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Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*

Part One of Two Articles: Federal Fair Housing Law

Introduction: The Erosion of the Federally Assisted Affordable Housing Stock and Its Effect on Families of Color

Thousands of units of rental housing affordable to very low-income families are being lost because of a recent series of changes to the federal housing programs. Public housing projects are being demolished outright or replaced with "mixed-income" developments, often containing drastically fewer units affordable to the average public housing family, and thereby excluding the original residents and other eligible families.[1] In 1996, the Department of Housing and Urban Development (HUD) initiated a "modernization" campaign to demolish 100,000 public housing units by the year 2000.[2] As of October 2000, 109,623 public housing units have been approved for removal across the country. Of these, 59,407 have actually been disposed of[3] or demolished.[4] Further, these figures do not include the units that will be lost as a result of HOPE VI demolition and revitalization awards in recent years.[5] Despite HUD's having reached and surpassed

* *This article is an extension of an article written by David Bryson on the fair housing duties of HUD regarding the loss of federally assisted housing. See HUD's Fair Housing Duties and the Loss of Public and Assisted Units, 20 HOUS. L. BULL. 1 (Jan. 1999) (available on-line at www.nhlp.org/html/hlb/199/199fairhsg.htm). NHLP extends its special thanks to Henry Korman formerly of Cambridge and Somerville Legal Services and Professor Duncan Kennedy of Harvard Law School for their generous assistance in the preparation of this article.*

[1] *See Survey of the Proportion of Family Public Housing Rental Units in HOPE VI Revitalization Sites: FY 1998, 1999, 2000 Awards*, 31 HOUS. L. BULL. 45 (Feb. 2001) (finding a bias against family public housing rental units in HOPE VI revitalizations).

[2] *See, e.g.*, 62 Fed. Reg. 47,740 (Sept. 10, 1997). This goal was based on a study by a "blue ribbon" commission, in which it was determined that six percent, approximately 86,000 units, of the nation's public housing stock was "severely distressed." *See* NATIONAL COMM'N ON SEVERELY DISTRESSED PUB. HOUS., THE FINAL REPORT 2 (1992) (cited in M. Schill and S. Wachter, THE SPATIAL BIAS OF FEDERAL HOUSING LAW AND POLICY: CONCENTRATED POVERTY IN URBAN AMERICA, 143 Univ. Penn. L. Rev. 1285, 1292, n.27 (1995)). It is unclear whether there is any relation between the units initially identified as "severely distressed" in the 1992 report and the 109,623 units that have been approved for removal to date.

[3] *e.g.*, sold or transferred.

[4] *See* Memo, U.S. Department of Housing and Urban Development Special Applications Center, "Demo/Dispo Units (State Total Recap)" (Oct. 26, 2000) (on file at NHLP).

[5] The demolition and disposition of public housing mentioned previously is authorized pursuant to § 18 of the *U.S. Housing Act of 1937*, 42 U.S.C. § 1437p, as amended by *the Quality Housing and Work Responsibility Act of 1998* (QHWRA), § 531, Pub. L. No. 105-276, 112 Stat. 2518, 2570-4 (Oct. 21, 1998).

its target, public housing losses continue at a high rate.[6] HUD has received significant support from Congress in this regard, recently passing legislation limiting resident protections in public housing demolitions and dispositions, expanding opportunities for the conversion of public housing to voucher assistance, and providing more permanent statutory authority for the HOPE VI program.[7]

Owners of federally assisted, multifamily projects are exiting subsidy and mortgage insurance programs and leasing low-income families' units at often drastically higher rents. As of December 31, 1998, approximately 100,000 assisted multifamily units had been converted to higher-income use nationally, with an average rent increase of 50 percent.[8] Families in residence at the time of the conversion of an assisted development have had their rights recently clarified, allowing them to remain in their homes with "enhanced" tenant-based Section 8 vouchers.[9] However, when owners take action to undercut residents' rights, HUD does little to ensure that owners actually accept enhanced vouchers and allow families to remain in their homes after the conversion of a development. Further, as with public housing, despite the improvement of resident protections, the conversion of assisted multifamily projects reduces the availability of rental housing guaranteed to be affordable to families with the lowest incomes.

This erosion of the federally assisted housing stock has a stark racial significance. Families of color rely on federal housing programs to a disproportionate extent, which means that it is families of color who will unfairly and disproportionately bear the burdens of losses to the federal housing stock. Even though African Americans comprise only 12 percent of the national population,[10] 27 percent of project-based Section 8 Substantial Rehabilitation and New Construction families are headed by African Americans.[11] Forty-eight percent of families living in federal public housing are headed by African Americans; 20 percent of public housing families are headed by Latinos.[12]

Since the days of the Federal Housing Administration (FHA), federal housing programs have always had a racial aspect.[13] Public housing developments, in particular, have often been constructed with the purpose of imposing and strengthening racial segregation in housing. Some of the most celebrated fair housing cases involving the federal housing programs, such as *Gautreaux v. Romney*[14] and *Young v. Pierce*,[15] were efforts to disestablish the racial segregation and isolation of African-American families created and maintained by public housing programs.

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Much of the push to reduce the federal housing stock today is done in the name of, or under the veneer of, desegregation or the "deconcentration of poverty." The National Housing Law Project (NHLP) is deeply skeptical of the effectiveness of the strategies to advance desegregation through policies that remove large numbers of federally assisted housing developments. Increasingly, we suspect that "deconcentration" is invoked as a convenient excuse to displace low-income families when the land on which their homes sit is wanted for other purposes.

We suspect that demolishing, disposing of, or converting federally assisted housing developments will not always leave families who reside in these developments or other eligible families better off. Not all federally assisted housing developments, even public housing developments, were constructed to further segregationist purposes[16] or promote segregation today.[17] Despite its reputation, public housing developments, which on average each contain less than 100 dwelling units, provide some of the best quality housing

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The 1998 QHWRA included separate statutory authority for HOPE VI demolitions—but not dispositions, which are still governed by Section 18. *See* 42 U.S.C. § 1437v, as amended by QHWRA, § 531, Pub. L. No. 105-276, 112 Stat. 2518, 2581-6 (Oct. 21, 1998). *See also* Notice PIH-99-19 (Apr. 20, 1999) *(Demolition/Disposition Processing Requirements Under the New Law*) (extended until Apr. 30, 2001 by Notice PIH-2000-16 (Apr. 18, 2000)).

[6]*See, e.g.*, 66 Fed. Reg. 11,638, 11,913 (Feb. 26, 2001) (FY 2001 SuperNOFA, including $75 million in HOPE VI public housing demolition funding available through a competitive application process). *See also* HUD Special Applications Center Work In Progress web page, www.hud.gov:80/pih/sac/workprog.html (listing public housing demolition, disposition, and other applications currently entered in the Special Application Center's (SAC) Assignment Planning System (APS)).

[7]*See Quality Housing and Work Responsibility Act of 1998,* Pub. L. No. 105-276, Title V, 112 Stat. 2,461, 2,518 (1998).

[8]*See* Michael Bodaken, National Housing Trust, Statement to the House Committee on Banking and Financial Services, Subcommittee on Housing & Community Opportunity (May 4, 1999).

[9]*See* Pub. L. No. 106-246, § 2801 (July 13, 2000).

[10]*See* Census 2000 PHC-T-1., Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000, Table 1 (available on-line at www.census.gov/population/cen2000/phc-t1/tab01.pdf).

[11]*See* HUD Multifamily Tenant Characteristics System Guest Login Page, www.hud.gov:80/mtcs/public/guest.cfm (Mar. 2001).

[12]*See id.*

[13]*See generally* Charles L. Nier, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. Marshall L. Rev. 617 (1999).

[14]448 F.2d 731 (7th Cir. 1971). *See also Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

[15]544 F. Supp. 1010 (E.D. Tex. 1982) and 628 F. Supp. 1037 (E.D.Tex. 1985).

[16]*See, e.g.,* Center for Community Change, *How to Save and Improve Public Housing: An Action Guide,* 11 (1994) ("Public housing expanded during [World War II], adding nearly 200,000 units of worker housing that was needed near factories or military bases.").

[17]A March 1995 HUD study, *The Location and Racial Composition of Public Housing in the United States,* p. 3, found that: "While 59 percent of African-American [public housing] residents are concentrated in [census] tracts that are more than 60 percent African American, 50 percent of African-American residents live in areas with less than 20 percent African-American population."

opportunities for very low income families.[18] Similarly, we suspect that the public housing developments currently being targeted for demolition are not necessarily the most severely distressed since, for example, HUD's 100,000-unit removal goal was met last year.[19]

A major reason that the loss of federally assisted housing is a crisis has to do with problems with the Section 8 voucher program that HUD and PHAs have been unable or unwilling to resolve. When units are removed from the federally assisted inventory, they are typically replaced, all or in part, with tenant-based Section 8 vouchers. In some areas for some families, Section 8 vouchers can work well by allowing families access to quality housing in well-served neighborhoods.[20] In other areas and for other families, Section 8 vouchers do not work well, with families only able to use vouchers to secure housing in certain neighborhoods or not able to find a landlord willing to accept their vouchers at all.[21] We suspect that in some, perhaps many, areas voucher families are fed into existing local patterns of residential segregation.[22] HUD does not adequately take the realities of voucher utilization into account in its decisions regarding the loss of federally assisted housing. Half of the 44 HOPE VI demolition and revitalization awards made by HUD in 2000, which involve the planned net loss of at least 10,000 public housing units, were made in areas that HUD has recognized as having serious voucher utilization problems.[23]

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[18]*See, e.g., How to Save and Improve Public Housing* at 11-16.

