a few months later, in March 2015 (the "March Complaint").[183] The November Complaint, which was successfully conciliated by HUD before commencement of any investigatory activities, was brought on behalf of the Metropolitan Interfaith Council on Affordable Housing ("MICAH") and the cities of Brooklyn Park, Brooklyn Center, and Richfield.[184]

The November Complaint alleged discrimination by the Minnesota Housing Finance Agency and the Metropolitan Council of the Twin Cities (the "Met Council") based on race and/or national origin through the administration of federally funded housing and community development programs, as well as LIHTC program tax credits.[185] The complaint set out statistics for demographic changes in Brooklyn Park, Brooklyn Center, and Richfield showing dramatically increased racial segregation and poverty.[186] This, they alleged, disparately impacted nonwhites and

180. *See* Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539 (2014).

181. Housing Discrimination Complaint, Metro. Interfaith Council on Affordable Hous. v. Minnesota (Nov. 15, 2014), https://dk-media.s3.amazonaws.com/AA/AV/micahorg/downloads/292213/Complaint_Final_Filed_2014_11_10.pdf [hereinafter "The November Complaint"].

182. *See id.*

183. Housing Discrimination Complaint, Metro. Interfaith Council on Affordable Hous. v. City of Minneapolis (Mar. 30, 2015), http://dk-media.s3.amazonaws.com/AA/AV/micahorg/downloads/294541/MICAH_Complaint_to_HUD_-_Mpls._and_St._Paul_filed_March_30__2015.pdf [hereinafter "The March Complaint"].

184. Brooklyn Park and Brooklyn Center are two cities located to the north and northwest of one of Minneapolis's historic African American neighborhoods: North Minneapolis. Richfield is directly south of Minneapolis's Southside neighborhoods, similarly segregated by race and home to many in the Twin Cities' Somali community.

185. The November Complaint, *supra* note 181, at 2–9.

186. *Id.* at 3–4.

Hispanics and violated obligations, as recipients of federal low-income housing funds, "to take affirmative steps to overcome impediments to fair-housing choice."[187] Targeted for particular approbation was the regional analysis of fair-housing impediments, which most local housing advocates had long criticized as grossly inadequate.[188]

The HUD-mediated conciliation proceedings resulted in agreement on a process to better understand Twin Cities metro low-income housing needs as a geographic whole, which would presumably lead to a fair and balanced allocation of federal housing funding dollars between urban and suburban recipients. Terms of the settlement included funding from HUD to add an addendum to the regional analysis of fair-housing impediments addressing the requirement that the cities specifically examine issues raised in the complaint, including: "how the region distributes its affordable housing; whether the way the region distributes low-income housing tax credits 'reinforces existing racial or ethnic concentrations of poverty or perpetuates racial or ethnic segregation'; whether zoning codes reinforce existing concentrations; and how the region's other housing policies reinforce those concentrations."[189]

The March Complaint, submitted by MICAH and three Minneapolis neighborhood associations, contained similar allegations that low-income housing funding was overly concentrated in poor inner city areas.[190] One statistical finding in this second complaint was that in high-minority census tracts in Minneapolis there was an average of one affordable housing unit for every block, while in low-minority tracts there was one affordable housing unit every 6.5 miles.[191] At last report, the March Complaint is still pending and HUD is actively investigating its allegations.[192] The parties have met face-to-face twice, and housing

187. *Id.* at 2–4.

188. *Id.*

189. Peter Callaghan, *Settlement Could Alter How Affordable Housing is Built Throughout Twin Cities Metro*, MINNPOST (May 13, 2016), https://www.minnpost.com/politics-policy/2016/05/settlement-could-alter-how-affordable-housing-built-throughout-twin-cities-m.

190. *See* The March Complaint, *supra* note 183, at 3.

191. *Id.* at 5.

