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Water Justice: The Ninth Circuit Examines the Fair Housing Act in the Context of Water Services in Southwest Fair Housing Council Inc. v. Maricopa Domestic Water Improvement District

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WATER JUSTICE: THE NINTH CIRCUIT EXAMINES THE FAIR HOUSING ACT IN THE CONTEXT OF WATER SERVICES IN *SOUTHWEST FAIR HOUSING COUNCIL, INC. V. MARICOPA DOMESTIC WATER IMPROVEMENT DISTRICT*

I. Water Affordability and the Fair Housing Act: An Introduction

Water affordability is an area of growing concern in the United States.[1] Research suggests the price of water and sewage increased by approximately eighty percent between 2010 and 2018.[2] In the drought-stricken southwest, water prices may rise further as states become more dependent on imported water.[3] A 2017 study estimated that, at the time, roughly twelve percent of households struggled to afford water services.[4] Researchers in that study predicted the percentage of households grappling with water affordability would triple within five years.[5] Another study notes the economic burdens rising water prices impose on low-income families.[6] Some water utilities have responded by implementing Customer Assistance Plans or Affordability Plans to help struggling homeowners and renters.[7] Lack of affordable access to necessary utilities like

1. Manuel P. Teodoro & Robin Rose Saywitz, *Water and Sewer Affordability in the United States: A 2019 Update*, Am. Water Works Ass'n Water Sci., Apr. 14, 2020, at 1 (acknowledging rising water prices); Nina Lakhani, *Revealed: Millions of Americans Can't Afford Water as Bills Rise 80% in a Decade*, The Guardian (June 23, 2020), https://www.theguardian.com/us-news/2020/jun/23/millions-of-americans-cant-afford-water-bills-rise (noting increase of unaffordable water bills); Martha F. Davis, *Hidden Burdens: Household Water Bills, "Hard-To Reach" Renters, and Systemic Racism*, 52 Seton Hall L. Rev. 1461, 1470–71 (2022) (discussing gradual rise of consumer water prices over time).

2. *See* Lakhani, *supra* note 1 (noting unaffordability of water services in certain cities).

3. Ciara Nugent, *Arizona Faces an Existential Dilemma: Import Water or End Its Housing Boom*, Time (Jan. 20, 2023), https://time.com/6248517/arizona-growing-population-drought-housing/ (recognizing southwest drought and its potential effect on water prices).

4. Elizabeth A. Mack & Sarah Wrase, *A Burgeoning Crisis? A Nationwide Assessment of the Geography of Water Affordability in the United States*, Plos One (Jan. 11, 2017), at 3 (attributing decline in water affordability to rising prices and stagnating household incomes).

5. *Id.* (reporting that water affordability could worsen).

6. *See* Teodoro & Saywitz, *supra* note 1 (noting increase in percentage of disposable income required for low-income households to afford water).

7. Davis, *supra* note 1, at 1466–67 (stating water utilities understand financial hardships that result from rising water prices).

water can make it difficult for individuals to "achieve a decent and dignified life . . . ."[8]

As part of the Civil Rights Act of 1968, President Lyndon B. Johnson enacted the Fair Housing Act (FHA) to end segregation.[9] Subsequently, courts have interpreted the FHA to prohibit intentionally discriminatory housing decisions and decisions that have discriminatory effects on protected classes of individuals.[10] The FHA provides that it is unlawful "to discriminate against any person . . . in the provision of services . . . because of race, color, religion, sex, familial status, or national origin."[11] Thus, the FHA prohibits property owners from denying buyers and renters housing opportunities based on their status as individuals of a protected class.[12] The statute also prohibits housing service providers from creating unnecessary and discriminatory barriers for residents procuring those services.[13]

In 2021, a time when rising water prices were adversely affecting low-income households, the Court of Appeals for the Ninth Circuit heard *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District*.[14] The court considered whether an Arizona municipal water district could require a higher security deposit for public housing residents than nonpublic housing residents as a condition for providing water services.[15] The crux of the issue was that the water district's policy disproportionately impacted minority and single mother residents, thus implicating the FHA.[16] Ultimately, the court ruled in favor of the water district, finding that

8. Azadeh Shahshahani & Kathryn Madison, *No Papers? You Can't Have Water: A Critique of Localities' Denial of Utilities to Undocumented Immigrants*, 31 EMORY INT'L L. REV. 505, 506 (2017) (emphasizing importance of water access to households).

9. Parisa Ijadi-Maghsoodi, *Eradicating Race-Based Health Disparities by Effectuating the Fair Housing Act's De-Segregation Intent*, 58 S.D. L. REV. 903, 916-17 (2021) (confirming FHA's primary purpose of desegregation by citing legislative records and Supreme Court cases).

10. *See* Tex. Dep't of Hous. and Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 576 U.S. 519, 524, 545 (2015) (recognizing both theories of liability under FHA).

11. 42 U.S.C. § 3604(b) (prohibiting discriminatory housing practices relating to provision of services).

12. *See id.* (prohibiting discrimination in buying and renting of property).

13. *See id.* (banning discrimination in provision of services).

14. Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950 (9th Cir. 2021) (considering FHA claim against municipal water district); *see* Lakhani, *supra* note 1 (finding low-income households in Tucson, Arizona face rising water bills).

15. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 956 (outlining plaintiffs' claim).

16. *See id.* (recognizing disproportionate amount of minority and single mother public housing residents).

its policy lacked discriminatory animus, served a legitimate business interest, and the plaintiffs failed to establish the availability of a less discriminatory and equally effective alternative policy.[17]

This Note explores the Ninth Circuit's analysis in *Southwest Fair Housing Council*.[18] Part II provides the factual background of the case and a synopsis of the parties' arguments.[19] Part III discusses the FHA, the theories of liability a plaintiff may pursue under an FHA claim, and the case law and federal regulations that created the framework for FHA claims analysis.[20] Part IV includes a step-by-step analysis of the Ninth Circuit's reasoning.[21] Part V provides a critical discussion of the Court's reasoning and contends that the Ninth Circuit erred in requiring the plaintiffs to provide an equally effective alternative to the water district's current policy.[22] Finally, Part VI discusses the decision's impact on public housing residents within the Ninth Circuit and the merits of the current FHA claim framework.[23]

II. IN DEEP WATER: THE FACTS OF *SOUTHWEST FAIR HOUSING COUNCIL*

The Maricopa Domestic Water Improvement District (the District) is a municipal corporation that supplies water to approximately three hundred Arizona households.[24] The District serves private and public housing residents of Edwards Circle, a federally funded public housing complex in Pinal County, Arizona.[25] In 2017, Edwards Circle had a higher percentage of African American, Native American, Hispanic, and single mother residents than the District's total customer base.[26] The District conditioned its provi-

17. *Id.* at 970, 972, 974 (ruling in favor of District).

18. For a discussion of the issues and holding of *Sw. Fair Hous. Council, Inc.*, see *supra* notes 14–17 and accompanying text.

19. For a discussion of the context of the decision in *Sw. Fair Hous. Council, Inc.*, see *infra* notes 24–44 and accompanying text.

20. For a discussion of the history, purpose, and framework of the FHA, see *infra* notes 45–122 and accompanying text.

21. For a discussion of the Ninth Circuit's analysis and reasoning in *Sw. Fair Hous. Council, Inc.*, see *infra* notes 123–66 and accompanying text.

22. For a more critical discussion of the court's analysis and reasoning in *Sw. Fair Hous. Council, Inc.*, see *infra* notes 167–208 and accompanying text.

23. For a discussion of the impact of the Ninth Circuit's holding in *Sw. Fair Hous. Council, Inc.*, see *infra* notes 209–23 and accompanying text.

24. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 956 (noting scope of District's customer base).

25. *Id.* (describing District's customer base).