[19]*See* n. 2, *supra*. There are other possible explanations: the previous estimates of the numbers of distressed units may have been too low or additional units may have deteriorated after estimates were made. Nonetheless, HUD has not explained this apparent discrepancy in any detail, nor has it announced a new target number to replace the previous goal.

[20]Even when vouchers work well, voucher housing after the 1998 QHWRA has drawbacks that public housing and project-based assisted housing does not—in particular, voucher families now have no security of tenure after their initial lease term and voucher families may pay more than 30 percent of their income for housing costs.

[21]HUD finally began publicly to recognize voucher utilization problems late last year in a press release identifying 39 metropolitan areas nationwide with severe geographic concentrations of voucher households and an additional 10 areas in which public housing authorities have complained of a high incidence of failure in families seeking housing with their vouchers. *See* HUD No. 00-223 (Sept. 12, 2000) (*CUOMO EXPANDS RENTAL OPPORTUNITY FOR HUNDREDS OF THOUSANDS OF LOW-INCOME FAMILIES), available at* www.hud.gov/pressrel/pr00-223.html. *See also* 65 Fed. Reg. 58,870 (Oct. 2, 2000) (interim regulations authorizing modest increases in Fair Market Rent levels in those areas with voucher utilization problems).

[22]In its Sept. 2000 press release, addressing the geographic concentration of voucher families (*see* n. 21, *supra*), HUD made no mention of any potential fair housing implications of voucher utilization problems. This is despite the fact 11 of the 39 areas in which HUD identified serious geographic concentrations of voucher families—Atlanta, Buffalo, Chicago, Cleveland, Dallas, Detroit, Fort Worth, Kansas City, Newark, Philadelphia, and St. Louis—are considered "hypersegregated" by race. *See* Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of an Underclass*, 8th printing, Table 3.4, p. 76 (1998).

[23]While this figure owes to the large number of awards that Chicago received in 2000, the fact that half of the FY 2000 HOPE VI awards were made in areas with voucher concentration problems remains.

NLADA Substantive Law Conference July 25-July 29, Berkeley, California

The National Legal Aid and Defender Association's annual Substantive Law Conference is the legal services community's premier national training event. Trainers from national support centers and allied organizations, including the National Housing Law Project, as well as substantive experts from field programs will cover the latest legal developments and strategies affecting clients.

This year's conference will provide participants with comprehensive coverage of issues which are the focus of 10 training tracks. Additionally, participants have the opportunity to attend workshops addressing issues that cut across traditional poverty law specialty areas as well as a separate skills-based training track for participants who want to strengthen their ability to develop partnerships, collaborations and coalitions.

This year's training tracks include:

- Federal Housing
- Consumer Law
- Social Security
- Welfare
- Native American Law
- Women & Family Law
- Children & Youth Law
- Community Economic Development
- Employment Law
- Health Law

A detailed conference announcement with a registration form and preliminary agenda was sent out by NLADA to its members and others. For a copy of the form and for information about the conference, contact Marc Holladay at (202) 452-0620 or by e-mail at m.holladay@nlada.org.

More information about the Federal Housing Law Track will appear in the next issue of the *Bulletin.*

This two-part series of articles will describe how fair housing litigation against PHAs and owners of assisted housing projects[24] under the federal *Fair Housing Act* may be used to stem the erosion of the federal affordable housing stock. Part One will address federal fair housing law and the rules of decision applied in "discriminatory effect" cases under the *Fair Housing Act*. Part Two will focus on the application of these fair housing authorities in specific examples involving the demolition, disposition, or conversion of federally assisted housing.

A Brief Overview of the Legal Mechanisms Permitting Demolitions, Dispositions, and Conversions in the Federally Assisted Housing Stock

A summary of the mechanisms permitting demolitions and conversions in the federally assisted housing[25] stock is provided below. A full treatment of the different schemes is beyond the scope of this discussion and has already been presented in detail elsewhere.[26]

The Privately Owned Federally Assisted Housing Stock

The privately owned stock can be separated into two categories: the "older assisted stock" and the "newer assisted stock." The older stock was constructed in the 1960s through the § 221(d)(3) and § 236 federal mortgage programs. Of the approximately 700,000 units of older stock, around 450,000 are additionally subsidized through the Section 8 Loan Management Set-Aside (LMSA) Program which was created to prop-up financially troubled projects in the late 1960s.[27] The newer stock, which includes approximately 675,000 units, was often constructed or rehabilitated through the § 221(d)(4) federal mortgage program and has always been subsidized through long-term Section 8 Housing Assistance Payments contracts.[28]

Units are "lost"—or rather, the guaranteed affordability of units is lost—from the older stock when project owners prepay their insured mortgages and are no longer subject to the low-income use restrictions included in their mortgage insurance regulatory agreements. In 1996, Congress authorized most older stock owners to prepay their mortgages and convert their projects to higher-income use.[29] Units are lost from the newer stock when owners' long-term Section 8 subsidy contracts expire and owners elect to opt-out of the Section 8 program and convert their projects to higher-income use. When owners opt-out or prepay, tenants may be eligible for special "enhanced" vouchers that would allow them to remain in their units.[30]

The Public Housing Stock

The federal public housing stock, comprised of over 1 million units, essentially all belongs to a single category.[31] *The Quality Housing and Work Responsibility Act* (QHWRA)[32] of 1998 is the primary basis for the threat to the federal public housing stock today. The QHWRA amended Section 18 of the *U.S. Housing Act of 1937*,[33] which historically had been the principal statutory authority for public housing demolitions.[34] The QHWRA provided a permanent statutory basis for the HOPE VI program, a federal grant program funding the demolition[35] of distressed public housing projects or the "revitalization" of these projects, often with drastically fewer affordable units.[36] The QHWRA also added Sections 22 and 33 to the *U.S. Housing Act* for the voluntary[37] and mandatory[38] conversion of public housing to tenant-based assistance, also termed "vouchering out." HUD has not yet implemented these provisions, but has issued draft regulations.[39]

Because of the dramatic adverse impact on families of color nationwide, the mounting erosion of federally assisted housing has become a national fair housing crisis. In addition to bringing claims to enforce procedural requirements relating to the demolition and conversion of this housing,

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[24]This discussion focuses on the fair housing duties of PHAs and private Section 8 project owners. For a discussion of HUD's duties, see *HUD's Fair Housing Duties, id*. In addition, although the legal standards are often quite similar, only fair housing protections relating to race and ethnicity or national origin, not other protected classes such as gender, disability or familial status, will be addressed here. For a detailed discussion of familial status discrimination, *see* Adam Culbreath, *Housing Discrimination Against Section 8 Families Calls for Creative Advocacy*, 20 Youth Law News 1 (Mar.-Apr. 1999).

[25]For the purposes of this discussion, public housing and Section 8 housing will be referred to generally as "federally assisted housing."

[26]*See* National Housing Law Project, *HUD Housing Programs: Tenant's Rights (2nd Ed.) and 1998 supplement (HUD Housing Programs and 1998 Supplement)*, § 15.1.1, *et seq;* David Smith ("Smith"), *Mark-to-Market: A Fundamental Shift in Affordable Housing Policy*, 10 Housing Policy Debate 143, 150 (1999). Note that the regulatory or statutory scheme under which a project is removed from the assisted housing stock will often be highly relevant to a fair housing analysis: program-specific requirements will often provide useful handles to bolster fair housing claims or will provide the basis for separate claims not directly related to civil rights requirements.

[27]*See* Smith, 10 Housing Policy Debate at 145.

[28]*See id.*

[29]*See* Pub. L. No. 104–134, § 101(e), tit. II, 110 Stat. 1321 (1996).

[30]*See HUD Housing Programs and 1998 supplement*, § 15.1.1.1.

[31]*But see id.* at § 15.2.6. (describing the vestigial § 23 stock).

[32]Pub. L. No. 105-276, Title V, 112 Stat. 2,461, 2,518 (1998).

[33]Codified at 42 U.S.C.A. § 1437p (West Supp. 2000).

[34]Pub. L. No. 105-276, Title V, § 531, 112 Stat. 2,518, 2,570-4 (1998).

[35]The QHWRA provided a new statutory basis for HOPE VI public housing demolitions apart from Section 18.

[36]*See id.* at Title V, Subtitle B, Part 3, codified at 42 U.S.C.A. § 1437v (West Supp. 2000).

