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Environmental Justice as Housing Justice: HUD, Land Use, and the Case for the Fair Housing Act's Application to Discriminatory Siting Claims

John Leiner†

Introduction

"This community cannot and should not take more chemical pollution," said Deborah Hawley, director at St. Francis Prayer Center in Genesee Township, Michigan.[1] St. Francis is one of the complainants seeking to block the siting, or placement, of the Ajax hot-mix asphalt plant in the same community the Flint Water Crisis ravaged less than a decade ago.[2] St. Francis and two other neighborhood groups allege that by siting polluting industry near majority-marginalized neighborhoods, the Township continues a practice of racial discrimination, violating Title VI of the 1964 Civil Rights Act, the Fair Housing Act (FHA), and the Housing and Community Development Act of 1974.[3] The complainants' Housing and Urban Development (HUD) administrative complaint argues that, in granting Ajax a building permit, the Township ignored concerns about the plant's toxic pollution disproportionately harming Black residents in nearby low-income and federally-

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1. Erin Fitzgerald, *Flint Residents Sue State Agency for Approving Air-Polluting Asphalt Plant*, EARTHJUSTICE (Feb. 11, 2022), https://earthjustice.org/news/press/2022/flint-residents-sue-state-agency-for-approving-air-polluting-asphalt-plant [https://perma.cc/AYN6-GVYY].

2. Flint Rising v. Genesee Twp. (U.S. Dep't of Hous. & Urb. Dev. Dec. 12, 2021) (housing discrimination administrative complaint).

3. *Id.* at 4.

subsidized housing.[4] Toxic pollution exacerbates these residents' comorbidities and forces them to stay in unsafe housing conditions.[5]

Historically, HUD has demurred upon receiving similar environmental justice (EJ)[6] complaints, hardly ever investigating such claims.[7] Environmental discrimination claims are ostensibly less directly related to housing than, say, claims of mortgage discrimination[8] or racial steering, both of which are discrimination claims within HUD's investigative jurisdiction.[9] For example, if a mortgage lender refuses to offer a loan to a Black couple on the basis of race with the effect of that family being unable to purchase a home, the discriminatory cause responsible for that effect is the lender's racial bias.[10] Moreover, if a real estate agent does not show the same Black couple a new home in a certain neighborhood because of the couple's race, the discriminatory cause responsible for the effect of that family not living in that neighborhood is the agent's racial bias.[11]

On the other hand, assume there is a Black family living in Section 8 housing. If that family suffers lead exposure with the effect of that family living in unsafe housing, the cause of the lead exposure, which then caused the family's housing to be unsafe, is less clear. It could be soil contaminated by a long-demolished industrial plant or a number of other causes.[12] Whether the cause

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4. *Id.* at 5.

5. *Id.*

6. *See* U.S. DEP'T HOUS. & URB. DEV., *Pursuing Environmental Justice*, https://www.hud.gov/climate/environmental_justice [https://perma.cc/92C2-B64U]; *see also* U.S. ENV'T PROT. AGENCY, *Learn About Environmental Justice*, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/L34E-X5KB].

7. *Cf.* Megan Haberle, *Fair Housing and Environmental Justice: New Strategies and Challenges*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 272, 273 (2017) (stating that HUD indicated in its 2016–2020 EJ Strategy a plan "to issue guidance on civil rights enforcement relating to EJ," guidance which HUD has yet to provide).

8. *Housing Discrimination Under the Fair Housing Act*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview [https://perma.cc/PXZ4-BGR5]. This webpage from HUD provides examples of mortgage discrimination under the Fair Housing Act, including "[r]efus[ing] to make a mortgage loan or provide other financial assistance for a dwelling." *Id.*

9. *Id.*; *Examples of Housing Discrimination*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/examples_housing_discrimination [https://perma.cc/3WEY-3CJT].

10. *Id.*

11. *Id.*

12. *Lead in Soil*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 16, 2022), https://www.cdc.gov/nceh/lead/prevention/sources/soil.htm [https://perma.cc/D3CH-AWBT].

of the lead exposure is linked to some discriminatory conduct ultimately affecting the family's housing, insofar as it is unsafe, is yet another question. Put simply, there is an issue of cause and effect—a longer causal chain—that makes environmental discrimination hard to prove. It is less likely to be investigated by HUD as a *housing* issue because the environment's nexus with housing is less direct than the nexus between mortgage lending and housing or the nexus between real estate agents and housing.