26. *Id.* (providing details of District's customer demographics).

sion of water services to customers on payment of a refundable deposit.[27]

As the owner and manager of Edwards Circle, Pinal County routinely failed to pay the District for its tenants' delinquent water bills despite recognizing its responsibility to pay.[28] In 2001, the District, with Pinal County's consent, ceased water service to Edwards Circle tenants with delinquent accounts.[29] While Pinal County attempted to avoid paying the District for its ex–tenants' delinquencies, it asked the District to resume providing water services, prompting the District to raise the water security deposit for Edwards Circle tenants from fifty-five dollars to one hundred dollars.[30] Following several failed attempts to recover past-due payments from Pinal County, the District again raised its refundable deposit for new Edwards Circle residents to $180, but the non-public housing customer deposit stayed at fifty-five dollars.[31]

Plaintiffs Tavita Peña, Jennifer Peters, and the Southwest Fair Housing Council complained that the District's deposit policy violated the FHA.[32] The plaintiffs argued the District's water deposit policy was discriminatory and disproportionately affected African Americans, Native Americans, and single mothers, all of whom are

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27. *Id.* at 957 (observing that both private and public residents had to pay deposit).

28. *See id.* (delineating District's policy for delinquent water service accounts). The District required property owners renting their property to others to pay the water service delinquencies of their tenants. *Id.* (highlighting that District places liens on properties when owners fail to pay tenants' delinquencies). Pinal County – the owner of the Edwards Circle property – was therefore responsible for tenants who left and failed to pay their water bills. *Id.* (expressing Pinal County's initial assent to this policy). Despite Pinal County's recognition of its obligations to the District, it routinely failed to pay the District for the delinquencies of its tenants. *Id.* (detailing troubled relationship between Pinal County and District). After the District threatened to impose a lien on Edwards Circle to facilitate recovery of overdue payments, Pinal County asserted that because it was a public entity, its properties were immune to liens and the county did not have to pay former tenants' delinquencies. *Id.* at 957-58 (stating reasons for District's decision to raise residents' rates after fruitless negotiations).

29. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 957 (highlighting Pinal County aimed to limit its liability).

30. *Id.* (citing District's first instance of raising water deposit rates). The Ninth Circuit also noted that Pinal County did not challenge the District's first instance of raising rates. *Id.* (signaling apparent acquiescence of increased rates).

31. *See id.* at 957–58 (recounting negotiation timeline between parties and District's decision to increase deposit amount).

32. *Id.* at 956 (arguing District's policy caused disparate impact on protected class members under FHA).

members of protected classes under the FHA.[33] The plaintiffs advanced two theories of liability: (1) disparate treatment that alleged intentional discrimination on the defendant's part, and (2) disparate impact that highlighted the discriminatory effects stemming from a facially–neutral policy.[34]

The United States District Court for the District of Arizona granted summary judgment in favor of the District.[35] The court reasoned that the plaintiffs failed to establish a prima facie disparate impact claim because they did not demonstrate statistically significant causation between the deposit policy and its disproportionate effect on protected class members.[36] Additionally, the court determined that the plaintiffs failed to adequately plead a disparate treatment claim, and even if they had, the evidence presented would create a genuine issue of material fact about the District's alleged discrimination.[37]

The plaintiffs appealed the district court's ruling and again advanced disparate treatment and disparate impact claims.[38] The Ninth Circuit affirmed the district court's judgment, but noted weaknesses in the lower court's reasoning.[39] The court held that the plaintiffs successfully demonstrated a prima facie disparate impact claim.[40] Nevertheless, the Ninth Circuit concluded the District established that the policy served a legitimate business interest.[41] Additionally, the court determined that the plaintiffs failed to present a triable issue of fact that an equally effective, less discriminatory alternative policy existed.[42] The Ninth Circuit also affirmed the district court's holding that the plaintiff did not provide enough evidence to establish a triable issue of fact regarding the

33. *Id.* (contending increased deposit requirement adversely affects members of protected classes); *see also* 42 U.S.C. § 3604(b) (disallowing housing discrimination based on race, color, familial status, or national origin).

34. *See* Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 438 F. Supp. 3d 991, 996, 1000 (D. Ariz. 2020), *aff'd*, 9 F.4th 1177 (9th Cir. 2021), *withdrawn and superseded on denial of reh'g en banc*, 17 F.4th 950 (9th Cir. 2021), and *aff'd*, 17 F.4th 950 (9th Cir. 2021) (detailing plaintiffs' arguments).

35. *Id.* at 1002 (granting District's motion for summary judgment).

36. *Id.* at 996–1000 (finding insufficient evidence of disparate impact).

37. *Id.* at 1000–02 (analyzing and rejecting disparate treatment claim).

38. *See Sw. Fair Hous. Council Inc.*, 17 F.4th at 959 (outlining plaintiffs' argument).

39. *See id.* at 972 (critiquing district court's analysis but affirming grant of summary judgment).

40. *Id.* at 966 (stating district court's erroneous rationale).

41. *Id.* at 970 (concluding water deposit policy served legitimate business interest).

42. *Id.* at 972 (holding plaintiffs failed to establish equally effective and less discriminatory alternative policy).

disparate treatment claim.[43] Thus, the court held that the District did not violate the FHA and the district court properly granted summary judgment in favor of the District.[44]

III. MURKY WATERS: BACKGROUND OF DISPARATE IMPACT LIABILITY UNDER THE FAIR HOUSING ACT

Congress enacted the FHA in 1968, shortly after the assassination of Dr. Martin Luther King Jr.[45] The FHA affirms: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[46] Specifically, the statute makes it unlawful to discriminate against any individual in the "sale or rental of a dwelling, or the provision of services . . . because of race, color, religion, sex, familial status, or national origin."[47] Notably, several courts have recognized the FHA also covers claims challenging discriminatory household water policies.[48]

A statistical disparity in a policy's effect on protected class members compared to an entire population does not, per se, constitute discrimination.[49] Courts will only strike down a policy without intentional discrimination if the policy does not serve a legitimate business interest or if a less discriminatory alternative exists that serves the defendant's legitimate interests.[50] As such, courts should only remove "artificial, arbitrary, and unnecessary barriers" to housing and housing-related services.[51] Likewise, plaintiffs submit to courts two theories of liability for alleged FHA violations: disparate treatment and disparate impact.[52]

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43. *Sw. Fair Hous. Council Inc.*, 17 F.4th at 974 (stating plaintiffs failed to provide evidence of District's discriminatory intent).

44. *Id.* (affirming district court's judgment).

45. *See* Ijadi-Maghsoodi, *supra* note 9, at 916–17 (citing legislative records and Supreme Court cases to confirm FHA's desegregation goal).

46. 42 U.S.C. § 3601 (announcing new United States housing policy).

47. 42 U.S.C. § 3604(b) (outlining unlawful discriminatory housing policies and practices).

48. *See Davis*, *supra* note 1, at 1498–99 (citing cases where courts found claims of discrimination regarding water access cognizable under FHA).

49. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015) (stating there must be "robust causality" between policy and disparity).

50. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 955 (detailing policies that courts may invalidate under FHA).

51. *Inclusive Cmtys.*, 576 U.S. at 540 (providing removable housing policies' characteristics).

52. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 10:1, Westlaw (database updated Aug. 2022) (explaining different FHA claims).

A. Disparate Treatment Liability

Disparate treatment claims challenge acts of intentional discrimination.[53] Thus, most lawsuits brought under the FHA allege intentional discrimination.[54] To prevail, plaintiffs must produce evidence showing that "a discriminatory reason more likely than not motivated the defendant" and that the defendant's practice or policy adversely affected the plaintiff.[55]

B. Disparate Impact Liability

In many cases, defendants' practices lack discriminatory intent but still disproportionately and adversely affect protected class members.[56] For example, a plaintiff may allege that a defendant's strict enforcement of housing code regulations "has a disparate impact on the availability of housing . . . ." for protected class members under the FHA without claiming any discriminatory intent.[57] The Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*[58] and a United States Department of Housing and Urban Development (HUD) regulation (2013 HUD Regulation) established the analytical framework for disparate impact claims under the FHA.[59] While *Inclusive Communities* appears to now guide disparate impact claims moving forward, courts still struggle to incorporate the Supreme Court's guidance.[60]

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53. *See id.* § 10:2 (stating intentional discrimination through housing policies violates FHA).

54. *Id.* (acknowledging frequency of disparate treatment claims).

55. *See Sw. Fair Hous. Council, Inc.*, 17 F.4th at 972 (quoting Ave. 6E Inv.'s, LLC v. City of Yuma, Ariz., 818 F.3d 493, 504 (9th Cir. 2016)) (noting requirements for successful disparate treatment claim).

