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The Fair Housing Act (FHA): A Legal Overview

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David H. Carpenter
Legislative Attorney

The Fair Housing Act (FHA): A Legal Overview

The Fair Housing Act (FHA) was enacted “to provide, within constitutional limitations, for fair housing throughout the United States.” The original 1968 Act prohibited discrimination on the basis of “race, color, religion, or national origin” in the sale or rental of housing, the financing of housing, or the provision of brokerage services. In 1974, Congress amended the Act to add sex discrimination to the list of prohibited activities. The last major change to the Act occurred in 1988 when it was amended to prohibit discrimination on the additional grounds of physical and mental disability, as well as familial status. However, legislation that would amend the FHA is routinely introduced in Congress, including H.R. 15, H.R. 697, H.R. 1431, H.R. 2846, H.R. 2918, H.R. 4439, S. 5, S. 1267, and S. 1293 in the 118th Congress. These bills would extend the Act’s anti-discrimination provisions to prohibit discrimination expressly based on sexual orientation, gender identity, marital status, source of income, and status as a military servicemember or veteran.

Key Takeaways

- The FHA prohibits discrimination on the basis of “race, color, religion, sex, handicap, familial status, or national origin.” The FHA does not expressly prohibit discrimination on the basis of sexual orientation or gender identity. However, courts have construed the Act’s prohibition against sex discrimination to encapsulate discrimination on the basis of sexual orientation and gender identity in line with the Supreme Court’s 2020 decision in *Bostock v. Clayton County*.
- The FHA applies broadly to public and private housing-related activities, including single-family homes, apartments, condominiums, and mobile homes. The Act’s coverage also extends to the secondary mortgage market.
- Although the Act is broad, it exempts some activities. For example, the FHA does not restrict reasonable zoning laws governing “the maximum number of occupants permitted to occupy a dwelling.” The Act also exempts from its rental discrimination provisions units in dwellings that are intended for four or fewer families if the owner of the property resides in one of the units.
- In June 2015, the Supreme Court held in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* that, in addition to intentional discrimination, disparate impact claims are cognizable under the FHA—a view previously espoused by the Department of Housing and Urban Development (HUD) and the eleven U.S. Courts of Appeals to render opinions on the issue.
- Although plaintiffs historically have faced fairly steep odds of getting their disparate impact claims past the preliminary stages of litigation (much less succeeding on the merits), the Court urged lower courts to dispose quickly of disparate impact claims that fail to meet the “cautionary standards” outlined in *Inclusive Communities*.

The FHA may be enforced by the Attorney General, by HUD, and through private rights of actions by victims of discrimination. Potential remedies available under the Act include actual damages, equitable relief, reasonable legal costs, punitive damages, and civil penalties.

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Introduction

The Fair Housing Act (FHA) was enacted “to provide, within constitutional limitations, for fair housing throughout the United States.”¹ The original 1968 Act prohibited discrimination on the basis of “race, color, religion, or national origin” in the sale or rental of housing, the financing of housing, or the provision of brokerage services.² In 1974, the Act was amended to add sex discrimination to the list of prohibited activities.³ The last major change to the FHA occurred in 1988 when it was amended to prohibit discrimination on the additional grounds of physical and mental disability, as well as familial status.⁴ Legislation that would amend the FHA is routinely introduced in Congress, including proposals to extend the Act’s anti-discrimination provisions to expressly prohibit discrimination based on sexual orientation, gender identity, marital status, source of income, and status as a military servicemember or veteran.⁵

This report provides an overview of the types of discriminatory practices barred by the FHA, as well as certain activities that are exempted from the Act’s coverage. It also analyzes various legal tests applied by courts to assess both intentional discrimination (a.k.a., *disparate treatment*) and discriminatory effect claims brought under the Act. Additionally, the report addresses several specific types of discrimination that have been the source of fair housing litigation, including how the prohibition against discriminating on the basis of sex has been interpreted to encompass sexual orientation and gender identity, how the FHA’s protections against discrimination on the basis of mental and physical disabilities affect local zoning laws applicable to group homes, and how the Act’s proscription on discriminating against families with children interplays with housing communities for older persons. The report concludes with an overview of how the Act can be enforced, as well as the potential remedies available to victims of unlawful discrimination and potential penalties that can be assessed against violators.

Housing Practices in Which Discrimination Is Prohibited

The FHA prohibits discrimination on the basis of race, color, religion, sex, disability, familial status, and national origin in the sale or rental of housing, housing financing, and brokerage services. The FHA applies to a broad assortment of housing, both public and private, including single-family homes, apartments, condominiums, and mobile homes.⁶ The Act’s coverage extends to “residential real estate-related transactions,” which include both the “making [and] purchasing

¹ 42 U.S.C. § 3601. The FHA, 42 U.S.C. §§ 3601–3631, was originally enacted as Title VIII of the Civil Rights Act of 1968.

² *Id.* §§ 3604–3606.

³ Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633.

⁴ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619. The FHA uses the term *handicap*, but this report uses the term *disability* instead.

⁵ *See, e.g.* H.R. 15, 118th Cong. (2023); H.R. 697, 118th Cong. (2023); H.R. 1431, 118th Cong. (2023); H.R. 2846, 118th Cong. (2023); H.R. 2918, 118th Cong. (2023); H.R. 4439, 118th Cong. (2023); S. 5, 118th Cong.; S. 1267, 118th Cong. (2023); S. 1293, 118th Cong. (2023).

⁶ *See* 42 U.S.C. § 3602(b); 24 C.F.R. § 100.201 (2023). Courts have also concluded that the FHA applies, at times, to college dormitories and homeless shelters. *See, e.g.,* United States v. Univ. of Neb. at Kearney, 940 F. Supp. 2d 974, 983 (D. Neb. 2013) (university housing); Turning Point, Inc. v. City of Caldwell, 74 F.3d 941, 942 (9th Cir. 1996) (homeless shelter).

of loans . . . secured by residential real estate [and] the selling, brokering, or appraising of residential real property,”⁷ which includes the secondary mortgage market.⁸

Department of Housing and Urban Development (HUD) regulations elaborate upon and provide illustrations of covered housing practices.⁹ The illustrations include engaging in the following activities on the basis of an individual’s race, color, religion, sex, disability, or familial status:

- refusing to sell or rent a dwelling;¹⁰
- refusing to provide services or facilities in connection with the sale or rental of a dwelling;¹¹
- engaging in conduct that makes dwellings unavailable;¹²
- steering individuals toward or away from housing;¹³
- advertising or publishing discriminatory notices with regard to the selling or renting of a dwelling;¹⁴
- misrepresenting the availability of a dwelling;¹⁵

⁷ 42 U.S.C. § 3605.

⁸ See 24 C.F.R. § 100.125.

⁹ See, e.g., *id.* §§ 100.50–90.

¹⁰ *Id.* § 100.60. Prohibited actions under this section include: “(1) [f]ailing to accept or consider a bona fide offer . . . (2) [r]efusing to sell or rent a dwelling [], or to negotiate for a sale or rental . . . (3) [i]mposing different sales prices or rental charges for the sale or rental of a dwelling . . . (4) [u]sing different qualification criteria or applications . . . or (5) [e]victing tenants because of their race, color, religion, sex, handicap, familial status, or national origin.” *Id.*

¹¹ *Id.* § 100.65. Such discriminatory conduct includes: “(1) [u]sing different provisions in leases or contracts of sale . . . (2) [f]ailing or delaying maintenance or repairs of . . . dwellings . . . (3) [f]ailing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately . . . (4) [l]imiting the use of privileges, services or facilities in connection with the sale or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin . . . or (5) [d]enying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.” *Id.*

¹² *Id.* § 100.70(d). Such discriminatory conduct includes: “(1) [d]ischarging or taking other adverse action against an employee, broker, or agent because he or she refused to participate in a discriminatory practice [or] . . . (2) [e]mploying codes or other devices to segregate or reject applicants, purchasers or renters . . . or refusing to deal with certain real estate brokers or agents . . . (3) [d]enying or delaying the processing of an application made by a purchaser or renter or refusing to approve such a person for occupancy in a cooperative or condominium . . . [or] (4) [r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.” *Id.*

¹³ *Id.* § 100.70(c). Prohibited steering practices include: “(1) [d]iscouraging any person from inspecting, purchasing, or renting a dwelling . . . (2) [d]iscouraging the purchase or rental of a dwelling . . . by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community, neighborhood, or development . . . (3) [c]ommunicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development . . . [or] (4) [a]ssigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of race, color, religion, sex, handicap, familial status, or national origin.” *Id.*

¹⁴ *Id.* § 100.75. Discriminatory advertisements or notices include: “(1) [u]sing words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons . . . (2) [e]xpressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter . . . (3) [s]electing media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities . . . [or] (4) [r]efusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.” *Id.*

¹⁵ *Id.* § 100.80. Illustrations of this prohibited activity include: “(1) [i]ndicating through words or conduct that a dwelling which is available for inspection, sale, or rental has been sold or rented . . . (2) [r]epresenting that [a person cannot rent or purchase a dwelling because] covenants or other deed, trust, or lease provisions which purport to restrict (continued...)

