
CHALLENGING PROPERTY TAX FORECLOSURE POLICIES UNDER THE FAIR HOUSING ACT:

LESSONS FROM MORNINGSIDE*

I. INTRODUCTION

Since the collapse of the housing market in 2008, there has been enhanced legal scrutiny of mortgage foreclosure practices in the form of federal legislation¹ and hundreds of local and state programs to stem the tide of foreclosures and keep families in their homes.² At the same time, property tax foreclosure—which has been called “The Other Foreclosure Crisis”—has been devastating communities across the country with little public outcry or acknowledgement.³ When homeowners do not pay or fall behind on the property taxes assessed by their local governments, municipalities can place liens on those homeowners’ properties for the amount of overdue taxes.⁴ Municipalities can then auction off the liens or the properties themselves to private parties, public entities, or investors, often resulting in foreclosure and eviction for the homeowner in default.⁵

Property tax foreclosures are particularly harmful to homeowners and their communities because “[p]roperty tax delinquency not only mirrors the struggles of American homeowners, it has compounded them.”⁶ For many low-income homeowners, their home is their largest and most valuable asset,⁷ and tax

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1. Kathryn E. Johnson & Carolyn E. Waldrep, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Overview*, 14 N.C. BANKING INST. 191, 203–13 (2010).

2. GEOFF WALSH, NAT’L CONSUMER LAW CTR., REBUILDING AMERICA: HOW STATES CAN SAVE MILLIONS OF HOMES THROUGH FORECLOSURE MEDIATION 11 (2012), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-mediation.pdf [perma: <http://perma.cc/Z32F-FCW8>].

3. JOHN RAO, NAT’L CONSUMER LAW CTR., THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES 4 (2012), http://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf [perma: <http://perma.cc/D5HJ-HX9M>].

4. *Id.*

5. *Id.*

6. Andrew W. Kahrl, *Investing in Distress: Tax Delinquency and Predatory Tax Buying in Urban America*, 43 CRITICAL SOC. 199, 199 (2017).

7. *See id.* at 202.

foreclosures often result in the complete loss of that equity.⁸ In many states, municipalities can initiate tax foreclosure proceedings for delinquencies as small as \$1,000, and properties may be sold for the amount of the delinquency, even if the property is worth much more.⁹ This loss of equity displaces families, destroys their savings, and sometimes destabilizes entire communities.¹⁰

As with many housing issues in the United States, there is a history of racial discrimination in property tax foreclosure proceedings, particularly in the assessment of property values for taxation purposes.¹¹ One academic has argued that the practice of assessing a property's value for taxation purposes is "less a science and more an expression of political power."¹² A number of studies in the 1960s, '70s, and '80s revealed that in many cities, neighborhoods that were considered blighted or declining were assessed at a higher rate of market value than neighborhoods considered to be stable or improving.¹³ The overall effect of such disparities was that "low-income homeowners devoted a far greater percentage of their annual incomes to property taxes than higher earners."¹⁴ Predominantly nonwhite "blighted" neighborhoods bore a higher property tax burden than predominantly white neighborhoods.¹⁵

Racial discrimination in the property tax foreclosure context is difficult, if not impossible, to prove in court because the applicable laws and policies are almost always facially race-neutral.¹⁶ Nonwhite people are not explicitly singled out for unequal treatment, yet foreclosure laws and policies often have a demonstrably disproportionate effect on low-income, nonwhite homeowners. Alleviating that a law or policy results in a disparate impact avoids the difficulties of proving discriminatory treatment by allowing plaintiffs to show discriminatory effect without the burden of proving discriminatory intent.¹⁷

The Fair Housing Act (FHA),¹⁸ also known as Title VIII of the Civil Rights Act of 1968, prohibits housing-based discrimination on the basis of race, color, religion, sex, familial status, or national origin.¹⁹ After years of litigation, in 2015, the Supreme Court officially recognized that claims of disparate impact are cognizable under the FHA in *Texas Department of Housing & Community*

8. RAO, *supra* note 3, at 4.

9. *Id.*

10. *Id.*

11. See Kahrl, *supra* note 6, at 201–06.

12. *Id.* at 203.

13. *Id.* at 204.

14. *Id.*

15. *Id.*

16. *Id.* (describing "uniformity clauses" in some states dictating that property must be assessed at a "uniform percentage of its full value").

17. Joseph A. Seiner, Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach, 25 YALE L. & POL'Y REV. 95, 98–99 (2006).

18. Fair Housing Act, Pub. L. No. 90–284, tit. 8, 82 Stat. 73, 81–89 (codified as amended at 42 U.S.C. §§ 3601–3619).

19. 42 U.S.C.A. § 3604(a) (2012).

Affairs v. Inclusive Communities Project.²⁰

Despite many historical successes in combatting discriminatory zoning,²¹ lending practices,²² and rental policies²³ using the disparate impact doctrine, before the summer of 2016 there had been only one disparate impact challenge of property tax foreclosure policies under the FHA.²⁴ In July 2016, the ACLU and the NAACP Legal Defense Fund brought a lawsuit under the FHA challenging the property tax foreclosure policies of Wayne County, Michigan, alleging that those policies disproportionately burdened nonwhite homeowners in the City of Detroit.²⁵

Unfortunately, the lawsuit, *Morningside Community Organization v. Wayne County Treasurer*,²⁶ was unsuccessful.²⁷ The trial court dismissed the case because it found that the appropriate forum for the dispute was the Michigan Tax Tribunal, a quasi-judicial body with specific jurisdictional powers.²⁸ The Michigan Court of Appeals affirmed.²⁹ Importantly, however, the trial court also found that the claim itself was fully cognizable under the FHA and that the plaintiffs had successfully pled a prima facie case under the standard established by *Inclusive Communities*.³⁰

This Comment will criticize *Morningside* and suggest strategies for similar challenges in other municipalities. The Michigan Tax Tribunal should not have had exclusive jurisdiction over the *Morningside* claim; rather, the state court should have decided the merits of the claim.³¹ Plaintiffs in other municipalities may encounter similar jurisdictional conflicts with their local administrative bodies, and will need to plead carefully in state court to avoid invoking such jurisdiction or be prepared to take a case through the administrative process.³²

Despite the failure of *Morningside*, policies involved in property tax administration can be successfully challenged under the FHA because they may

20. 135 S. Ct. 2507, 2514 (2015).

21. See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

22. See, e.g., *Nat'l. Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70 (D.D.C. 2008); *Hargraves v. Capital City Mortg. Corp.*, 147 F. Supp. 2d 1 (D.D.C. 2001).

23. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

24. See *Coleman v. Seldin*, 687 N.Y.S.2d 240 (Sup. Ct. 1999). See also *infra* notes 239–55 and accompanying text for a discussion of *Coleman*.

25. Complaint at 2, *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH (Wayne Cty. Mich. Cir. Ct. July 13, 2016) [hereinafter *Morningside* Complaint].

26. No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

27. *Morningside*, 2017 WL 4182985, at *1 (affirming trial court's dismissal of the action for lack of subject matter jurisdiction).

28. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 7 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff'd*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

29. *Morningside*, 2017 WL 4182985, at *1.

30. *Morningside*, slip op. at 16–17. See *infra* notes 137–45 and accompanying text for a discussion of the *Inclusive Communities* prima facie disparate impact standard.

31. See *infra* notes 261–311.

32. See *infra* Part III.C.

have a disparate impact on nonwhite homeowners. The FHA and the disparate impact doctrine can still become tools for housing advocates to combat the property tax foreclosure crisis and pressure municipalities into improving policies that disproportionately affect low-income and nonwhite homeowners.

II. OVERVIEW

The Overview is divided into two sections: Part II.A traces the development of disparate impact liability and its application to the FHA, and Part II.B provides a summary of the administration of property taxes and the challenge to Wayne County's property tax policies in *Morningside*.

A. Disparate Impact Under the Fair Housing Act

Part II.A.1 describes the origins and development of disparate impact liability. Parts II.A.2 and II.A.3 discuss early application of the doctrine to claims under the FHA and the Supreme Court's ultimate recognition of the doctrine under the FHA in *Inclusive Communities*. Part II.A.4 explores the impact of the *Inclusive Communities* decision on plaintiffs bringing disparate impact claims under the FHA.

1. A Brief History of the Disparate Impact Doctrine

Proving legal discrimination has traditionally required a showing of either discriminatory treatment—the law or policy at issue was enacted with the intent to discriminate on the basis of a protected characteristic such as race, color, religion, sex, or national origin—or discriminatory effect—the law or policy at issue is neutral on its face, but disproportionately affects a protected class.³³

The disparate impact doctrine governs the second option, allowing a complainant to proffer evidence that a particular policy had a discriminatory effect without needing to prove the defendant's discriminatory *intent*.³⁴ Plaintiffs may succeed in proving discriminatory treatment just as readily as disparate impact where the facts pled could lead to an inference that a policy was *intended* to be discriminatory, though apparently neutral on its face.³⁵ Because it is not

33. Seiner, *supra* note 17, at 98–99.

34. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006).

35. IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, 3 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 5:20, Westlaw (database updated November 2017). Though this Comment does not focus on allegations of intentional discrimination, some background may be useful. The Supreme Court held in *Washington v. Davis*, 426 U.S. 229, 239 (1976), that state action cannot be held unconstitutional merely because it results in a racially disparate impact; only proof of discriminatory *intent* is enough to show a violation of the Equal Protection Clause. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), the Court introduced a number of factors for finding purposeful discrimination under the Fourteenth Amendment, including consideration of patterns of disparate impact. The petitioners in *Arlington Heights* also brought a claim under the FHA, which the Supreme Court remanded to the Seventh Circuit. *Id.* at 271. The Seventh Circuit reaffirmed its original holding that discriminatory effect alone is enough to prove a violation of the FHA, relying on *Griggs v. Duke Power Co.*, discussed *infra* at

uncommon for courts to review similar evidence to determine whether there has been intentional or unintentional discrimination,³⁶ plaintiffs will often argue both discriminatory treatment and disparate impact.³⁷

The disparate impact doctrine has been employed since 1971, notably by activists in the Civil Rights Movement in their efforts to “identify[] and dismantl[e] intent-neutral but historically laden sources of unnecessary structural exclusion.”³⁸ Proponents argue that effects-based proof must be an option to combat discrimination because proving intentional discrimination can be so difficult as to render it nearly impossible to accomplish.³⁹ Disparate impact claims are intended to “reach discrimination that [is] otherwise out of reach for claims of intentional discrimination.”⁴⁰

The Supreme Court first recognized disparate impact liability when it interpreted Title VII of the Civil Rights Act of 1964⁴¹ in *Griggs v. Duke Power Co.*⁴² In *Griggs*, nonwhite employees challenged their employer’s policy requiring a certain education level and aptitude test score for any assignment outside of the generally low-paying “Labor Department.”⁴³ The plaintiffs argued that this facially neutral policy nevertheless resulted in racial discrimination.⁴⁴ Title VII of the Civil Rights Act then provided (and still provides) that it is an “unlawful employment practice” for an employer to “limit, segregate, or classify his employees” in any way which would “deprive or tend to deprive any individual of employment opportunities” due to the individual’s membership in a protected class.⁴⁵ The Supreme Court agreed with the Court of Appeals “that there was no showing of a racial purpose or invidious intent”⁴⁶ but found that the employer’s facially neutral practice was prohibited because Title VII was intended to address “the consequences of employment practices, not simply the motivation.”⁴⁷ The Court interpreted the statute to prohibit not only overt discrimination (policies with a discriminatory purpose), but also practices that

notes 42–55 and accompanying text. *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977).

36. Seiner, *supra* note 17, at 106.

37. BODENSTEINER & LEVINSON, *supra* note 35, § 5:20.

38. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 251 (2011).

39. *See id.* at 258; DAVID H. CARPENTER, CONG. RESEARCH SERV., R44203, DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT 2 (2015) (noting that “a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy” (quoting *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977))).

40. Selmi, *supra* note 34, at 702.

41. Civil Rights Act of 1964, Pub. L. No. 88–352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

42. 401 U.S. 424 (1971).

43. *Griggs*, 401 U.S. at 426–27.

44. *Id.*

45. 42 U.S.C. § 2000e-2(a) (2012).

46. *Griggs*, 401 U.S. at 429.