56. *See, e.g.*, Schaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259, 1273–74 (11th Cir. 2019) (providing example of bringing disparate impact claim without alleging discriminatory intent).

57. Ellis v. City of Minneapolis, 860 F.3d 1106, 1107 (8th Cir. 2017) (highlighting plaintiff's disparate impact claim lacking discriminatory intent).

58. 576 U.S. 519, 524 (2015) (addressing whether disparate impact claims are cognizable under FHA).

59. *See id.* at 530–46 (detailing disparate impact claim requirements); *see also* 24 C.F.R. § 100.500 (2013) (communicating prior HUD guidance on disparate impact analysis).

60. DAVID H. CARPENTER, CONG. RSCH. SERV., R44203, DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT 10-11 (Sept. 24, 2015), https://crsreports.congress.gov/product/pdf/R/R44203 (expressing uncertainty over how circuits will apply *Inclusive Communities*).

1. History and Development of Disparate Impact Liability Under the FHA

The courts and HUD long believed the FHA included liability for "discriminatory effects."[61] The Supreme Court, however, did not formally recognize disparate impact claims under the FHA until *Inclusive Communities*.[62] Before 2015, courts frequently grounded their disparate impact claims analysis on Title VII of the Civil Rights Act, which deals with employment discrimination.[63]

In 2015, the Supreme Court addressed whether disparate impact claims were cognizable under the FHA in *Inclusive Communities*.[64] The Inclusive Communities Project alleged that the Texas Department of Housing and Community Affairs "caused continued segregated housing patterns" by disproportionately allocating housing tax credits to "black inner–city areas," thereby discouraging the development of low–income housing in suburban areas.[65] The Court debated whether the FHA barred housing policies and practices with disparate impacts, but without a discriminatory purpose.[66] Ultimately, the Court held that even without discriminatory intent, a plaintiff may still bring a disparate impact claim under the FHA by arguing the defendant's policy had a disproportionately adverse effect on a protected class.[67]

While the ruling exposed future defendants to potential liability for unintentional discrimination, it also established a careful approach to limit liability for discriminatory impact suits.[68] The Court felt that safeguards were necessary to: (1) avoid FHA claims in which factors other than the defendant's housing decision caused discriminatory effects, (2) allow businesses to make decisions that

61. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (stating need for regulation based on longstanding belief that FHA covered discriminatory effects liability).

62. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545 (2015) (holding that disparate impact claims under FHA are cognizable).

63. *See* CARPENTER, *supra* note 60, at 3 (citing decisions pre–2015 with analysis based on Civil Rights Act cases).

64. *Inclusive Cmtys.*, 576 U.S. at 524 (considering whether disparate impact claims are cognizable under FHA).

65. *Id.* at 526 (outlining plaintiff's disparate impact claim). The Inclusive Communities Project is a nonprofit corporation that helps low-income families secure affordable housing. *Id.* (describing Inclusive Communities Project).

66. *See id.* at 530 (identifying case's main issue).

67. *See id.* at 524, 545 (validating disparate impact theory while contrasting it with disparate treatment theory).

68. *Id.* at 542–44 (imploring courts to analyze disparate impact claims carefully).

further a legitimate purpose, and (3) only target unnecessary hurdles to housing.[69] Consequently, plaintiffs were required to demonstrate that protected class members were adversely affected by the defendant's policy and prove "robust" causation between the policy and its discriminatory effects.[70] Defendants were allowed to describe the legitimate interests served by their policies.[71] The Court, therefore, made it more difficult for plaintiffs to win FHA cases lacking discriminatory intent by adding defendant-friendly rules to the disparate impact analysis.[72]

2. Analytical Framework of Disparate Impact Claims

The 2013 HUD regulation and *Inclusive Communities* govern disparate impact claims.[73] Both sources set forth a three–step analysis and burden-shifting framework.[74] First, the plaintiff must prove a prima facie case of disparate impact and show: (1) the defendant implemented a seemingly neutral housing policy or practice, (2) the policy or practice disproportionately affected a protected class of persons, and (3) statistical evidence that the policy or practice caused the disproportionate effect.[75]

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69. *See Inclusive Cmtys.*, 576 U.S. at 533, 544 (describing why limitations on disparate impact claims are necessary).

70. *See id.* at 542 (outlining robust causality requirement).

71. *See id.* at 541 (holding that defendants may keep policies if they establish they are necessary to "achieve a valid interest").

72. *See* SCHWEMM, *supra* note 52, § 10:6 (explaining rigorousness of robust causality requirement and how decisions pre-*Inclusive Communities* frequently found defendant failed to justify valid interest); Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 430–31 (2021) (discussing how safeguards of *Inclusive Communities* and 2020 HUD Regulation makes proving disparate impact harder for plaintiffs).

73. *See* 24 C.F.R. § 100.500(c) (2013) (describing burdens of proof in disparate impact cases); *Inclusive Cmtys.*, 576 U.S. at 527, 530–46 (referencing 2013 HUD Regulation and describing disparate impact analysis). The 2013 HUD regulation and *Inclusive Communities* appear to be the guides moving forward for lower courts. *See* CARPENTER, *supra* note 60, at 10–11 (noting that circuits using balancing tests will likely switch to burden-shifting tests). Even though, prior to *Inclusive Communities*, some circuits did not use pure burden-shifting models and some kept the burden on the defendant to show there was no less discriminatory alternative policy, the Congressional Research Service expects these circuits to follow *Inclusive Communities* moving forward. *Id.* at 10 (predicting circuits will use burden–shifting test).

74. *See* SCHWEMM, *supra* note 52, § 10:6 (outlining framework HUD and *Inclusive Communities* described for disparate impact claim analysis).

75. *See id.* (offering detailed review of plaintiff's initial burden).

The discriminatory effect must result from the defendant's specific policy or practice, not a one-time act or decision.[76] For example, in *Crain v. City of Selma*,[77] the Court of Appeals for the Fifth Circuit addressed the plaintiff's claim that the city of Selma, Texas's process for selling parcels of property owned by Selma had a discriminatory impact on African-American buyers.[78] The court denied the plaintiff's claim because he failed to allege a specific policy the defendants used to decline his bid to purchase the property.[79]

If the plaintiff successfully identifies a neutral policy, it must provide statistical evidence that the policy had a greater adverse effect on members of a protected class than the rest of a given population.[80] The disproportionate effect must be significant.[81] In *Schaw v. Habitat for Humanity of Citrus County*,[82] the Court of Appeals for the Eleventh Circuit ruled that the disparity in how individuals of different classes are affected by a policy "must be substantial enough to raise an inference of causation."[83] In this case, the plaintiff alleged that Habitat for Humanity of Citrus County's minimum-income requirement for housing applications had a disparate impact on applicants collecting social security disability income.[84] The court denied the plaintiff's claim because he provided no evidence that the defendant's policy had a disparate impact on those applicants.[85]

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76. *See id.* (explaining that courts will only consider disparate impact claims when parties challenge general policies); Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 962 (9th Cir. 2021) (requiring plaintiff to identify policy and not single decision).

77. 952 F.3d 634 (5th Cir. 2020) (rejecting disparate impact claim).

78. *Id.* at 636, 641 n.6 (describing plaintiff's FHA complaint).

79. *See id.* at 641 n.6 (denying plaintiff's disparate impact claim citing lack of specific policy alleged).

80. *See* SCHWEMM, *supra* note 52, § 10:6 (explaining policy must show disproportionate effect on protected class members).

81. *See id.* (noting disparity in impact must be "sizeable"); *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 964 (stating policy must have significantly disproportionate effect); *see, e.g.*, Schaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259, 1274 (11th Cir. 2019) (finding plaintiff failed to state prima facie case because plaintiff did not provide substantial evidence of discriminatory effects).

82. 938 F.3d 1259, 1259 (11th Cir. 2019) (considering discriminatory effects allegation).

83. *Id.* at 1274 (ruling plaintiff failed to state prima facie case).

84. *Id.* at 1262 (explaining plaintiff sought disparate impact liability based on defendant's minimum-income requirement).

85. *Id.* at 1274 (denying plaintiff's claim because he failed to provide substantial evidence of discriminatory effects).