- blockbusting, i.e., using racial or other prohibited motives to induce or attempt to induce an individual to sell or rent a dwelling for profit;¹⁶ and
- denying “access to membership or participation in any multiple-listing service, real estate brokers association, or other service . . . relating to the business of selling or renting dwellings.”¹⁷

The FHA also makes it unlawful to “coerce intimidate, threaten, or interfere with” individuals for exercising or aiding others in the exercise of their rights under the Act.¹⁸

Finally, as noted above, the FHA applies to public as well as private housing. As a result, a number of lawsuits have challenged the fair housing practices of state and local housing authorities and even HUD itself, particularly regarding discrimination in low-income public housing.¹⁹ For example, in one 2005 case, Black public housing residents in Baltimore sued HUD and various local agencies, alleging racial discrimination. The court ultimately held that HUD had violated the FHA “by failing adequately to consider regional approaches to ameliorate racial segregation in public housing in the Baltimore Region.”²⁰

Exemptions from Coverage

Although the FHA is broadly applicable, it includes some exemptions. For instance:

- **Small housing providers.** The FHA does not apply to single-family homes that are rented or sold without the use of a real estate agent by a private owner who owns no more than three single-family homes at the same time, provided that certain other conditions are met.²¹ The Act’s rental discrimination restrictions are

the sale or rental of a dwelling . . . (3) [e]nforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person . . . (4) [l]imiting information, by word or conduct, regarding suitably priced dwellings . . . [or] (5) [p]roviding false or inaccurate information regarding the availability of a dwelling for sale or rental to any person . . . because of race, color, religion, sex, handicap, familial status, or national origin.” *Id.*

¹⁶ *Id.* § 100.85(b). The HUD regulations define *blockbusting* to mean “for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or with a handicap.” *Id.* § 100.85(a). For blockbusting to be established, profit does not have to be realized so long as profit was a factor for engaging in the activity. *Id.* § 100.85(b).

¹⁷ *Id.* § 100.90. Such prohibited actions include: “(1) [s]etting different fees for access to or membership in a multiple listing service . . . (2) [d]enying or limiting benefits accruing to members in a real estate brokers’ organization . . . (3) [i]mposing different standards or criteria for membership in a real-estate sales or rental organization . . . [or] (4) [e]stablishing geographic boundaries or office location or residence requirements for access to or membership or participation in any multiple listing service, real estate brokers’ organization or other service . . . because of race, color, religion, sex, handicap, familial status, or national origin.” *Id.*

¹⁸ 42 U.S.C. § 3617. Violations of this section include: “(1) coercing a person . . . to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction . . . (2) [t]hreatening, intimidating, or interfering with persons in their enjoyment of a dwelling . . . (3) [t]hreatening an employee or agent with dismissal or adverse action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction . . . (4) [i]ntimidating or threatening any person because that person is engaging in activities designed to make other persons aware of [their fair housing rights, or] . . . (5) [r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in a proceeding under the Fair Housing Act.” 24 C.F.R. § 100.400.

¹⁹ See, e.g., *Hawkins v. HUD*, 16 F.4th 147 (5th Cir. 2021); *NAACP v. Sec’y of HUD*, 817 F.2d 149 (1st Cir. 1987).

²⁰ *Thompson v. HUD*, 348 F. Supp. 2d 398, 524 (D. Md. 2005).

²¹ 42 U.S.C. § 3603(b)(1). Other requirements include the condition that the house be sold or rented without a broker and without advertising. HUD regulations explain that advertising indicating a discriminatory preference or limitation is prohibited under the Act even when such discrimination itself is not. 24 C.F.R. § 100.10(c).

- also inapplicable to units in dwellings that are intended for four or fewer families when the property owner resides in one of the units.²²
- **Private clubs, religious organizations, and retirement communities.** In addition, the Act does not bar a religious group or a nonprofit entity run by a religious group “from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preferences to such persons, unless membership in such religion is restricted on account of race, color, or national origin.”²³ The Act also does not prevent a private club “from limiting the rental or occupancy of [] lodgings to its members or from giving preference to its members” if those lodgings are not being run for a commercial purpose.²⁴ As discussed below in “Familial Discrimination and Housing for Older Persons,” *housing for older persons*, as the term is defined by the Act, is exempted from the FHA’s proscription of discrimination on the basis of familial status. In other words, housing that is intended for individuals over the age of fifty-five and meets various other conditions established by the FHA may exclude families with children.²⁵
 - **Zoning and occupancy standards.** The FHA does not “limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”²⁶ In 1995, the Supreme Court considered the issue of zoning restrictions in the context of group homes for individuals with disabilities. In *City of Edmonds v. Oxford House, Inc.*,²⁷ a group home for ten to twelve adults recovering from alcoholism and drug addiction was cited for violating a city ordinance because it was located in a neighborhood zoned for single-family residences. The ordinance in question defined “family” as “persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons.”²⁸ The Supreme Court held that the FHA’s reasonable occupancy limit exemption did not apply because the ordinance’s definition of “family” was not a restriction regarding “the maximum number of occupants’ a dwelling may house.”²⁹ Instead, the Court concluded that the ordinance, by setting a numerical ceiling for unrelated occupants but not related occupants, was designed to preserve the “family character of [] neighborhood[s].”³⁰ As a result, the Court held that the ordinance was not exempt from the FHA’s prohibition against disability discrimination.³¹

²² 42 U.S.C. § 3603(b)(2). The FHA’s advertising restrictions still apply to these owner-occupied scenarios. 24 C.F.R. § 100.10(c).

²³ 42 U.S.C. § 3607(a).

²⁴ *Id.*

²⁵ *Id.* § 3607(b).

²⁶ *Id.* § 3607(b)(1).

²⁷ 514 U.S. 725 (1995).

²⁸ *Id.* at 728 (citation omitted).

²⁹ *Id.* (quoting 42 U.S.C. § 3607(b)(1)).

³⁰ *Id.*

³¹ *Id.* The Court did not decide whether or not this ordinance actually violated the FHA. *Id.* at 738. The FHA does not prevent zoning ordinances that restrict group homes occupied by individuals who are not of a protected class, such as fraternity students.

Additionally, in response to concerns that occupancy limits could conflict with the prohibition against familial status discrimination, Congress enacted Section 589 of the Quality Housing and Work Responsibility Act of 1998.³² This legislation required HUD to adopt the standards specified in a HUD general counsel memorandum dated March 20, 1991,³³ which states that housing owners and managers have discretion to “implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the housing unit.”³⁴ HUD concluded that “an occupancy policy of two persons in a bedroom, as a general rule, is reasonable” under the FHA.³⁵

Evaluation of Discrimination Claims

FHA discrimination claims fall into two broad categories: (1) *intentional*, also referred to as *disparate treatment discrimination*, and (2) *discriminatory effect*. Courts apply different legal tests to assess the validity of intentional- versus effect-discrimination claims. Disparate treatment claims allege that a defendant made a covered housing decision based on “a discriminatory intent or motive.”³⁶ Discriminatory effect claims, in contrast, involve allegations that a facially neutral housing practice “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.”³⁷ These two categories of discrimination are explored in turn.

Disparate Treatment/Intentional Discrimination

Intentional discrimination claims under the FHA can be supported through either (1) direct evidence of discrimination or (2) indirect, circumstantial evidence. Courts apply different legal tests to assess claims based on direct and indirect evidence. Additionally, courts apply a different legal framework to assess a subset of disparate treatment claims involving statutes or local ordinances that discriminate on their face against a protected class.³⁸

Direct Evidence

“Direct evidence is evidence ‘showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding . . . that an illegitimate criterion

³² Pub. L. No. 105-276, § 589, 112 Stat. 2518, codified at 42 U.S.C. § 3608 note.

³³ Memorandum from Frank Keating, HUD Gen. Couns., to all HUD Reg’l Couns. (Mar. 20, 1991) (reprinted at 63 Fed. Reg. 70983–87). *See also* Fair Housing Enforcement—Occupancy Standards; Notice of Statement of Policy, 63 Fed. Reg. 70982 (Dec. 18, 1998).

³⁴ *Id.* at 70984.

³⁵ *Id.*

³⁶ 24 C.F.R. § 100.500(a); *see also* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

³⁷ Tex. Dep’t of Hous. & Cmty Affairs v. Inclusive Communities Project, 576 U.S. 519, 524 (2015) (quoting Ricci v. DeStafano, 557 U.S. 557, 577 (2009)).

³⁸ Larkin v. Mich. Prot. and Advoc. Serv., 89 F.3d 285, 289 (6th Cir. 1996); Bangerter v. Orem City Corp. 46 F.3d 1491, 1501 (10th Cir. 1995); *see also* Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson, 499 U.S. 187, 199 (1991) (holding the same in the Title VII employment discrimination context). Some courts treat this as a distinct category of discrimination. *See, e.g.,* Potomac Grp. Home Corp. v. Montgomery Cnty, 823 F. Supp. 1285, 1295 (D. Md. 1993).

actually motivated the adverse [decision].”³⁹ Direct evidence of discrimination can include openly discriminatory statements of hostility expressed by a landlord regarding a tenant’s race or other protected basis or housing policies that, on their face, treat members of a protected class less favorably than others, such as a landlord advertising a “no child” policy.⁴⁰ When a plaintiff provides sufficient direct evidence to support an intentional discrimination claim, the defendant, to avoid liability under the FHA, generally has the burden of proving by a preponderance of the evidence⁴¹ that it would have denied or revoked the housing benefit regardless of the discrimination. In other words, the defendant would have to prove that, regardless of the discrimination, the housing benefit would have been denied or revoked for nondiscriminatory reasons anyway.⁴²

Indirect or circumstantial evidence is evidence that supports a conclusion that something did or did not occur.⁴³ Indirect evidence of discrimination can include evidence of a landlord continuing to show an apartment to prospective White tenants after telling a Black family that the apartment was no longer available for rent.⁴⁴ FHA disparate treatment claims based on circumstantial evidence from which discrimination may be inferred are evaluated under the so-called *McDonnell Douglas*⁴⁵ burden-shifting framework. Under *McDonnell Douglas*, the initial burden rests with the plaintiff to establish a prima facie case of intentional discrimination by a preponderance of the evidence.⁴⁶ A plaintiff can establish a prima facie case by evidencing that (a) the plaintiff is a member of a protected class; (b) the plaintiff is qualified for a covered housing-related service or activity (e.g., housing rental or purchase); (c) the plaintiff had a housing-related service or activity denied or a housing benefit revoked by the defendant; and (d) the relevant housing-related service or activity remained available after it was revoked or denied.⁴⁷

If a plaintiff makes a prima facie case, then the burden shifts to the defendant to provide evidence that it revoked or denied the housing benefit to further a legitimate, nondiscriminatory purpose. The Supreme Court has noted that “[t]he explanation provided must be legally sufficient to justify

³⁹ *Gallagher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010) (quoting *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004); see also *Kormoczy v. Sec’y, HUD*, 53 F.3d 821, 824 (7th Cir. 1995) (“Direct evidence is that which can be interpreted as an acknowledgment of the defendant’s discriminatory intent.”).