Given this problem of proving cause and effect, plaintiffs have long struggled to obtain relief for environmental racism's harmful effects, both administratively and through the courts.[13] Recently, however, the Department has indicated a willingness to act on such claims. In July 2022, HUD issued a Letter of Findings in *Southeast Environmental Task Force v. City of Chicago*, in which it threatened to withhold all funding to the City of Chicago for its role in facilitating the proposed relocation of the General Iron metal recycling facility ("the General Iron case").[14] With its Letter, HUD has positioned itself to act on behalf of victims of discriminatory siting practices after criticism for failing to investigate EJ in accordance with HUD's own stated policies.[15]

Whereas before, HUD provided no guidance for proving discriminatory intent or disparate impact in EJ cases, the General Iron Letter of Findings suggests what legal framework future EJ plaintiffs may utilize to prove discrimination under both theories in discriminatory siting cases.[16] Notwithstanding the Letter's novelty,

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13. *See generally* JILL LINDSEY HARRISON, FROM THE INSIDE OUT: THE FIGHT FOR ENVIRONMENTAL JUSTICE WITHIN GOVERNMENT AGENCIES (2019) (providing helpful background on limitations causing state and federal regulatory agencies not to adopt environmental justice policies); Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENV'T L.J. 189, 226 (1998) ("The words of the statute, and the regulations seeking to clarify them, suggest that Title VIII . . . is not the easy solution envisioned . . . .").

14. *See* Env't Task Force v. City of Chicago, Case No. 05-20-0419-6/8/9, 18 (U.S. Dep't of Hous. & Urb. Dev. July 19, 2022) (Letter of Finding of Noncompliance with Title VI and Section 109).

15. *See* U.S. DEP'T HOUS. & URB. DEV., HUD ENVIRONMENTAL JUSTICE STRATEGY 2016–2020: DRAFT VERSION FOR PUBLIC COMMENT 12 (2016) ("While current investigation guidance does not specifically address environmental justice, the Office of Fair Housing and Equal Opportunity (FHEO) is in the process of revising guidance for investigators to encompass EJ complaints . . . ."); *cf.* Haberle, *supra* note 7, at 273 ("[H]owever, the initiatives developed by the last administration left much work to be done.").

16. *See* U.S. DEP'T JUST. C.R. DIV., *infra* note 74, for an explanation of the *Arlington Heights* burden-shifting framework. The HUD administrative Letter of Findings regarding the General Iron metal recycling facility in Chicago cites to *Arlington Heights*. It suggests the type of evidence EJ plaintiffs could show to meet their evidentiary burden, either in court or administratively, when challenging the

however, it postponed discussion of Chicago's liability under the FHA, only finding that the City violated Title VI and the Housing and Community Development Act of 1974.[17] A finding of an FHA violation in the General Iron case could add another arrow in EJ plaintiffs' quiver for alleging discriminatory siting and housing discrimination, like in Flint.[18] It could create a path for EJ plaintiffs to find administrative recourse where it did not exist before and could frame discriminatory siting as not only an environmental phenomenon but also a housing problem—for plausibly the first time in HUD's history.[19]

This Article argues that HUD has jurisdictional authority to make findings of discrimination in discriminatory siting cases under the FHA in light of its Letter of Findings in the General Iron case. Part I will include an overview of discriminatory siting and of environmental racism's relationship with housing and zoning. Part II will provide a background of the FHA and its broad implementation, focusing on the Act's statutory language and scope. Part III will explain challenges EJ plaintiffs face proving discriminatory intent and effect in discriminatory siting cases. Part IV will assess the Chicago case's implications. Part V will describe the FHA's statutory text. Part VI will be split into three subsections of analysis. The first will explain how the FHA's statutory text and discriminatory intent and disparate impact case precedent support the FHA's application to siting claims. The second subsection will set forth how HUD's own policy supports the Department's investigation of siting claims under the FHA. Lastly, the final subsection will suggest that courts would likely defer to HUD's interpretation of its own jurisdiction.

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siting of an industrial facility.

17. *See* Env't Task Force v. City of Chicago, Case No. 05-20-0419-6/8/9, 2 (U.S. Dep't of Hous. & Urb. Dev. July 19, 2022) (Letter of Finding of Noncompliance with Title VI and Section 109).