192. Interview with Michael Allen, Esq., Relman, Dane & Colfax PLLC (July 8, 2016).

advocates hope that HUD is taking the matter seriously enough to move things forward toward conciliation.[193] The complainants' endgame is to use the updated regional analysis of impediments to inform decisions about housing funding allocation, which, in turn, should lead to better outcomes for residents.[194] It is their belief that a more ideal balance of low-income housing dollars between urban and suburban locations would be in line with historical funding patterns from the 1970s and 1980s when state and local housing funding decision makers considered community preferences for housing and educational infrastructure in a more genuine manner.[195]

Meanwhile, a nineteen-member advisory committee has convened and is meeting regularly to advise the Fair Housing Implementation Council on the process of amending the regional analysis of impediments.[196] The Council includes stakeholders from around the region, including the city manager of Brooklyn Park, the mayor of Richfield, neighborhood association representatives, and Legal Aid.[197] Some of the housing advocates participating in these proceedings have a different view of where funding allocation should end up, believing that the 60%-40% urban-suburban split stated by the MICAH complainants is, in fact, closer to 50%-50%.[198] Some offer a different perspective altogether on the tax credit allocation issue, arguing that housing funding resources ought not be taken away from inner-city communities but should rather be used to build or preserve affordable, safe housing to improve places where people already live.[199] Commentators urge that the focus in updating the regional analysis of impediments should be on the kind of robust community engagement that will truly inform how funding allocations will actually affect impoverished communities,

193. *Id.*

194. *Id.*

195. *Id.*

196. Interview with Lael Robertson, Esq., Mid-Minnesota Legal Aid (July 15, 2016).

197. *Id.*

198. *Id.*

199. *See generally* Thomas B. Edsall, *Where Should a Poor Family Live?*, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/05/opinion/where-should-a-poor-family-live.html?_r=0 ("[P]reservation of existing affordable housing and reinvestment in distressed or gentrifying neighborhoods must be considered as valid strategies equal to mobility and moving to high opportunity areas.").

as well as on including enforcement mechanisms that advocates can use if the cities fail to follow the outlined steps.[200]

C. What Potential Cases Are on the Horizon?

An issue currently of interest to fair-housing advocates in the Twin Cities involves the trend of setting aside LIHTC dollars and other federally funded housing resources to support local arts communities and, more specifically, local artists. On its face, this would seem to be an appropriate solution to the age-old problem of arts patronage, especially in a mid-size regional capital like the Twin Cities without the institutionalized resources available to artists in, say, New York City or San Francisco. The need is especially acute in today's public fiscal conservativism; many of the resources available to support artists in the past, such as National Endowment for the Arts grants, have essentially gone away, especially for those who pursue art with controversial images or themes.[201]

When government funds are made available for this sort of dedicated housing, however, fair-housing laws still apply and require rental policies to be nondiscriminatory.[202] What's more, federal fair-housing laws require communities receiving federal funds for low-income housing development to take affirmative steps to further fair housing.[203] This includes engaging in appropriate and culturally competent affirmative marketing efforts to ensure diverse tenant populations that mirror the communities around them.[204]

All of this is sharply at odds with the reality of majority-white tenant populations in local low-income arts housing

200. *Id.*

201. *See, e.g.*, *National Endowment for the Arts Appropriations History*, NAT'L ENDOWMENT FOR THE ARTS, https://www.arts.gov/open-government/national-endowment-arts-appropriations-history (last visited Oct. 19, 2016).

202. *See Fair Housing Assistance Program (FHAP)*, U.S. DEP'T HOUSING & URBAN DEV. http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP (last visited Oct. 19, 2016) ("To be eligible for assistance through the FHAP, a state or local agency must demonstrate to HUD that it enforces a fair housing law that is substantially equivalent to the federal Fair Housing Act.").

203. *See* HUD Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

204. *Id.*

developments.[205] For example, the Pillsbury A-Mill artist lofts in Minneapolis were recently completed at a total cost of about $170 million, using around $35 million in affordable housing tax credit proceeds.[206] Billed as "An Artist Community" and marketed as "Artist Lofts! Amazing Location! Art Meets Affordable!",[207] the A-Mill Lofts are located close to the newly revitalized Mississippi Riverfront area adjacent to downtown Minneapolis. Close to local arts powerhouses such as the Guthrie Theater and the MacPhail music school, the A-Mill Lofts itself boasts arts amenities such as multiple studios and rehearsal spaces.[208] Years ago, starving artists who stayed in the Twin Cities would have sacrificed much for this sort of on-site accessibility. But a quick look at tenant demographics at the A-Mill Lofts indicates that the population now living there heavily skews towards white residents (86%, in an urban area where traditional subsidized housing residents are 80% minority)[209] with incomes far above what one would expect in low-income housing.[210]