⁴⁰ See Memorandum from Jeanine M. Worden, HUD Assoc. Gen. Couns. for Fair Housing, to Timothy Smyth, HUD Deputy Assistant Sec’y for Enf’t Programs 1–2 (Sep. 4, 2018) (citing *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007)), <https://www.hud.gov/sites/dfiles/FHEO/images/AJElementsofproofmemocorrected.pdf> (“A facially discriminatory policy is one which on its face applies less favorably to a protected group”); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500–01 (10th Cir. 1995) (facially discriminatory policy imposed conditions that applied only to group homes for persons with disabilities).

⁴¹ *Preponderance of the Evidence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force.”).

⁴² *Kormoczy*, 53 F.3d at 824 (“[O]nce the plaintiff demonstrates disparate treatment through the direct method, a defendant must prove by a preponderance of the evidence that it would have made the same decision absent the impermissible factor.”).

⁴³ See Memorandum from Jeanine M. Worden, *supra* note 40, at 2.

⁴⁴ *Id.*

⁴⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* is an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, but courts have applied it to the FHA as well. See, e.g., *2922 Sherman Ave. Tenants’ Ass’n v. District of Columbia*, 444 F.3d 673, 682 (D.C. Cir. 2006); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536–38 (9th Cir. 2003); *Kormoczy*, 53 F.3d at 823–24.

⁴⁶ *McDonnell Douglas*, 411 U.S. at 802.

⁴⁷ See *id.*; *2922 Sherman Ave. Tenants’ Ass’n*, 444 F.3d at 682 (collecting cases applying *McDonnell Douglas*’s burden-shifting framework to FHA disparate treatment claims).

a judgment for the defendant.”⁴⁸ The justification requires actual evidence and must be more than “an answer to the complaint or [an] argument by counsel.”⁴⁹ If the defendant is able to meet this burden, then the plaintiff can still prevail by showing, based a preponderance of the evidence, that the stated purpose for the denial or revocation was really just a pretext for discrimination.⁵⁰

Facially Discriminatory Law

Laws that explicitly differentiate between a protected class and unprotected groups are generally “characterized as claims of intentional discrimination.”⁵¹ (These types of claims frequently come up in the context of local zoning laws that impact group homes, which are discussed in the “Group Homes and Zoning Restrictions” section of this report.) As the Supreme Court has explained in the analogous Title VII of the Civil Rights Act of 1964 employment context, “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”⁵² Plaintiffs, therefore, establish a prima facie case of intentional discrimination by simply proving that the law in question treats an FHA-protected class differently.⁵³

Upon meeting this burden, the federal courts of appeals are split as to which of two disparate treatment tests defendants must meet. A minority of courts, including the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit), applies a rational basis test, which merely requires the defendant town or city to show there is a legitimate, nondiscriminatory purpose for classification (or denial from a variance) on the basis of an FHA-protected class.⁵⁴ This test is a relatively low burden to meet. The majority rule, which is followed by the U.S. Courts of Appeals for the Sixth (Sixth Circuit), Ninth, and Tenth Circuits, on the other hand, requires the defendant to meet a more exacting test—to show that the justification for the facial discrimination is (1) beneficial to the members of the protected class or (2) reasonably related to a matter of public safety that is “tailored to the particularized concerns [of the] individual residents” that are targeted by the law in question.⁵⁵

⁴⁸ *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 (1981).

⁴⁹ *Id.* at 255 n.9 (“An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.”).

⁵⁰ *McDonnell Douglas*, 411 U.S. at 804.

⁵¹ *Bangerter v. Orem City Corp.* 46 F.3d 1491, 1500–01 (10th Cir. 1995).

⁵² *United Auto. Workers v. Johnson Controls, Inc.* 499 U.S. 187, 199 (1991).

⁵³ *Bangerter*, 46 F.3d at 1500–01.

⁵⁴ *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251–52 (8th Cir. 1996). This test is adapted from one applicable to constitutional claims under the Equal Protection Clause. Some courts have criticized the Eighth Circuit’s rational basis test because (1) FHA claims are based in statute, not the Constitution; (2) the FHA protects classes that are not protected under the Equal Protection Clause (e.g., individuals with disabilities, families with children); and (3) it seems at odds with the Supreme Court’s treatment of analogous claims in the Title VII context. *See, e.g., Johnson Controls*, 499 U.S. at 211; *Cmty. House v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007).

⁵⁵ *Bangerter*, 46 F.3d at 1503; *see also Cmty. House*, 490 F.3d at 1050 (“The Sixth and Tenth Circuits employ a more searching method of analysis. To allow the circumstance of facial discrimination under the Sixth and Tenth Circuits’ approach, a defendant must show either: (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. We will follow the standard adopted by the Sixth and Tenth Circuits, which standard is, we believe, more in line with the Supreme Court’s analysis in *Johnson Controls*.”); *Larkin v. Mich. Prot. & Advoc. Serv.*, 89 F.3d 285, 291 (6th Cir. 1996) (“Therefore, in order for facially discriminatory statutes to survive a challenge under the FHAA [i.e., the Fair Housing Amendments Act of 1988], the defendant must demonstrate that they are ‘warranted by the unique and specific needs and abilities of those [disabled] persons’ to whom the regulations apply.” (quoting *Bangerter*, 46 F.3d at 1503–04)).

Discriminatory Effects

In addition to barring intentional discrimination, HUD and courts have historically recognized that the FHA also bars housing actions that have a *discriminatory effect* because they either result in a disparate impact on a protected class (i.e., *disparate impact*) or perpetuate segregation (i.e., *segregative effect*).⁵⁶ However, the viability of discriminatory effect claims under the FHA was indirectly called into question by the Supreme Court’s 2005 decision *Smith v. City of Jackson, Mississippi*⁵⁷—a case involving the federal Age Discrimination in Employment Act of 1967 (ADEA). *Smith* prompted a number of legal challenges questioning whether discriminatory effect claims remain cognizable under the FHA, culminating in a 2015 Supreme Court decision confirming that they are viable,⁵⁸ as well as conflicting rulemakings on the subject by HUD during the Obama, Trump, and Biden Administrations.

This section provides an overview of these legal challenges, judicial decisions, and varying rulemakings, which is followed by a legal analysis of disparate impact and segregative effect claims.

Discriminatory Effects: Litigation and Administrative Actions

In *Smith*, the Court held that the ADEA supports discriminatory effect claims in part because the law expressly prohibits actions that “adversely affect” a protected class.⁵⁹ Due to the absence of the same statutory language in the FHA, various court decisions following *Smith* raised questions about whether the Act supports discriminatory effect claims and, if it does, what test courts should apply to evaluate them.⁶⁰ This uncertainty sparked conflicting regulations issued by HUD

⁵⁶ *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *see also* 24 C.F.R. § 100.500(a) (“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.”). Courts often refer to discriminatory effect and disparate impact claims interchangeably. *See, e.g.,* *Tx. Dept. of Hous. & Cmty. Aff. v. Inclusive Cmities.*, 576 U.S. 519, 536–37 (2015); *but see* Implementation of the FHA’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) (distinguishing segregative effect and disparate impact claims under the larger rubric of discriminatory effect claims). This might be, in part, because segregative effect claims appear to be unique to housing-based discrimination laws, whereas disparate impact claims apply to a broader array of discrimination laws, such as the employment-based Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. This report uses the term *discriminatory effect* to encompass both disparate impact and segregative effect claims except when quoting judicial opinions.

⁵⁷ 544 U.S. 228 (2005).

⁵⁸ *Inclusive Cmities.*, 576 U.S. at 519.

⁵⁹ *Id.* at 235–38.

⁶⁰ *See, e.g.,* *Am. Ins. Assoc. v. HUD*, 74 F. Supp. 3d 30 (D.D.C. 2014) (interpreting the FHA as prohibiting only intentional discrimination, not discriminatory effects, and vacating HUD’s 2013 rule). The district court’s decision was subsequently vacated and remanded for reconsideration in accordance with the Supreme Court’s *Inclusive Communities* ruling. *Am. Ins. Assoc. v. HUD*, No. 14-5321, 2015 WL 14038463 (D.C. Cir. Sept. 23, 2015) (per curiam). Before *Inclusive Communities*, the Supreme Court had previously granted certiorari in two different cases to address whether disparate impact claims were cognizable under the FHA, but the parties in both cases settled outside of court before Supreme Court decisions were issued. *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 570 U.S. 904 (2013); *Magner v. Gallagher*, 565 U.S. 1013 (2011). Both cases were dismissed before the Court heard any argument. *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 571 U.S. 1023 (2013); *Magner v. Gallagher*, 565 U.S. 1187 (2012).

under the successive Obama,⁶¹ Trump,⁶² and Biden Administrations,⁶³ the first two of which prompted litigation. The uncertainty over discriminatory effect liability under the FHA also percolated in separate lawsuits, one of which the Supreme Court ultimately ruled on in 2015. HUD's differing regulations and ensuing litigation challenging those regulations, as well as the intervening Supreme Court opinion in 2015, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,⁶⁴ are addressed in turn.