18. Fitzgerald, *supra* note 1; Flint Rising v. Genesee Twp. (U.S. Dep't of Hous. & Urb. Dev. Dec. 12, 2021).

19. There are myriad phenomena which may fall under the umbrella of 'environmental justice.' While this Article may indirectly suggest HUD's willingness to investigate environmental justice more broadly, it focuses on HUD's willingness and capacity to investigate discriminatory siting claims *as a subset of* environmental justice claims. This Article does not seek to provide commentary on the Fair Housing Act's applicability to, or HUD's investigative authority over, environmental justice claims beyond those discussed in the forthcoming text.

I. Background

A. Discriminatory Siting and Its Relationship to Zoning, Housing, and Environmental Racism

i. Discriminatory Siting Defined

Industrial siting is a common example of how zoning decisions affecting the location of polluting industry sites, such as an industrial facility or a toxic waste dump, disproportionately impact marginalized communities. As a public health principle, municipalities commonly separate land uses through what is known as Euclidean zoning.[20] Keeping industrial, commercial, and residential areas separate minimizes humans' exposure to industrial pollutants and communicable diseases.[21] At the same time, zoning is also a cause of racial segregation and socioeconomic disparities.[22] In the early twentieth century, municipalities frequently zoned for industrial and commercial uses near marginalized neighborhoods and exposed those communities to environmental hazards as a result.[23] Today, polluting facilities are still predominantly zoned in marginalized neighborhoods at the time of siting.[24]

Discriminatory siting occurs when marginalized communities, particularly Black communities, are disproportionately exposed to industrial sites' harmful pollutants.[25] The siting process refers to the procedures a municipality takes to plan and zone for polluting industry, including abidance to environmental regulations, environmental review procedures, and hearings for public

20. *See generally* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (establishing the power of municipalities to zone for a variety of land uses); *see also* Michelle Shortsleeve, *Challenging Growth-Restrictive Zoning in Massachusetts on a Disparate Impact Theory*, 27 B.U. PUB. INT. L.J. 361, 381 (2018) ("In [*Euclid*], the Supreme Court held zoning laws to be a permissible exercise of municipalities' police power . . . .").

21. Lauren M. Rossen & Keshia M. Pollack, *Making the Connection Between Zoning and Health Disparities*, 5 ENV'T JUST. 119, 120 (2012); Ashira Pelman Ostrow, *Preempting Zoning*, 36 J. LAND USE & ENV'T L. 91, 99 (2020).

22. Rossen & Pollack, *supra* note 21, at 122.

23. *Id.* ("Research has suggested that noxious facilities are deliberately sited in disadvantaged neighborhoods, rather than low-income or minority groups moving in to communities fraught with environmental hazards."); Sheila R. Foster, *Vulnerability, Equality and Environmental Justice: The Potential and Limits of Law*, *in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 136 (Ryan Holifield, Jayajit Chakraborty & Gordon Walker eds., 2018).

24. *Id.* at 137.

25. Kyla N. George, *Black Spaces Matter: An Analysis of Environmental Racism, Siting, and Litigation in America*, 16 S. J. POL'Y & JUST. 69, 76 (2022).

comment.[26] Sometimes municipalities take shortcuts during the siting process by bypassing review procedures.[27] In other cases, municipalities deliberately site industry near low-income communities of color.[28] If a community adjacent to polluting industry disproportionately suffers from underlying health conditions, which air pollutants tend to exacerbate, this could give rise to discriminatory siting claims although this health impact is not a prerequisite for claims to arise.[29]

ii. Discriminatory Siting's Effects and the EJ Movement's Origins

Negative Effects of Discriminatory Siting on Low-Income Communities of Color

Housing and discriminatory siting are interrelated because of the disproportionate proximity of low-income and federally subsidized housing to polluting industry.[30] More than half of people living within two miles of toxic waste facilities are people of color.[31] A 2007 report by the United Church of Christ (UCC) observed that 46% of the 1.9 million housing units for poor families were located within a mile of factories that reported toxic emissions to the EPA.[32] Over 68% of Black people lived in areas prone to the maximum effects of coal-fired power plants' smokestack plumes, as opposed to 56% of white people.[33] The U.S. Government Accountability Office

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26. *See* William G. Murray Jr. & Carl J. Seneker II, *Industrial Siting Allocating the Burden of Pollution*, 30 HASTINGS L.J. 301 (1978) (describing federal and state regulations as well as general siting requirements for industrial facilities, including the concept of "interested persons," which broadly refers to public participation in the siting process and testimony by those whom the siting may affect).