[37]*See id.* at § 533, 112 Stat. 2,518, 2,576-9, codified at 42 U.S.C.A. § 1437t (*Authority to Convert Public Housing to Vouchers).*

[38]*See id.* at § 537, 112 Stat. 2,518, 2,588-92, codified at 42 U.S.C.A. § 1437z-5 (*Required Conversion of Distressed Public Housing to Tenant-Based Assistance).*

[39]*See* 64 Fed. Reg. 40,231 (Jul. 23, 1999) (*Required Conversion of Developments From Public Housing Stock; Proposed Rule*); 64 Fed. Reg. 40,239 (Jul. 23, 1999) (*Voluntary Conversion of Developments From Public Housing Stock; Proposed Rule*).

advocates should regard PHAs and private project owners as potential defendants in claims brought under federal civil rights statutes. In addition to federal constitutional protections, the *Civil Rights Act of 1866*[40] and Title VI of the *Civil Rights Act of 1964*[41] prohibit intentional discrimination in housing programs. Most important, however, is Title VIII of the *Civil Rights Act of 1968*,[42] which has also been interpreted to prohibit those actions that have a disparate impact with respect to race or national origin regardless of discriminatory purpose. In addition, it has been interpreted to prohibit those actions that perpetuate patterns of housing segregation and used to impose affirmative duties to promote fair housing on HUD and recipients of HUD funding.

Overview of the Legal Framework of Discriminatory Effect Under Title VIII of the Civil Rights Act of 1968[43]

Title VIII of the *Civil Rights Act of 1968*, also known as the *Fair Housing Act*, as amended by the *Fair Housing Amendments Act of 1988*, makes it unlawful, among other things, to refuse to rent or negotiate for the rental of a dwelling or "otherwise [to] make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[44] Title VIII is most important because it has been interpreted to prohibit both purposeful discrimination ("disparate treatment")[45] and actions that have a harmful "discriminatory effect"[46] on members of minority groups or on communities generally even when there is no discriminatory purpose on the part of the defendant.[47]

Four main strands of reasoning in the case law have contributed to the availability of discriminatory effect theories under Title VIII. One is the availability of this theory in Title VII employment discrimination cases.[48] The exact similarity of the statutory language of Title VII and Title VIII, each prohibiting adverse employment and housing decisions made "because of ... race"[49] has encouraged the application by analogy of the theory to Title VIII cases.[50] Two, courts have recognized the difficulties faced by plaintiffs in proving discriminatory purpose. In *U.S. v. City of Black Jack,* the Eighth Circuit explained in an often-quoted phrase: "Effect, and not motivation, is the touchstone [of Title VIII liability], in part because clever men may easily conceal their motivations."[51] Three, courts have recognized the equivalence of the harm of disparate treatment and discriminatory effect. The Eighth Circuit in *Black Jack* went on to cite the following passage from the D.C. Court of Appeals: "[W]hatever our law was once, ... we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[52] Four, while the Supreme Court has not directly addressed discriminatory effect under Title VIII, it has recognized that the language of the *Act* is "broad and inclusive" and should be given a "generous construction."[53]

The discriminatory effect theories of Title VIII are the focus of this discussion of fair housing and the dismantling of the federally assisted housing programs because they should have a broad applicability given the extent to which members of protected classes rely on federally assisted housing. Advocates should also be watchful for potential purposeful discrimination claims. Such claims may be proven by indirect

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[40]42 U.S.C.A. §§ 1981, 1982.

[41]42 U.S.C.A. § 2000d, *et seq.*

[42]42 U.S.C.A. § 3601, *et seq.*

[43]For a further summary and analysis of fair housing law, *see* Florence Wagman Roisman, *An Outline of Principles, Authorities for Fair Housing Litigation* (July 1997) (on file at NHLP); Florence Wagman Roisman and Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color* ("Roisman and Tegeler"), 24 Clearinghouse Rev. 312, 325-337 (1990); Robert G. Schwemm, *Housing Discrimination: Law and Litigation* ("Schwemm") (1996); Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle* ("Mahoney"), 47 Emory L.J. 409 (1998) (a revisionist account of the origins and development of discriminatory effect fair housing law; (available online at www.law.emory.edu/ELJ/volumes/spg98/mahoney.html).

[44]*Id.* at § 3604(a).

[45]"Disparate treatment means treating a person differently because of his race; it implies consciousness of race, and a purpose to use race as a decision-making tool. Proof of discriminatory motive is critical ... although it can in some situations be inferred from the mere fact of differences in treatment." *Village of Bellwood v. Dwivedi ("Dwivedi")*, 895 F.2d 1521, 1533–34 (7th Cir. 1990) (citing *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977); internal quotations omitted).

[46]For clarity, "disparate impact," as the term is used in this discussion, refers *only* to a disproportionately harmful effect on members of a protected class. Following Roisman and Tegeler, the term "discriminatory effect," used here, will refer generally to *both* of the non-intentional theories that may be the bases of Title VIII claims—i.e., disparate impact and the non-intentional perpetuation of segregation. The case law uses a number of different terms to describe these concepts. *See, e.g., Metropolitan Housing Development Corp. v. Village of Arlington Heights ("Arlington II"),* 558 F.2d 1283 (7th Cir. 1977) (using "disparate impact" and "discriminatory effect" interchangeably).

[47]The Supreme Court's recent decision in *Alexander v. Sandoval (Sandoval),* 2001 WL 408983 (2001), barring a private right to bring disparate impact claim related to the provision of government services, does not have any direct relevance to this discussion. *Sandoval* had to do with regulations issued under *Title VI of the Civil Rights Act of 1964*, not Title VIII or its regulations. Further, the Court's decision in *Sandoval* was based in large part on the fact that disparate impact claims are not permitted under Title VI. *See Washington v. Davis*, 426 U.S. 229 (1976). This is not the case with Title VIII or with Title VII, which has provided analogical support for discriminatory effect claims under Title VIII. *See* n. 48-50, *infra*.

[48]*See Griggs v. Duke Power Co. ("Griggs")*, 401 U.S. 424 (1971).

[49]42 U.S.C.A. § 2000e-2 (West 1999); 42 U.S.C.A. § 3604 (West 1999).

[50]*See generally Mountain Side Mobile Estates Partnership v. Sec'y of HUD ("Mountain Side")*, 56 F.3d 1243, 1251, n.7 (10th Cir. 1995) (citing *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993)). *But see* Mahoney, *supra*.

[51]508 F.2d 1179, 1185 (8th Cir. 1974).

[52]*Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C.1967), *aff'd sub nom. Smuck v. Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969) (en banc); *See also Mountain Side"*, 56 F.3d at 1250–51 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination")).

[53]*City of Edmonds v. Oxford House*, 514 U.S. 725, 730-32 (1995); *Trafficante v. Metro. Life Ins. Co. ("Trafficante")*, 409 U.S. 205, 209, 212 (1972).

evidence,[54] but direct evidence of racial motive, even in written form, can sometimes be found with surprising ease.[55]

Divergence Among the Circuits on Title VIII Discriminatory Effect in the Absence of Clear Direction from the Supreme Court

Although discriminatory effect litigation under Title VIII shows promise as a preservation strategy, it is also a largely untested strategy. The Supreme Court has dealt extensively with discriminatory effect under Title VII, which prohibits discrimination in employment, but it has never ruled directly on the issue of discriminatory effect under Title VIII. The closest the Court came to deciding the issue was in *Huntington Branch, NAACP v. Town of Huntington*,[56] in which it declined to address (thereby leaving intact) the Second Circuit's discriminatory effect ruling against a municipal defendant for zoning restrictions.

Although discriminatory effect litigation under Title VIII shows promise as a preservation strategy, it is also a largely untested strategy.

Despite the lack of direction from the Supreme Court, all of the circuit courts, with the exception of the D.C. Court of Appeals,[57] have recognized some form of discriminatory effect under Title VIII.[58] This being said, the circuit courts differ among each other on such basic issues as what constitutes a discriminatory effect and what rules and standards of decision to apply in discriminatory effect cases.

The Two Forms of Discriminatory Effect: Disparate Impact and the Perpetuation of Segregation

The circuit courts have recognized two different forms of harm that may be the basis for discriminatory effect claims under Title VIII: (1) *disparate impact*, which involves a harmful effect disproportionately suffered by members of a protected class, and (2) *the perpetuation of segregation*, which involves harm suffered by all members of a community caused by the denial of opportunity for interracial association.[59] Of the two theories, disparate impact is more fully developed in the case law, largely because courts have imported much of the Title VII[60] employment discrimination disparate impact framework.[61]

Disparate Impact

The Second Circuit has summed up disparate impact, explaining that it involves "a facially-neutral policy or practice, such as a hiring test or zoning law, [that has a] differential impact or effect on a particular group."[62] In other words, disparate impact occurs where a defendant's policy or practice that makes no reference to race causes disproportionate harm to people of color.