Finally, the plaintiff must show a causal connection between the disproportionate effect and the defendant's housing decision.[86] In establishing this additional requirement, the Court in *Inclusive Communities* was conscious of protecting the defendants against claims of racial disparities that its policies did not actually cause.[87] Otherwise, a plaintiff could establish a prima facie case based on a mere racial imbalance.[88] Thus, a disparate impact claim predicated on a disproportionate effect caused by factors other than the defendant's policies and practices will fail.[89]

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to demonstrate that its policy or practice "advances a valid interest . . . and is therefore not arbitrary, artificial, and unnecessary."[90] Similar to the Supreme Court, the Ninth Circuit refers to a valid interest under the FHA as a "legitimate business interest."[91] The Supreme Court emphasized the importance of this step, for it functions to limit liability to only unnecessary housing decisions.[92] The defendant is not required to prove that its policy is necessary to its business, only that the policy serves a legitimate business interest in a significant way.[93] The Supreme Court's decision in *Inclusive Communities* has made it easier for the defendant to satisfy this burden.[94]

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86. *Inclusive Cmtys.*, 576 U.S. at 542 (requiring robust causality between policy and effect).

87. *Id.* (emphasizing importance of robust causality requirement to shield defendants from unwarranted liability).

88. *See id.* (expanding on importance of robust causality safeguard).

89. *See id.* (noting prima facie case fails if policy does not cause disparity); *see also* Quad Enters. Co. v. Town of Southold, 369 F. App'x 202, 206 (2d Cir. 2010) (rejecting disparate impact claim because plaintiff, while providing evidence of handicapped-accessible housing shortage in Southold compared to handicapped population, did not show defendant's policy caused shortage). If the plaintiff cannot establish a prima facie case, the judge will dismiss the case. *See Inclusive Cmtys.*, 576 U.S. at 543 (declaring lack of causal connection between policy and disparate impact should cause case dismissal).

90. 24 C.F.R. § 100.500(c)(2) (2020) (stating requirements for defendants to defeat disparate impact claim if plaintiff establishes prima facie case). Similarly, the Court in *Inclusive Communities* required the defendant show its policy was "necessary to achieve a valid interest." *Inclusive Cmtys.*, 576 U.S. at 541 (affirming defendant must prove necessity of its policy despite adverse effects).

91. Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 966 (9th Cir. 2021) (explaining defendant must prove legitimate business interest to avoid liability).

92. *See Inclusive Cmtys.*, 576 U.S. at 541 (underscoring importance of allowing housing policies that serve valid interests).

93. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 967–68 (clarifying defendant's policy need not be indispensable).

94. *See* SCHWEMM, *supra* note 52, § 10:6 nn.47–48 (referencing more cases where defendant satisfied burden than where defendant failed to satisfy burden).

Once the defendant establishes a legitimate business interest, the burden shifts to the plaintiff to prove the defendant could have employed a less discriminatory policy.[95] Few courts have addressed this step.[96] The Ninth Circuit requires the plaintiff's proposed policy to be equally effective in serving the defendant's interests and less discriminatory than the original policy.[97] The Supreme Court, however, is silent on the requirements to satisfy this step.[98] In *Inclusive Communities*, the Court wanted "to give [defendants] leeway to state and explain the valid interest served by their policies" and decided Congress did not intend for the FHA to "force [defendants] to reorder their priorities."[99] The Court has not elaborated further on this step.[100]

The Ninth Circuit also drew upon its previous decision in *Hardie v. National Collegiate Athletic Association*.[101] In this case, the plaintiff challenged a rule from the National Collegiate Athletic Association (NCAA) prohibiting individuals with a felony conviction from coaching at NCAA youth athletic tournaments by claiming the

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Post–*Inclusive Communities*, few cases have found the defendant failed to satisfy the burden of showing a legitimate business interest. *See* Fair Hous. Ctr. of Wash. v. Breier-Scheetz Props., LLC, 743 F. App'x 116, 117–18 (9th Cir. 2018) (holding defendant failed to provide sufficient evidence for court to conclude its policy was reasonably related to achieving defendant's legitimate interests). More cases have concluded that the defendant properly explained its interests. *See, e.g.*, MHANY Mgmt., Inc. v. Cnty. of Nassau, (*MHANY Management*), No. 05-cv-2301, 2017 WL 4174787, at *4 (E.D.N.Y. Sept. 19, 2017) (finding defendant's concerns over traffic and pressure on public schools were legitimate governmental interests regarding its decision to restrict availability of multi-family housing in certain areas); Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 311 (D. Conn. 2020) (holding defendant's authentication policy served legitimate interest of protecting consumer files); Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., No. 3:17-CV-206-K, 2017 WL 3498335, at *10 (N.D. Tex. Aug. 16, 2017), *aff'd*, 920 F.3d 890 (5th Cir. 2019) (stating "increased costs, administrative delays in receiving payment, and other financial risks . . . ." are legitimate business interests).

95. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 966 (referencing legally sufficient reason for employing policy or practice as legitimate business interest); *see also* 24 C.F.R. § 100.500(c)(3) (2020) (describing how plaintiff may defeat defendant who has established legitimate business interest).

96. *See* SCHWEMM, *supra* note 52, § 10:6 (recognizing lack of decisions discussing plaintiff's burden to prove less discriminatory policy was available).

97. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 970 (drawing upon non-FHA cases to interpret step three).

98. *See* Shahshahani & Madison, *supra* note 8, at 521 (discussing how Supreme Court did not address whether plaintiffs may succeed by showing less discriminatory alternative).

99. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540–41 (2015) (stating defendants must be permitted to keep policies necessary to achieve desired interests).

100. *See id.* at 541 (ending its discussion on third step).

101. 876 F.3d 312 (9th Cir. 2017) (addressing disparate impact claim under Civil Rights Act).

rule violated Title II of the Civil Rights Act of 1964.[102] The court stated that for a plaintiff to prevail in a disparate impact suit under Title II, the plaintiff must provide an alternative policy that is just as effective as the defendant's policy in promoting the defendant's legitimate interest.[103]

Conversely, in 2013, HUD adopted rules regarding disparate impact analysis and later promulgated those rules in 24 C.F.R. section 100.500, which did not require the alternative policy be equally effective.[104] In 2020, however, HUD revised the regulation (2020 HUD Regulation) to include the term "equally effective . . . ."[105] HUD attributed the revision to the Supreme Court's ruling in *Inclusive Communities*.[106] Nevertheless, the United States District Court for the District of Massachusetts recently enjoined HUD from revising the regulation to include the equal effectiveness language.[107] As a result, the 2020 HUD Regulation never took effect.[108] President Joe Biden also criticized the proposed regulation, emphasizing how it does not adhere to the FHA's purpose.[109]

Some scholars believe HUD will inevitably scrap the 2020 amendment and return to the 2013 rule.[110] Others acknowledge that *Inclusive Communities* and HUD's 2020 rule weakened disparate

102. *Id.* at 315 (describing plaintiff's disparate impact claim).

103. *Id.* at 320 (outlining disparate impact framework in Civil Rights Act actions).

104. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11473 (Feb. 15, 2013) (rejecting proposition that regulation needed modification); 24 C.F.R. § 100.500(c)(3) (2013) (noting absence of any equal effectiveness language).

105. *See* 24 C.F.R. § 100.500(c)(3) (2020) (including equal effectiveness language).

106. *See* Mitchell E. Feldman, *Statistically Speaking: Restrictive Changes to Fair Housing Act Disparate Impact Liability*, 62 B.C. L. REV. 1321, 1338 (2021) (stating *Inclusive Communities* heavily influenced HUD's proposal).

107. *See* Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. and Urb. Dev., 496 F. Supp. 3d 600, 610-11 (D. Mass. 2020) (raising concerns that regulation's inclusion of new language would severely weaken disparate impact liability under FHA). The court explained that HUD wanted to embrace the Supreme Court's decision in *Inclusive Communities* and "provide greater clarity to the public" when updating the language. *Id.* (outlining HUD's defenses). The court, however, found HUD's explanations unsatisfactory because the "equally effective" language contained in the proposed regulation was not in *Inclusive Communities* and providing enhanced clarity was arbitrary and capricious. *Id.* (rejecting HUD's explanations).

108. Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33590, 33590 (proposed June 25, 2021) (to be codified at 24 C.F.R. pt. 100) (affirming 2013 rule remained in effect).

109. *See* Angel Rodriguez, *VI. Disparate Impact Liability's Future Under the Biden Administration and Best Practices*, 41 REV. BANKING & FIN. L. 74, 83–84 (2021) (instructing HUD to reevaluate 2020 rule).

110. *Id.* at 84 (stating it is likely government will restore 2013 rule based on criticism of 2020 rule).

impact liability.[111] Further, some scholars have implored HUD to rethink its disparate impact rule entirely.[112]

Before *Inclusive Communities*, some courts did not require an equally effective alternative policy.[113] For example, in *Mt. Holly Gardens Citizens in Action v. Township of Mount Holly*,[114] the Court of Appeals for the Third Circuit stated that the plaintiff must simply "demonstrate that there is a less discriminatory way to advance the defendant's legitimate interest."[115] Following *Inclusive Communities*, some courts like those in *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions*[116] and *MHANY Management v. County of Nassau*,[117] did not read *Inclusive Communities* to require an equally effective alternative policy.[118] In *Connecticut Fair Housing Center*, a Connecticut district court reviewed *Inclusive Communities* and held that after a defendant demonstrates a legitimate business interest in its policy, the plaintiff must provide a less discriminatory alternative that serves the defendant's interests.[119] Similarly, in *MHANY Management*, a New York district court stated it "could not be clearer" that the plaintiff need not show an equally effective alternative.[120] Notwithstanding debates over how effective the alternative policy must be, if the plaintiff establishes a viable alternative, it has proven

111. *See* Ceballos et al., *supra* note 72, at 430–31 (2021) (discussing how procedural safeguards of *Inclusive Communities* and HUD's 2020 rule make proving disparate impact under FHA more difficult for plaintiff).

112. *See* Feldman, *supra* note 106, at 1363 (urging HUD to adopt more balanced regulation recognizing plaintiffs' need for legal action).

113. *See* Mt. Holly Gardens Citizens in Action v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011) (failing to include equal effectiveness term in disparate impact claim framework).

114. 658 F.3d 375, 382 (3d Cir. 2011) (deciding FHA disparate impact claim prior to *Inclusive Communities* decision).

115. *Id.* (leaving out equal effectiveness language).

116. 478 F. Supp. 3d 259, 318 (D. Conn. 2020) (considering FHA disparate impact claim post-*Inclusive Communities*).

117. No. 05-cv-2301, 2017 WL 4174787, at *8 (E.D.N.Y. Sept. 19, 2017) (analyzing FHA disparate impact claim and reviewing 2013 HUD Regulation and *Inclusive Communities*).

118. *Conn. Fair Hous. Ctr.*, 478 F. Supp. 3d at 301–02 (requiring only less discriminatory alternative after reviewing *Inclusive Communities*); *MHANY Mgmt.*, No. 05-cv-2301, 2017 WL 4174787, at *8 (stating plaintiff must only show less discriminatory alternative due to *Inclusive Communities*).

119. *Conn. Fair Hous. Ctr.*, 478 F. Supp. 3d at 301 (demanding plaintiff provide less discriminatory alternative but not mandating it be equally effective).

120. *MHANY Mgmt.*, No. 05-cv-2301, 2017 WL 4174787, at *8 (rejecting defendant's argument that plaintiff's alternative policy must be as effective as defendant's policy at issue).

a disparate impact violation under the FHA.[121] Otherwise, the plaintiff's claim fails.[122]

IV. PIPE DOWN: A NARRATIVE ANALYSIS OF THE NINTH CIRCUIT'S DECISION TO DISMISS PLAINTIFFS' PROPOSED ALTERNATIVES

On appeal, the Ninth Circuit considered disparate treatment and disparate impact theories of liability and reviewed the plaintiffs' argument that the District's water deposit policy violated the FHA.[123] On the former claim, the court affirmed the district court's holding that the plaintiffs failed to provide sufficient evidence to establish a genuine issue of material fact.[124] Similarly, the court affirmed the district court's judgment regarding the plaintiffs' disparate impact claim, but also found the district court erred by awarding summary judgment to the District based on the plaintiffs' failure to establish a prima facie disparate impact case.[125] Ultimately, the Ninth Circuit affirmed the lower court's judgment in favor of the District.[126]

A. Analysis of Disparate Treatment Claim

The district court concluded that the plaintiffs failed to provide sufficient evidence proving the District's discriminatory intent.[127] The Ninth Circuit upheld the district court's disparate treatment holding after determining the plaintiffs presented neither direct nor circumstantial evidence of any discriminatory intent from the District.[128] The plaintiffs asserted that a District board member who noted "[an] influx of people and tenants" into Edwards Circle was using "code for African Americans, Native Americans, and single mothers."[129] The court determined this was

121. *See* SCHWEMM, *supra* note 52, § 10:6 (stating that plaintiff may still win by providing alternative policy).

122. *See id.* (providing that plaintiff's last chance of winning depends on proving less discriminatory alternative).

123. Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 960–74 (9th Cir. 2021) (analyzing plaintiffs' disparate treatment and disparate impact claims).

124. *Id.* at 972–74 (rejecting plaintiffs' disparate treatment claim).

125. *Id.* at 956 (noting district court error but affirming judgment).

126. *Id.* at 974 (affirming district court's ruling).

127. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 972 (providing decision at district court level).

128. *Id.* at 974 (stating plaintiffs did not demonstrate "genuine issue of material fact . . . ." as to whether District acted with discriminatory intent).

129. *Id.* (describing plaintiffs' disparate treatment argument).

a baseless assertion of discriminatory intent.[130] Likewise, the court did not discern any legitimate circumstantial evidence of discriminatory intent.[131]

B. Analysis of Disparate Impact Claim

The Ninth Circuit also determined whether the district court erred in holding that the plaintiffs failed to establish a prima facie disparate impact case.[132] The court concluded that the plaintiffs stated a prima facie case of disparate impact discrimination.[133] Then, due to *Inclusive Communities*' new burden-shifting analysis, the court addressed whether the District met its burden of proving the policy served a legitimate business interest.[134] Lastly, the court contemplated whether the plaintiffs put forth an equally effective and less discriminatory alternative policy.[135]

1. Plaintiffs State a Prima Facie Case

Ultimately, the Ninth Circuit concluded that the district court erred in holding the plaintiffs failed to state a prima facie case.[136] First, the plaintiffs "identified an outwardly neutral policy."[137] The District's water deposit policy subjected public housing residents to increased rates, but the FHA does not explicitly protect public housing residents.[138] As a result, the policy, which was not a "one-time decision," was not outwardly discriminatory to any FHA–protected class.[139]

Second, the plaintiffs established that the District's policy had a "significant, adverse, and disproportionate effect on . . . protected class[es]" of individuals.[140] The affected group – public housing

130. *Id.* (determining no reasonable jury could discern discriminatory intent from this statement).

131. *Id.* (concluding District's knowledge that policy would have discriminatory effects was insufficient to show discriminatory intent).

132. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 961 (outlining district court's reasoning for rejecting plaintiffs' disparate impact claim).

133. *Id.* at 962 (holding district court erred in its determination).

134. *Id.* at 966–70 (discussing District's interests in policy).

135. *Id.* at 970–72 (analyzing plaintiffs' proposed alternatives).

136. *Id.* at 962 (concluding plaintiffs established robust causation and prima facie case).

137. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 962–63 (stating District's water deposit policy did not directly treat residents differently based on protected class status).

138. *Id.* (affirming FHA does not protect public housing residents).

139. *Id.* (concluding District's policy was evidently evenhanded).