47. *Id.* at 432.

are discriminatory in effect (policies that cause a disparate impact).⁴⁸ The *Griggs* decision has since been explicitly codified in Title VII.⁴⁹

Griggs introduced the first Supreme Court-mandated application of disparate impact liability and originated the burden-shifting framework that would develop over the succeeding decades.⁵⁰ The Court acknowledged that Congress placed a burden on the employer to show that any allegedly discriminatory requirement has a “manifest relationship to the employment in question.”⁵¹ Employers are given a chance to justify the practices as a “business necessity.”⁵² In other words, Title VII does not outlaw all types of neutral policies that divide potential employees; it merely outlaws those that divide employees in ways that are not “a reasonable measure of job performance” and also effectively discriminate on the basis of a protected characteristic.⁵³ The idea that a defendant might combat disparate impact claims with a legitimate reason for the neutral practice has since transformed into an elaborate procedure of burden shifting between complainant and defendant, which seeks to balance the rights and interests of each.⁵⁴

The disparate impact doctrine was applied to the Age Discrimination in Employment Act (ADEA)⁵⁵ in *Smith v. City of Jackson*.⁵⁶ In *Smith*, law enforcement officers employed by the City of Jackson alleged that salary increases were more generous to younger officers than older officers, and therefore discriminated on the basis of age in violation of the ADEA.⁵⁷ The Supreme Court held that the ADEA allows for claims under a disparate impact theory,⁵⁸ with four Justices reasoning that the language of the ADEA is almost identical to the language in Title VII at issue in *Griggs*.⁵⁹ Thus, complainants alleging age discrimination might rely on the disparate impact doctrine when

48. *Id.* at 431.

49. 42 U.S.C. § 2000e-2(k); *see also* Seiner, *supra* note 17, at 101–03 (describing path to codification).

50. *See* Seiner, *supra* note 17, at 99–103.

51. *Griggs*, 401 U.S. at 432.

52. Selmi, *supra* note 34, at 705.

53. *Griggs*, 401 U.S. at 436.

54. 24 C.F.R. § 100.500 (2018). These regulations contain the Department of Housing and Urban Development’s burden-shifting procedures announced in 2013. *See infra* notes 120–23 and accompanying text.

55. Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

56. 544 U.S. 228, 230 (2005).

57. *Smith*, 544 U.S. at 230.

58. *Id.* at 232.

59. *Id.* at 233–34 (Stevens, J., concurring). The ADEA provides that it is unlawful for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual’s age.” 29 U.S.C. § 623(a)(2) (2012). The concurring Justices reasoned that, as in *Griggs*, “the text focuses on the effects of the action on the employee rather than the motivation for the action of the employer.” *Smith*, 544 U.S. at 236 (Stevens, J., concurring).

intentional discrimination is difficult or impossible to prove.⁶⁰

2. Early Application to the Fair Housing Act

The FHA provides that it is 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.*”⁶¹ By 2000, each of the eleven circuits to address the issue held that the FHA “prohibits housing practices that have a disparate impact on a protected group, even in the absence of discriminatory intent.”⁶² In 2013, the U.S. Department of Housing and Urban Development (HUD) released regulations “formaliz[ing] its long-held recognition” of disparate impact liability under the FHA.⁶³

Though each of the circuits approached the theory in slightly different ways, most established a three- or four-step process of burden shifting.⁶⁴ First, courts required the complainant to clear the initial hurdle of “proving that a challenged practice caused or predictably will cause a discriminatory effect.”⁶⁵ Next, the burden shifted to the defendant to show that the challenged practice was “justified by a substantial, legitimate, nondiscriminatory objective.”⁶⁶ The circuits disagreed on the next step: in some circuits, the burden shifted back to the plaintiff to show that there was a less discriminatory alternative available;⁶⁷

60. See *Smith*, 544 U.S. at 243 (majority opinion).

61. 42 U.S.C. § 3604(a) (2012) (emphasis added).

62. Michael G. Allen, Jamie L. Crook & John P. Relman, *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 156 (2014); see also *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229–30 (10th Cir. 2007); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 53 (1st Cir. 2000); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1542–43 (11th Cir. 1994); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988); *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988); *Arthur v. Toledo*, 782 F.2d 565, 574–76 (6th Cir. 1986); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065–66 (4th Cir. 1982); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288–89 (7th Cir. 1977); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148–49 (3d Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974). The U.S. Court of Appeals for the District of Columbia has not ruled on the issue. CARPENTER, *supra* note 39, at 1–2, n.9.

63. Allen, *supra* note 62, at 158 (quoting Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100)); see 24 C.F.R. § 100.500 (2018).

64. Allen, *supra* note 62, at 158; see *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm’n*, 508 F.3d 366, 374 (6th Cir. 2007); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 446 (3d Cir. 2002); *Langlois*, 207 F.3d at 50–51; *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1254 (10th Cir. 1995); *Huntington*, 844 F.2d at 939; *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984); *City of Black Jack*, 508 F.2d at 1185. Some circuits chose to use a multifactor balancing test for claims against nonprivate defendants. See *Arthur*, 782 F.2d at 575; *Clarkton*, 682 F.2d at 1065. Some circuits recognized disparate impact liability but did not explicitly adopt a burden-shifting procedure. See *Jackson*, 21 F.3d at 1541; *Keith*, 858 F.2d at 483–84; *Hanson*, 800 F.2d at 1386.

65. Allen, *supra* note 62, at 161.

66. *Id.*

67. See *Graoch*, 508 F.3d at 374; *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902–03 (8th Cir. 2005); *Mountain Side Mobile Estates*, 56 F.3d at 1254.

in others, the burden remained with the defendant to prove the absence of such alternatives.⁶⁸ Additionally, several circuits called for a final step weighing “the defendant’s justifications against the plaintiff’s showing of a discriminatory effect.”⁶⁹

Two paradigmatic cases under the FHA illustrate how courts have analyzed the disparate impact doctrine and the intricacies of the burden-shifting process: *Resident Advisory Board v. Rizzo*⁷⁰ and *Huntington Branch of the NAACP v. Town of Huntington*.⁷¹ These cases demonstrate some of the typical issues circuit courts have addressed in disparate impact litigation under the FHA before the Supreme Court finally addressed the issue in 2015.⁷²

In *Rizzo*, a class of individuals eligible for low-income housing in Philadelphia sued the City of Philadelphia, its housing authority, its redevelopment authority, and HUD under the FHA (then referred to more commonly as Title VIII of the Civil Rights Act).⁷³ The complainants alleged that the City and its agencies had intentionally delayed the construction of a low-income housing project in South Philadelphia, resulting in a racially discriminatory impact on access to housing.⁷⁴ The Third Circuit held that, “in delaying and frustrating the construction of the project, the [City] acted with discriminatory intent and thereby violated the plaintiffs’ constitutional rights and rights” under the FHA.⁷⁵

With respect to the municipal agency defendants, the court held that, even absent evidence of discriminatory intent, proof of disparate racial impact was enough to find an FHA violation.⁷⁶ The Third Circuit created a burden-shifting framework in which a prima facie case of disparate impact can be rebutted by the defendant with a showing of adequate “justification” for the alleged acts.⁷⁷ The court offered some guidance in determining whether the defendant has

68. See *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 385 (3d Cir. 2011).

69. Allen, *supra* note 62, at 161; see *Graoch*, 508 F.3d at 374; *Mountain Side Mobile Estates*, 56 F.3d at 1254; *Huntington*, 844 F.2d at 940.

70. 564 F.2d 126 (3d Cir. 1977).

71. 844 F.2d 926 (2d Cir. 1988).

72. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Proj., Inc.*, 135 S. Ct. 2507, 2519 (2015) (citing *Huntington* and *Rizzo* as representative of a general trend of FHA cases among the circuits).

73. *Rizzo*, 564 F.2d at 129–30.

74. *Id.* at 130–38. The *Rizzo* Administration actively opposed the project: Mayor Rizzo campaigned on the promise to “support local communities in their opposition to public housing projects proposed for their neighborhoods.” *Id.* at 136.

75. *Id.* at 130. The court applied the *Arlington Heights* factors. See *id.* at 142–45.

76. *Id.* at 145–46. The court noted, as did the O’Connor concurrence in *Smith*, that the “because of” language in the FHA might suggest that a plaintiff must show discriminatory intent. *Id.* at 146; see *Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O’Connor, J., concurring in judgment). However, the *Rizzo* court reasoned that construing the FHA this way would “have the effect of increasing the plaintiffs’ burden . . . to a level almost commensurate with the burden of proof required to demonstrate an equal protection violation” and declined to do so. *Rizzo*, 564 F.2d at 146–47.

77. *Rizzo*, 564 F.2d at 149.

carried its burden: a justification must serve “a legitimate, bona fide interest of the . . . defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.”⁷⁸ The Third Circuit found that an FHA violation is proven where a prima facie case is not so rebutted.⁷⁹

As applied to the particular facts in *Rizzo*, the court found that the plaintiffs proved a prima facie case of discriminatory impact.⁸⁰ The evidence showing that the actions of the defendants “had the result of removing black families from the . . . site” and leaving the neighborhood as an “all-white community” was enough to establish a prima facie case.⁸¹ Additionally, the defendants failed to carry their burden of showing that their actions served a legitimate interest and that there were no alternatives that would have a less discriminatory impact.⁸² The City of Philadelphia was the only defendant to advance any justification at all,⁸³ arguing that “its actions in terminating the project were required because of threatened violence.”⁸⁴ The Third Circuit agreed with the district court’s finding that threats of violence alone cannot justify deprivations of constitutional rights.⁸⁵ The court went on to find it unnecessary to address the legitimacy of the other defendants’ interests, “[g]iven the absence of any justification for [their] actions.”⁸⁶

In *Huntington*, the NAACP and two low-income residents of Huntington, New York, a suburb on the North Shore of Long Island, alleged that a zoning regulation restricting multifamily housing projects to a designated “urban renewal area” was racially discriminatory.⁸⁷ The Second Circuit joined other circuits in holding that a plaintiff could establish a prima facie case of disparate impact under the FHA by showing discriminatory effect, even if they could not prove discriminatory intent.⁸⁸ The court reasoned that the FHA’s stated purpose

78. *Id.* The court rejected the Eighth Circuit’s “‘compelling’ interest” standard, finding such a high standard to be best reserved for purposeful discrimination claims. *Id.* at 148 (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1186–87 (8th Cir. 1974)). The court also rejected the *Griggs* “business necessity” standard because it found that some “job-related qualities” might legitimately bar a Title VII claim, whereas there would be no comparable reason to deny someone housing. *Rizzo*, 564 F.2d at 148–49 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

79. *Id.*

80. *Id.*

81. *Id.* at 149.

82. *Id.* at 149–50.

83. *Id.* at 150.

84. *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1023 (E.D. Pa. 1976).

85. *Rizzo*, 564 F.2d at 150; *Rizzo*, 425 F. Supp. at 1023–24 (“Inspector Fencl, the able head of the Civil Disobedience Unit, testified that the Philadelphia Police Department could control any disturbance in connection with the Whitman Park Townhouse Project and could have seen that construction was completed.”).

86. *Rizzo*, 564 F.2d at 150.

87. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988), *rev’g* 668 F. Supp. 762 (E.D.N.Y. 1987), *aff’d*, 488 U.S. 15 (1988).