HUD's Dueling Regulations

Amidst the uncertainty regarding discriminatory effect discrimination under the FHA following the Supreme Court's *Smith* opinion,⁶⁵ HUD, for the first time in February 2013 during the Obama Administration, issued regulations to "formalize HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the Fair Housing Act and to provide nationwide consistency in the application of that form of liability."⁶⁶ In 2014, a federal district court briefly vacated the 2013 discriminatory effect rule after holding that discriminatory effect claims are not cognizable under the FHA and that HUD had exceeded its statutory authority in issuing the rule.⁶⁷ While the appeal of that district court decision was pending, the Supreme Court issued the *Inclusive Communities* decision.⁶⁸

Inclusive Communities

The *Inclusive Communities* Court held that discriminatory effect claims are cognizable under the FHA.⁶⁹ The Court's decision did not expressly adopt the discriminatory effect test implemented by HUD's 2013 rule; rather, the Court referenced the 2013 rule and adopted a three-step burden-shifting test using language similar, but not identical, to the 2013 rule.⁷⁰ In so doing, the Court cautioned that discriminatory effect claims must rely on more than just "a statistical disparity,"⁷¹ stressed the need for courts to impose a "robust causality requirement,"⁷² and noted that remedies for discriminatory effect violations "that impose racial targets or quotas might raise [] difficult constitutional questions."⁷³

⁶¹ Implementation of the FHA's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

⁶² HUD's Implementation of the FHA's Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

⁶³ Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19450-19500 (Mar. 31, 2023) (to be codified at 24 C.F.R. pt. 100).

⁶⁴ *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmities. Project, Inc.* 576 U.S. 519 (2015).

⁶⁵ *See Smith*, 544 U.S. at 235–38.

⁶⁶ Implementation of the FHA's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

⁶⁷ *Am. Ins. Assoc.*, 74 F. Supp. 3d at 32 (interpreting the FHA as only prohibiting intentional discrimination, not discriminatory effects, and vacating HUD's 2013 rule), *vacated by Am. Ins. Assoc. v. HUD*, No. 14-5321, 2015 WL 14038463 (D.C. Cir. Sept. 23, 2015) (per curiam).

⁶⁸ 576 U.S. 519 (2015).

⁶⁹ *Id.* at 545.

⁷⁰ *Id.* at 531–45.

⁷¹ *Id.* at 521.

⁷² *Id.* at 542.

⁷³ *Id.* at 545.

To support its interpretation of the FHA, the Court began its analysis with two prior cases: *Smith*⁷⁴ and *Griggs v. Duke Power Co.*,⁷⁵ which the Court described as providing “essential background and instruction in the case now before the Court.”⁷⁶ In *Smith* and *Griggs*, the Court interpreted the ADEA and Title VII of the Civil Rights Act of 1964, respectively, as permitting discriminatory effect claims. The Court reasoned that both statutes contain language that focuses not just on the intent or motivation of employers but also on the discriminatory consequences or effects of their actions.⁷⁷ Similar to the ADEA and Title VII, FHA Section 804(a) makes it unlawful to “refuse to sell or rent . . . 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.”⁷⁸ The Court stated that “the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses discriminatory effect claims . . . [because] Congress’ use of the phrase ‘otherwise make unavailable’ refers to the consequences of an action rather than the actor’s intent.”⁷⁹

The Court added that this conclusion is bolstered by the fact that Congress amended the FHA in 1988 to establish three exemptions to discriminatory effect liability without making any changes to the statutory language that previous courts had relied upon to conclude that discriminatory effect claims were cognizable under the Act. “In short, the 1988 amendments signal that Congress ratified disparate-impact liability.”⁸⁰

After concluding that the FHA supports discriminatory effect claims, the Court provided guidance on how discriminatory effect claims should be assessed. The Court made clear that, before a plaintiff can establish a prima facie case of discriminatory effect based on a statistical disparity, courts should apply a “robust causality requirement” that requires the plaintiff to prove that a policy or decision led to the disparity.⁸¹ The Court stressed that a careful examination of the plaintiff’s causality evidence should be made at preliminary stages of litigation to avoid “the inject[ion of] racial considerations into every housing decision;” the erection of “numerical quotas” and similar constitutionally dubious outcomes; the imposition of liability on defendants for disparities that they did not cause; and unnecessarily protracted litigation that might dissuade the development of housing for the poor, which would “undermine [the FHA’s] purpose as well as the free-market system.”⁸²

The Court emphasized that discriminatory effect claims should be further limited by ensuring that defendants, whether private developers or governmental actors, have the ability to counter a prima facie case with evidence that the policy or decision in question is “necessary to achieve a valid interest.”⁸³ Further, the Court indicated that such policies should stand unless the “plaintiff has shown that there is an available alternative . . . practice that has less disparate impact and serves the [defendant’s] legitimate needs.”⁸⁴ The Court explained that the “cautionary standards”

⁷⁴ 554 U.S. 228 (2005) (plurality opinion).

⁷⁵ 401 U.S. 424 (1971).

⁷⁶ *Inclusive Cmities.*, 576 U.S. at 532.

⁷⁷ *Id.*

⁷⁸ *Id.* at 533 (emphasis added) (quoting 42 U.S.C. § 3604(a)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 538.

⁸¹ *Id.* at 542.

⁸² *Id.* at 544.

⁸³ *Id.* at 541.

⁸⁴ *Id.* at 533 (citation omitted). The Court did not expressly state that, in the FHA context, the burden at step three (continued...)

articulated in *Inclusive Communities* are intended to ensure that “disparate-impact liability [does not] displace valid governmental and private priorities, rather than solely ‘remov[ing] . . . artificial, arbitrary, and unnecessary barriers.’”⁸⁵

Shortly after the Supreme Court’s *Inclusive Communities* decision, the U.S. Court of Appeals for the D.C. Circuit vacated the district court’s decision that had vacated HUD’s 2013 discriminatory effect regulations and remanded proceedings for reconsideration in accordance with *Inclusive Communities*.⁸⁶

Subsequently, HUD, under the Trump Administration, began a rulemaking process to modify the 2013 discriminatory effect rule “to better reflect the Supreme Court’s 2015 [*Inclusive Communities*] ruling.”⁸⁷ This process culminated in a final rule issued in September 2020 that would have significantly altered the 2013 rule by, among other things, imposing new pleading requirements on plaintiffs to maintain a prima facie discriminatory effect claim and establishing new defenses that a defendant could use to rebut discriminatory effect claims.⁸⁸ Shortly after the rule’s issuance, however, housing advocates filed a lawsuit in federal district court alleging that the 2020 rule should be set aside because it was an arbitrary and capricious interpretation of the law in violation of the Administrative Procedure Act.⁸⁹ Before the 2020 rule went into effect, the district court issued a preliminary injunction prohibiting HUD from implementing and enforcing that rule, which had the effect of keeping the 2013 rule in place.⁹⁰

The district court explained that the 2020 rule constituted a “massive overhaul” of the 2013 rule by “introducing new, onerous pleading requirements,” “easing the burden on defendants of justifying a policy with discriminatory effect while at the same time rendering it more difficult for plaintiffs to rebut that justification,” and “arm[ing] defendants with broad new defenses.”⁹¹ In the court’s view, these alterations “weaken[ed], for housing discrimination victims and fair housing organizations, disparate impact liability under the Fair Housing Act.”⁹² HUD argued that these changes were justified because they brought the rule into alignment with *Inclusive Communities* and provided “greater clarity to the public.”⁹³ The court concluded that these major changes, which ran “the risk of effectively neutering disparate impact liability under the Fair Housing Act, appear[ed] inadequately justified” and “accomplish[ed] the opposite of clarity.”⁹⁴ Consequently, the court held that the plaintiffs demonstrated “a substantial likelihood of success on the merits as to their claim that the 2020 Rule [wa]s arbitrary and capricious” under the Administrative Procedure Act.⁹⁵

should be on the plaintiff to prove the existence of a less discriminatory alternative. Instead, it stated that the plaintiff carries the burden of the third step in the burden-shifting tests applied in Title VII and ADEA cases and that the “cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.” *Id.*

⁸⁵ *Id.* at 539 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)),

⁸⁶ *Am. Ins. Assoc. v. HUD*, No. 14-5321, 2015 WL 14038463 (D.C. Cir. Sept. 23, 2015) (per curiam).

⁸⁷ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

⁸⁸ *Id.*

⁸⁹ *Mass. Fair Hous. Ctr. v. HUD*, 496 F. Supp. 3d 600, 603 (D. Mass. 2020).

⁹⁰ *Id.* at 612.

⁹¹ *Id.* at 606–08.

⁹² *Id.* at 606.

⁹³ *Id.* at 610.

⁹⁴ *Id.* at 611.

⁹⁵ *Id.*

Within his first month of taking office, President Biden issued a memorandum directing HUD to “take all steps necessary to examine the effects” of the 2020 rule.⁹⁶ HUD responded to this presidential directive by voluntarily dismissing its appeal of the federal district court’s injunction⁹⁷ and proposing a regulation that would recodify the 2013 rule and effectively rescind the 2020 rule.⁹⁸ In the proposed rule issued on June 25, 2021, HUD expressed its belief “that the practical effect of the 2020 Rule’s amendments” was “to severely limit HUD’s and plaintiffs’ use of the discriminatory effects framework in ways that substantially diminish[ed] that framework’s effectiveness in accomplishing the purposes that *Inclusive Communities* articulated.”⁹⁹ HUD further explained that “the 2013 Rule has provided a workable and balanced framework for investigating and litigating discriminatory effects claims that is consistent with the Act, HUD’s own guidance, *Inclusive Communities*, and other jurisprudence.”¹⁰⁰

In March 2023, HUD issued a final rule reinstating the 2013 rule.¹⁰¹

Disparate Impact Three-Step Burden-Shifting Test

As described above, to support a prima facie disparate impact claim under the FHA, a plaintiff, at step one, must prove that a challenged, facially neutral housing policy caused or will predictably cause a disparate effect on a protected class.¹⁰² According to the Supreme Court’s *Inclusive Communities* decision, disparate impact claims must identify a generally applicable policy—not a one-time, individual decision or action¹⁰³—that imposes “artificial, arbitrary, and unnecessary barriers.”¹⁰⁴ Such challenged policies can be implemented by either governmental or private parties.¹⁰⁵

A disparate impact claim must generally be supported by statistical evidence and documentation showing that the policy in question *caused* or *will predictably cause* the statistical disparity on the individuals in a protected class as compared to similarly situated members of a nonprotected class.¹⁰⁶ The statistics must show not only how a subset of a protected class was negatively affected by the challenged policy but also how other “appropriate comparison groups” were

⁹⁶ Memorandum of Jan. 26, 2021, Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 29, 2021).