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[54] *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977) ("determining whether invidious discriminatory purpose was a motivating factor *demands* a sensitive inquiry into such circumstantial and direct evidence of intent as my be available" (emphasis added)). In fact, the disparate treatment effects test from the Title VII case law — under which a complainant need not prove discriminatory purpose, but only certain factual circumstances leading to an inference of such a purpose — has been applied to Title VIII disparate treatment defendants in several cases. *See McDonnell Douglas Corp. v. Green (McDonnell Douglas)*, 411 U.S. 792, 802 (1973) (setting out a four-part "effects" test in the Title VII discrimination-in-hiring context: "(i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications"); *Smith v. Anchor Building Corp. (Smith),* 536 F.2d 231, 233 (8th Cir. 1976) (applying *McDonnell Douglas* test to disparate treatment in leasing claim under Title VIII); *Village of Bellwood v. Dwivedi (Dwivedi)*, 895 F.2d 1521, 1533–34 (7th Cir. 1990) (applying *McDonnell Douglas* test to racial steering claim under Title VIII).

[55] *See* Michael M. Daniel, *Factual Basis for the Liability and Remedial Involvement of the Federal Government In Public Housing Desegregation* (on file at NHLP).

[56] 844 F.2d 926 (2nd Cir. 1988), *review denied in part and judgment aff'd in part*, 488 U.S. 15, 18 (1988) (*per curiam*).

[57] *See Brown v. Artery Organization ("Artery")*, 654 F. Supp. 1106, 1114 (D.C. Dist. Col. 1987) (refused to apply discriminatory effect liability to a project owner).

[58] *See, e.g., Langlois v. Abington Housing Authority ("Langlois")*, 207 F.3d 43, 51, n.4 (1st Cir. 2000) (residency preferences in provision of federal tenant-based Section 8 rental subsidies); *Huntington,* 844 F.2d 926 (2nd Cir. 1988); *Resident Advisory Board v. Rizzo ("Rizzo")*, 564 F.2d 126, 148 (3rd Cir. 1977) (refusal to permit construction of low-income housing development affecting families of color); *Betsey v. Turtle Creek Assocs. ("Betsey")*, 736 F.2d 983, 988, n.5 (4th Cir. 1984) (all-adult conversion policy affecting tenants of color); *Simms v. First Gibraltar Bank ("Simms")*, 83 F.3d 1546, 1555 (5th Cir. 1996) (refusal of loan application affecting minority-owned cooperative corporation; complainants were unsuccessful); *Arthur v. City of Toledo ("Arthur")*, 782 F.2d 565, 575 (6th Cir. 1986) (local referenda repealing sewer extensions necessary for construction of housing affecting families of color); *Metropolitan Housing. Dev. Corp. v. Village of Arlington Heights ("Arlington II")*, 558 F.2d 1283, 1289–90 (7th Cir. 1977) (zoning restrictions preventing construction of low-income housing affecting families of color); *U.S. v. City of Black Jack ("Black Jack")*, 508 F.2d 1179, 1184–85 (8th Cir. 1974) (zoning restrictions in all-white neighborhood in segregated region preventing construction of a Section 236 project affecting African Americans); *Keith v. Volpe ("Keith")*, 858 F.2d 467, 482–84 (9th Cir. 1988) (exclusion of low-income housing that was part of a highway displacement consent decree); *Mountain Side Mobile Estates Partnership v. Sec'y of HUD ("Mountain Side")*, 56 F.3d 1243, 1251 (10th Cir. 1995) (numerical occupancy restrictions in mobile home park affecting families with children); *Jackson v. Okaloosa County ("Jackson")*, 21 F.3d 1531, 1543 (11th Cir. 1994) (public housing siting decisions affecting African Americans).

[59] *See* Roisman and Tegeler at 317–18.

[60] Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq*. (West 1999).

[61] *See, e.g., Rizzo,* 564 F.2d at 148; *Betsey*, 736 F.2d at 988; *Black Jack,* 508 F.2d at 1184–85 (early Title VIII disparate impact cases relying on *Griggs).*

[62] *Huntington,* 844 F.2d at 933 (1988) (citing *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 28 (2nd Cir. 1988)).

Disparity: Designation of Populations to Contrast

A disparate impact case requires the designation of two populations: the population affected by the defendant's allegedly discriminatory practice and some other population against which "disparity" is measured. In *Wards Cove Packing Co., Inc. v. Atonio,*[63] the Supreme Court held that in Title VII employment discrimination cases involving hiring or promotion practices:

> [t]he proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market. It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case.

Wards Cove was partially "overruled" by the *Civil Rights Act of 1991*,[64] but is considered still to be good law in most respects, including the methods it described for establishing disparate impact.[65] The First,[66] Fourth,[67] and Tenth[68] Circuit Courts have invoked *Wards Cove* in their disparate impact analysis in Title VIII cases.

All of this being said, the designation of populations to contrast in a disparate impact claim involving the loss of federally assisted units will vary depending on the case and the situation of the plaintiffs.[69] While *Wards Cove* has imposed additional requirements, the Supreme Court has not provided comprehensive guidance on establishing the disparate impact of a particular practice, even in the employment discrimination context. There are a number of possibilities in a fair housing loss-of-units case. The population of affected families could be compared with the local population of program-eligible families, with the overall population of families participating in a PHA's programs or residing in other properties held by a project owner, or with some definable subset of these populations.[70]

Disparity: Criteria for Measuring

Three forms of disparate impact have been recognized by the circuit courts.[71] They differ from each other in the way that the severity of harm to members of a protected class is assessed. Some or all may apply in particular instances of demolitions and conversions depending on the demographic composition of the building's occupants, the demographic composition of the region, and, perhaps, the conditions of the local housing market.

The first and strongest type of disparate impact occurs when a greater number of people of color, rather than whites, will be adversely affected by a defendant's policy or practice.[72] A second and somewhat weaker type of disparate impact occurs where people of color make up a disproportionately higher percentage of the adversely affected group relative to the composition of the local population.[73] A third and not as widely acknowledged type of disparate impact occurs when a defendant's actions cause disproportionately greater harm to people of color, even if there is no numerically disproportionate effect.[74]

The Perpetuation of Segregation

The second theory of Title VIII discriminatory effect liability is based not on the harm experienced disproportionately by members of protected classes, but on the harm inflicted on all members of a community by the "perpetuation of segregation" in housing. Unlike the disparate impact under Title VIII,

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[63]490 U.S. 642, 650–1 (1989) (internal quotations omitted).

[64]42 U.S.C.*A*. § 2000e-2(k)(1) (1994).

[65]*See* Mahoney at § II.A. (1998).

[66]*See Langlois v. Abington Housing Authority*, 207 F.3d 43, 49-50, n. 4 (1st Cir. 2000).

[67]*See Edwards v. Johnston County Health Dept.*, 885 F.2d 1215, 1223-4 (4th Cir. 1989).

[68]*Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, 56 F.3d 1243, 1253 (10th Cir. 1995).

[69]It will also vary according to the jurisdiction. While a number of circuits have relied on *Wards Cove*, the Fourth Circuit and the Eastern District of Missouri have each treated the populations affected by a defendant's actions as a kind of comparison population, examining whether persons of color make up a majority of this population. *See Betsey*, 736 F.2d at 988 (4th Cir. 1984); *In re Malone*, 592 F. Supp. 1135 (E.D.Mo. 1984). Neither court makes the point explicitly, but there appears to be an assumption of disproportionality where people of color (i.e., "minorities") comprise the majority of an adversely affected group.

[70]This subject will receive further treatment in part two of this series.

[71]*See* Roisman and Tegeler at 317–18.

[72]*See, e.g., Resident Advisory Board v. Rizzo*, 425 F. Supp. 987, 1018 (E.D. Pa. 1976) (failure to build public housing where 95 percent of the individuals on the waiting list for public housing in Philadelphia were members of minority groups; cited as a strong example of disparate impact in *Arlington II,* 558 F.2d at 1291).

[73]*See Arlington II,* 558 F.2d at 1286, 1290 (zoning restrictions preventing the construction of a low-income housing project where African Americans made up 40 percent of the group eligible for occupancy but only 18 percent of the local population; described as a weakly disparate impact as compared to *Rizzo* because 60 percent of the group eligible for occupancy was white); *Betsey*, 736 F.2d at 988 (treating the residents in a building as the population for comparison, a revised occupancy policy imposed in an apartment building leading to eviction notices being sent to 74.9 percent of the building's non-white tenants, but only 24.6 percent of the building's white tenants). *Contra In re Malone*, 592 F. Supp. 1135 (E.D.Mo. 1984), *aff'd without opinion*, 794 F.2d 680 (8th Cir. 1986) (no showing of disparate impact where fewer numbers of African Americans than whites affected).