88. *Id.* at 934. The Second Circuit reversed the district court’s refusal to invalidate the zoning regulation because the court had “incorrectly employed an intent-based standard for the disparate

of ending discrimination “requires a discriminatory effect standard” because an intent requirement “would strip the statute of all impact on de facto segregation.”⁸⁹

In developing its burden-shifting procedure, the Second Circuit agreed with the Third Circuit’s formulation of “weighing . . . the adverse impact against the defendant’s justification.”⁹⁰ However, the Second Circuit noted that the Third Circuit did not offer much guidance regarding formulations of legitimate interests and alternative means because only one of the defendants in *Rizzo* offered a justification, and that justification was “entirely unacceptable.”⁹¹ Accordingly, the *Huntington* court expanded on the *Rizzo* two-prong test of assessing (1) whether the defendant’s interests are legitimate and bona fide and (2) whether there are any less discriminatory alternatives.⁹²

The plaintiffs in *Huntington* made out a prima facie case of disparate impact by showing that the failure to rezone disproportionately harmed African Americans and had a “segregative impact on the entire community.”⁹³ The Second Circuit took issue with the district court’s focus on “absolute” numbers, which led the district court to conclude that because the majority of victims of the failure to rezone were white, there was no discriminatory effect.⁹⁴ The Second Circuit asserted that the analysis should instead focus on the “disproportionate burden on minorities.”⁹⁵ This disproportionate burden existed in *Huntington* because, while 7% of all Huntington families needed subsidized housing, 24% of black families in Huntington needed subsidized housing.⁹⁶ Such evidence constituted a prima facie case that the failure to rezone had “a substantial adverse impact on minorities.”⁹⁷

Turning to the defendant’s proffered justifications, the Second Circuit divided each of the Town’s seven justifications for the refusal to rezone into plan-specific and site-specific justifications.⁹⁸ Plan-specific concerns refer to choices of design and construction that are not necessarily particular to a specific site (e.g., placement of driveways), while site-specific concerns are particular to a specific site (e.g., where a town has a legitimate interest in repurposing a

impact claim asserted.” *Id.* at 928.

89. *Id.* at 934.

90. *Id.* at 936.

91. *Id.*

92. *Id.* at 939.

93. *Id.* at 938.

94. *Id.*

95. *Id.*

96. *Id.* For a discussion of the significance of statistics in proving disparate impact and the drawbacks of statistical models, see generally Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773 (2009).

97. *Huntington*, 844 F.2d at 938.

98. *Id.* at 939–40 (listing justifications as “(1) inconsistency with the Town’s Housing Assistance Plan; (2) inconsistency with zoning; (3) traffic considerations; (4) parking and fire protection problems; (5) proximity to the railroad and Long Island Lighting Company substation; (6) inadequate recreation and play areas; and (7) undersized and unrealistic units”).

particular site for parks and recreation).⁹⁹ The Second Circuit in *Huntington* reasoned that plan-specific justifications could be resolved “by the less discriminatory alternative of requiring reasonable design modifications.”¹⁰⁰ Site-specific justifications, on the other hand, are more likely to be considered acceptable justifications, though they should still be scrutinized to determine if they are “legitimate and bona fide.”¹⁰¹

The court dismissed two of the defendant’s proffered justifications for lack of evidence, and found that three of the justifications were plan-specific, and so could have been solved with “reasonable design modifications.”¹⁰² Though the final two justifications were site-specific, one of the objections was never directly raised at trial and the other was not raised until after the litigation had begun, leading the Second Circuit to conclude that the Town’s justifications were “weak and inadequate.”¹⁰³ Accordingly, because the Town’s justifications did not outweigh the showing of discriminatory effect, the court found that the Town had violated the FHA.¹⁰⁴

3. The Inclusive Communities Decision

The Supreme Court held in *Inclusive Communities* that disparate impact claims are cognizable under the FHA, just as they are under Title VII and the ADEA.¹⁰⁵ The Inclusive Communities Project (the Project) brought a lawsuit alleging that the Texas Department of Housing and Community Affairs (the Department) followed a policy of allocating tax credits for the development of low-income housing that resulted in “segregated housing patterns.”¹⁰⁶ Specifically, the Project alleged that the Department had disproportionately granted “too many [tax] credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods.”¹⁰⁷

The Northern District of Texas applied the *Huntington* standard for establishing a prima facie case of discriminatory impact: a showing of “adverse impact on a particular minority group” or “harm to the community generally by the perpetuation of segregation.”¹⁰⁸ The Project offered statistical evidence showing that, during a nine-year period, the Department had approved nearly

99. See Melinda Westbrook, *Connecticut’s New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions*, 66 CONN. B.J. 169, 193–94 (1992).

100. *Huntington*, 844 F.2d at 939.

101. *Id.*

102. *Id.*

103. *Id.* at 940.

104. *Id.* at 940–41.

105. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Proj., Inc.*, 135 S. Ct. 2507, 2525 (2015).

106. *Id.* at 2514. The Project brought both intent-based and effects-based claims, but this Comment will focus only on the effects-based claims.

107. *Id.*

108. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs (ICP I)*, 749 F. Supp. 2d 486, 499 (N.D. Tex. 2010) (quoting *Huntington Branch*, 844 F.2d at 937) (granting partial summary judgment for the Project).

50% of tax credits for proposed units in areas that were majority nonwhite, and had approved only about 37% of proposed units in majority white areas.¹⁰⁹ The district court found that the Department's practice of "disproportionately" approving tax credit applications in nonwhite neighborhoods led to a concentration of low-income units in those neighborhoods and made it more difficult to place low-income nonwhite residents in majority-white neighborhoods.¹¹⁰ As the district court noted, "[o]ther courts have held that actions that cause disproportionate harm to African-Americans and produce a segregative impact on the entire community create a strong prima facie case."¹¹¹ The court accordingly concluded that these statistics satisfied the complainant's initial burden.¹¹²

The Department was given the opportunity to rebut this showing with evidence that the policy was justified by some nondiscriminatory objective.¹¹³ The district court applied the test from *Rizzo* and *Huntington*, requiring that the Department's asserted interest be bona fide and legitimate, and that there be no less discriminatory alternative.¹¹⁴ The Department argued that its actions served a legitimate government interest: "the awarding of tax credits in an objective, transparent, predictable, and race-neutral manner, in accordance with federal and state law."¹¹⁵ As to the second prong, the Department argued that it had limited discretion for the issuance of tax credits under mandatory statutory requirements, and that there was no less discriminatory alternative to the "racially-neutral objective scoring system [currently] . . . in effect."¹¹⁶ The district court assumed that the Department's proffered interests were legitimate and bona fide,¹¹⁷ but found that the Department ultimately failed to carry its burden because it did not address whether it was possible to use the least discriminatory means "while still furthering its interests."¹¹⁸ Thus, the district court ruled for the Project, and the Department appealed to the Fifth Circuit.¹¹⁹

While the appeal was pending, HUD released regulations that set out a burden-shifting framework for disparate impact claims under the FHA.¹²⁰ The regulations require that the complainant bear the first "burden of proving that a

109. *Id.* at 499–500.

110. *Id.* at 500.

111. *Id.*; see *Huntington Branch*, 844 F.2d at 938.

112. *ICP I*, 749 F. Supp. 2d at 500.

113. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs (ICP II)*, 860 F. Supp. 2d 312, 322–23 (N.D. Tex. 2012) (order following bench trial), *rev'd*, 747 F.3d 275 (5th Cir. 2014), *aff'd*, 135 S. Ct. 2507 (2015).

114. *Id.*

115. *Id.* at 323.

116. *Id.* at 325 (quoting Reply Brief for Defendants at 6, *ICP II*, 860 F. Supp. 2d 312 (No. 3:08-CV-0546-D)).

117. *Id.* at 326.

118. *Id.* at 330.

119. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2514 (2015).

120. *Id.*; see 24 C.F.R. § 100.500(c) (2018).

challenged practice caused or predictably will cause a discriminatory effect.”¹²¹ Next, the burden shifts to the defendant to show that the “challenged practice is necessary to achieve one or more [of its] substantial, legitimate, nondiscriminatory interests.”¹²² Finally, the burden shifts back to the complainant for a chance to show that those “substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”¹²³

The Fifth Circuit officially adopted HUD’s regulations in its consideration of *Inclusive Communities*, and then remanded the case to the district court to apply the new legal standard.¹²⁴ The Department, seeking guidance from the Supreme Court, petitioned for a writ of certiorari for the Court to decide whether disparate impact claims are even cognizable under the FHA.¹²⁵ The Department presented just two issues to the court: (1) whether disparate impact claims are cognizable under the FHA and (2) if so, what standards and burdens of proof should apply.¹²⁶ The Supreme Court granted the writ.¹²⁷

The Court decided to recognize disparate impact claims under the FHA and affirmed the Fifth Circuit’s holding, including its adoption of HUD’s burden-shifting procedures.¹²⁸ In deciding to recognize disparate impact claims under the FHA, the Supreme Court relied primarily on previous interpretations of Title VII and the ADEA in *Griggs* and *Smith*.¹²⁹ Those opinions instructed that when statutory text “refers to the consequences of actions and not just to the mindset of actors” it must be “construed to encompass disparate-impact claims.”¹³⁰ The Court found that the logic of those cases provided “strong support for the conclusion that the FHA [also] encompasses disparate impact claims.”¹³¹

121. 24 C.F.R. § 100.500(c)(1).

122. *Id.* § 100.500(c)(2).

123. *Id.* § 100.500(c)(3).

124. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275, 282–83 (5th Cir. 2014), *aff’d*, 135 S. Ct. 2507 (2015).

125. Petition for Writ of Certiorari at 14–15, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371). The Department pointed out that the circuits were divided on standards and burdens of proof. *Id.* at 11, 21. It also noted that the Court had granted cert on this issue previously, without coming to a resolution. *See infra* note 127 (noting prior cases).

126. Petition for Writ of Certiorari at i, *Inclusive Cmty.*, 135 S. Ct. 2507 (No. 13-1371).

127. *Inclusive Cmty.*, 135 S. Ct. at 2515. *Inclusive Communities* was the Court’s third opportunity to decide the issue, as two previous cases for which it had granted cert settled before the Court could hear them. CARPENTER, *supra* note 39, at 2; *see* *Township of Mount Holly v. Mt. Holly Garden Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.) (denying writ of certiorari); *Magner v. Gallagher*, 565 U.S. 1187 (2012) (mem.) (denying writ of certiorari).

128. *Inclusive Cmty.*, 135 S. Ct. at 2526. On remand, the district court decided the case on the merits considering both the Supreme Court’s affirmance and the Fifth Circuit’s adoption of HUD’s regulations. *See infra* notes 148–56 and accompanying text.

129. *Inclusive Cmty.*, 135 S. Ct. at 2516–17.

130. *Id.* at 2518. *See supra* notes 41–58 and accompanying text for a discussion of the *Griggs* and *Smith* opinions.

131. *Id.* Recall that the FHA provides that it is unlawful to “refuse to sell or rent . . . or to refuse

The Court also pointed to FHA amendments as evidence of congressional intent to allow for disparate impact liability.¹³² The majority reasoned that Congress was aware of “unanimous precedent”¹³³ in the circuit courts when it amended the FHA, and that the amendments included several exemptions that “assume the existence of disparate-impact claims.”¹³⁴ Finally, the Court found that disparate impact liability is consistent with the “central purpose” of the FHA.¹³⁵ The Court noted, “[t]he FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation’s economy.”¹³⁶

While the *Inclusive Communities* decision officially recognized that the FHA does allow for disparate impact claims,¹³⁷ it also has altered how the disparate impact doctrine functions in the FHA context. In fact, the decision articulates heightened standards a complainant must meet to successfully shift the burden to the defendant.¹³⁸ The Court made clear that “disparate impact liability has always been properly limited” and that it may not mandate “the displacement of valid governmental policies” or “force housing authorities to reorder their priorities.”¹³⁹

To achieve this end, the Court constructed a “robust causality requirement” to “protect[] defendants from being held liable for racial disparities they did not create.”¹⁴⁰ In order to make out a prima facie case of disparate impact, a complainant must “produce statistical evidence demonstrating a causal connection” between the alleged discrimination and the defendant’s policy that it claims caused that discrimination.¹⁴¹ Furthermore, the Court held that “[g]overnmental or private policies are not contrary to the disparate-impact

to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin,” 42 U.S.C. § 3604(a) (2012), and Title VII similarly provides that it is unlawful to “limit, segregate, or classify . . . employees” in any way that would “deprive or tend to deprive any individual of employment opportunities . . . because of such individual’s race, color, religion, sex, or national origin.” *Id.* § 2000e-2(a)(2).

132. *Inclusive Cmty.*, 135 S. Ct. at 2519; see also Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3619).

133. *Inclusive Cmty.*, 135 S. Ct. at 2519.

134. *Id.* at 2519-20. In the 1988 amendments, Congress added three provisions the Court reasoned would be “superfluous” if Congress had not assumed disparate impact liability existed. *Id.* The three provisions clarified that (1) nothing in the FHA prohibits property appraisals to consider factors other than protected factors, (2) nothing in the FHA limits applicability of reasonable restrictions on the number of occupants living in a dwelling, and (3) nothing in the FHA prohibits conduct against a person convicted under controlled substance laws. 42 U.S.C. § 3605(c) (provision one); *id.* § 3607(b)(1) (provision two); *id.* § 3607(b)(4) (provision three).