⁹⁷ Judgment, Mass. Fair Hous. Ctr. v. HUD, No 21-1003 (1st Cir. Feb. 18, 2021) (unpublished order).

⁹⁸ Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590 (June 25, 2021).

⁹⁹ *Id.* at 33594.

¹⁰⁰ *Id.*

¹⁰¹ Reinstatement of HUD’s Discriminatory Effects Standard, 88 Fed. Reg. 19450-19500 (Mar. 31, 2023) (to be codified at 24 C.F.R. pt. 100).

¹⁰² 24 C.F.R. § 100.500(a), (c)(1); Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmities. Project, Inc., 576 U.S. 519, 537 (2015).

¹⁰³ *Inclusive Cmities.*, 576 U.S. at 538 (“A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.”) (emphasis added); see also Nadiyah J. Humber, *A Home for Digital Equity: Algorithmic Redlining and Property Technology*, 111 CAL. L. REV. 1421 (2023); Robert G. Schwemm and Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases after Inclusive Communities*, 19 Legis. & Pub. Pol’y 685, 693 (2016).

¹⁰⁴ *Inclusive Cmities.*, 576 U.S. at 538 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

¹⁰⁵ *Id.*

¹⁰⁶ 24 C.F.R. § 100.500(a); *Inclusive Cmities.*, 576 U.S. at 544.

relatively less impacted by the policy.¹⁰⁷ Additionally, courts require that the statistical disparities be “significant,”¹⁰⁸ although they have not established a bright-line rule for how large the disparity must be.¹⁰⁹

If the plaintiff meets her burden at step one, then the burden shifts to the defendant at step two to prove that the challenged policy “is necessary to achieve a valid interest.”¹¹⁰ If the defendant meets its burden at step two, a plaintiff can still prevail by showing at step three that the defendant’s valid interest “could be served by another practice that has a less discriminatory effect.”¹¹¹

Segregative Effect Three-Step Burden-Shifting Test

HUD’s regulations define a discriminatory segregative effect as a housing policy or practice that “actually or predictably . . . creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”¹¹² In developing this definition, HUD looked to more than a dozen federal courts of appeals decisions,¹¹³ determining that “every federal court of appeals to have addressed the issue has agreed with HUD’s interpretation that the Act prohibits practices with the unjustified effect of perpetuating segregation.”¹¹⁴

To make a prima facie case of a segregative effect, a plaintiff must show, at step one, that a challenged housing policy or decision actually or predictably will create or exacerbate segregation.¹¹⁵ Like a disparate impact claim, the plaintiff must generally rely on statistical evidence that shows that the housing practice or decision substantially caused or exacerbated segregation.¹¹⁶ As a result, “most perpetuation-of-segregation claims have been made against municipal defendants accused of blocking integrated housing developments in predominantly white areas.”¹¹⁷ Thus, the statistical disparity involves a relative comparison of integration in a

¹⁰⁷ *Tsombanidis v. West Haven Fire Dep’t*, 352 F.3d 565, 576–77 (2d Cir. 2003) (“Whether using statistics or some other analytical method, plaintiffs must also utilize the appropriate comparison groups. They must first identify members of a protected group that are affected by the neutral policy and then identify similarly situated persons who are unaffected by the policy.”); see also Schwemm & Bradford, *supra* note 103, at 698.

¹⁰⁸ Schwemm & Bradford, *supra* note 103, at 699 (quoting *Tsombanidis*, 352 F.3d at 576).

¹⁰⁹ *Id.* at 699–700, 706–07.

¹¹⁰ *Inclusive Cmities.*, 576 U.S. at 537; see also 24 C.F.R. § 100.500(c)(2) (“[T]he respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”). This valid interest standard is the housing equivalent to the “business necessity” standard under Title VII employment discrimination claims. *Inclusive Cmities.*, 576 U.S. at 537.

¹¹¹ 24 C.F.R. § 100.500(c)(3); see also *Inclusive Cmities.*, 576 U.S. at 533 (housing policies should stand unless the “plaintiff has shown that there is an available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.”).

¹¹² 24 C.F.R. § 100.500(a).

¹¹³ Implementation of the FHA’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11468 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100); see also Schwemm & Bradford, *supra* note 103, at 691 (“The Supreme Court’s 2015 decision in *Inclusive Communities* endorsed FHA disparate-impact claims, but did not deal with—indeed, barely mentioned—the segregative-effect theory. . . . This is not to say that segregative-effect claims are now on shaky ground. To the contrary, based on the 2013 HUD regulation and *Inclusive Communities*’ recognition that the FHA is designed to foster integration, such claims have a strong foundation” (internal citations omitted)).

¹¹⁴ Implementation of the FHA’s Discriminatory Effects Standard, 78 Fed. Reg. at 11468.

¹¹⁵ 24 C.F.R. § 100.500(c)(1).

¹¹⁶ Humber, *supra* note 103, at 1468–69.

¹¹⁷ Schwemm & Bradford, *supra* note 103, at 691.

particular geographic area. In contrast to disparate impact claims, segregative effect claims can hinge on one-time decisions in addition to broad-based policies.¹¹⁸

Steps two and three of the burden-shifting test applicable to segregative effect claims are the same as those applicable to disparate impact claims. If the plaintiff meets her burden at step one, then the burden shifts to the defendant at step two to prove that the challenged policy or decision “is necessary to achieve a valid interest.”¹¹⁹ If the defendant meets its burden at step two, a plaintiff can still prevail by showing at step three that the defendant’s valid interest “could be served by another practice that has a less discriminatory effect.”¹²⁰

Affirmatively Furthering Fair Housing Standards

In addition to prohibiting discrimination, the FHA imposes a broad mandate on HUD and all other federal “executive departments and agencies [to] administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of” the FHA.¹²¹ The statute does not elaborate more on this mandate, which is known as *affirmatively furthering fair housing* (AFFH). Various court decisions involving HUD’s obligations under the mandate have concluded that it means more than refraining from discrimination.¹²² A 1987 federal appellate court decision examined the FHA’s legislative history and concluded that the “law’s supporters saw the ending of discrimination as a means toward truly opening the nation’s housing stock to persons of every race and creed.”¹²³ With that goal in mind, the court stated, “This broader goal suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”¹²⁴

HUD has applied the AFFH requirement to states and localities that receive certain HUD grant funds (*state and local grantees*) and public housing authorities (collectively called *program participants*), first through program guidance and then through regulations. The Obama, Trump,

¹¹⁸ *Id.*; see, e.g., *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974) (“There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white.”); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–10 (1972) (“[T]he alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations.”).

¹¹⁹ *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmities. Project, Inc.* 576 U.S. 519, 537 (2015); see also 24 C.F.R. § 100.500(c)(2) (“the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”). This valid interest standard is the housing-equivalent to the “business necessity” standard under Title VII employment discrimination claims. *Inclusive Cmities.*, 576 U.S. at 537.

¹²⁰ 24 C.F.R. § 100.500(c)(3); see also *Inclusive Cmities.*, 576 U.S. at 533 (housing policies should stand unless the “plaintiff has shown that there is an available alternative . . . practice that has less disparate impact and serves the [defendant’s] legitimate needs.”).

¹²¹ 42 U.S.C. § 3608(d).

¹²² See, e.g., *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (“Finally, every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposefully aiding discrimination by others.)”; *Nat’l Fair Hous. Alliance v. Carson*, 330 F. Supp. 3d 14, 25 (D.D.C. 2015) (stating the same).

¹²³ *NAACP*, 817 F.2d at 155.

¹²⁴ *Id.*

and Biden Administrations have implemented the mandate differently. AFFH rules have been controversial, and in past Congresses, legislation has been introduced to curb their application.¹²⁵

The Obama Administration issued the first AFFH regulations in 2015 (2015 Rule).¹²⁶ The 2015 Rule defined AFFH as “taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”¹²⁷ Under the 2015 Rule, HUD program participants were required to file reports on their local communities’ fair housing needs to HUD.¹²⁸ These reports, called Assessments of Fair Housing, required a review of housing-related data received by HUD and responses to around 100 questions developed by HUD, as well as the assessment of approximately forty contributing factors for every fair-housing-related concern identified by a program participant.¹²⁹

In May 2018 during the Trump Administration, HUD suspended implementation of the 2015 Rule and in August 2020 issued a new final rule (2020 Rule) that repealed and replaced the 2015 Rule.¹³⁰ The 2020 Rule, which went into effect on September 8, 2020, cited concerns including, among others, the 2015 Rule’s complexity, compliance and implementation costs to program participants and HUD, and federalization of local housing decisionmaking.¹³¹ The 2020 Rule redefined AFFH as “tak[ing] any action rationally related to promoting any attribute or attributes of fair housing.”¹³² The 2020 Rule required state and local grantees to certify that they satisfied the AFFH requirement, which HUD would accept “if the grantee has taken some active step to promote fair housing.”¹³³ The rule did not require certifications from public housing authorities.