[74]*See Black Jack,* 508 F.2d at 1186 (overruling the district court's finding that a zoning ordinance restricting the construction of a low-income housing project had no disparate impact because the "ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units"—even though fewer African-Americans that whites would be eligible for occupancy and the numbers of eligible African-Americans and whites were essentially proportional to the composition of the local population). *See also Huntington*, 844 F.2d at 929 (zoning restrictions preventing the construction of a subsidized project where 7 percent of all the town's families required subsidized housing, while 24 percent of African-American families needed such housing); *Pfaff v. HUD ("Pfaff"),* 88 F.3d 739, 745 (9th Cir. 1996) (explaining that disparate impact involves "a significantly *adverse* ***or*** *disproportionate* impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices" (emphasis added)).

which was judicially inferred largely by analogy to Title VII, perpetuation of segregation is a legal theory based specifically on the particular legislative history of Title VIII.[75] As the Supreme Court held in *Trafficante v. Metropolitan Life Insurance Co.*, the nature of this harm stems from "the loss of important benefits from interracial associations."[76] The Court explained: "While members of minority groups were damaged the most from discrimination in housing practices, the proponents of [Title VIII] emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered."[77] There is some irony to discussing the benefits of interracial associations and the prohibitions on the perpetuation of segregation in the context of federal housing programs. The value placed on opportunities for interracial association in federally assisted housing varies.[78] And, federal housing policies have been blamed for creating or encouraging much of the patterns of residential segregation that exist today.[79]

The Second,[80] Sixth,[81] and Seventh[82] Circuit Courts have entertained discriminatory effect claims based on the perpetuation of segregation. The Fourth,[83] Fifth[84] and Eighth[85] Circuit Courts have remarked favorably on the theory in passing. The Ninth[86] and Tenth[87] Circuit Courts have made oblique reference to the theory. A recent dissent in the First Circuit has addressed unintentional or "subconscious" perpetuation of segregation in detail.[88]

A displacement of tenants in one complex may perpetuate segregation in the region as a whole, if, for example, these tenants are forced to relocate to racially segregated areas.

Discriminatory effect cases based on the perpetuation of segregation have typically involved zoning restrictions in white communities that have had the result of excluding people of color. To the extent that demolition and conversion cases do not fit the pattern, it is not completely clear how this theory of Title VIII will apply in these cases. Demolitions and conversions alter existing housing patterns, not perpetuate them. On the other hand, the Supreme Court has found that housing markets are regional, not municipal, and highly complex.[89] A displacement of tenants in one complex may perpetuate segregation in the region as a whole, if, for example, these tenants are forced to relocate to racially segregated areas. In other words, the alteration of specific neighborhood housing patterns may have the effect of perpetuating, or retrenching, a segregated status quo in a region.

Rules of Decision Applied in Title VIII Discriminatory Effect Cases

While nearly all of the circuit courts recognize at least one form of discriminatory effect, they are split on the rules of decision to apply in discriminatory effect cases. Three different frameworks have been employed: the "pure effects" test, the "four-factor" test, and the "three-factor" test.[90]

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[75]*See Arlington II*, 558 F.2d at 1289–90 (Citing *Trafficante*, 409 U.S. at 211, in turn citing 114 Cong. Rec. 3,422 (remarks of Sen. Walter Mondale): "Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns." (internal quotations omitted)).

[76]409 U.S. 205, 210 (1972).

[77]*Id*.

[78]*See, e.g., Schmidt v. Boston Housing Auth.*, 505 F. Supp. 988 (D. Mass 1981) (White residents challenged, unsuccessfully, admissions plan that hindered them from finding housing in predominantly white projects in South Boston.).

[79]*See, e.g.,* Michael H. Schill and Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. Pa. L. Rev. 1285, 1308–11 (1995) (describing, among other things, discriminatory underwriting practices by the Federal Housing Administration). *And see* 114 Cong. Record 2,281 (1968) (Remarks of Senator Edward Brooke: "Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph—even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. ... In other words, our Government, unfortunately, has been sanctioning discrimination in housing throughout this Nation;" cited in *Otero v. New York City Housing Authority,* 484 F.2d 1122, 1133–34 (2nd Cir. 1973)). *But see* Richard H. Muth, *The Causes of Housing Segregation*, in *U.S. Commission on Civil Rights, Issues in Housing Discrimination: A Consultation* at 372 (1985) ("Whatever impact [Federal Housing Administration] practices may have had was presumably eliminated by President Kennedy's famous stroke of the pen in 1962. Yet, it is difficult to discern any marked changes in the intensity or patterns of black segregation since that time.").

[80]*See Huntington*, 844 F.2d at 937.

[81]*See Arthur*, 782 F.2d at 575.

[82]*See Arlington II,* 558 F.2d at 1293.

[83]*See Betsey v. Turtle Creek Assocs.,* 736 F.2d 983, 988, n.3 (4th Cir. 1984); *Edwards v. Johnston County Health Dept.,* 885 F.2d 1215, 1224 (4th Cir. 1989).

[84]*See U.S. v. Mitchell*, 580 F.2d 789, 791–92 (5th Cir. 1978).

[85]*See Black Jack*, 508 F.2d at 1186.

[86]*See Halet v. Wend Inv. Co.,* 672 F.2d 1305, 1309, 1311 (9th Cir. 1982) (held white tenant had standing under Title VIII to challenge apartment occupancy policy alleged to have discriminatory effect on African American and Latino families, but the court did not resolve the issue of effect and the case is further complicated by the tenant's related Fourteenth Amendment claim).

[87]*See Mountain Side*, 56 F.3d at 1253 (making reference to *Arlington II).*

[88]*See Langlois*, 207 F.3d at 54 (Stahl, J., dissent: "Because 'subconscious discrimination' in housing tends to manifest itself in practices that, although not overtly racial, have the effect of freezing segregation, I address [the complaint] by asking whether defendants' use of local preferences within the jurisdictions they represent may have the effect of 'perpetuat[ing] segregation and thereby prevent[ing] interracial association.' *Arlington Heights*, 558 F.2d at 1290.").

[89]*See Hills v. Gautreaux ("Gautreaux")*, 425 U.S. 284, 299 (1976).

[90]For a recent overview of standards of decision that have been applied in Title VIII discriminatory effect cases, *see* Kristopher E. Ahrend ("Ahrend"), *Effect, Or No Effect: A Comparison Of Prima Facie Standards Applied in "Disparate Impact" Cases Brought Under The Fair Housing Act (Title VIII),* 2 Race & Ethnic Ancestry L. Dig. 64 (1996) (Ahrend uses the term "disparate impact" more broadly than Roisman and Tegeler to include non-purposeful perpetuation of segregation.).

The "Pure Effects" Test

The "pure effects"[91] test is the test most widely used in Title VIII discriminatory effect cases. The test has been adopted by the First,[92] Second,[93] Third,[94] Fifth,[95] Eighth,[96] and Ninth [97] Circuit Courts. The Fourth Circuit has also adopted it, but only in cases involving private defendants.[98] The "pure effects test," imported from Title VII disparate impact case law,[99] relies on a two-part framework of prima facie showing and rebuttal.

The Plaintiff's Prima Facie Showing

To make out a prima facie discriminatory effect case under Title VIII, the plaintiff must show: "(1) the occurrence of certain outwardly neutral [policies or] practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices."[100]

Part (1) of the prima facie showing—"outward" or facial neutrality—has to do with whether the policies or practices make express reference to membership in a protected class. Those policies or practices that are facially discriminatory are analyzed according to a disparate treatment framework.[101]

Part (2) of the prima facie showing requires the plaintiff's special effort and attention. First, the plaintiff must prove actual discriminatory effect—that is, that people of color will be disparately impacted or segregation will be perpetuated in a community—usually with statistical comparisons.[102] Second, the discriminatory effect the plaintiff shows must be "significant."[103] No court has articulated a clear standard for what constitutes a "significant" discriminatory effect. But, it appears to be a threshold requirement. For example, the Eighth Circuit has suggested that a zoning restriction adversely affecting 32 percent of an area's African-American population and 29 percent of its white population does not, by itself, constitute a sufficiently strong or significant disparate impact.[104] However, in a disparate impact context, this probably need not mean that greater numbers of people of color than whites are affected; a disproportionate effect on people of color should be sufficient.[105] Finally, as described above, there are two forms of discriminatory effect. The Second Circuit has held that a showing that particular policies and practices that both have a disparate impact and perpetuate segregation is especially strong.[106]

A disparate impact defendant cannot undermine a prima facie showing of disparate impact with a "bottom line" argument that only a small number of people of color are affected by its conduct or that its actions have only a small effect on the total minority population of an area.

The Defendant's Challenge of the Sufficiency of the Prima Facie Showing

Prior to presenting its rebuttal to the plaintiff's prima facie showing, the discriminatory effect defendant may also respond by attacking the sufficiency of the plaintiff's showing.[107] This will usually be done by challenging the accuracy of the plaintiff's statistical analysis.[108] However, there is an important difference between prima facie showings based on disparate impact and those based on the perpetuation of segregation. A disparate impact defendant cannot undermine a prima facie showing of disparate impact with a "bottom line" argument that only a small number of people of color are affected by its conduct or that its actions have only a small effect on the total minority population of an area.[109] The disparate impact prohibitions of Title VIII protect individuals, not groups.[110] Therefore, disparate-impact plaintiffs are required only to prove "discriminatory impact on them as individuals. The plain language of the statute makes it unlawful '[t]o discriminate against any person.'"[111]

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[91]This term has been borrowed from Roisman and Tegeler. The test is also referred to as the "effect-only" test or the "effects" test. *See*, *e.g.*, Ahrend at 65 ("effect-only").

[92]*See Langlois*, 207 F.3d 43, 51, n.4.

[93]*See Huntington,* 844 F.2d at 934.

[94]*See Rizzo,* 564 F.2d at 148.