27. *See* Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 415–16 (1992) (suggesting that "departures from the ordinary decisionmaking process" for hazardous waste siting could be pertinent to a showing of discriminatory intent).

28. *Id.* at 418.

29. *See id.*

30. *Id.*; *but see* R. Shea Diaz, *Getting to the Root of Environmental Injustice: Evaluating Claims, Causes, and Solutions*, 29 GEO. ENV'T L. REV. 767, 769–75 (2017) (assessing mixed empirical results for negative environmental impacts on low-income communities of color, with some research suggesting higher-income white people are more vulnerable to certain environmental harm).

31. Jorge Andres Soto & Morgan Williams, *The Nation's Challenge and HUD's Charge: Creating Communities of Opportunity for All*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 305, 309 (2017).

32. ROBERT D. BULLARD, PAUL MOHAI, ROBIN SAHA & BEVERLY WRIGHT, TOXIC WASTES AND RACE AT TWENTY: 1987–2007, at 4 (United Church of Christ, 2007).

33. *Id.*

determined that the majority of the between 130,000 and 450,000 suspected toxic waste sites, known as brownfields, are located near low-income communities of color.[34] Pollution exacerbates underlying health disparities in these communities, including higher rates of cardiovascular disease and obesity.[35] Additionally, over 1,000 federally-assisted housing developments are located near sites on the National Priorities List of potentially hazardous waste sites.[36] Residents in these developments are predominantly people most vulnerable to harmful pollution, including people of color.[37]

Residents in federally-subsidized housing are particularly vulnerable to harmful pollution because of federal housing programs' requirements limiting both residents' notice of environmental harms and ability to move away from these harms.[38] For example, "[f]ederal law does not require any federal agency or housing provider to give current or prospective tenants actual notice that a housing unit is located on or near a Superfund site."[39] Nor do "[c]urrent federally mandated housing inspections [take] into consideration environmental contamination."[40] Moreover, many of these tenants are either in public housing or receive Section 8 project-based vouchers.[41] Therefore, since tenants in federally-subsidized housing often do not have warning of nearby pollution and are frequently unable to transfer their affordable housing contract to another development, they have a 'Sophie's choice' upon notice of the environmental harms they face: lose their housing or risk exposure to harmful pollution.[42]

Origins and Progress of the EJ Movement

Community action against discriminatory siting was the impetus for the greater EJ movement.[43] Chicago resident Hazel

34. *Id.*

35. Soto & Williams, *supra* note 31, at 310.

36. SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, POISONOUS HOMES: THE FIGHT FOR ENVIRONMENTAL JUSTICE IN FEDERALLY ASSISTED HOUSING 14 (2020). The National Priorities list is a list of industrial sites known to potentially release hazardous pollutants. It guides the EPA in determining which industrial sites it should investigate for clean-up.

37. *Id.* at 15.

38. *Id.* at 29.

39. *Id.*

40. *Id.* at 33.

41. *See id.*

42. *Id.*

43. For further background on the EJ movement's political action and discussion of siting process reforms, see Sheila Foster, *Justice from the Ground Up: Distributive*

Johnson, known as the Mother of the Environmental Justice Movement, lived in a public housing development called Altgeld Gardens Homes.[44] After Johnson's husband died of lung cancer and her children suffered from skin and respiratory problems, she learned that city officials had deliberately placed Altgeld Gardens where toxic industry was sited.[45] Johnson famously referred to a "toxic doughnut": toxic industry completely surrounded her neighborhood.[46] Later, Johnson founded People for Community Recovery (PCR) in 1979,[47] a group that led numerous widespread protests against new landfill and incinerator development.[48]

Johnson's activism occurred simultaneously with that of predominantly Black residents in Warren County, North Carolina, opposing the siting of toxic waste disposal.[49] The Warren protests fostered a 1987 report by the aforementioned UCC's Commission for Racial Justice.[50] That report "examined the race and socio-economic status of communities with commercial hazardous waste facilities and uncontrolled toxic waste sites and concluded that a community's racial composition was the strongest predictor of a hazardous waste facility's location."[51] Johnson's efforts, along with the UCC report, led to President Bill Clinton's Executive Order Number 12898.[52] Entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," the Order mandated that federal agencies "identif[y] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs . . . ."[53]

Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement, 86 CAL. L. REV. 775 (1998).

44. SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, *supra* note 36, at 22.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 23.

49. *Id.* at 24.