140. *Id.* at 964 (confirming significantly disproportionate effect on FHA–protected class members).

residents – was disproportionately African American, Native American, and unmarried women with children.[141] At this point in the analysis, the district court determined the plaintiffs had not established a prima facie case because the plaintiffs failed to show the District's policy had a disproportionate effect on FHA–protected class members.[142] The Ninth Circuit noted, however, that the district court erred in its analysis because it compared the policy's effect on protected class members to nonprotected class members of Edwards Circle.[143] The proper comparison, the court explained, was between all public housing and private housing customers of the District.[144] Because the District did not offer any contrary evidence, the court concluded the plaintiffs' "statistical evidence adequately suggest[ed] a material and significant disproportionate effect on members of . . . protected groups."[145]

Finally, the court found the plaintiffs established robust causation between the District's water deposit policy and its disparate effects on FHA–protected class members.[146] The court explained that "[f]or no reason other than the District's decision to create two different security deposit amounts for its public housing customers and for its private housing customers did the disparate impact arise."[147] The district court, therefore, erred in its holding because the plaintiffs successfully proved a prima facie case of disparate impact under the FHA.[148]

2. The District Established a Legitimate Business Interest

Next, the burden shifted to the District to prove its water deposit policy "significantly serve[d] a legitimate business interest."[149] The Ninth Circuit held there was no genuine disagreement that "the District demonstrated a legitimate business justification for implementing the . . . [p]olicy and that the policy served that interest

141. *Id.* (identifying affected groups).

142. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 963 (recounting that district court determined plaintiffs failed to prove disproportionate effect of policy).

143. *Id.* (rejecting district court's approach).

144. *Id.* at 963–64 (affirming plaintiffs' comparison method was correct).

145. *Id.* (noting District's lack of contrary statistical evidence).

146. *Id.* at 965–66 (finding that district court again employed improper comparison).

147. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 965 (noting disparate impact would not have occurred but for different policy amounts).

148. *Id.* at 966 (concluding plaintiffs established prima facie disparate impact case).

149. *Id.* (stating burden shifted to District).

in a significant way."[150] The court found the District unquestionably had an interest in Pinal County paying for water services and the District was justified in altering its water deposit policy based on the delinquent accounts of Edwards Circle residents.[151] In addition, the court found the District's policy served its business interest in a significant way because its decision to raise the deposit amount specifically for public housing residents was to protect itself against uncollected delinquencies.[152] Since the increase was neither arbitrary nor unnecessary, the court concluded the District satisfied its burden of establishing a legitimate business interest.[153]

3. The Plaintiffs Fail to Provide an Equally Effective Alternative Policy

Finally, after one final shift of the burden to the plaintiffs, the Ninth Circuit held that the plaintiffs failed to set forth an equally effective, less discriminatory alternative to the District's water deposit policy.[154] The court found the plaintiffs' three arguments unpersuasive.[155] First, the plaintiffs contended the District could have negotiated with Pinal County or taken legal action to force the county to pay for the Edwards Circle delinquencies it assumed responsibility for.[156] The court rejected this notion, reasoning that the District tried and failed to negotiate with Pinal County and any legal action against Pinal County would be costly, time-consuming, and would not guarantee success for the District.[157]

Second, the plaintiffs argued the District should have attempted to collect on the delinquent housing tenants rather than raise the deposit amount for all public housing tenants.[158] Again, the court rejected this alternative, explaining that the District al-

150. *Id.* at 966–67 (holding District had legitimate business interest in collecting debts owed to it and maintaining solvency).

151. *Id.* at 968 (explaining businesses are entitled to "maintain[ ] fiscal solvency").

152. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 968 (noting that past attempts to recover from delinquent tenants were unsuccessful). Further, the court found it inconsequential that Edwards Circle residents represented only a small portion of the District's customer base and could not realistically threaten the District's financial solvency via delinquencies. *Id.* (dismissing plaintiffs' argument).

153. *Id.* at 969 (finding increase to $180 was significant and justified based on current amounts Edwards Circle residents owed on their water bills).

154. *Id.* at 970–71 (noting plaintiffs failed to provide sufficient evidence of equally effective and less discriminatory alternative).

155. *Id.* at 971–72 (explaining and rejecting plaintiffs' proposed alternatives).

156. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 971 (arguing District had legal avenues worth exploring).

157. *Id.* (rejecting plaintiffs' first proposed alternative).

158. *Id.* (articulating plaintiffs' second policy suggestion).

ready tried to collect from the delinquent customers and that employing a collections agency to help would likely be more burdensome to the District and less effective than increasing the water deposit.[159] Finally, the plaintiffs suggested the District should have raised the deposit amount for all customers, not just public housing residents.[160] The court found this proposal unreasonable because if the court required the District take this course of action instead of the deposit policy it implemented, it would "incorrectly signal[ ] that justified, deliberate, and legitimate policies, which impact protected groups, violate the FHA."[161] Additionally, this approach would be ineffective because the District must repay the deposit amounts to each customer who does not have a delinquent balance.[162] Using other customers' security deposit amounts to cover delinquencies would eventually require the District to use its own funds, which would threaten financial solvency.[163]

Thus, the Ninth Circuit held that the District established a legitimate business interest and determined all proposed alternatives were unsatisfactory.[164] As a result, the court concluded the District's water deposit policy did not violate the FHA under a disparate impact theory.[165] Ultimately, the court affirmed the district court's grant of summary judgment for the District.[166]

V. THE NINTH CIRCUIT REFUSES TO MAKE WAVES: A CRITICAL ANALYSIS

Reviewing the Supreme Court's decision in *Inclusive Communities* – which gave substantial latitude to housing authorities in establishing a valid business interest – the Ninth Circuit ruled in favor of the District.[167] In *Inclusive Communities*, the Supreme Court established procedural safeguards to protect businesses from liability for

159. *Id.* (noting lack of evidence to support viability of second alternative option).

160. *See id.* at 971–72 (describing final proposed alternative).

161. *See Sw. Fair Hous. Council, Inc.*, 17 F.4th at 971–72 (rejecting final alternative).

162. *See id.* at 972–73 (identifying issue with third alternative policy).

163. *See id.* (noting costs and burdens of this policy on District).

164. *Id.* at 972 (accepting District's argument).

165. *Id.* (ruling in favor of District).

166. *See Sw. Fair Hous. Council, Inc.*, 17 F.4th at 972 (granting summary judgment for District despite district court's errors).

167. *Id.* at 966–72 (accepting District's interest in employing policy as valid and rejecting plaintiffs' proposed alternatives).

legitimate housing decisions with discriminatory effects.[168] Indeed, the Court vowed not to force businesses to "reorder their priorities," but sought only to invalidate unnecessary housing decisions.[169] In light of this precedent, the Ninth Circuit gave the District the opportunity to explain its water deposit policy and closely evaluated the plaintiffs' proposed alternatives.[170] As a result – and seemingly in line with *Inclusive Communities* – the District avoided liability despite its policy's proven discriminatory effects.[171] Based on a plain reading of the Supreme Court's opinion in *Inclusive Communities* and subsequent interpretations of the decision, the Court did not bind the Ninth Circuit to require the plaintiff set forth an equally effective alternative policy the District could have employed to prevail.[172]

A. *Inclusive Communities*: What did the Supreme Court Actually Hold?

The Court in *Inclusive Communities* did not explicitly state that the plaintiff's proposed alternative must be equally effective to hold a defendant liable for unintentionally discriminatory housing policies.[173] Instead, the Court asserted that the alternative should "serve[ ] the [entity's] legitimate needs."[174] The Court borrowed this language from the disparate impact employment discrimina-

168. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 544 (2015) (explaining disparate impact liability would eliminate valid business interests without proper safeguards); *see also* Feldman, *supra* note 106, at 1340 (stating disparate impact liability is meant to eliminate unnecessary barriers to housing "without hindering legitimate interests").

169. *See Inclusive Cmtys.*, 576 U.S. at 540 (emphasizing FHA's purpose to eliminate discriminatory effects resulting from arbitrary housing decisions).

170. *See* Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 966–72 (9th Cir. 2021) (analyzing District's business interest and plaintiffs' suggested alternatives).

171. *See id.* at 966, 972 (acknowledging disproportionate effect of District's policy but granting District summary judgment based on plaintiffs' failure to identify equally effective alternative policy).

172. For an in-depth discussion of the Supreme Court's holding in *Inclusive Communities*, various circuit court interpretations of the decision, and the Ninth Circuit's interpretation in *Southwest Fair Housing Council, Inc.*, see *supra* notes 167–71 and *infra* notes 173–208 and accompanying text.