[95]*See Simms,* 83 F.3d at 1555.

[96]*See Black Jack,* 508 F.2d at 1184–85.

[97]*See Pfaff,* 88 F.3d at 745.

[98]*See Betsey,* 736 F.2d at 988.

[99]*See Griggs.*

[100]*Pfaff*, 88 F.3d at 745 (9th Cir. 1996) (citing *Palmer v. U.S.*, 794 F.2d 534, 538 (9th Cir. 1986) (ADEA)).

[101]*See Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (discussing difference between disparate treatment and "disparate impact" (discriminatory effect)).

[102]*See Pfaff*, 88 F.3d at 746.

[103]*See, e.g., id.* at 745; *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386, 1388–89 (5th Cir. 1986). *See also Southend Neighborhood Imp. v. County of St. Clair ("Southend")*, 743 F.2d 1207, 1209–10 (7th Cir. 1984) ("significant ... discriminatory effects" and the "four-factor" test).

[104]*See Black Jack*, 508 F.2d at 1186 (going on to find sufficient disparate impact on the basis of disproportionate harm).

[105]*See* n. 73, *supra*.

[106]*See Hungtington*, 844 F.2d at 938 (contrasting the prima facie showing in *Rizzo).*

[107]In a related move, the defendant may also challenge the applicability of discriminatory effect theories under Title VIII in the first place. This will be addressed further in part two of the series.

[108]*See, e.g., Hanson v. Veterans Admin.*, 800 F.2d 1381, 1388–89 (5th Cir. 1986) (defendant successfully refuted the accuracy of plaintiff's statistical analysis, which purported to show that the defendant's appraisal policies disparately impacted African-American veterans by systematically underappraising home values).

[109]*See Connecticut v. Teal*, 457 U.S. 440, 453 (1982) (rejecting the appellee's "bottom line" argument: "The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole.").

[110]*See id.*

[111]*Betsey,* 736 F.2d at 987 (citing 42 U.S.C.A. § 3604(b)).

A prima facie showing based on the perpetuation of segregation is more vulnerable to a "bottom line" challenge. In a perpetuation of segregation claim, the overall composition of a community is exactly what is at issue. Even though Title VIII protects "persons," a plaintiff shows injury under the perpetuation of segregation theory by showing that she has been denied opportunities for interracial association within her community because of the actions of the defendant that have affected the racial diversity of her community.[112]

A plaintiff shows injury under the perpetuation of segregation theory by showing that she has been denied opportunities for interracial association within her community because of the actions of the defendant that have affected the racial diversity of her community.

The Defendant's Rebuttal: The "Simple Justification" Test and Stricter Standards

If a plaintiff is successful in making a prima facie showing of discriminatory effect, the burden then shifts to the defendant to present a rebuttal. The circuit courts applying the pure effects test diverge on the substance of the rebuttal requirement. The Second[113] and Third[114] Circuit Courts apply a "simple justification"[115] test, requiring the defendant to prove: (1) that the outwardly neutral policy or practice causing the discriminatory effect furthers a "legitimate and bona fide interest"[116] and (2) that no alternative would serve this interest with "less discriminatory effect." The First Circuit[117] has pointed to a "simple justification test," but has left open the issue of a "less restrictive alternative." The Fifth[118] and Ninth[119] Circuit Courts have not addressed their rebuttal standards in detail, but appear also to be leaning towards the simple justification test. The Fourth[120] and Eighth[121] Circuit Courts, however, apply stricter standards, requiring the defendant to show that its policy or practice was "necessary" to further a "compelling interest."

The simple justification test and the stricter tests of the Fourth and Eighth Circuit Courts are more demanding than those applied to the Title VII disparate impact defendant. In Title VII disparate impact cases, the defendant merely has the burden of production to articulate a legitimate interest; the plaintiff must then challenge this rebuttal as a "pretext," by showing that there are less discriminatory alternatives available.[122] In a Title VIII discriminatory effect case, the defendant must show that no alternative would serve this interest with less discriminatory effect.[123]

None of seven circuit courts that have applied the pure effects test have clearly stated the nature of the Title VIII defendant's burden on rebuttal.[124] Under Title VII, while a burden of production may shift to the defendant on rebuttal, the plaintiff always has the ultimate burden of persuasion.[125] Citing Fed. R. Evid. 301 and Title VII disparate treatment case law,[126] the Supreme Court has held that this arrangement "conforms with the usual method for allocating persuasion and production burdens in the federal courts."[127] The matter has yet to be fully addressed.

The "Four-Factor" Test

A minority of the circuit courts apply multi-factor balancing tests in lieu of the pure effects test. The Fourth[128] and Seventh[129] Circuit Courts apply a "four-factor" test; the Sixth and Tenth Circuit Courts apply a "three-factor" test, discussed

[112]*See id*. at 987, n.3 (indirectly suggesting a "bottom line" analysis in perpetuation of segregation cases).

[113]*See Huntington*, 844 F.2d at 939.

[114]*See Rizzo*, 564 F.2d at 148.

[115]This term is borrowed from *Langlois*, 207 F.3d at 51.

[116]The Second Circuit has provided more detail on these terms. To be legitimate, "the proffered justification" must at least be "of substantial concern such that it would justify a reasonable official in making [a] determination" on this basis. *Huntington*, 844 F.2d at 939. To be bona fide, the justification must have animated the decision at the time it was made: "[p]ost hoc rationalizations by administrative agencies should be afforded 'little deference' by the courts." *Id.*

[117]*See Langlois*, 207 F.3d at 51, n.6.

[118]*Simms*, 83 F.3d at 1555.

[119]*Pfaff*, 88 F.3d at 747.

[120]*Betsey*, 736 F.2d at 988 (requiring a private defendant to "prove a business necessity sufficiently compelling to justify the challenged practice" on rebuttal).

[121]*See Black Jack*, 508 F.2d at 1185 (requiring a "governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest").

[122]As this description suggests, "pretext" is something of a term of art: a Title VII disparate impact plaintiff can show that an employer's rebuttal justification is pretextual merely by demonstrating that the employer's business interests may be met by means that have less of a discriminatory effect; the plaintiff need not prove bad faith or discriminatory purpose. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Wards Cove*, 490 U.S. at 660. The plaintiff need not prove deception or discriminatory purpose on the part of the defendant.

[123]*See Huntington*, 844 F.2d at 939 (the inapplicability of the Title VII pretext test in Title VIII cases).

[124]*But see Langlois*, 207 F.3d at 50, n.4 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658-61, (1989)).

[125]*See Wards Cove Packing Co. v. Atonio ("Wards Cove")*, 490 U.S. 642, 658-61, (1989) (Title VII); 42 U.S.C. § 2000e-2(k)(1) (1994) (codifying disparate impact standard in employment discrimination cases, overruling *Wards Cove* in part, but retaining a form of justification defense; cited in *Langlois*, 207 F.3d at 50, n.4.).

[126]*See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256–258 (1981).

[127]*Wards Cove*, 490 U.S. at 660–61.

[128]*Smith v. Town of Clarkton ("Clarkton")*, 682 F.2d 1055, 1065–66 (4th Cir. 1982).

[129]*Arlington II*, 558 F.2d at 1290.

in the following section. The elements of the "four-factor" test have been set out by the Seventh Circuit as follows:

> (1) how strong[130] is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* [, 426 U.S. 229 (1976)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[131]

The Fourth Circuit has held explicitly that the "four-factor" test applies only to government defendants;[132] the Seventh Circuit has applied the four-factor test to a private defendant.[133]

The actual functioning of the "four-factor" test in the Fourth and Seventh Circuit Courts is somewhat unclear, largely because of the limited amount of case law. Neither court has described any burden shifting mechanism and the Seventh Circuit has emphasized that "the ultimate burden of proof" lies with the complainant.[134]

Of the four factors, the Seventh Circuit has held that the second factor, evidence of discriminatory intent, is the least important and that a plaintiff need not provide evidence of intent to prevail.[135] In fact, the Seventh Circuit has ruled for plaintiffs where only two of the four factors, the first and fourth, favored them on the principle that Title VIII is to be "liberally construe[d]."[136] The Fourth Circuit has not specifically addressed how close cases are to be resolved.[137] The importance of the other factors with respect to each other has not been specifically addressed. However, if the pure effects cases are any indication, the strength of the plaintiff's showing of discriminatory effect and the interests of the defendant will always figure prominently in a "four-factor" analysis.