Many question this use of federal low-income housing funds to help support local arts communities, arguing that it fails fair-housing criteria and certainly falls short of any goal to affirmatively further fair housing.[211] The countervailing argument is that this

205. *See* Alana Semuels, *The Artist Loft: Affordable Housing (for White People)*, THE ATLANTIC (May 19, 2016), http://www.theatlantic.com/business/archive/2016/05/affordable-housing-for-white-people/483444/ (quoting Jay Wilkerson of Mid-Minnesota Legal Aid).

206. INST. ON METRO. OPPORTUNITY, THE RISE OF WHITE-SEGREGATED SUBSIDIZED HOUSING 17 (2016), https://www1.law.umn.edu/uploads/15/8a/158a9849bb744b4573b59f51e4f0ab54/IMO-White-Segregated-Subsidized-Housing-5-18-2016.pdf.

207. *See* A-MILL ARTIST LOFTS, http://www.a-millartistlofts.com (last visited Oct. 19, 2016).

208. *See About*, A-MILL ARTIST LOFTS, http://www.a-millartistlofts.com/about/ (last visited Oct. 19, 2016).

209. Semuels, *supra* note 205.

210. *See Reserve Info*, A-MILL ARTIST LOFTS, http://www.a-millartistlofts.com/reserve-info/ (last visited Oct. 19, 2016).

211. *See* Editorial Board, *Federal Tax Credits Are Misused on Costly Artist Lofts in Twin Cities*, STAR TRIB. (Minneapolis, Minn.) (June 16, 2016), http://www.startribune.com/federal-tax-credits-are-misused-on-costly-artist-lofts-in-twin-cities/383350961/ ("[I]t verges on irresponsible to squander federal housing tax credits on projects that benefit so few."); *see also* Editorial Board, *Who Gets the Subsidized Apartments?*, STAR TRIB. (Minneapolis, Minn.) (Jul. 5, 2016), http://www.startribune.com/federal-tax-credits-are-misused-on-costly-artist-lofts-in-twin-cities/383350961/ ("HUD needs to make sure all subsidized housing—including artist housing—meets [fair housing] goals.").

funding goes to costly historic building renovations and can help high-income neighborhoods become more economically diverse.[212] The resulting majority-white tenant populations in such housing developments, however, may indicate potential fair-housing disparate-impact violations.

Although the IRS has made a special exemption (sought by Minneapolis developers) for artist housing from the tax credit requirement that such housing be available for "general public use," the fact that so few minorities actually live there raises discrimination red flags, particularly with regard to how tenant screening procedures are being employed.[213] Moreover, the fact that this is occurring in a state with such acute income inequality and persistent housing segregation makes it that much more suspect as a fair-housing matter. Some note that the use of low-income tax credits for artist housing may distinguish Minnesota from the way Texas has been using its federal low-income housing dollars, as challenged in the *Inclusive Communities* case.[214] Arguably, a challenge to this method of federal tax credit allocation might present a stronger case for fair-housing disparate-impact liability than that which so troubled the Supreme Court in *Inclusive Communities*. It should not matter that artist housing funded by federal low-income tax credit proceeds in Minnesota forms a comparatively small percentage of subsidized housing opportunities; what is important are the consequences of diverting these scarce resources away from needed low-income housing in the Twin Cities. It is an open question whether the $460 million spent on just four artist housing developments in Minneapolis and Saint Paul could have created 6000 units of more typical affordable housing[215] and how much opportunity has consequently been lost to reduce housing segregation.

VI. CONCLUSION

As housing advocates go about our work, we should bear in mind that disparate-impact litigation brought under the auspices of the FHA these days means treading in uncertain waters. Things can

212. *See* Semuels, *supra* note 205.