173. *See Inclusive Cmtys.*, 576 U.S. at 533 (failing to use language indicating equal effectiveness when describing third step); Shahshahani & Madison, *supra* note 8, at 521 (discussing how Supreme Court was silent on whether plaintiffs may succeed by showing less discriminatory alternative).

174. *Inclusive Cmtys.*, 576 U.S. at 533 (quoting Ricci v. DeStefano, 557 U.S. 557, 578 (2009)) (drawing on disparate impact civil rights case law to assert that prior to rejecting defendant's business justification courts must determine that plaintiff described less discriminatory alternative practice that serves defendant's legitimate interests).

tion context to justify its defendant-friendly safeguards.[175] The Court then explained those safeguards – the robust causality requirement and the opportunity for defendants to describe a valid business interest – but failed to discuss the plaintiff's role in disparate impact suits further.[176] As a result, while employment discrimination case law requires plaintiffs produce alternative policies that serve the entities' legitimate needs, the Supreme Court did not provide a similarly definitive structure for the third step of the FHA disparate impact analysis.[177] Instead, the Court merely suggested the proposed alternative policy be less discriminatory than the defendant's policy and still serve the entity's legitimate needs.[178] Further, the Court did not describe an "equally effective" requirement.[179]

When the Court decided *Inclusive Communities*, HUD's 2013 regulation addressing disparate impact claims under the FHA did not require the plaintiff's alternative to be equally effective.[180] Although *Inclusive Communities* discussed this regulation, it is unclear whether the Court followed HUD's disparate impact test or the employment discrimination cases' disparate impact test.[181] The Court mentioned the regulation while discussing background information for the FHA and disparate impact liability, but it did not expressly refer to the regulation when developing its standard for judging disparate impact claims later in the opinion.[182] The Ninth Circuit in *Southwest Fair Housing Council, Inc.* ultimately declined to follow HUD's guidance because: (1) the court felt obligated to follow the Supreme Court instead of HUD's now ineffective 2013 regulation, and (2) the District Court for the District of Massachusetts recently

175. *See id.* at 533–46 (outlining and discussing need for procedural safeguards).

176. *See id.* (mentioning plaintiff's requirement to show less discriminatory alternative practice in employment discrimination case law but failing to discuss it in FHA context).

177. *See id.* (describing burden shifting framework while failing to articulate third step).

178. *See* CARPENTER, *supra* note 60, at 9 (stating Court seemed to suggest that business decisions would stand unless plaintiff's alternative serves entity's legitimate interests).

179. *See Inclusive Cmtys.*, 576 U.S. at 533 (explaining third step of disparate impact analysis and not introducing any "equally effective" requirement).

180. 24 C.F.R. § 100.500(c)(3) (2013) (lacking "equally effective" language).

181. *See* CARPENTER, *supra* note 60, at 2 (noting *Inclusive Communities* Court did not outright adopt HUD's disparate impact standards); *see also* Shahshahani & Madison, *supra* note 8, at 520 (stating Court mentioned 2013 HUD Regulation but remained impartial to disparate impact framework).

182. *See Inclusive Cmtys.*, 576 U.S. at 527 (discussing but not explicitly endorsing 2013 HUD Regulation).

approved an injunction on HUD's updated 2020 disparate impact regulation.[183] Thus, the Ninth Circuit's determination – that the plaintiffs' proposed alternative must be equally effective and not just less discriminatory than the District's water deposit policy – does not directly follow any FHA-based Supreme Court decision or effective regulation.[184]

The Ninth Circuit justified the final step of its disparate impact analysis under the FHA based on the Supreme Court's safeguards in *Inclusive Communities*.[185] The court noted that *Inclusive Communities* "clarified the limited scope of the third step . . . ." and granted defendants latitude to explain their policy and business interests while expressing a desire to protect defendants' business interests.[186] In formulating its final step, the Ninth Circuit relied on more than the Supreme Court's decision in *Inclusive Communities*.[187] The court also looked to *Hardie*, which held that a plaintiff must provide a policy that is equally effective at advancing a defendant's legitimate interests to prevail in a disparate impact action under Title II of the Civil Rights Act.[188] Thus, the court did not draw its "equally effective" requirement from any Ninth Circuit FHA precedent.[189]

B. Circuit Courts' Interpretations of *Inclusive Communities*

Specifically in the context of FHA disparate impact claims, courts across the country do not uniformly recognize an "equally

183. *See* Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 961 n.6 (9th Cir. 2021) (recognizing disagreement over whether Supreme Court adopted 2013 HUD framework and opting to follow Supreme Court's guidance). Additionally, the court did not wish to follow HUD in light of the U.S. District Court for the District of Massachusetts challenging the new 2020 regulation's validity, which sought to incorporate a term requiring the plaintiff's proposed alternative policy to be equally effective. *Id.* (expressing concern over HUD's complicating revision).

184. For a discussion of the third step of FHA disparate impact claim analysis under the Supreme Court and HUD, see *supra* notes 174-83 and accompanying text.

185. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 970 (introducing third step of disparate impact analysis and discussing *Inclusive Communities*' safeguards).

186. *Id.* (discussing Supreme Court's justifications for procedural safeguards).

187. *See id.* at 970–73 (citing *Inclusive Communities*, other civil rights Supreme Court cases, and Ninth Circuit civil rights cases).

188. Hardie v. Nat'l Collegiate Athletic Ass'n, 876 F.3d 312, 320 (9th Cir. 2017) (requiring equally effective alternative).

189. *See Sw. Fair Hous. Council, Inc.*, 17 F.4th at 970–72 (citing *Hardie* as authority for equally effective step of disparate impact analysis).

effective" requirement as under other civil rights claims.[190] Before *Inclusive Communities*, some courts did not require a plaintiff's proposed alternative to be equally effective.[191] For example, in *Mt. Holly Gardens*, the Third Circuit stated that the plaintiff must only "demonstrate that there is a less discriminatory way to advance the defendant's legitimate interest."[192]

It is uncertain how future courts, like the Third Circuit, will address this issue in light of *Inclusive Communities*.[193] In at least two cases post-*Inclusive Communities*, courts have found that the Supreme Court's decision and the 2013 HUD Regulation do not require an equally effective alternative policy.[194] For instance, in *Connecticut Fair Housing Center*, the District Court for the District of Connecticut did not use the words "equally effective" to describe the third step.[195] After reviewing both the 2013 HUD Regulation and *Inclusive Communities*, the district court required the plaintiff set forth a less discriminatory policy that "serve[s] the . . . defendant's substantial, legitimate nondiscriminatory interests . . . ."[196] Similarly, in *MHANY Management*, the District Court for the Eastern District of New York expressly rejected the notion that the *Inclusive Communities* decision established such a strict standard for plaintiffs in the third step of disparate impact claims analysis.[197]

C. Analyzing the Ninth Circuit's Decision

Given the confusion and inconsistencies surrounding the third step of the disparate impact analysis, the Ninth Circuit was likely

190. *See id.* at 970 (requiring equally effective alternative policy). *But see* Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 301–02 (D. Conn. 2020) (lacking "equally effective" requirement).

191. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011) (describing final step without including "equally effective" term).

192. *Id.* (explaining third step of FHA disparate impact analysis).

193. *See* CARPENTER, *supra* note 60, at 10 (stating uncertainty of *Inclusive Communities'* impact on disparate impact liability under FHA).

194. *See Conn. Fair Hous. Ctr.*, 478 F. Supp. 3d at 301–02 (requiring less discriminatory alternative); *see also* MHANY Mgmt. v. Cnty. of Nassau, No. 05-cv-2301, 2017 WL 4174787, at *8 (E.D.N.Y. Sept. 19, 2017) (stating plaintiff must only show proposed alternative serves defendant's interests).

195. *See Conn. Fair Hous. Ctr.*, 478 F. Supp. 3d at 301–02 (lacking equally effective alternative requirement).

196. *Id.* at 301 (quoting Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11473 (Feb. 15, 2013)) (describing third step requirements).