135. *Inclusive Cmty.*, 135 S. Ct. at 2521.

136. *Id.*

137. *Id.* at 2525.

138. Elizabeth L. McKeen et al., *Robust Causality and Cautionary Standards: Why the Inclusive Communities Decision, Despite Upholding Disparate-Impact Liability, Establishes New Protections for Defendants—Part I*, 132 BANKING L.J. 553, 553 (2015) [hereinafter McKeen et al., *Part I*].

139. *Inclusive Cmty.*, 135 S. Ct. at 2522.

140. *Id.* at 2523.

141. *Id.*

requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”¹⁴² The Court found that governmental bodies “must not be prevented from achieving legitimate objectives.”¹⁴³ In short, it is no longer sufficient to identify a statistical disparity, allege a policy, and expect to make a prima facie case.¹⁴⁴ Rather, complainants are required at the pleading stage to identify a specific, arbitrary, and unnecessary barrier to housing and show “robust causality” between that barrier and an “associated statistical disparity.”¹⁴⁵

The Court did not decide *Inclusive Communities* on the merits, but rather remanded it to the Fifth Circuit to be decided in accordance with its opinion.¹⁴⁶ However, it did state that if the Project “cannot show a causal connection between the Department’s policy and a disparate impact—for instance, because federal law substantially limits the Department’s discretion—that should result in dismissal of this case.”¹⁴⁷

4. Developments Post-*Inclusive Communities*

Though a clear pattern has yet to emerge in the few years since *Inclusive Communities*, there is some indication that the robust causality requirement has made pleading successful prima facie cases more difficult for plaintiffs.¹⁴⁸ The fate of *Inclusive Communities* on remand is particularly illuminating.

The Fifth Circuit, having received the Supreme Court’s affirmance, remanded the case to the Northern District of Texas.¹⁴⁹ The district court determined that it would decide the Project’s claim based on the current record and expressly stated that it would apply both the Supreme Court’s new standard and the Fifth Circuit’s adoption of HUD’s burden-shifting procedures, which the Supreme Court had affirmed without altering.¹⁵⁰ The district court also determined that it would reconsider whether the Project had established a prima facie case and allowed the parties to brief the issue.¹⁵¹

Ultimately, the district court found that the Project had not established a prima facie case under the Supreme Court’s more “onerous” standard and so dismissed its disparate impact claim.¹⁵² First, the court found that the Project

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

143. *Id.*

144. Elizabeth L. McKeen et al., *Robust Causality and Cautionary Standards: Why the Inclusive Communities Decision, Despite Upholding Disparate-Impact Liability, Establishes New Protections for Defendants—Part II*, 133 *BANKING L.J.* 16, 20 (2016) [hereinafter McKeen et al., *Part II*].

145. *Id.*

146. *Inclusive Cmty.*, 135 S. Ct. at 2526.

147. *Id.* at 2524.

148. *See infra* notes 149–63 and accompanying text.

149. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 795 F.3d 509, 510 (5th Cir. 2014) (mem.) (remanding to Northern District of Texas for further proceedings).

150. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2015 WL 5916220, at *1–3 (N.D. Texas Oct. 8, 2015) (on remand).

151. *Id.* at *4–5.

152. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322, at *1 (N.D. Tex. Aug. 26, 2016) (on remand).

failed to identify a “specific, facially neutral policy” that caused a disparate impact.¹⁵³ The court reasoned that merely pointing to the Department’s discretion in awarding tax credits was not considered a sufficiently specific practice because it was actually the “cumulative effects” of a decisionmaking process.¹⁵⁴ Second, the court found that even if the Project had identified a specific rather than general policy, it had not proved that the policy of allowing discretion “caused a statistically significant disparity.”¹⁵⁵ The Project also had not demonstrated that there were no other potential causes of statistical disparity.¹⁵⁶

While it is still too soon to identify any clear pattern of outcomes since *Inclusive Communities*, at least one commentator has argued that lawsuits challenging traditional areas of FHA discrimination have been more successful than more novel claims.¹⁵⁷ For instance, cases dealing with zoning laws and apartment leasing policies have been successful. In *Mhany Management, Inc. v. County of Nassau*,¹⁵⁸ an affordable housing company and other plaintiffs alleged that the municipality’s decision to choose one form of zoning over another resulted in a disparate impact on nonwhite people.¹⁵⁹ The trial court had determined that the plaintiffs pleaded a prima facie case before *Inclusive Communities* was decided, and the Second Circuit upheld that determination under the new *Inclusive Communities* standard, noting that zoning laws are at the “heartland of disparate-impact liability.”¹⁶⁰ In *CROSSRDS v. MSP Crossroads Apartments*,¹⁶¹ the district court found that residents of an apartment complex pled a viable prima facie disparate impact case where they showed a causal relationship between the apartment complex’s policies and the residents’ inability to remain tenants in the complex.¹⁶² On the other hand, less traditional claims, like plaintiff landlords challenging alleged overinvolvement of city officials in their rental practices, have not been as successful.¹⁶³

153. *Id.* at *6.

154. *Id.*

155. *Id.*

156. *Id.* at *7. The court noted specifically that the Project had “failed to demonstrate that local zoning rules, community preferences, or developers’ choices did not contribute to the statistical disparity.” *Id.* at *9.

157. Harry J. Kelly, *Down and Out in Texas*, NIXON PEABODY AFFORDABLE HOUSING BLOG (Aug. 29, 2016), <http://web20.nixonpeabody.com/ahrc/Lists/Posts/Post.aspx?ID=797> [perma: <http://perma.cc/7MMF-TK8G>] (identifying zoning decisions as a traditional subject of FHA litigation).

158. 819 F.3d 581 (2d Cir. 2016).

159. *Mhany*, 819 F.3d at 616.

160. *Id.* at 619 (quoting *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521–22 (2015)).

161. No. 16-233 ADM/KMM, 2016 WL 3661146 (D. Minn. July 5, 2016).

162. *CROSSRDS*, 2016 WL 3661146, at *8. The apartment complex’s policies included demanding a certain credit score for lease renewals, requiring no more than two occupants per bedroom, and termination of its Section 8 voucher program. *Id.* at *2–3.

163. See *Ellis v. City of Minneapolis*, No. 14-CV-3045 (SRN/SER), 2016 WL 1222227, at *6–8 (D. Minn. Mar. 28, 2016) (dismissing disparate impact claim where plaintiff failed to allege that the City’s policies had prevented him from leasing out his units or had caused displacement of his tenants);

There has been, however, at least one successful case involving a nontraditional fair housing claim. In *Sams v. Ga West Gate, LLC*,¹⁶⁴ tenants and former tenants of an apartment complex challenged the complex's imposition of a "99-year criminal history rule," which barred from residency any individual convicted of a misdemeanor or felony within the last ninety-nine years and required current tenants to undergo a "criminal history probe."¹⁶⁵ Several of the plaintiffs were evicted as a result of this probe.¹⁶⁶ The Southern District of Georgia denied the defendant's motion to dismiss, finding a prima facie case of disparate impact because the policy disproportionately affected African Americans.¹⁶⁷

B. Challenging Property Tax Policies Under the Fair Housing Act

"There is nothing like the property tax."¹⁶⁸ In the United States, there are over 150 different systems for administering and collecting property taxes, with many procedural differences across counties.¹⁶⁹ Perhaps one quality unites the property tax across all municipalities: it is "by far the single most important source of revenue for local governments in the United States."¹⁷⁰ Property tax revenue finances local government services, most notably public education.¹⁷¹ Though the property tax has been the subject of many critiques, particularly for its effect on low-income homeowners,¹⁷² it has been an enduring method of funding local services largely because local governments have few other options.¹⁷³

This Comment will focus predominantly on the property tax procedures employed by Wayne County, Michigan and the City of Detroit, but it is useful to examine the property tax administration scheme more generally. Part II.B.1 provides an overview of the property tax, while Part II.B.2 provides an overview of the property tax system in Wayne County and the City of Detroit. Part II.B.3 delves into the challenge to property tax policies in *Morningside*, and Part II.B.4

Azam v. City of Columbia Heights, No. 14-1044 (JRT/BRT), 2016 WL 424966, at *11 (D. Minn. Feb. 3, 2016) (dismissing disparate impact claim where plaintiff failed to show that the City's housing code increased costs for property owners renting to low-income tenants).

164. No. CV415-282, 2017 WL 436281 (S.D. Ga. Jan. 30, 2017).

165. *Sams*, 2017 WL 436281, at *1.

166. *Id.* at *2.

167. *Id.* at *5.

168. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 748 (2000).

169. *Id.*

170. J. Lyn Entrikin, *Tax Ferrets, Tax Consultants, Bounty Hunters, and Hired Guns: The Property Tax Netherworld Fueled by Contingency Fees and Champertous Agreements*, 89 CHI.-KENT L. REV. 289, 289 (2014).

171. *Id.* at 291. Property taxes often have been challenged in the context of public education because schools financed by low-income communities cannot provide the same level of education as schools financed by higher-income communities. Edward A. Zelinsky, *The Once and Future Property Tax: A Dialogue with My Younger Self*, 23 CARDOZO L. REV. 2199, 2202-03 (2002).

172. Zelinsky, *supra* note 171, at 2202-03.

173. Alexander, *supra* note 168, at 756.

addresses the only other challenge to property tax policies under the FHA: *Coleman v. Seldin*.¹⁷⁴

1. Property Tax Administration

A typical property tax foreclosure cycle follows a familiar pattern: the value of the property is assessed and taxed, the homeowner falls behind on payments, the property becomes delinquent, the municipality imposes a lien on the property, the lien or deed is sold, the sale is enforced through a foreclosure that eliminates the homeowner's interest in the property, and the municipality collects the back taxes from the revenue of the sale.¹⁷⁵ Each state has its own set of laws that permit municipalities to execute tax sale foreclosures and the procedures under these laws are "exceedingly complicated" to the average person.¹⁷⁶

Taxable property is assessed by the local taxing jurisdiction, which could be a city, a county, or a local agency.¹⁷⁷ Homeowners receive notice of the assessment and are typically given thirty days to appeal the local assessor's determination.¹⁷⁸ The first appeal is often directed toward a local board, and subsequent appeals are directed toward either a state board or an administrative tax court.¹⁷⁹ If the homeowner is still unsatisfied, he or she may then seek judicial review of the assessment, in which a state court will review the administrative proceedings and arguments of the parties.¹⁸⁰ Very few of these cases reach appellate courts because the standards of review are highly deferential to the administrative tribunals, and because there are incentives on both sides to settle and stipulate a value before incurring the costs of further litigation.¹⁸¹

When homeowners fail to pay their tax bills and tax debts develop, the property becomes delinquent.¹⁸² Property owners generally become delinquent

174. 687 N.Y.S.2d 240 (Sup. Ct. 1999).

175. RAO, *supra* note 3, at 4. Most jurisdictions allow homeowners a limited right of redemption by providing an opportunity to reclaim the property after a tax sale and before foreclosure. See Jennifer C.H. Francis, Comment, *Redeeming What Is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 GEO. MASON U. C.R.L.J. 85, 96 (2014); William Weber, Comment, *Tax Foreclosure: A Drag on Community Vitality or a Tool for Economic Growth?*, 81 U. CIN. L. REV. 1615, 1619 (2013). During the redemption period, homeowners are generally allowed to remain in the home. Francis, *supra*, at 96. However, the price of redemption includes "not just the original amount in tax liens but also interest, penalties, and costs." *Id.*

176. RAO, *supra* note 3, at 4–5. See generally ABA, PROPERTY TAX DESKBOOK (22d ed. 2017) for brief descriptions of the assessment and appeals process in each state.

177. Entrikin, *supra* note 170, at 295.

178. *Id.*

179. *Id.* at 295–96. Boards of review are quasi-judicial administrative bodies and not courts. *Id.* at 296 n.43.

180. *Id.* at 296.

181. *Id.* at 296–97.