213. *See id.*

214. Interview, Myron Orfield, Institute on Metropolitan Opportunity, University of Minnesota Law School, June 28, 2016.

215. Editorial Board, STAR TRIB., *supra* note 211.

go awry quickly if careful choices are not made about which cases to push forward and what resources are used in the process. At the same time, we cannot pass up chances to assist our clients in enforcing their right to fair housing by pushing the law forward when opportunities present themselves.

Disparate-impact litigation around the country, the new HUD rule, the Supreme Court's decision in *Inclusive Communities*, and recent cases brought here in the Twin Cities have shifted the fair-housing landscape. From the new HUD disparate-impact rule, we now have a plainly stated, three-part burden-shifting test that should allow stakeholders to at least start from the same page in analyzing developments in housing policy, developments in low-income housing funding, and those developments' impact on perpetuating protected class segregation. From the Supreme Court's warnings in *Inclusive Communities* and how that case has been applied to disparate-impact cases since, as well as the Eighth Circuit's treatment of fair-housing disparate-impact cases brought here in the Midwest in recent years, we can better assess the litigation prospects of challenging various kinds of housing development proposals and scenarios.

Going forward, disparate-impact theories of liability will undoubtedly take a more prominent role in addressing housing segregation and its attendant racial and income inequality. To be sure, efforts by local developers to gentrify new rental housing acquisitions that result in large displacements of tenants belonging to protected classes, such as is being currently challenged in Richfield in *Crossroads*, should be scrutinized by fair-housing advocates using disparate-impact analysis. The use of federal low-income housing tax credit funding in artist housing developments, particularly when such residential populations skew so heavily towards middle- and high-income whites, should similarly raise fair-housing disparate-impact concerns. The recently clarified burden-shifting test formalized in the HUD disparate-impact rule should breathe new life into efforts to defeat policies such as criminal records tenant screening requirements and posting income three times the rent. Past and developing Eighth Circuit and Supreme Court jurisprudence increases our understanding of which scenarios best lend themselves to disparate-impact analysis and effective fair-housing advocacy.

Meanwhile, the struggle continues to meet the needs of those most impacted by lack of housing choice and barriers to reducing

residential segregation. As Prince implores in the lyrics opening this article, fair-housing advocates must indeed "lend a helping hand" to solve these problems and work together.[216] Advocates can serve an important role in identifying issues and developments that contribute, in a systemic manner, to the day-to-day housing problems experienced by our client communities. Community organizations and their advocates must do everything possible to make mechanisms for assessing community input on housing policy as robust and genuine as possible. The bottom line is that stakeholders must collaborate effectively with each other to prioritize what resources to put into play to push change forward in the most positive and constructive manner possible.

All of this is complicated by the enduring constant of change. Local, regional, and national economies ebb and flow irrespective of fair-housing activities and arguably play a larger role in how housing development actually moves forward.[217] Individual families come and go as they pursue economic and educational opportunities, regardless of the pace of housing policy development or the evolving insights of fair-housing advocates.[218] Developments in transportation and communication technologies further impact these migration patterns.[219]

Advocates must accordingly be flexible and skilled enough in communicating with stakeholders on all sides to anticipate and effectively deal with these sorts of changes. After all, little of these underlying economic and social dynamics tends to bear much relation to the judicial court process. Much of the challenge to fair-housing advocates in coming years will be to sort out what dispute resolution mechanisms are best employed for the various housing problems that present themselves. Disparate-impact theories of liability will accordingly be a useful addition to the legal toolbox for improving housing conditions and opportunities in the years to come.

216. PRINCE, *supra* note 1.

217. *See* John Muellbauer & Anthony Murphy, *Housing Markets and the Economy: The Assessment*, 24 OXFORD REV. OF ECON. POL'Y 1 (2008) (explaining how the economy impacts the housing market), https://www.wu.ac.at/fileadmin/wu/d/i/iqv/Gstach/Artikel/Muellbauer_2008.pdf.

218. *See* FED. RESERVE BANK OF MINNEAPOLIS, RESEARCH DEP'T, WORKING PAPER 697, UNDERSTANDING THE LONG-RUN DECLINE IN INTERSTATE MIGRATION 5 n.2 (2015), https://www.minneapolisfed.org/research/wp/wp697.pdf.

219. *Id.* at 5.