The "Three-Factor" Test

The Sixth [138] and Tenth [139] Circuit Courts have adopted a "three-factor" test. The "three-factor" test is the Seventh Circuit's "four-factor" test with the second factor, "evidence of discriminatory intent," omitted. [140] The Sixth and Tenth Circuit Courts refuse to provide "half credit" where a plaintiff does not "present sufficient evidence to allow the conclusion that the [defendant] racially discriminated in [its actions]."[141] The test is summarized, in the following manner, by the Tenth Circuit:

> (1) the strength of the plaintiff's showing of discriminatory effect; (2) the defendant's interest in taking the action complained of; and (3) whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of a protected class or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[142]

The Sixth Circuit appears to apply its "three-factor" test as a balancing test, with each factor weighed together simultaneously.[143] The Tenth Circuit's test, however, operates in a way very similar to the "pure effects" test. The Tenth Circuit first requires a complainant to establish a "prima facie case," which the defendant is then required to rebut by "presenting valid non-pretextual reasons for the challenged practices" and "demonstrat[ing] that the discriminatory practice has a manifest relationship to the housing in question."[144]

The Tenth Circuit has not clearly specified the elements of the plaintiff's prima facie case. In introducing the "three-factor" test, it stated that all three factors would be employed in determining the sufficiency of the plaintiff's prima facie case.[145] But, this would make the defendant's *rebuttal* of the prima facie case—a showing related to its interests in taking the challenged action—part of the prima facie case itself. The relation of the third factor with respect to the plaintiff's prima facie showing is clearer. The Tenth Circuit states:

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[130] *See* n. 109-12, *supra*, for a discussion of "bottom line" attacks to the strength of a showing of discriminatory effect.

[131] *Arlington II*, 558 F.2d at 1290.

[132] *See Betsey*, 736 F.2d at 988 n. 5.

[133] *See Gomez v. Chody ("Gomez")*, 867 F.2d 395 (7th Cir. 1989) (challenge to displacement of Latino families as part of building purchaser's rehabilitation plan).

[134] *See Gomez*, 867 F.2d at 402.

[135] *See Arlington II*, 558 F.2d at 1292–93 (noting the difficulty of proving intent, but that partial evidence of intent undermines the defendant's equitable position).

[136] *See id.*, 1294.

[137] *See Clarkton* 682 F.2d at 1065–66 (granting relief on the strength of plaintiffs' showing on the first three factors without proceeding to the fourth).

[138] *See Arthur*, 782 F.2d at 575.

[139] *See Mountain Side*, 56 F.3d at 1251.

[140] *See Arlington II*, 558 F.2d at 1290. *And see Arthur*, 782 F.2d at 575 ("we adopt only the first, third, and fourth factors that the Seventh Circuit established in *Arlington II"); Mountain Side*, 56 F.3d at 1252 ("We adopt the Sixth Circuit's analysis of disparate impact. We also decline to adopt the second factor of discriminatory intent from the Seventh Circuit's analysis.").

[141] *Arthur*, 782 F.2d at 575.

[142] *Mountain Side*, 56 F.3d at 1252.

[143] *See Arthur*, 782 F.2d at 575–77.

[144] *Mountain Side*, 56 F.3d at 1253, 1254.

[145] *See id.* at 1252.

> Where plaintiff seeks a judgment which would require defendant to take affirmative action to correct a Title VIII violation, plaintiff must make a greater showing of discriminatory effect. On the other hand, if plaintiff seeks a judgment merely enjoining defendant from further interference with the exercise of plaintiff's Title VIII rights, a lesser showing of discriminatory effect would suffice.[146]

In other words, the more drastic the relief sought by the plaintiff, the stronger the plaintiff's prima facie case must be, at least with respect to the first factor.

The Practical Significance of the Different Tests

The practical difference between the three tests has been questioned, since plaintiffs have consistently prevailed where they have shown significant discriminatory effect in the face of weak justification by defendants.[147] For example, the Third and Ninth Circuit Courts have noted in prominent decisions that their conclusions would be the same under either the "pure effects" or "four-factor" tests.[148] The Seventh Circuit has gone as far as to state that the "four-factor" test it created is "in fact, though not in words, the 'disparate impact' analysis familiar from Title VII cases."[149] Some circuit courts have applied more than one decisional framework. The Second and Third Circuit Courts, while they have adopted the pure effects test, also employ the four-factor test to guide final decisions on the merits.[150] The First Circuit initially employed a similar approach, but appears more recently to have retreated from it.[151]

On the other hand, one instance where the choice of a test has led to substantive differences in outcomes has been pointed out.[152] In *Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, the Tenth Circuit, applying the "three-factor" test, denied a disparate-impact claimant relief.[153] The dissent in this case, applying the "pure effects" test, would have granted relief.[154] The important difference between the approaches was that, under the majority's decisional framework, the plaintiff's prima facie showing of discriminatory effect is weighed against the nature of the relief sought—more drastic relief must be justified by a stronger showing of discriminatory effect.[155] The "pure effects" test does not involve this type of balancing.

Something similar happens in the application of the "four-factor" test. The Seventh Circuit weighs the second factor, partial evidence of discriminatory intent, against the third factor, the defendant's interests. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights ("Arlington II")*, the Seventh Circuit has noted that evidence of discriminatory intent tends to "undermin[e] the equitable position of the defendant."[156] While the *Arlington II* court did not find any such evidence of intent in that case, presumably a finding of this kind would subject a defendant's "third factor" showing to a higher level of scrutiny, which would likely translate into a requirement of a stronger showing of interest. The "pure effects" test, on the other hand, does not involve analysis of partial evidence of discriminatory intent as directly.[157]

The more drastic the relief sought by the plaintiff, the stronger the plaintiff's prima facie case must be, at least with respect to the first factor.

All of this being said, the "pure effects" test, the most widely employed test, does appear to accommodate a certain amount of balancing analysis.[158] A plaintiff's prima facie showing must be sufficiently "significant."[159] A defendant must demonstrate a sufficiently "bona fide and legitimate" interest on rebuttal.[160] Other circuit courts have not been as explicit about their analysis as the Tenth Circuit, but "significant" and "legitimate" are open-textured terms that invite comparison, balancing, and the exercise of discretion.

Affirmative Fair Housing Duties and Title VIII Discriminatory Effect Claims

In addition to a duty to refrain from discrimination on the basis of race, HUD has special affirmative fair housing duties. Title VIII provides that "the Secretary of Housing and Urban Development shall [...] administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchap-

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[146] *Id.* at 1253 (citing *Casa Marie v. Superior Court of Puerto Rico for Dist. of Arecibo,* 988 F.2d 252, 269 n. 20, (1st Cir. 1993)).

[147] *See* SCHWEMM at § 10.4(2)(c).

[148] *See Rizzo*, 564 F.2d at 148, n. 32; *Volpe*, 858 F.2d at 482–84.

[149] *Dwivedi*, 895 F.2d at 1533.

[150] *See Huntington,* 844 F.2d at 936; *Rizzo,* 564 F.2d at 148 n. 32 (describing the four factor test as "a standard upon which ultimate Title VIII relief may be predicated").

[151] *See Casa Marie v. Superior Court of Puerto Rico for Dist. of Arecibo ("Casa Marie")*, 988 F.2d at 270, n.20 (1st Cir. 1993). *But see Langlois,* 207 F.3d at 51 (1st Cir. 2000) (rejecting *Arlington II* "balancing" analysis).

[152] *See* Ahrend, Race & Ethnic Ancestry L. Dig. at 76–77.

[153] *See Mountain Side*, 56 F.3d at 1255–57.

[154] *See id.*, 56 F.3d at 1257–59.

[155] *See* n. 144-6, *supra* (discussing also the confusing nature of the Tenth Circuit's description of its test).

[156] *Arlington II,* 558 F.2d at 1292.

[157] *But see* n. 116, *supra* (defendant must show a "bona fide" interest on rebuttal).

[158] *But see Langlois,* 207 F.3d at 51 (rejecting *Arlington II* "balancing" analysis).

[159] *See* n. 103, *supra*.

[160] *See* n. 116, *supra*.

ter."[161] The Second Circuit has interpreted Title VIII to extend this affirmative duty to PHAs.[162] The First Circuit, in a very recent decision, acknowledged the possibility, but left the issue for the district court on remand.[163] However, among the rest of the circuit courts, this analysis of the statute, imposing affirmative duties on defendants other than HUD, has not been widely adopted.[164]

Sources of Law Imposing Affirmative Fair Housing Duties on PHAs and Project Owners: Regulation and Contract

While Title VIII may not directly impose affirmative duties on PHAs and project owners, a number of other authorities do. HUD regulations regarding public housing admissions and occupancy state that a PHA "must affirmatively further fair housing in the administration of its public housing program."[165] In addition, the QHWRA requires PHAs to include a certification that they "will affirmatively further fair housing" in their annual PHA plans describing their program administration procedures.[166]

Most important is Executive Order (E.O.) 11063, issued by President John F. Kennedy in 1962. This order directs "all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race ..."[167] HUD's regulations implementing E.O. 11063 are very broad in their scope and apply to both PHAs and project owners as HUD housing program participants. Further, project owners' Section 8 Housing Assistance Payments (HAP) contracts with HUD[168] and the Regulatory Agreements attached to owners' federally insured mortgages[169] expressly require owners to comply with regulations issued pursuant to E.O. 11063.[170] The E.O. 11063 regulations provide that "no person receiving assistance from or participating in any program or activity of [HUD] involving housing and related facilities shall engage in a discriminatory practice."[171]

A "discriminatory practice" is defined as:

> Any discrimination on the basis of race ... or the existence or use of a policy or practice, or any arrangement, criterion or other method of administration which has the effect of denying equal housing opportunity or which substantially impairs the ability of persons to apply for or receive the benefits of assistance because of race ... in the sale, rental or other disposition of residential property or related facilities ... or in the use or occupancy thereof ...[172]

This prohibition of discriminatory practices, as they are defined, is essentially the same as the discrimination prohibitions of Title VIII — it encompasses both purposeful discrimination and policies and practices that have the "effect of denying equal housing opportunity."