182. See Ellen Kirtner, Note, *Interrupting the Blight Cycle: Managing the Future of Properties in Tax Foreclosure Sales Through Pre- and Post-Sale Initiatives*, 66 CASE W. RES. L. REV. 1083, 1083–84 (2016).

on their property taxes in three contexts: (1) when property values and income levels drop and the assessed value no longer reflects the actual value, (2) when the tax is higher than the public will tolerate, and (3) when investors forego tax payments to maximize income and minimize expenses.¹⁸³ Of course, many homeowners do not pay their property taxes simply because they cannot afford them.¹⁸⁴ In the meantime, interest and penalties accrue, often at rates too high to allow homeowners to catch up on their back taxes while also staying current on each subsequent year's tax bill.¹⁸⁵

The outstanding tax obligation becomes a lien on the property if the homeowner is delinquent for a certain period of time, which varies by state.¹⁸⁶ In a minority of jurisdictions, once a lien is imposed, a final date is established by which outstanding taxes must be paid; if no payment is received, the property is immediately conveyed to the government.¹⁸⁷ However, in a majority of jurisdictions, enforcement of the lien involves a "tax sale," accomplished in one of three ways: auction, bulk sale, or securitization.¹⁸⁸ Many jurisdictions auction off the property to the highest bidder, "with a minimum bid equal to the aggregate amount of delinquent taxes, interest, penalties, and costs."¹⁸⁹ Some jurisdictions sell the property to the purchaser willing to purchase the smallest percentage interest in the property.¹⁹⁰ In negotiated bulk sales, the local government will pool tax liens and sell them as a package to a private entity, allowing that entity to take on the collection duties associated with those liens.¹⁹¹ Finally, some local governments complete a bulk sale, but through a securitization process.¹⁹²

2. Property Taxes in Michigan

In the State of Michigan, property values are assessed by local assessors in each town or city;¹⁹³ for instance, properties located in the City of Detroit are

183. *Id.* at 1114 (citing Alexander, *supra* note 168, at 748).

184. RAO, *supra* note 3, at 9–11 (discussing the numerous ways economic conditions contribute to an increase in tax lien sales).

185. *Id.* at 4.

186. *Id.*

187. Alexander, *supra* note 168, at 747.

188. RAO, *supra* note 3, at 12.

189. Alexander, *supra* note 168, at 774.

190. *Id.*

191. RAO, *supra* note 3, at 12–13. The National Consumer Law Center has found that these private entities largely operate "with little or no oversight." *Id.* at 16.

192. For more on tax lien securitization, see Michelle Z. Marchiony, Comment, *Making Debt Pay: Examining the Use of Property Tax Delinquency as a Revenue Source*, 62 EMORY L.J. 217, 219 (2012). Securitizing tax liens is a popular means of drumming up revenue for cities having cash flow problems, *Id.* at 227, but can be disastrous for cities with lien pools of variable quality, see PHILA. CONTROLLER, DELINQUENT REAL ESTATE TAXES: CHANGES REQUIRED TO IMPROVE COLLECTABILITY 8–9 (2013), http://www.philadelphiacontroller.org/publications/other%20reports/DelinquentRealEstateTaxes_November2013.pdf [perma: <http://perma.cc/8EDQ-VEZW>].

193. MICH. COMP. LAWS ANN. § 211.10 (West 2018).

assessed by city officials. The local assessors then provide their assessment rolls to county boards of commissioners for an equalization process.¹⁹⁴ County boards, including the Wayne County board, examine the assessment rolls and determine whether properties “in the respective townships or cities [have] been equally and uniformly assessed at true cash value.”¹⁹⁵ If the board finds the assessments are unequal across the municipality, it can equalize them to reach “a sum which represents the true cash value of that property.”¹⁹⁶ The board will then certify the assessment rolls, and tax bills can then be assessed based on those values.¹⁹⁷

Homeowners must pay the yearly tax balance to the Wayne County Treasurer by the end of February of each year.¹⁹⁸ Any unpaid taxes are considered delinquent on March 1 of each year, at which time the balance is sent to the county treasurer for collection, and penalties of 4% per month and interest of 1% per month are added.¹⁹⁹ If the homeowner does not pay the outstanding balance by March of Year 2 of delinquency, the property is forfeited to the county treasurer and additional fees and higher interest are assessed.²⁰⁰ By March of Year 3 of delinquency, the Wayne County Circuit Court will enter a judgment of foreclosure if the balance remains unpaid.²⁰¹ Homeowners have an opportunity to redeem the property by the end of the month, but if they are not able to do so, the property is foreclosed upon on April 1, when title passes to the county.²⁰² Properties are then sold at public auction in the fall of Year 3 of delinquency.²⁰³

If a homeowner wishes to contest his or her assessment, he or she must appeal to the local City Board of Review by February 15 of the year those taxes are due; this is known as the February Assessor’s Review.²⁰⁴ Subsequent appeal may be made to the March Review Board by the second Monday of March.²⁰⁵ If a taxpayer is still dissatisfied, he or she may appeal to the state review board, the Michigan Tax Tribunal, before June 30 of any given year.²⁰⁶

The Michigan Tax Tribunal is a “quasi-judicial agency” created by the Tax Tribunal Act²⁰⁷ for the purpose of reviewing decisions from the February and

194. *Id.* § 211.34.

195. *Id.* § 211.34(c).

196. *See id.*

197. *See id.*

198. Kirtner, *supra* note 182, at 1091.

199. *Id.*

200. *Id.*

201. *Id.* at 1091–92.

202. *Id.* at 1092.

203. *Id.*

204. *Property Assessment Board of Review Process*, CITY OF DETROIT, <http://www.detroitmi.gov/Government/Boards/Property-Assessment-Board-of-Review-Process> [perma: <http://perma.cc/K66H-3J2X>] (last visited Dec. 26, 2018).

205. *Id.*

206. *Id.*

207. MICH. COMP. LAWS ANN. §§ 205.701–205.779 (West 2018).

March Boards of Review.²⁰⁸ The Tribunal has “exclusive and original jurisdiction” over

(a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.

(b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.²⁰⁹

Within this subject matter jurisdiction, the Tribunal has the power to affirm, reverse, modify, or remand any decision or finding of an agency.²¹⁰ It may order “the payment or refund of taxes” or issue “writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it has jurisdiction.”²¹¹ The Tribunal also has the authority to “determine [a] property’s taxable value.”²¹²

Final opinions and judgments of the Tribunal are appealable directly to the Michigan Court of Appeals, but this review is quite limited.²¹³ “The Tax Tribunal’s factual findings are final if they are supported by competent, material, and substantial evidence.”²¹⁴ The state court will merely review for error of law.²¹⁵ However, if there is a question of statutory interpretation, the state court may review de novo.²¹⁶

3. Novel Application of the Fair Housing Act in *Morningside*

On July 13, 2016, the ACLU of Michigan, the NAACP Legal Defense Fund, and a private law firm filed a class action lawsuit against the City of Detroit and Wayne County alleging that the municipalities’ property tax foreclosure polices discriminated against African American homeowners.²¹⁷ The lead plaintiffs were five Wayne County homeowners and four Wayne County neighborhood associations suing on behalf of themselves and all similarly situated homeowners.²¹⁸ The plaintiff homeowners owed back taxes to Detroit and were therefore subject to tax foreclosure, though Wayne County had not yet foreclosed upon them.²¹⁹

The complaint put forward two causes of action: one against Wayne County and its treasurer for a disparate impact violation of the FHA, and another

208. *Mich. Props., LLC v. Meridian Township*, 817 N.W.2d 548, 559 (Mich. 2012).

209. MICH. COMP. LAWS ANN. § 205.731.

210. *Id.* § 205.732(a)–(b).

211. *Id.* § 205.732(c).

212. *Mich. Props.*, 817 N.W.2d at 559 n.16 (quoting MICH. COMP. LAWS ANN. § 211.27(a)(3)).

213. See MICH. ADMIN. CODE r. 792.10213 (2018); see also MICH. COMP. LAWS ANN. § 205.753(2).

214. *Mich. Properties*, 817 N.W.2d at 552.

215. *Id.*

216. *Id.*

217. *Morningside Complaint*, *supra* note 25, at 1.

218. *Id.* at 2–3.

219. *Id.* at 22–29.

against the City of Detroit for due process violations stemming from the administration of the City's poverty exemption program.²²⁰ This Comment will focus only on the first cause of action against the Wayne County defendants.²²¹

The plaintiffs alleged that the County's practice was to foreclose upon owner-occupied properties that were tax delinquent without regard to the fact that many property tax bills were determined from overassessments of property values.²²² The *Detroit News* released a study in 2013 that found that Detroit was overassessing homes by an average of 65%.²²³ This study prompted an "overhaul" of the city's assessment division in 2014 and the decision to conduct a citywide reassessment.²²⁴ Although the reassessment of the city's properties was still incomplete, Wayne County nevertheless continued to foreclose on tax delinquent properties.²²⁵ These foreclosures, the plaintiffs alleged, had caused and would continue to cause thousands of homeowners to unlawfully lose their homes.²²⁶

The plaintiffs alleged that the County's practice of foreclosing on homes that may have been overassessed had a disparate impact on African American homeowners and thereby violated the FHA.²²⁷ In particular, the complaint pointed to the fact that in census blocks where a majority of homeowners are African Americans, 4.81% of homes were at risk of property tax foreclosure and sale, while only 0.48% of homes were at risk in census blocks where a majority of homeowners are not nonwhite.²²⁸ Additionally, the complaint alleged that in census blocks where 100% of homeowners were African American, those homeowners are 13.4 times more likely to be at risk of property tax foreclosure and sale than homeowners in census blocks where 100% of homeowners were non-African American.²²⁹

The proposed class included African American homeowners that were foreclosed upon in 2016 for nonpayment of taxes before Detroit's reassessment process began in 2014.²³⁰ The plaintiffs sought both declaratory and injunctive relief, including (1) a declaration that Wayne County's policies violate the FHA, (2) an injunction to prevent Wayne County "from continuing [its] practice of

220. *Id.* at 46–48.

221. The claim against the City involved its administration of a poverty exemption program, which the plaintiffs described as "needlessly complex" and "impenetrable." *Morningside* Complaint, *supra* note 25, at 3. Several plaintiffs were precluded from receiving the exemption and they claimed that the misadministration of the program violated their constitutional right to due process. *Id.*

222. *Morningside* Complaint, *supra* note 25, at 2–5.

223. Christine Ferretti, *Most Detroit Property Assessments to Decrease*, DETROIT NEWS (Feb. 1, 2016, 1:38 PM), <http://www.detroitnews.com/story/news/local/detroit-city/2016/02/01/detroit-assessments/79646766/> [perma: <http://perma.cc/533C-6WQB>].

224. *Id.*

225. *Id.*

226. *Morningside* Complaint, *supra* note 25, at 19.

227. *Id.* at 4.

228. *Id.* at 21.

229. *Id.* at 21–22.

230. *Id.* at 43–46.

foreclosing on owner-occupied properties without regard to whether a property has been over-assessed,” (3) a requirement that Wayne County correct the “continuing effects of [its] past and present discriminatory practices,” and (4) a requirement that Wayne County take whatever action is necessary to restore homeowners affected by its discriminatory housing practices to the position they would have occupied but for the discriminatory conduct.²³¹

The County and City defendants moved to dismiss the case.²³² The County argued that the case should be dismissed for a number of reasons: (1) the quasi-judicial Michigan Tax Tribunal had exclusive jurisdiction over the matter, (2) the property tax foreclosure process did not implicate the FHA, and (3) even if it did, there was no Wayne County policy implicated because the City of Detroit performed the tax assessments.²³³ After hearing arguments from the parties, the presiding judge issued an order taking the County defendant’s motion to dismiss under advisement.²³⁴ At the same time, the judge denied a motion from the plaintiffs for a preliminary injunction on all property tax foreclosures and sales.²³⁵

Over a month later, the judge dismissed the case against Wayne County.²³⁶ The court ruled that, though the claims certainly implicated the FHA and though the plaintiffs successfully pled a prima facie case, the appropriate adjudicative body to hear the claim was the Michigan Tax Tribunal because, at its base, the claim was really about disputed assessments and thus fell within the exclusive jurisdiction of the Tribunal.²³⁷ The plaintiffs appealed, and in September 2017 the Michigan Court of Appeals affirmed the dismissal, agreeing that the

231. *Id.* at 48.