In January 2021, President Biden issued a presidential memorandum to HUD, directing the agency to “take all steps necessary to examine the effects of the [2020 Rule] . . . including the effect that repealing [the 2015 Rule] has had on HUD’s statutory duty to affirmatively further fair housing.”¹³⁴ In response, HUD published an interim final rule in June 2021 (2021 Interim Final Rule) that rescinded the 2020 Rule and reinstated certain aspects of the 2015 Rule, including its definition of AFFH.¹³⁵

¹²⁵ For example, in the 114th Congress, the Local Zoning Decisions Protection Act of 2015 (S. 1909) would have prohibited federal funds from being used to administer, implement, or enforce the AFFH rule. (Similar versions were introduced in the 115th Congress.) In the 115th Congress, the Restoring Fair Housing Protections Eliminated by HUD Act of 2018 (H.R. 6220) would have reinstated the Obama Administration AFFH rule. In the 116th Congress, the Economic Justice Act (S. 5065) would have repealed the Trump Administration rule.

¹²⁶ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42353 (July 16, 2015) (to be codified in scattered sections of 24 C.F.R.).

¹²⁷ *Id.* at 42353.

¹²⁸ *Id.* at 42355–56.

¹²⁹ Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8518 (Feb. 9, 2023) (to be codified in scattered sections of 24 C.F.R.).

¹³⁰ Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899 (Aug. 7, 2020) (to be codified in scattered sections of 24 C.F.R.).

¹³¹ *Id.* at 47900–01.

¹³² *Id.* at 47905.

¹³³ *Id.* at 47902.

¹³⁴ Memorandum of Jan. 26, 2021, Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 29, 2021).

¹³⁵ Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779, 30783 (Jun. 10, 2021).

In January 2023, HUD issued a proposed rule that would replace the 2021 Interim Final Rule and reinstate additional aspects of the 2015 Rule while establishing a compliance process intended to be less onerous for program participants.¹³⁶

Selected Types of Housing Discrimination

This section addresses several different types of discrimination that have been the source of a significant number of legal disputes or otherwise raise complex legal issues under the FHA.

Discrimination Based on Sex, Sexual Orientation, and Gender Identity

The FHA prohibits discrimination based on an individual’s sex but does not expressly bar discrimination on the basis of sexual orientation or gender identity. However, citing a Supreme Court ruling involving an analogous anti-discrimination statute, HUD has interpreted the Act’s sex-based protections as encompassing sexual orientation and gender identity.¹³⁷

In the 2020 opinion *Bostock v. Clayton County*, the Supreme Court ruled that Title VII of the Civil Rights Act of 1964’s prohibition against sex-based discrimination in the workplace encompasses discrimination because an individual is gay or transgender.¹³⁸ The *Bostock* Court explained that “homosexuality and transgender status are inextricably bound up with sex. . . [so] to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”¹³⁹ As a result, the Court concluded that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹⁴⁰ Thus, the Court held that Title VII’s sex-based protections make it unlawful to discriminate on the basis of sexual orientation or gender identity in the workplace.¹⁴¹

In response to *Bostock*, President Biden issued Executive Order 13,988 concluding that laws that prohibit sex-based discrimination, expressly including the FHA, also “prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”¹⁴² The executive order further directed HUD and other relevant federal agencies to take administrative action to implement this policy.¹⁴³

In accordance with E.O. 13,988, HUD issued a legal memorandum stating that the FHA’s proscription on sex discrimination is “nearly identical” to Title VII’s.¹⁴⁴ The memorandum

¹³⁶ Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8517 (Feb. 9, 2023) (to be codified in scattered sections of 24 C.F.R.).

¹³⁷ See Memorandum from Damon Y. Smith, HUD Principal Deputy Gen. Couns., to Jeanine M. Worden, HUD Acting Assistant Sec’y for Fair Hous. 1 (Feb. 9, 2021), <https://www.hud.gov/sites/dfiles/ENF/documents/Bostock%20Legal%20Memorandum%2002-09-2021.pdf>.

¹³⁸ 590 U.S. 644 (2020); see also CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole.

¹³⁹ *Id.* at 660–61.

¹⁴⁰ *Id.* at 660.

¹⁴¹ *Id.* at 669–71.

¹⁴² Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 25, 2021).

¹⁴³ *Id.* at 7023–24.

¹⁴⁴ *Supra* note 137.

continues that “[n]othing in the Fair Housing Act’s text, purposes, or precedent suggests that sex discrimination under the Act should be construed more narrowly than under Title VII with respect to discrimination because of gender identity or sexual orientation.”¹⁴⁵ Consequently, HUD will enforce the FHA’s protections against sex-based discrimination as covering discrimination on the basis of sexual orientation or gender identity, consistent with *Bostock* and E.O. 13,988.¹⁴⁶

Discrimination Based on Disability¹⁴⁷

The FHA also prohibits discrimination in housing on the basis of disability. The Act defines the term as “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”¹⁴⁸ The definition expressly excludes the current illegal use of or addiction to a controlled substance.¹⁴⁹ However, because this exclusion does not apply to *former* drug users, the Act’s proscription against disability discrimination encompasses individuals who have had drug or alcohol problems that are severe enough to substantially impair a major life activity but who are not *current* illegal users or addicts. As a result, recovering alcoholics and drug addicts can fall within the FHA’s protections.¹⁵⁰

The FHA makes it unlawful to ask about the disabilities of an applicant for housing or someone with whom the applicant is associated. However, FHA regulations allow raising certain questions that may have some bearing on one’s disability so long as those questions are posed to all applicants. For example, all applicants could be asked whether they would be able to mow their lawns if required in a rental agreement.¹⁵¹

Reasonable Modifications

Disability-based discrimination under the FHA includes prohibiting disabled individuals to make reasonable modifications to a housing unit that will “afford [them] full enjoyment of the premises.”¹⁵² For example, a landlord must generally allow a disabled tenant to install grab bars in a bathroom at the tenant’s expense. However, a landlord can premise the changes on the tenant’s promise to return the unit to its original state upon ending the tenancy. A landlord may not increase a required security deposit to cover these changes but can require tenants to, in

¹⁴⁵ *Id.* at 2.

¹⁴⁶ *Id.* Approximately thirty states, the District of Columbia, and numerous localities have also implemented housing discrimination laws that prohibit discrimination on the basis of sexual orientation and gender identity, either expressly or through sex-based discrimination restrictions. See *Non-Discrimination Laws: Housing*, MOVEMENT ADVANCEMENT PROJECT (Apr. 26, 2024), http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

¹⁴⁷ The FHA uses the term “handicapped.” This report uses the term *disability* interchangeably with *handicap*.

¹⁴⁸ 42 U.S.C. § 3602(h). The FHA’s disability protections do not require “that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.” *Id.* § 3604(f)(9).

¹⁴⁹ *Id.* § 3602(h). The regulations also state that “an individual shall not be considered to have a handicap solely because that individual is a transvestite.” 24 C.F.R. § 100.201.

¹⁵⁰ See, e.g., *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996).

¹⁵¹ 24 C.F.R. § 100.202(c). The regulations include the following examples of permissible questions: “(1) Inquiry into an applicant’s ability to meet the requirements of ownership or tenancy, (2) Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps . . . [and] (4) Inquiring whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance.” *Id.*

¹⁵² 42 U.S.C. § 3604(f)(3)(A).

certain circumstances, make payments into an escrow account to cover restoration costs.¹⁵³ The landlord can require the tenant to remove the grab bars at the tenancy's end without running afoul of the FHA's reasonable modification mandate, but the Act would prohibit a landlord from requiring a tenant to remove any necessary in-wall blocking that was installed to support the grab bars because the blocking "will not interfere in any way with the landlord's or the next tenant's use and enjoyment of the premises and may be needed by some future tenant."¹⁵⁴

In addition, all "covered multifamily dwellings"¹⁵⁵ built after March 13, 1991, must meet certain design and construction specifications that ensure they are readily accessible to and usable by individuals with disabilities.¹⁵⁶

Reasonable Accommodations and Assistance Animals

The FHA also prohibits landlords from "refus[ing] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled individual] equal opportunity to use and enjoy [the] dwelling."¹⁵⁷ A common reasonable accommodation required by the Act is for housing providers to set aside parking spaces for individuals with disabilities as an exception to the normal policy of providing parking on a first-come, first-served basis.¹⁵⁸ Housing providers must also generally provide reasonable accommodations from standard pet policies for assistance and support animals.¹⁵⁹ HUD defines *support animals* as "service [and] other animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities."¹⁶⁰ A housing provider must, for example, provide a tenant with a legitimate disability-related need an accommodation from a building's general pet size or breed restriction upon the tenant's request.¹⁶¹ The housing provider can, however, deny such an accommodation request if it would (1) be an undue administrative or financial burden, (2) pose a direct threat to safety or health, or (3) result in a significant property damage that could not be reduced by other reasonable accommodations.¹⁶²

¹⁵³ 24 C.F.R. § 100.203(a). Payments required to be made into escrow must be reasonable and must be for no more than restoration costs. *Id.*

¹⁵⁴ *Id.* § 100.203(c).

¹⁵⁵ *Covered multifamily dwellings* have four or more living units. 24 C.F.R. § 100.201.

¹⁵⁶ 42 U.S.C. § 3604(f)(3)(C). In 1991, HUD published final Fair Housing Accessibility Guidelines to provide builders and developers with technical guidance for these accessibility requirements. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Mar. 6, 1991) (to be codified in 24 C.F.R. ch. 1). HUD supplemented these guidelines in 1994. Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 Fed. Reg. 33362 (June 28, 1994) (to be codified in 24 C.F.R. ch. 1).

¹⁵⁷ 42 U.S.C. § 3604(f)(3)(B).

¹⁵⁸ 24 C.F.R. § 100.204(b).