The regulations do not stop there. Another subsection, entitled *Prevention of Discriminatory Practices*, commands HUD housing program participants "to take all action necessary and proper to prevent discrimination on the basis of race..."[173] In other words, E.O. 11063 regulations not only require PHAs and project owners to refrain from engaging in practices that have a discriminatory effect, the regulations require PHAs and project owners to prevent these effects in the first place.[174]

The Meaning of "Affirmatively Further Fair Housing"

The problem is that the duty of PHAs and project owners to affirmatively further fair housing or to prevent discrimination has not been fleshed out to any degree. HUD has provided a small amount of additional guidance with respect to the Community Development Block Grant (CDBG) Program. HUD regulations require grantees under the CDBG Program to submit a certification that they will affirmatively further fair housing. Under the CDBG program:

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[161]42 U.S.C.A. § 3608(e) (West 1999). *See also Shannon v. United States Department of HUD*, 436 F.2d 809 (3rd Cir. 1970) (construing HUD's affirmative fair housing duties in the context of project siting decisions).

[162]*See Otero v. New York City Housing Authority ("Otero")*, 484 F.2d 1122, 1133 (2nd Cir. 1973). *See also U.S. v. Charlottesville Redevelopment and Housing Authority ("Charlottesville")*, 718 F. Supp. 461, 464–467 (W.D.Va. 1989).

[163]*See Langlois*, 207 F.3d at 51–52 (1st Cir. 2000).

[164]*See, e.g., Rizzo*, 564 F.2d at 130 (3rd Cir. 1977) (declining to affirm the district court's decision on the basis of a breach of the defendant PHA's duty to affirmatively further fair housing).

[165]24 C.F.R. § 960.103 (as amended, 65 Fed. Reg. 16,691, 16,725 (Mar. 29, 2000)).

[166]*See* 42 U.S.C.A. § 1437c-1(d)(15) (West Supp.1999).

[167]E.O. 11063 at Part I, § 101 (issued pursuant to 42 U.S.C.A. § 1982).

[168]*See* HUD Form 52587, Exh. A, ¶ 1.b. (May 1993) (*Housing Assistance Payments (HAP) Contract: Section 8 Housing Assistance Payments Program).*

[169]*See* FHA Form 2466, ¶ 10 (Nov. 1969) (*Regulatory Agreement for Multifamily Housing Projects (Under 207, 220, 221(d)(4), 231 and 232, Except Nonprofits)*).

[170]*See* 24 C.F.R. § 107.25 (1999) (requiring E.O. 11063 compliance provisions to be included in HUD legal instruments).

[171]24 C.F.R. § 107.20(a)(1999) (*Prohibition against discriminatory practices*). "Person" is defined to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives or agents, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, fiduciaries and public entities." *Id.* at § 107.15(d). "Public entity" is defined as "a government or governmental subdivision or agency." *Id.* at § 107.15(e).

[172]*Id.* at § 107.15(f).

[173]*Id.* at § 107.21 (*Prevention of discriminatory practices*).

[174]Interestingly, these regulations prohibiting discriminatory effects provide for no "legitimate interest" rebuttal or defense. One reading would be that strict liability for discriminatory effects is imposed against HUD housing program participants.

> [this] require[s] the grantee to assume the responsibility of fair housing planning by conducting an analysis to identify impediments to fair housing choice within its jurisdiction, taking appropriate actions to overcome the effects of any impediments identified through that analysis, and maintaining records reflecting the analysis and actions in this regard.[175]

HUD has considered but declined to implement regulations that would further clarify these affirmative duties of CDBG program participants.[176]

This conception of the duty affirmatively to further fair housing as a planning and analysis requirement is basically in line with HUD's affirmative fair housing duties under Title VIII,[177] as they have been interpreted.[178] In order to satisfy its affirmative fair housing obligations, HUD must, at minimum, study the racial and socio-economic effects of its decisions before proceeding with a particular course of action.[179]

Offensive Use of Affirmative Duties

The affirmative fair housing duties of non-federal defendants have only been addressed in a limited fashion in the case law.[180] Typically, they have been invoked by defendants who sought to use them to justify acts of discrimination for the purposes of maintaining demographic balance in racial "tipping" cases.[181]

There is no reason why these affirmative fair housing duties cannot be used offensively by Title VIII plaintiffs. There are two ways to attempt this. The first way is to seek relief directly under the legal provision imposing the affirmative duty. This will be difficult under E.O. 11063 regulations, as these regulations allow only for an administrative grievance procedure through HUD,[182] and less difficult under the other authorities.[183]

The affirmative fair housing duties of non-federal defendants have only been addressed in a limited fashion in the case law.

A second and potentially promising way to bring these affirmative duties to bear against PHAs and project owners is to incorporate these duties into the decisional frameworks for discriminatory effect cases. Under the pure effects test, a defendant's affirmative duty should affect the burden the defendant must carry on rebuttal. A practice that has been shown to have a discriminatory effect is less likely to be "legitimate" when a defendant is required to prevent these effects in the first place. A defendant's failure to study the fair housing effects of its decision would also undermine the legitimacy of its position.

Similarly, affirmative duties ought to affect the application of the four-factor or three-factor tests. A PHA or project owner's interest in taking an action that has a discriminatory effect is limited since such defendants are required to act to prevent these effects, or at least to study them prior to acting. Further, the significance of the final factor, the nature of the relief sought by the plaintiff, ought to weigh in favor of granting relief where the plaintiff seeks to compel a defendant to act affirmatively to prevent a discriminatory effect, since again defendant PHAs and project owners are already required to act affirmatively to prevent discrimination.

Conclusion

Federal fair housing law offers a powerful means by which to mount a fundamental challenge to the loss of federally assisted housing developments. HUD, PHAs, and project owners are particularly vulnerable to such challenges because of the disproportionate adverse impact their actions impose on families of color and the segregative effects their actions can cause, and because of their special affirmative fair housing duties. Part two of this series will apply the legal frameworks described above to specific examples and attempt to anticipate potential objections and defenses to the imposition of discriminatory effect liability against PHAs and project owners. ■

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[175] 24 C.F.R. § 570.601(a)(2) (1999).

[176] 63 Fed. Reg. 57,882 (Oct. 28, 1998) (*Fair Housing Performance Standards for Acceptance of Consolidated Plan Certifications and Compliance With Community Development Block Grant Performance Review Criteria; Proposed Rule).*

[177] 42 U.S.C.A. § 3608(e)(5).

[178] *See, e.g., NAACP, Boston Chapter v. Secretary of HUD,* 817 F.2d 149, 154 (1st Cir. 1987); *Shannon v. HUD*, 436 F.2d 809, 816 (3rd Cir. 1970) (relying also on Exec. Ord. 11063 (1962)); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1538 (11th Cir. 1984).

[179] As HUD hardly ever does this in the loss of units context or in any other context, any claim against a PHA or project owner should also include HUD, provided that HUD made some kind of discretionary decision relating to the demolition, disposition, or conversion. *See HUD's Fair Housing Duties*, 20 HOUS. L. BULL. 1. (Jan. 1999).

[180] HUD's duties to affirmative further fair housing have received fuller treatment, typically in the context of challenges to funding decisions. *See Rizzo*, 564 F.2d at 139-40; *Acevedo v. Nassau County*, 500 F.2d 1078, 1082 (2d Cir. 1974); *Otero*, 484 F.2d at 1133–34; *Shannon*, 436 F.2d at 816; *Clients' Council v. Pierce*, 711 F.2d 1406, 1422–25 (8th Cir. 1983); *Alschuler v. HUD*, 686 F.2d 472, 475 (7th Cir. 1982); *Business Association v. Landrieu*, 660 F.2d 867, 870-71 (3d Cir. 1981); *King v. Harris*, 464 F. Supp. 827, 837 (E.D.N.Y.), *aff'd without opinion sub nom. King v. Faymor Development Corp.*, 614 F.2d 1288 (2d Cir. 1979), *vacated on other grounds*, 446 U.S. 905 (1980); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1538 (11th Cir. 1984); *Gautreaux v. Romney*, 448 F.2d 731, 739 (7th Cir. 1971).

[181] *See Otero,* 484 F.2d at 1133*; Charlottseville,* 718 F. Supp. at 467. *See also U.S. v. Starrett City Assocs.*, 840 F.2d 1096 (2nd Cir. 1988). This strategy of disparate treatment on the basis of race in the name of integration has been consistently unsuccessful. Courts have held that affirmative duties to integrate are subordinate to the duty to refrain from engaging in discrimination on the basis of race. *See Charlottesville, id*.

[182] *See* 24 C.F.R. § 107.35 (1999) (Complaints).

[183] *See* Schwemm at § 21.3 (discussing enforcement of § 3608).