232. Motion for Summary Disposition by Defendants Eric Sabree & Wayne County, Morningside Cmty. Org. v. Sabree, No. 16-008807-CH (Wayne Cty. Mich. Cir. Ct. Aug. 9, 2016) [hereinafter Wayne County Motion to Dismiss]; Motion by Defendants City of Detroit & Detroit Citizens Bd. of Review to Dismiss Claims Against Them for Lack of Jurisdiction, *Morningside*, No. 16-008807-CH [hereinafter City of Detroit Motion to Dismiss]. A motion for summary disposition can be used as the Michigan state law equivalent of the Federal Rule of Civil Procedure Rule 12 motion to dismiss. *See* 1 MICH. CT. RULES PRAC. §2.116(B)(1). The City of Detroit’s motion was later denied. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH (Wayne Cty. Mich. Cir. Ct. Sept. 7, 2016) (denying motion to dismiss).

233. Wayne County Motion to Dismiss, *supra* note 232, at 1–2. The County also argued that the neighborhood organization plaintiffs lacked standing because they are not the “real parties in interest.” *Id.* at 13. The judge disagreed, ultimately finding that the organizations had standing under both Michigan and federal law. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 19 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff’d*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

234. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH (Wayne Cty. Mich. Cir. Ct. Sept. 2, 2016) (order taking defendants Wayne County and Eric Sabree’s motion for summary disposition under advisement).

235. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH (Wayne Cty. Mich. Cir. Ct. Sept. 2, 2016) (order denying plaintiffs’ motion for a preliminary injunction).

236. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 21 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016).

237. *Id.* (slip op. at 8–17).

Michigan Tax Tribunal had exclusive jurisdiction over the claim.²³⁸

4. Previous FHA Challenges to Property Tax Administration

There has been just one previous challenge to property tax administration under the FHA: *Coleman v. Seldin*.²³⁹ In *Coleman*, a group of homeowners filed an action against Nassau County, New York and the Board of Assessors of Nassau County alleging that the residential assessment system was racially discriminatory against nonwhite homeowners.²⁴⁰ The plaintiffs alleged three causes of action, one of which was an FHA violation.²⁴¹ The court was tasked with deciding whether the FHA could be interpreted to encompass the stated claims.²⁴² The defendants argued that the statute could not apply because the plaintiffs already owned their homes.²⁴³ The court ultimately held that the FHA did in fact apply “to the real property assessment policies, procedures and conditions practiced and imposed by the defendants.”²⁴⁴

Coleman differs from *Morningside* in one significant way: the plaintiffs in *Coleman* directly challenged the administrative body responsible for assessing property values, while the plaintiffs in *Morningside* focused their FHA claim on the County and County Treasurer, who were foreclosing on homes regardless of the accuracy of the underlying assessments.²⁴⁵ If the *Coleman* plaintiffs had brought an action only against Nassau County, and not the Board of Assessors, the cases would be more comparable.

Nevertheless, the *Coleman* opinion’s reasoning about the broad application of the FHA is useful, not least because the *Morningside* trial court relied on it.²⁴⁶ The *Coleman* court noted quite readily that it could not find “any decision which is four square on point with the instant claims,”²⁴⁷ likely because there had been no previous attempts to challenge property tax policies under the FHA. Nevertheless, the court found authority that led it to determine that the FHA may be interpreted broadly enough to include claims in which the plaintiffs already own a home and, more specifically, on the basis of property tax policies.²⁴⁸

First, the court examined past decisions construing the FHA, particularly the prohibition against “mak[ing] unavailable or deny[ing] a dwelling” based

238. *Morningside Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985, at *1 (Mich. Ct. App. Sept. 21, 2017).

239. 687 N.Y.S.2d 240 (Sup. Ct. 1999).

240. *Id.* at 242.

241. *Id.*

242. *Id.* at 248.

243. *Id.*

244. *Id.* at 250.

245. Compare *Coleman*, 687 N.Y.S.2d at 240, with *Morningside* Complaint, *supra* note 25, at 1.

246. See *infra* note 333–37 and accompanying text.

247. *Coleman*, 687 N.Y.S.2d at 248.

248. *Id.* at 249–50.

on protected characteristics.²⁴⁹ Those cases interpreted the FHA to be “broad and inclusive” and “subject to generous construction.”²⁵⁰ The court also noted that the broadness of the language is “well illustrated” by the level of relief afforded in exclusionary zoning cases, in which courts have found that national policy must prevail over state and local legislation.²⁵¹

Second, the court acknowledged the many other housing contexts in which courts had found FHA liability.²⁵² The court noted that the statute “has been held to encompass mortgage redlining, insurance redlining . . . ‘and other actions by individuals or governmental units which directly affect the availability of housing to minorities.’”²⁵³ Specifically, the court pointed to “the long line of cases” under the FHA requiring local authorities to make reasonable accommodations in relation to persons with disabilities, and a case that held the FHA was applicable to redlining,²⁵⁴ *NAACP v. American Family Mutual Insurance Co.*²⁵⁵

Unfortunately, it is impossible to know what more could have come from *Coleman*, as it was settled two days before the scheduled trial.²⁵⁶ The court subsequently allowed a stipulation that the County would adopt a new system of tax assessment that was nondiscriminatory.²⁵⁷ As of 2004, the parties agreed that the assessments were no longer discriminatory.²⁵⁸

III. DISCUSSION

The Discussion is divided into three parts. Part III.A argues that *Morningside* was wrongly decided, while Part III.B acknowledges the positive example the case sets despite its ultimate failure. Part III.C looks ahead to future applications of disparate impact liability to property tax policies in other municipalities and the obstacles that housing advocates are likely to encounter.

The goal of the *Morningside* suit was narrow: to keep Wayne County from

249. 42 U.S.C. § 3604(a) (2012).

250. *Coleman*, 687 N.Y.S.2d at 248 (quoting *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1011 (7th Cir. 1980)). For a more detailed statutory analysis, see *United States v. Gilbert*, 813 F.2d 1523, 1527 (9th Cir. 1987).

251. *Coleman*, 687 N.Y.S.2d at 249.

252. *Id.*

253. *Id.* (quoting *Southend Neighborhood Improvement Ass’n v. County of. St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984)).

254. *Id.* at 249–50.

255. 978 F.2d 287, 301–03 (7th Cir. 1992). Redlining is the discriminatory practice of refusing to provide loans or insurance to people who live in certain areas. *Redlining*, BLACK’S LAW DICTIONARY (10th ed. 2014). The Seventh Circuit determined in *American Family Mutual* that the FHA applies to such “discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.” *Am. Family Mut. Ins. Co.*, 978 F.2d at 301.

256. *Coleman v. Seldin (Challenging Racial Discrimination in Nassau County’s Tax Assessment Policies)*, N.Y.C.L. UNION, <http://www.nyclu.org/case/coleman-v-seldin-challenging-racial-discrimination-nassau-countys-tax-assessment-policies> [perma: <http://perma.cc/4BGB-MGKW>] (last visited Dec. 26, 2018).

257. *Id.*

258. *Id.*

foreclosing on homes based on taxes assessed prior to receiving the benefit of Detroit's efforts to reassess.²⁵⁹ Thus, the plaintiffs were necessarily concerned with finding the fastest and most efficient means of keeping families in their homes.

Morningside should have been a successful challenge to Wayne County's property tax foreclosure policies under the FHA. The trial court's finding that the Michigan Tax Tribunal had exclusive jurisdiction of the claim was incorrect because (1) the claim did not fall within the Tax Tribunal's narrow statutory jurisdiction, and (2) even if it did, the Tax Tribunal was not an appropriate or efficient forum for a class action with a federal statutory claim.²⁶⁰

However, the trial court's finding that the claim was valid under the FHA and that the plaintiffs successfully pled a prima facie case sets a positive example for future challenges to property tax proceedings under the FHA. Accordingly, the FHA and the disparate impact doctrine can still become tools for housing advocates to combat the property tax foreclosure crisis and pressure municipalities to improve policies that disproportionately affect low-income and nonwhite homeowners.

A. *Morningside* Was Wrongly Decided

The *Morningside* trial court dismissed the plaintiffs' FHA claim, holding that the Michigan Tax Tribunal had exclusive jurisdiction.²⁶¹ The *Morningside* plaintiffs appealed the dismissal, arguing that the Michigan Tax Tribunal did not have exclusive jurisdiction over the claim.²⁶² The Court of Appeals of Michigan erroneously affirmed the trial court's ruling.²⁶³

1. The Michigan Tax Tribunal Did Not Have Exclusive Jurisdiction

The Michigan Tax Tribunal has "original and exclusive" jurisdiction only where a case meets the following four elements: "(1) a proceeding for direct review of a final decision, finding, ruling, determination, or order; (2) of an agency; (3) relating to an assessment, valuation, rate, special assessment, allocation, or equalization; (4) under the property tax laws."²⁶⁴ The *Morningside* plaintiffs argued that their claim could be heard by Michigan state courts because they challenged the County's *foreclosure* practice, and not any practices relating to assessment, valuation, or equalization that would fall within the Tax

259. The class included only homeowners at risk of foreclosure in 2016 because of taxes owed prior to the city's overhaul of its assessment program in 2014. *Morningside* Complaint, *supra* note 25, at 43–45.

260. See *infra* notes 264–311 and accompanying text.

261. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 21 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff'd*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

262. *Morningside Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985, at *1 (Mich. Ct. App. Sept. 21, 2017).

263. *Id.* at *4.

264. *Hillsdale Cty. Senior Servs., Inc. v. Hillsdale County*, 832 N.W.2d 728, 731–32 (Mich. 2013) (interpreting MICH. COMP. LAWS ANN. § 205.731).

Tribunal's exclusive jurisdiction.²⁶⁵ The *Morningside* trial court nevertheless held that the plaintiffs were *actually* challenging either the County's failure to equalize the assessments made by Detroit²⁶⁶ or the assessments themselves.²⁶⁷ Therefore, the challenge fell within the exclusive jurisdiction of the Tax Tribunal.²⁶⁸

The Court of Appeals acknowledged that the plaintiffs were not seeking a refund or asking to enjoin the equalization process, but agreed with the trial court that the plaintiffs' claims would require proof that there actually were overassessments.²⁶⁹ The court reasoned that plaintiffs' request for a declaration "that defendants' procedure of foreclosing on homes when knowing (yet ignoring) that Detroit had over assessed properties violates the FHA" required proof that "there were, in fact, overassessments."²⁷⁰ Such factual determinations, the court held, fell within the exclusive jurisdiction of the Tax Tribunal.²⁷¹

As the *Morningside* plaintiffs argued, however, their cause of action did not meet the elements of the Tax Tribunal's jurisdiction.²⁷² The plaintiffs did not seek a direct review of their individual property tax assessments, nor did they challenge the County's conduct under the equalization statute.²⁷³ Rather, they merely sought to enjoin Wayne County from continuing to foreclose on homes without regard for whether they had been overassessed.²⁷⁴ The Tax Tribunal's power is limited to matters concerning the value of property, the process of determining that value, and taxes based on that value.²⁷⁵ The Tribunal's power does not extend to the procedures surrounding tax sales and foreclosure, which are managed by Wayne County.²⁷⁶

Furthermore, the Tax Tribunal does not have exclusive jurisdiction over all cases simply because they somehow relate to property tax assessments. In *Sal-Mar Royal Village, LLC v. Macomb County Treasurer*,²⁷⁷ the Michigan Tax Tribunal issued a consent judgment for plaintiff, waiving penalties and interest.²⁷⁸ The Macomb County Treasurer refused to recognize that consent

265. Plaintiffs' Opposition to Wayne County Defendants' Motion for Summary Disposition at 19–20, *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016) [hereinafter *Morningside Opposition to Dismissal*].

266. As required by MICH. COMP. LAWS ANN. § 211.34, discussed *supra* note 193–97 and accompanying text.

267. *Morningside*, slip op. at 8–12.

268. *Id.*

269. *Morningside Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985, at *2 (Mich. Ct. App. Sept. 21, 2017).

270. *Id.*

271. *Id.* at *3.

272. *Morningside Opposition to Dismissal*, *supra* note 265, at 19–20.

273. *Id.*

274. *Morningside Complaint*, *supra* note 25, at 48.