197. *See MHANY Management*, 2017 WL 4174787, at *12 (distinguishing *Inclusive Communities* to conclude that plaintiff only has to show alternative policy serves defendant's interests).

correct in looking to the *Inclusive Communities* decision for guidance.[198] A plain reading of the Supreme Court's decision, however, shows that the Court does not expressly require the plaintiff's proposed alternative policy to be as effective as the defendant's policy: it just needs to be less discriminatory and "serve the defendant's legitimate interests."[199] The Supreme Court, therefore, did not bind the Ninth Circuit to impose such a strict burden on the plaintiff, as supported by other courts' interpretations of *Inclusive Communities*.[200]

By only requiring that the plaintiffs provide a less discriminatory alternative that advances the interests of the business, the Ninth Circuit could have decided *Southwest Fair Housing Council, Inc.* differently.[201] The plaintiffs' proposed alternatives, where the plaintiffs suggest the District should have filed a declaratory relief action against Pinal County, is the most compelling.[202] The plaintiffs believed the District had a reasonable chance to force Pinal County to pay Edwards Circle residents' delinquent water bills because Pinal County had weak legal defenses for not paying.[203] This course of action would be less discriminatory than the District's decision to raise water deposit rates for public housing residents because the FHA–protected class members of Edwards Circle would not be adversely affected by a declaratory relief action against the county.[204]

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198. *See* Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 961 n.6 (9th Cir. 2021) (recognizing complicated history of disparate impact analysis under FHA); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 530–46 (2015) (recognizing disparate impact liability under FHA and providing framework for analysis of claims); *see also* Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600, 610–11 (D. Mass. 2020) (enjoining 2020 HUD Regulation regarding disparate impact claims analysis).

199. *Inclusive Cmtys.*, 576 U.S. at 533 (providing third step of framework).

200. *See Conn. Fair Hous. Ctr.*, 478 F. Supp. 3d at 301 (reviewing *Inclusive Communities* and still opting to exclude "equally effective" requirement); *see also MHANY Mgmt.*, 2017 WL 4174787, at *12 (applying *Inclusive Communities* without requiring plaintiff's alternative be equally effective).

201. *See Sw. Fair Hous. Council, Inc.*, 17 F.4th at 971–72 (dismissing all three proposed alternatives because they were not as effective as defendant's policy).

202. *See id.* at 971 (arguing District could have forced Pinal County to pay through litigation).

203. *Id.* (describing why plaintiffs proposed this alternative). According to the plaintiffs, Pinal County's defenses that public property is immune from liens and that Arizona's anti-gift clause blocks Pinal County from paying its residents' delinquencies, were not strong. *Id.* (suggesting weakness in Pinal County's legal claims).

204. *See id.* at 965–66 (explaining discriminatory adverse effect exists only because of District's policy).

Additionally, this alternative would serve the District's legitimate interest in avoiding insolvency because it would settle whether Pinal County, a public entity, is required to cover its residents' delinquent water bill accounts.[205] Pinal County would no longer have any defenses for non-payment.[206] Even though it is arguably not as effective as the District's water deposit policy, it is less discriminatory and serves the District's legitimate interests.[207] This proposed alternative, therefore, appears to pass the *Inclusive Communities* test and should permit the Ninth Circuit to rule in favor of the plaintiffs.[208]

VI. JUST A DROP IN THE BUCKET?: ANALYZING THE IMPACT OF THE NINTH CIRCUIT'S HOLDING

In *Inclusive Communities*, the Supreme Court legitimized liability for housing policies that had discriminatory effects.[209] The Court wanted to allow plaintiffs to defend themselves against "unconscious prejudices and disguised animus . . . ." that evade disparate treatment liability.[210] Some scholars assert when individuals have discretionary authority, their implicit racial biases cause them to use their power "in a racially biased manner . . . ."[211] Thus, the Court's recognition of disparate impact liability was crucial in thwarting discriminatory housing policies resulting from implicit bias.[212] This is especially relevant in *Southwest Fair Housing Council, Inc.* considering the demographics of Edwards Circle residents, their claim that the District's water deposit policy produced adverse and disproportionate effects, and that water affordability in parts of Arizona was becoming an area of concern, particularly for low-in-

205. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 956 (stating Pinal County's defense against paying delinquencies is its status as public municipality).

206. *Id.* at 956–58 (noting public entity status as justification for nonpayment).

207. *See id.* at 971 (arguing legal action would be expensive and lengthy and success is not guaranteed).

208. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 533 (2015) (requiring plaintiff's suggested policy only be less discriminatory and serve defendant's legitimate interests).

209. For a discussion of the Supreme Court's decision in *Inclusive Communities*, see *supra* notes 58-72 and accompanying text.

210. *Inclusive Cmtys.*, 576 U.S. at 540 (emphasizing importance of disparate impact liability).

211. Ijadi-Maghsoodi, *supra* note 9, at 922 (describing implicit racial bias of government officials in FHA context); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987) (noting unconscious racism is basis for many racially disproportionate government policies).

212. *See id.* (recognizing importance of disparate impact liability).

come individuals.[213] The Supreme Court's decision to recognize disparate impact liability under the FHA seemed to provide an avenue for these residents to obtain water services at a reasonable price even though the District's decision to raise their rates was not facially discriminatory.[214]

While the *Inclusive Communities* decision represents an important step forward for plaintiffs in FHA cases, it may be too burdensome for plaintiffs to prevail on a theory of disparate impact after certain interpretations of the Supreme Court's decision.[215] The Ninth Circuit's ruling in *Southwest Fair Housing Council, Inc.* is a prime example of what courts and commentators fear.[216] The plaintiffs lost despite establishing a prima facie disparate impact case and proposing less discriminatory alternative policies the District could have employed.[217] Whether the Supreme Court requires alternative housing policies to be equally effective is still an open question among federal courts.[218] Going forward, more federal courts across the United States will have the opportunity to discern whether *Inclusive Communities* established an "equally effective" requirement.[219]

Ultimately, the Ninth Circuit decided the District was entitled to charge higher prices for public housing residents seeking water service, regardless of the policy's discriminatory impact.[220] Thus, interpretations of *Inclusive Communities*, like the Ninth Circuit's in *Southwest Fair Housing Council, Inc.*, weaken the effectiveness of disparate impact actions for plaintiffs and permit businesses to employ utility service policies with discriminatory effects if the plaintiff can-

213. For a discussion of water affordability and *Sw. Fair Hous. Council, Inc.*, see *supra* notes 1–44 and accompanying text.

214. For a discussion of the Supreme Court's holding and reasoning in *Inclusive Communities*, see *supra* notes 58–72 and accompanying text.

215. For a discussion of skepticism about the application of the *Inclusive Communities* decision, see *supra* notes 104–20 and accompanying text.

216. For a discussion of courts and commentators who have criticized HUD's 2020 amendment to FHA disparate impact claim analysis, see *supra* notes 107–12 and accompanying text.

217. *See* Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 966, 971–72 (9th Cir. 2021) (holding disparate impact claim failed despite prima facie showing because plaintiffs did not provide equally effective alternative policy).

218. For a discussion of whether *Inclusive Communities* requires plaintiffs to propose an equally effective alternative policy, see *supra* notes 173–208 and accompanying text.

219. *See* CARPENTER, *supra* note 60, at 10 (noting *Inclusive Communities*' impact is uncertain and will likely differ among federal circuit courts).

220. For a discussion of the Ninth Circuit's reasoning and holding in *Sw. Fair Hous. Council, Inc.*, see *supra* notes 123–66 and accompanying text.

not propose an equally effective alternative.[221] Considering the growing problem of water affordability, particularly for low-income individuals, and the potential for racially-biased housing decisions from water service providers, disparate impact claims under the FHA should allow plaintiffs a fair chance to recover even when the policy was not enacted for discriminatory reasons.[222] Requiring plaintiffs to provide an equally effective alternative policy rather than a less discriminatory policy makes FHA disparate impact claims more difficult to prove, and in the case of Edwards Circle residents, it makes their already rising water bills that much higher.[223]

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221. For a critical discussion of the Ninth Circuit's analysis, see *supra* notes 167–208 and accompanying text.

222. For a discussion of water affordability, see *supra* notes 1–12 and accompanying text. For a discussion on the relationship between racial bias in housing decisions and disparate impact liability, see *supra* notes 209–212 and accompanying text.

223. For a discussion of the third step of disparate impact analysis under the FHA, see *supra* notes 95–122 and accompanying text.

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