¹⁵⁹ OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, HUD, FHEO-2020-01, ASSESSING A PERSON'S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 3 (2020) (defining *support animals* to mean "trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities"); see also 24 C.F.R. § 5.303(a).

¹⁶⁰ *Id.* at 3.

¹⁶¹ *Id.* at 14.

¹⁶² *Id.* at 13–15.

The FHA’s Accessibility Standards and Their Intersection with Other Federal Disability Laws

The FHA requires that certain multifamily housing properties built after March 13, 1991, meet specified design and construction accessibility standards for individuals with disabilities.¹⁶³ Constructing covered properties in violation of these accessibility standards constitutes unlawful disability discrimination under the FHA.¹⁶⁴

Several other federal laws also regulate building accessibility standards on various types of properties, such as places of public accommodations; properties used by entities receiving federal financial assistance; and properties that are designed, constructed, or rehabilitated using federal funds. These other federal laws—including the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, and the Architectural Barriers Act of 1968—are generally not focused on housing, but their applicability often intersects or overlaps in some ways with FHA-covered housing. Properties can, and often are, subject to multiple such laws.¹⁶⁵

For example, the ADA broadly prohibits discrimination against individuals with disabilities but generally does not apply to permanent housing.¹⁶⁶ However, the ADA does cover public accommodations, which include various types of transient housing, such as “an inn, hotel, motel, or other place of lodging.”¹⁶⁷ Additionally, the ADA covers “commercial facilities,” which it defines as “facilities intended for nonresidential use . . . whose operations will affect commerce,”¹⁶⁸ but the term excludes “facilities that are covered or expressly exempted from coverage under the Fair Housing Act.”¹⁶⁹

Section 504 of the Rehabilitation Act of 1973 bars discrimination against individuals with disabilities in any federally funded or federally conducted program or activity, which can include housing-related programs.¹⁷⁰ HUD’s Section 504 regulations impose accessibility and design standards, called the Uniform Federal Accessibility Standards, that are more stringent than those required under the FHA.¹⁷¹ Under the Architectural Barriers Act of 1968 (ABA), certain publicly owned buildings and facilities that are designed, built, or modified using federal funds must be

¹⁶³ 42 U.S.C. § 3604(f)(3)(C); 24 C.F.R. § 100.205; *see also* HUD, FAIR HOUSING ACT DESIGN MANUAL (1998).

¹⁶⁴ 42 U.S.C. § 3604(f)(3)(C).

¹⁶⁵ *See generally* Off. of Fair Hous. & Equal Opportunity, *Physical Accessibility*, HUD, https://www.hud.gov/program_offices/fair_housing_equal_opp/physical_accessibility (last visited Apr. 27, 2024).

¹⁶⁶ 42 U.S.C. §§ 12101–12213.

¹⁶⁷ *Id.* § 12181(2)(A). The ADA excludes from the definition of *public accommodations* “an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.” *Id.*

¹⁶⁸ *Id.* § 12181(2)(A)(2).

¹⁶⁹ *Id.* The Department of Justice’s comments on its ADA rules address mixed use facilities, such as hotels that also have separate accommodations for apartments. The comments explain that the residential wing would be covered by the FHA even though the rest of the hotel would be covered by the ADA. However:

[i]f a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility. Such determinations will need to be made on a case-by-case basis. . . . A similar analysis would also be applied to other residential facilities that provide social services, including homeless shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time.

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35552 (July 26, 1991).

¹⁷⁰ 29 U.S.C. § 794(a).

¹⁷¹ 24 C.F.R. § 8.32.

accessible to individuals with physical disabilities.¹⁷² Four different agencies—the General Services Administration (GSA), the Department of Defense (DOD), United States Postal Service (USPS), and HUD—implement the ABA. ABA-covered properties within HUD’s jurisdiction must comply with the Uniform Federal Accessibility Standards.¹⁷³ ABA-covered properties within the jurisdictions of the other three agencies must comply with accessibility standards developed by the U.S. Access Board.¹⁷⁴

Group Homes and Zoning Restrictions

The FHA protects group homes for people with disabilities from discrimination by certain types of state or local zoning laws. While the FHA does not “limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling,”¹⁷⁵ it does generally prohibit “[l]ocal zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities.”¹⁷⁶

Nevertheless, some municipalities have attempted to restrict the location of group homes for individuals with disabilities by enacting zoning ordinances that establish occupancy limits.¹⁷⁷ Such occupancy limits, which are typically justified as a way to maintain the residential character of certain neighborhoods, can operate to restrict group homes for recovering drug addicts and alcoholics in violation of the FHA. Localities could also violate the reasonable accommodation requirement of the Act by refusing to provide a variance from an occupancy ordinance to a group home.¹⁷⁸ As a result, these limits are the subject of controversy and legal challenges under the FHA,¹⁷⁹ and the Department of Justice (DOJ) and HUD have issued joint guidance on the issue.¹⁸⁰

Determining whether zoning ordinances violate the FHA requires a case-by-case assessment based on the ordinance language and the specific facts surrounding the alleged violation.¹⁸¹ The ad-hoc, fact-specific nature of these disputes makes it difficult to predict how a court would rule on a particular matter.

¹⁷² 42 U.S.C. §§ 4151–4157.

¹⁷³ 24 C.F.R. § 570.614(a).

¹⁷⁴ 41 C.F.R. pt. 102-76 (2023) (GSA); Memorandum from the Deputy Sec’y of Def. to the Sec’ys of the Mil. Dep’ts, et al. (Oct. 31, 2008), https://www.wbdg.org/FFC/DOD/dod_memo_aba.pdf (DOD); 39 C.F.R. pt. 254 (2023) (USPS).

¹⁷⁵ 42 U.S.C. § 3607(b)(1).

¹⁷⁶ Press Release, U.S. Dep’t of Just. & U.S. Dep’t of Hous. & Urban Dev., Joint Statement of the Department of Justice and the Department of Housing and Urban Development: Group Homes, Local Land Use, and the Fair Housing Act (Aug. 18, 1999), <https://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development> [hereinafter Joint Statement].

¹⁷⁷ Discrimination against group homes for the disabled is prohibited not only by the FHA but also by the Constitution to the extent that such discrimination is found to be irrational. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court held unconstitutional a zoning ordinance that allowed group homes generally but prohibited them for mentally disabled individuals. The basis for the decision was that the ordinance was based on irrational prejudice; that is, the discrimination failed a “rational basis” test under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 446.

¹⁷⁸ A city could be subject to a discriminatory effect discrimination claim based on all of its denials for variances. For more information on discriminatory effect analysis, see the “Discriminatory Effects” section of this report.

¹⁷⁹ See Michael J. Davis, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 KAN. L. REV. 777, 809–14 (1998).

¹⁸⁰ Joint Statement, *supra* note 176.

¹⁸¹ See *id.*

Zoning ordinances that limit the number of group homes that can be located within a certain proximity of each other, commonly referred to as density restrictions, can also run afoul of the FHA. In their group home guidance, HUD and DOJ “take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act.”¹⁸² For example, the Sixth Circuit, in *Larkin v. Michigan Department of Social Services*, addressed a state licensing requirement that group homes for the disabled could not be spaced within a 1,500-foot radius of other such group homes and had to comply with public notice requirements.¹⁸³ The court ruled that these spacing and notification requirements discriminated on their face by “singl[ing] out for regulation group homes for the [disabled].”¹⁸⁴ Once the court ruled that these non-uniform conditions were facially discriminatory, the court, consistent with the intentional discrimination test applied by the majority of federal courts of appeals discussed in the “Disparate Treatment/Intentional Discrimination” section above, required the defendant to demonstrate that spacing and notification requirements “are warranted by the unique and specific needs and abilities of those [disabled] persons to whom the regulations apply.”¹⁸⁵ The Sixth Circuit held that the state had failed to meet this burden because the ordinance “is too broad, and is not tailored to the specific needs” of the disabled.¹⁸⁶

The group home joint guidance also addresses claims that localities failed to make “reasonable accommodations” for group homes:

Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. The determination of what is reasonable depends on the answers to two questions: First, does the request impose an undue burden or expense on the local government? Second, does the proposed use create a fundamental alteration in the zoning scheme? If the answer to either question is “yes,” the requested accommodation is unreasonable.¹⁸⁷

For example, it might be unreasonable for a locality to deny a request by a group home for five individuals with disabilities for a variance from an ordinance that bars five or more unrelated people from living in a single-family home where it is shown that the group home would “have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an ‘ordinary family.’”¹⁸⁸ In contrast, it would likely not be unreasonable to deny a variance from this ordinance for a group home intended to house fifty individuals.¹⁸⁹

Familial Discrimination and Housing for Older Persons

The Fair Housing Amendments Act of 1988 added familial status to the grounds upon which housing discrimination is prohibited under the FHA.¹⁹⁰ *Familial status* generally means living with children under the age of eighteen.¹⁹¹ However, the FHA exempts from this general

¹⁸² *Id.*

¹⁸³ *Larkin v. Mich. Dep’t of Soc. Servs.*, 89 F.3d 285 (6th Cir. 1996).

¹⁸⁴ *Id.* at 290.

¹⁸⁵ *Id.* (citation omitted). See also *Marbrunak, Inc. v. City of Stow*, 974 F.2d 45, 47 (6th Cir. 1992).

¹⁸⁶ *Larkin*, 89 F.3d at 292.

¹⁸⁷ Joint Statement, *supra* note 176.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Pub. L. No. 100-430, § 5, 102 Stat. 1619 (1988), codified at 42 U.S.C. § 3604, 3606.