275. See *Hillsdale Cty. Senior Servs., Inc. v. Hillsdale County*, 832 N.W.2d 728, 732 (Mich. 2013).

276. See *id.*

277. 848 N.W.2d 164 (Mich. Ct. App.), *rev'd on other grounds*, 856 N.W.2d 68 (Mich. 2014).

278. *Sal-Mar Royal Village*, 848 N.W.2d at 165.

judgment, and issued a new tax bill, again requesting payment of the penalties and interest.²⁷⁹ When the plaintiff filed an action in state court to enforce the consent judgment, the Treasurer argued that the Tribunal, and not the circuit court, should have exclusive jurisdiction over the cause of action.²⁸⁰ The Michigan appellate court found that because the plaintiff “was not seeking to appeal or obtain review of the county treasurer’s decision . . . and was not seeking a redetermination of the taxes owed” the action was not subject to the exclusive jurisdiction of the Tribunal.²⁸¹ Even if a cause of action is related to assessment disagreements, it may be heard in the state circuit courts if it is not seeking direct review of an assessment but rather the enforcement of an equitable claim.²⁸²

2. Comparing *Morningside* to *Johnson v. State*

The *Morningside* trial court relied on *Johnson v. State*²⁸³ for its contention that where “the general thrust” of the complaint challenges assessments, the Tax Tribunal has exclusive jurisdiction “regardless of the ‘label’ attached to the claim.”²⁸⁴ The Court of Appeals of Michigan agreed that *Johnson* controlled the *Morningside* case.²⁸⁵ In *Johnson*, the plaintiffs challenged allegedly discriminatory practices that resulted in “unequal and inequitable assessments” that violated the plaintiffs’ rights under the Civil Rights Act.²⁸⁶ The court ruled that “phrasing [the] claim in constitutional terms of discrimination . . . does not change the nature of the claim as a challenge to property tax assessments.”²⁸⁷ However, *Johnson* differs from *Morningside* in two significant respects.

First, the *Johnson* plaintiffs directly challenged assessments they alleged were artificially inflated because of intentional discrimination.²⁸⁸ The complaint contained specific averments that the defendants did not follow statutory procedures in assessing property values and the class of persons represented by the plaintiffs were “those whose property valuations were increased” by the use of the discriminatory practice.²⁸⁹

The *Morningside* plaintiffs, by contrast, challenged Wayne County’s foreclosure policy, and not the individual assessments of the class members or the County’s equalization procedures.²⁹⁰ Even if the *Morningside* plaintiffs had

279. *Id.*

280. *Id.* at 168.

281. *Id.*

282. *Id.*

283. 317 N.W.2d 652 (Mich. Ct. App. 1982).

284. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 7–9 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff’d*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

285. *Morningside Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985, at *4 (Mich. Ct. App. Sept. 21, 2017).

286. *Johnson*, 317 N.W.2d at 657.

287. *Id.*

288. *Id.*

289. *Id.* at 657.

290. *Morningside* Complaint, *supra* note 25, at 19.

challenged the County's conduct under the equalization statute, it is not clear that the statute could provide the appropriate relief. The statute only contemplates adjustments based on citywide errors and likely would not address the systemic foreclosures and disparate impact alleged by the plaintiffs.²⁹¹

The *Morningside* court nevertheless found that the Tax Tribunal had jurisdiction because deciding the claim would necessarily require an inquiry into whether the assessments were accurate.²⁹² As the plaintiffs pointed out in their opposition brief, the question of the existence of system-wide overassessments in Detroit is not much of a question at all, given the enormity of reporting on the subject over the past several years and numerous acknowledgements of the problem by City and County officials.²⁹³ The *Morningside* plaintiffs alleged that Wayne County's practice of foreclosing on homes without first determining that assessments were accurate had a disproportionate impact on African American homeowners.²⁹⁴ Proving this claim did not necessarily require a threshold determination of whether those particular assessments actually were inflated, because the allegation was that the County was foreclosing on homes *regardless*.

Second, the *Morningside* plaintiffs sought only declaratory and injunctive relief,²⁹⁵ while the *Johnson* plaintiffs sought equitable relief and money damages.²⁹⁶ The *Johnson* court relied heavily on the fact that the Tax Tribunal could offer the plaintiffs the relief they were seeking by adjusting inflated assessments and providing refunds should it decide doing so was necessary.²⁹⁷ In *Morningside*, however, the trial court acknowledged that the Tax Tribunal did not have the power to offer injunctive relief.²⁹⁸ The Tribunal could issue orders

291. MICH. COMP. LAWS ANN. § 211.34 (West 2018). "The county board of commissioners shall examine the assessment rolls of the townships or cities and ascertain whether the real and personal property in the respective townships or cities has been equally and uniformly assessed at true cash value." *Id.* § 211.34(2); *see also* *Morningside Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985, at *3 (Mich. Ct. App. Sept. 21, 2017) ("[E]qualization is designed to remedy the potential for unequal assessment levels *among* different taxing districts and *among* different classes of property within the same taxing district. It is important to understand that equalization will not remedy unequal assessment levels *within* a given class of property in a single taxing district." (quoting *Shaughnesy v. Mich. Tax Tribunal*, 362 N.W.2d 219, 249–50 (Mich. 1984))).

292. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 9 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff'd*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

293. *Morningside Opposition to Dismissal*, *supra* note 265, at 19–20; *see, e.g.*, Interview by Cynthia A. Johnson with Eric Sabree, Treasurer, Wayne Cty., Mich. (May 12, 2015), <http://www.youtube.com/watch?v=VVADzh4OWqI> [perma: <http://perma.cc/8T96-58V2>]; Bernadette Atuahene, *Detroit's Tax Foreclosures Indefensible*, DETROIT FREE PRESS (Sept. 1, 2016, 11:19 PM), <http://www.freep.com/story/opinion/contributors/2016/09/01/detroits-tax-foreclosures-indefensible/89717644/> [perma: <http://perma.cc/VXK4-NB5Y>] (reporting that Detroit's mayor, Mike Duggan, acknowledged that "for years, homes across the city have been over assessed").

294. *Morningside Complaint*, *supra* note 25, at 21–22.

295. *Id.* at 48–49.

296. *Johnson v. State*, 317 N.W.2d 652, 653 (Mich. Ct. App. 1982).

297. *Id.* at 657–58.

298. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 12 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff'd*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

that could then be enforced by a circuit court,²⁹⁹ but only a circuit court could enjoin Wayne County from continuing to foreclose on homes.³⁰⁰ The Court of Appeals held that, despite the Tax Tribunal's lack of power to enjoin, a party's request for an injunction "do[es] not take [claims] out of the exclusive jurisdiction of the [Tax Tribunal] [where] the tribunal [otherwise] has the jurisdiction and ability to resolve all the claims presented."³⁰¹ This language implies that the Tax Tribunal should not have exclusive jurisdiction where it is not able to resolve all the claims presented, which is the case in *Morningside*.

3. The Tax Tribunal Was an Inappropriate Forum as a Matter of Policy

Even ignoring the question of whether the Tax Tribunal should have subject matter jurisdiction in *Morningside*, it is clear that the Tax Tribunal is not the appropriate forum because of the size and content of the claim. Indeed, the plaintiffs could not have brought the FHA claim if each plaintiff had instead attempted to have their properties reassessed via the Michigan Tax Tribunal.³⁰² Their individual tax bills may have been readjusted, but the County's practice of foreclosing on hundreds of potentially overassessed homes would have gone unchallenged and homeowners without the resources to challenge their assessments would receive no relief.

The Tax Tribunal was not (and is not) equipped to give the speedy, tangible relief required by the *Morningside* plaintiffs. As discussed in the Overview, the process of even reaching the Tribunal is lengthy and complex.³⁰³ For an individual taxpayer challenging his or her assessment, the Tax Tribunal can offer tangible relief, but to be successful in such a quagmire of bureaucratic procedure would likely require the services of an attorney. Such an expense is likely out of the question for taxpayers who cannot even afford their yearly property tax bill. The *Morningside* suit was designed to protect the homes of low-income taxpayers who lacked the resources to personally challenge their assessments before their homes were foreclosed upon.³⁰⁴ Had the plaintiffs and the class chosen to begin their challenge with the local boards of review, receiving relief would have taken months, and, at the end of it, the Tribunal could not have offered the injunctive relief necessary to save the plaintiffs' homes from foreclosure.

Though the trial court determined that the Tax Tribunal is technically allowed to hear class actions,³⁰⁵ the Tribunal is functionally unequipped to hear

299. *Hillsdale Cty. Senior Servs., Inc. v. Hillsdale County*, 832 N.W.2d 728, 732 (Mich. 2013).

300. *Morningside*, slip op. at 12.

301. *Morningside Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985, at *3 (Mich. Ct. App. Sept. 21, 2017) (first, second, fourth, and fifth alterations in original) (quoting *Wikman v. Novi*, 322 N.W.2d 103, 115 (Mich. 1982)).

302. *See supra* Part II.A.

303. *See supra* notes 203–16 and accompanying text.

304. *See supra* note 259 and accompanying text.

305. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 12 n.8 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff'd*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

many actions. The Tribunal is structured to hear petitions by a single homeowner, who owns either a single piece of property or multiple parcels.³⁰⁶ The Rules and Procedures of the Tax Tribunal do not contemplate multiple petitioners attached to a single claim, let alone an entire class of petitioners, some of whom may be unknown at the time of filing.³⁰⁷ Additionally, the Tax Tribunal may only hear cases that are actually able to reach it, and it is unclear whether the local boards of review would even accept petitions by a class. In fact, the plaintiffs in the *Johnson* case, relied on by the *Morningside* court, did attempt to bring their claims to the local board of review and were denied a hearing.³⁰⁸

The *Morningside* trial court reasoned that an important legislative purpose of the Tax Tribunal's exclusive jurisdiction is "to assure that tax contests would be resolved in the first instance by an expert body."³⁰⁹ It is certainly a valid legislative purpose to allow complex claims to be heard by the bodies most equipped to hear them. This is precisely the reason why a Michigan state court was in the best position to hear the federal statutory and equitable claims of the *Morningside* plaintiffs. The complaint did not merely challenge a handful of tax assessments, which would of course be easily handled by the Tribunal, but instead clearly implicated federal and constitutional law on behalf of a large class of aggrieved persons.³¹⁰ The circuit court was the best forum to adjudicate those claims, which it in fact proved by devoting a large portion of its opinion in *Morningside* to a discussion of the FHA.³¹¹

B. *Morningside's Positive Precedent*

Despite dismissing the case on jurisdictional grounds, the *Morningside* trial court opinion confirms that claims challenging property tax procedures are cognizable under the FHA and that, absent the jurisdictional issue, the plaintiffs pled a prima facie case that successfully shifted the burden to the defendant.³¹²

The County argued in its motion to dismiss that the property tax foreclosure process does not implicate the FHA at all.³¹³ First, the County argued that because it had not "refused to sell or rent property" to the plaintiffs on the basis of their race and had not "refused to negotiate for the sale or rental of property"

306. See MICH. ADMIN. CODE r. § 792.10227 (2018).

307. *Id.*

308. *Johnson v. State*, 317 N.W.2d 652, 657–58 (Mich. Ct. App. 1982). The plaintiffs were first told that the board would hear "group appeals," but the board reversed this decision on the last day for hearing assessment appeals and denied the plaintiffs a hearing. *Id.* at 657.

309. *Morningside*, slip op. at 11 (quoting *State Treasurer v. Eaton*, 284 N.W.2d 801, 803 (Mich. 1979)).

310. See *supra* notes 220–31 and accompanying text.

311. *Morningside*, slip op. at 13–17.

312. *Id.* (slip op. at 16–17). The Michigan Court of Appeals did not address this issue because plaintiffs only appealed the determination that the Tax Tribunal had exclusive jurisdiction over the claim. *Morningside Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985, at *1 (Mich. Ct. App. Sept. 21, 2017).

313. *Wayne County Motion to Dismiss*, *supra* note 232, at 8–11.

with the plaintiffs on the basis of race, the FHA did not apply.³¹⁴ Second, the County argued that property tax foreclosure is not a type of activity that falls under the “otherwise make unavailable or deny”³¹⁵ provision of the FHA because it could not “locate any federal or state court that has interpreted the FHA so broadly.”³¹⁶

It is true that the plaintiffs did not allege they had been denied the sale or rental of property by Wayne County, but property tax foreclosure policies are activities that can fall under the FHA’s “otherwise make unavailable or deny” provision.³¹⁷ As the discussion regarding the *Coleman* holding makes clear, courts have been in the practice of broadly interpreting the FHA.³¹⁸ In fact, many instances of activity that took place *after* the acquisition of housing have been found to be prohibited by the FHA.

1. The FHA Reaches Post-Acquisition Activity

Though circuits are split on this issue, case law and federal regulations indicate that “post-acquisition” activity can fall under the FHA.³¹⁹ The Ninth Circuit found in *Committee Concerning Community Improvement v. City of Modesto*³²⁰ that the FHA reaches post-acquisition discrimination.³²¹ The court reasoned that the language of the FHA does not preclude all post-acquisition claims.³²² Rather, the court advanced a “natural” reading of the statute that “encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling.”³²³ The Ninth Circuit also pointed to HUD regulations as evidence that the FHA contemplates post-acquisition activity.³²⁴ Regulations promulgated by HUD contain language that specifically identifies certain post-acquisition activities, including “[f]ailing

314. *Id.* at 10.

315. *Id.* (quoting 42 U.S.C. § 3604(a)).

316. *Id.*

317. § 3604(a).

318. *See supra* notes 245–55 and accompanying text.

319. The Fifth Circuit has found that the FHA gives no right of action to “current owners” claiming that the “‘habitability’ of their property has decreased due to discrimination.” *Cox v. City of Dallas*, 430 F.3d 734, 742–43 (5th Cir. 2005). The Third Circuit, while dismissing an FHA claim in a footnote, noted that the plaintiffs’ claim could not prevail because they conceded “the Borough’s decision did not directly affect anyone’s current or future home.” *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 157 n.13 (3d Cir. 2002). The Seventh Circuit has found that the FHA does not apply to post-acquisition activity, *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330–31 (7th Cir. 2004), but later limited this holding by finding that such claims are cognizable “in some circumstances.” *Bloch v. Frischholz*, 587 F.3d 771, 772 (7th Cir. 2009). *See Rigel C. Oliveri, Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L.L. REV. 1 (2008), for a discussion of Halprin’s flaws.

320. 583 F.3d 690 (9th Cir. 2009).

321. *Comm. Concerning Cmty. Improvement*, 583 F.3d at 713.

322. *Id.* at 713.

323. *Id.* (noting that the word “privileges” implicates “continuing rights” and that there are many more services and facilities provided post-acquisition than in the acquisition process).

324. *Id.* at 713–14.

or delaying maintenance or repairs” and “[l]imiting the use of privileges, services or facilities associated with a dwelling.”³²⁵ If HUD has read the FHA to encompass such activities, then a fair reading of the statute would allow for claims to be brought on the basis of post-acquisition discrimination, which includes property tax foreclosure.

The Sixth Circuit, whose guidance would inform the Michigan state courts, has yet to address the issue.³²⁶ However, a number of district courts within the Sixth Circuit have held that the FHA’s protections should extend to post-acquisition activity. For instance, in *Wells v. Rhodes*,³²⁷ the Southern District of Ohio acknowledged that federal courts have generally held that “racially-motivated intimidating acts directed at a person’s property are actionable under the FHA.”³²⁸ The court held that the plaintiffs have the right to rent property “and not otherwise be denied their property,” and found that a reasonable jury could conclude that the burning of a cross on plaintiffs’ lawn was intended to deprive the plaintiffs of the enjoyment of their property.³²⁹ In *Guevara v. UMH Properties, Inc.*,³³⁰ the federal district court specifically recommended resolving the circuit split in favor of a broader reading of the FHA that would reach post-acquisition conduct.³³¹ The court reasoned that “[d]enying relief to plaintiffs who have been discriminated against after they were granted access to housing falls short of [the FHA’s] mandate” and therefore held that a mobile home operator could not “impose harsher rental terms or conditions based on a tenant’s national origin.”³³²

The *Morningside* court agreed with this broader interpretation of the FHA.³³³ After a discussion of the case law in other circuits, the court found that a broad reading of the FHA permits a claim for post-acquisition conduct where a discriminatory action prevents a party from living in their home “either through a constructive or actual eviction.”³³⁴ It went on to note that in *Morningside*, the alleged conduct “in the intracounty equalization process and subsequent foreclosures will eventually lead to the removal of plaintiffs from their homes.”³³⁵ The court also noted that *Coleman*³³⁶ supports this conclusion.³³⁷

325. 24 C.F.R. § 100.65(b)(2), (4) (2018).

326. *Guevara v. UMH Props., Inc.*, No. 2:11-CV-2339-SHL-tmp, 2014 WL 5488918, at *4 (W.D. Tenn. Oct. 29, 2014).

327. 928 F. Supp. 2d 920 (S.D. Ohio 2013).

328. *Wells*, 928 F. Supp. 2d at 932.

329. *Id.* at 933.

330. 2:11-CV-2339-SHL-tmp, 2014 WL 5488918 (W.D. Tenn. Oct. 29, 2014).

331. *Guevara*, 2014 WL 5488918, at *5.

332. *Id.*

333. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 15–16 (Wayne Cty. Mich. Cir. Ct. Oct. 17, 2016), *aff’d*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

334. *Id.* (slip op. at 15–16).

335. *Id.* (slip op. at 16).

336. *See supra* notes 247–55 and accompanying text.

337. *Morningside*, slip op. at 16.

2. Meeting the *Inclusive Communities* Standard with a Property Tax-Related Claim

The County also argued in its motion to dismiss that even if property tax policies are covered by the FHA, the *Morningside* plaintiffs did not plead a prima facie case. As discussed in Parts II.A.3–4, the *Inclusive Communities* decision expanded upon HUD’s requirement for making a prima facie case of disparate impact under the FHA.³³⁸ The HUD regulations require plaintiffs to show that a practice results in a discriminatory effect on the basis of a protected characteristic.³³⁹ *Inclusive Communities* introduced an additional hurdle, requiring plaintiffs in disparate impact cases to plead a “robust causality” between a specific policy and the alleged discriminatory effect through statistical evidence.³⁴⁰

Though the trial court dismissed the complaint on other grounds, it acknowledged that the *Morningside* plaintiffs pled a prima facie case of disparate impact.³⁴¹ The court noted that it was the plaintiffs’ burden to “identify and challenge a specific housing practice” and then “show that the practice had an adverse effect on members of a protected class by offering statistical evidence . . . to show that the practice in question has caused the adverse effect in question.”³⁴²

The *Morningside* plaintiffs specifically identified Wayne County’s policy of foreclosing upon tax delinquent homes despite knowing about Detroit’s systematic overassessments.³⁴³ This practice had a disparate impact on African American homeowners as evidenced by census data showing that black homeowners in Detroit are far more likely to be foreclosed upon by the County.³⁴⁴ There is an alleged causal connection between Wayne County’s foreclosure policy and the disproportionately high rate of foreclosures among African American homeowners.

Accordingly, the *Morningside* court found that that the plaintiffs’ complaint “identifies the Wayne County policy that allegedly results in a higher foreclosure rate among African American homeowners in the county and alleges statistical data to support a disparate impact finding.”³⁴⁵ The *Inclusive Communities* standard was met.

338. See *supra* notes 124–45 and accompanying text.

339. 24 C.F.R. § 100.500(c) (2018).

340. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

341. The court did not actually cite *Inclusive Communities*, but it was necessarily operating under the standards set down in that case. See U.S. CONST. art. VI, cl. 2. Instead, the court cited to the Sixth Circuit’s burden-shifting framework as established in *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 374 (6th Cir. 2007).

342. *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH, slip op. at 16 (Wayne Cty. Mich. Cir. Ct. Oct 17, 2016), *aff’d*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017).

343. See *supra* notes 222–31 and accompanying text.

344. See *supra* notes 227–29 and accompanying text.

345. *Morningside*, slip op. at 16–17.

C. *Looking Ahead to Other Jurisdictions*

Housing advocates in other municipalities seeking to challenge property tax foreclosure policies that have a disparate impact on nonwhite homeowners can learn two lessons from *Morningside*: (1) challenging these policies under the FHA is possible and (2) there are hurdles. At this point, it should be fairly easy to contend with the argument that these claims are not cognizable under the FHA. There is an abundance of case law supporting a broad reading of the statute,³⁴⁶ and the question of post-acquisition claims has been put to rest in several circuits.³⁴⁷ It appears that the two biggest hurdles housing advocates (and their client-homeowners) are likely to encounter are the difficulties of pleading a prima facie case and the possibility of exhausting administrative remedies through their municipality's equivalent of the Michigan Tax Tribunal.

Plaintiffs in other municipalities have two options when it comes to the administrative bodies with jurisdiction over property tax claims: (1) attempt to plead around that administrative body, as the *Morningside* plaintiffs did; or (2) be prepared to go through the administrative process. Each state will have a different system and different jurisdictional requirements for their tax tribunals.³⁴⁸ Some states may have tribunals with narrower jurisdictions than the Michigan Tax Tribunal, and some states may allow class actions with federal statutory or constitutional claims to plead directly to the state courts and entirely circumvent the tribunals. Housing advocates attempting to plead directly to state courts should be careful not to implicate any of the administrative body's jurisdictional powers when drafting complaints.³⁴⁹

When time and resources allow, and depending on the nature of the claim, it may also be possible to receive adequate relief from the administrative bodies themselves or from state courts on appeal from a tax tribunal. A group of plaintiffs smaller than a class likely could proceed through the administrative

346. See *supra* notes 246–55 and accompanying text.

347. See *supra* notes 319–37 and accompanying text.

348. For instance, in Philadelphia County the Tax Review Board has jurisdiction to review “any decision or determination relating to the liability of any person for any unpaid money or claim collectible by the Department of Revenue . . . including, but not limited to, any tax.” PHILA., PA. CODE § 19-1702(1) (2018). The Tax Review Board is the exclusive forum for challenging property tax disputes in Philadelphia (the city and county are coterminous). *City of Philadelphia v. Lerner*, No. 1347 C.D.2013, 2014 WL 10298894, at *4–5 (Pa. Commw. Ct. Dec. 11, 2014). If a taxpayer does not petition the Board for review, he or she waives any future challenges of the underlying assessment. *Id.* Even when the city commences collection actions in state court, the taxpayer may not raise issues on the merits of the underlying assessment if he or she has not first raised them before the Board. *Id.* Such a strict policy of administrative exhaustion would make a case like *Morningside* extremely difficult to bring in Philadelphia. Plaintiffs would almost certainly be forced to go through the Tax Review Board to reach the state court.

349. For instance, the *Morningside* plaintiffs attempted to avoid implicating the assessments themselves by identifying the County's specific policy as continuing foreclosures despite knowledge that there were overassessments in Detroit. See *supra* note 222 and accompanying text. Unfortunately, the court was not able to overlook the connection to the assessments themselves, and thus found that the Tax Tribunal's exclusive jurisdiction had been triggered. See *supra* note 292 and accompanying text.

process and, should there be questions of law to be answered or greater equitable relief to be granted, they can appeal from the tax tribunal to the state courts for that relief. This is admittedly a longer process, with many more levels of appeal, and would likely be difficult to manage with an entire class in most states.

IV. CONCLUSION

As the impact of *Inclusive Communities* becomes clearer, litigants will be better able to plead facts that will survive a motion to dismiss by successfully establishing robust causality and a prima facie case of disparate impact. In jurisdictions where administrative bodies do not necessarily have exclusive jurisdiction over property tax disputes, advocates can take their class actions straight to the courts. In jurisdictions where administrative bodies *do* have exclusive jurisdiction, creative pleading may avoid triggering statutory requirements and the foundering of good claims in slow systems.

Property tax foreclosure policies are necessarily housing policies. The FHA's guarantee of protection from the refusal to "sell or rent . . . 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" must be available to victims of unfair property tax foreclosure policies that disproportionately affect nonwhite homeowners.³⁵⁰ Despite the failure of *Morningside*, housing advocates should continue to combat the property tax foreclosure crisis and pressure municipalities into improving such policies.

350. 42 U.S.C. § 3604(a) (2012).