¹⁹¹ The statute (42 U.S.C. § 3602(k)) and the regulation (24 C.F.R. § 100.20) both define “familial status” as follows:

“Familial status” means one or more individuals (who have not attained the age of 18 years) being
(continued...)

proscription “housing for older persons.”¹⁹² The committee report that accompanied the 1988 amendments explains the purpose of this exemption:

In many parts of the country families with children are refused housing despite their ability to pay for it. Although 16 states have recognized this problem and have proscribed this type of discrimination to a certain extent, many of these state laws are not effective. . . . The bill specifically exempts housing for older persons. The Committee recognizes that some older Americans have chosen to live together with fellow senior citizen [sic] in retirement type communities. The Committee appreciates the interest and expectation these individuals have in living in environments tailored to their specific needs.¹⁹³

Housing for older persons is defined as housing that is (1) provided under any state or federal housing program for the elderly; (2) “intended for and solely occupied by persons 62 years of age or older;” or (3) “intended and operated for occupancy by persons 55 years of age or older” and that meets several other requirements, such as having at least 80% of units occupied by a minimum of one individual fifty-five or older.¹⁹⁴

The FHA provides that an individual who believes in good faith that his or her housing facility qualifies for housing for older persons exemption will not be held liable for money damages for discriminating on the basis of familial status, even if the facility does not in fact qualify as “housing for older persons.”¹⁹⁵

Enforcement of the FHA

The HUD Secretary, the Attorney General, and victims of discrimination may each take action to enforce the FHA’s protections against discrimination. HUD has primary administrative enforcement authority of the Act, which it fulfills through administrative adjudications. However, DOJ may also bring actions in federal court under certain circumstances.

Enforcement by the HUD Secretary

Within one year of the occurrence or end of an alleged discriminatory housing action, a harmed party may file a complaint with the HUD Secretary, or the Secretary may file a complaint on her own initiative. When a complaint is filed, the Secretary must, within ten days, serve the

domiciled with—

- (1) a parent or another individual having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

Compare 42 U.S.C. § 3602(k) with 24 C.F.R. § 100.20.

¹⁹² 42 U.S.C. § 3607(b).

¹⁹³ H.R. REP. NO. 100-711 at 19, 21 (1988).

¹⁹⁴ 42 U.S.C. § 3607(b)(2). The remaining requirements for the third category of housing for older persons are that “the housing facility or community publish[] and adhere[] to policies and procedures that demonstrate the intent required” to be housing for older persons and that the facility comply with HUD rules for occupancy verification. 42 U.S.C. § 3607(b)(2)(C); 24 C.F.R. §§ 100.304–100.307.

¹⁹⁵ 42 U.S.C. § 3607(b)(5).

respondent—the party charged with committing a discriminatory practice—with notice of the complaint. The respondent must then answer the complaint within ten days.¹⁹⁶

From the filing of the complaint, the Secretary has 100 days, subject to extension, to complete an investigation of the alleged discriminatory actions.¹⁹⁷ During this time, the Secretary must, “to the extent feasible, engage in conciliation with respect to” the complaint, and, as warranted, the Secretary may enter into a conciliation agreement, which can include binding arbitration and the award of monetary damages or other relief to harmed parties.¹⁹⁸

After the investigation, the Secretary must determine whether “reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur.”¹⁹⁹ If she finds no reasonable cause, then the Secretary must dismiss the complaint.²⁰⁰ If she finds reasonable cause, then the Secretary must file a charge on behalf of the harmed party, unless there is a conciliation agreement.²⁰¹ If a charge is filed, then the Secretary or any party to the dispute may elect to have the case heard in a federal district court. Otherwise, the case will be heard by an administrative law judge (ALJ).²⁰² In such a hearing, parties may appear with legal representation, obtain the issuance of subpoenas, cross-examine witnesses, and submit evidence.²⁰³

The ALJ must hold a hearing within 120 days of a charge being issued, unless adhering to that time frame is impracticable.²⁰⁴ The ALJ must also “make findings of fact and conclusions of law within 60 days after the end of the hearing . . . unless it is impracticable to do so.”²⁰⁵ “If the [ALJ] finds that a respondent has engaged or is about to engage in a discriminatory housing practice,” the ALJ may award the harmed party relief, which can include monetary damages, civil penalties, and injunctive or other equitable relief.²⁰⁶ The ALJ may impose a civil penalty of up to \$25,597 for first offenses and higher amounts for subsequent offenses.²⁰⁷

¹⁹⁶ *Id.* § 3610(a)(1).

¹⁹⁷ *Id.* § 3610(a)(1)(B)(iv). If the Secretary discovers that the complaint is within the jurisdiction of either a state or local public agency that the Secretary has certified, he must refer the complaint to that agency prior to pursuing the action. If the agency does not pursue the action within thirty days of the referral, or otherwise does not pursue “such proceedings with reasonable promptness, or the Secretary determines that the agency no longer qualifies for certification,” then the Secretary may take further action. 42 U.S.C. § 3610(f). The rules regarding the certification and funding of state and local housing enforcement agencies are provided in 24 C.F.R. pt. 115. For a list of HUD-certified fair housing agencies, see Off. of Fair Hous. & Equal Opportunity, *Fair Housing Assistance Program (FHAP) Agencies*, HUD, https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP/agencies (last visited Apr. 29, 2024).

¹⁹⁸ 42 U.S.C. § 3610(b). “The Secretary may authorize a civil action for appropriate temporary or preliminary relief, pending final disposition of the complaint.” *Id.* § 3610(e)(1). “Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed . . . [to] enforce [the] agreement.” *Id.* § 3610(c).

¹⁹⁹ *Id.* § 3610(g)(2).

²⁰⁰ *Id.* § 3610(g)(3).

²⁰¹ *Id.* § 3610(g)(2).

²⁰² *Id.* § 3612(b). Upon such an election, the Secretary must authorize a civil action, which the Attorney General (within thirty days) must commence and maintain on behalf of the harmed party, who may intervene as of right in that civil action. If the federal court finds a discriminatory practice took place, it may award actual and punitive damages to the extent it would in a civil action commenced by a private person. *Id.* § 3612(o).

²⁰³ *Id.* § 3612(c).

²⁰⁴ *Id.* § 3612(g).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* The statutory civil penalty cap of \$10,000 is adjusted for inflation in accordance with the Federal Civil Penalties (continued...)

The ALJ's orders, findings of fact, and conclusions of law may be reviewed by the Secretary.²⁰⁸ Parties are also authorized to appeal administrative orders to the federal courts.²⁰⁹ The Secretary may seek enforcement of an administrative order in a federal court of appeals.²¹⁰ Such court may "affirm, modify, or set aside, in whole or in part, the order, or remand" it to the ALJ for additional proceedings. The court may also grant any party "such temporary relief, restraining order, or other order as the court deems just and proper."²¹¹

A court may award reasonable attorney fees to a prevailing party other than the United States.²¹²

Enforcement by the Attorney General

The Attorney General may bring a civil action in federal district court if (1) the Attorney General has reasonable cause to think that an individual or a group is "engaged in a pattern or practice" of denying one's rights under the FHA and "such denial raises an issue of general public importance" or (2) the HUD Secretary refers a case involving a violation of a conciliation agreement or of housing discrimination to DOJ.²¹³ In such a civil action, the court may issue preventive relief (such as an injunction or a restraining order), provide monetary damages, issue civil penalties, or provide some other appropriate relief. In some instances, prevailing parties may be able to recover reasonable legal costs and fees.²¹⁴

Individuals who use force or the threat of force to "willfully injure[], intimidate[] or interfere[] with" a person's ability to own, rent, sell, or otherwise engage in housing-related activities based on a protected class could also be subject to criminal penalties.²¹⁵

Enforcement by Private Persons

An "aggrieved person"²¹⁶ may initiate a civil action, in either a federal district court or a state court, within two years of "the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement."²¹⁷ If the Secretary has filed a complaint, an aggrieved person may still bring a private suit unless HUD has reached a conciliation agreement

Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599 (2015), and the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990). In 2024, the maximum penalty for first violations is \$25,597, the maximum penalty with one prior violation is \$63,991, and the maximum penalty with two or more prior violations is \$123,965. Adjustment of Civil Monetary Penalty Amounts for 2024, 89 Fed. Reg. 13614, 13615 (Mar. 25, 2024) (to be codified in scattered sections of 24 C.F.R.).

²⁰⁸ 42 U.S.C. § 3612(h).

²⁰⁹ *Id.* § 3612(i).

²¹⁰ *Id.* § 3612(j).

²¹¹ *Id.* § 3612(k)(1)(A).

²¹² *Id.* § 3612(p); *see also* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Hum. Res., 532 U.S. 598, 605 (2001) (denying attorney fees to plaintiffs who tried to claim "prevailing party" status where there was no "alteration in the legal relationship of the parties.").

²¹³ 42 U.S.C. § 3614(a), (b). "Upon timely application, any person may intervene in a civil action commenced by the Attorney General." *Id.* § 3614(e).

²¹⁴ *Id.* § 3614(e).

²¹⁵ *Id.* § 3631.

²¹⁶ "An 'aggrieved person' includes any person who claims to have been injured by a discriminatory housing practice or believes that such person will be injured by a discriminatory housing practice that is about to occur." *Id.* § 3602(i).

²¹⁷ *Id.* § 3613(a)(1). The calculation of the two-year period does not include the time that an administrative proceeding is pending. *Id.*

or an administrative hearing has begun.²¹⁸ The Attorney General may intervene in a private suit upon determining that the suit is of “general public importance.” If the court determines that discrimination has occurred or is going to occur, it may award punitive damages, actual damages, equitable relief (e.g., a restraining order or injunction), or other appropriate relief.²¹⁹ In some instances, prevailing parties may be able to recover reasonable legal costs and fees.²²⁰

Author Information

David H. Carpenter
Legislative Attorney

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²¹⁸ *Id.* § 3613(a)(2)–(3).

²¹⁹ *Id.* § 3613(c).

²²⁰ *Id.* § 3613(c)(2).