50. *Id.*

51. *Id.* (citing BENJAMIN F. CHAVIS JR. & CHARLES LEE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (United Church of Christ, 1987)).

52. SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, *supra* note 36, at 23; Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

53. Exec. Order No. 12898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994) ("Agency Responsibilities[:] [t]o the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United

The federal approaches to discriminatory siting have been meager at best. Despite President Clinton's Executive Order, there has been no coordinated federal agency response to environmental justice.[54] Congress has not passed substantive legislation to mitigate discriminatory siting's effects on communities of color.[55] EJ plaintiffs often struggle to illuminate discriminatory intent undergirding siting decisions, and the government can easily point to a non-discriminatory motive for its siting decision to conceal intent.[56] Additionally, proving discrimination under disparate impact theory—that is, showing the siting's discriminatory effect as opposed to intent—is not an option for plaintiffs under Title VI of the Civil Rights Act and the Equal Protection Clause.[57] Recent proposed federal EJ legislation sought to amend Title VI to codify disparate impact theory, but it later stalled. The federal government has, for the most part, implicitly decided that environmental justice is a local issue to be left to the "laboratory of the states."[58] Whereas environmental justice has received comparatively little federal legislative support, the FHA has its roots in a federal mandate to address housing inequality.

B. The Fair Housing Act: A Broad Remedial Tool with an Uncertain Scope

Congress enacted the FHA, also known as Title VIII of the Civil Rights Act of 1968, to strengthen federal protections against

States . . . .").

54. Harrison, *supra* note 13.

55. *See* Jacob Elkin, *Environmental Justice and Pennsylvania's Environmental Rights Amendment: Applying the Duty of Impartiality to Discriminatory Siting*, 11 COLUM. J. RACE & L. 195, 230 (2021) (describing how the Environmental Equal Rights Act of 1993 was an example of an "unsuccessful attempt . . . to incorporate racial criteria into evaluations of siting approvals.").

56. Maria Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENV'T L.J. 449, 469 n.116 (1994).

57. *See* Elkin, *supra* note 55, at 197–98 ("Under modern Equal Protection Clause jurisprudence, governmental actions with racially disproportionate impacts are unconstitutional only when the government acted with an intent to discriminate. Similarly, Title VI of the Civil Rights Act does not provide a private right of action to combat discrimination unless the plaintiff can prove the governmental agent in question acted with discriminatory intent.").

58. Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T L. 135, 158–60 (2005) (describing how the "implicit decision to leave environmental justice issues to the 'laboratory' of the states" could in theory initiate states' expansion of plaintiffs' rights to oppose discriminatory siting and influence federal court decisions through a "new national consensus" but that this argument fails because environmental justice "primarily results from failed local political processes").

housing discrimination.[59] President Lyndon Johnson established the Kerner Commission in 1967 to evaluate the "origins of the recent major civil disorder in our cities," and in 1968, the Commission recommended legislation targeting housing discrimination.[60] Amidst civil unrest arising from Dr. Martin Luther King, Jr.'s assassination, Congress passed the FHA into law.[61]

The FHA authorized HUD to investigate claims of housing discrimination, sue discriminating entities, and to "affirmatively" encourage housing integration by promoting "truly balanced and integrated living patterns."[62] Isolated in substandard housing, people of color were the Act's primary intended beneficiary.[63] Marginalized residents were subject to both private and public housing discrimination.[64] For example, these residents were not only confined to economically depressed neighborhoods because of private racial covenants, but they also could not obtain federally-backed mortgage loans due to redlining and lending discrimination.[65]

Courts have applied the FHA to a broad range of discriminatory housing practices. Following the Supreme Court's mandate in *Trafficante v. Metropolitan Life Insurance Company*[66] to afford private litigants "very broad standing . . . to challenge discrimination,"[67] courts have applied the FHA to "racial steering, race-based appraisal practices, redlining, exclusionary zoning and planning, public housing site selection and demolition, and

59. Chloe K. Bell, The Lasting Impact of Housing Discrimination on Industrial Development, Environmental Injustice, and Land Use 1–23 (Oct. 1, 2021) (unpublished manuscript) (on file with IIT Chicago-Kent College of Law); *see* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571 (2018).

60. Exec. Order No. 11365, 3 C.F.R. § 674 (1966–1970); Spencer Bailey, *Winning the Battle and the War Against Housing Discrimination: Post-Acquisition Discrimination Claims Under the Fair Housing Act*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 223, 227 (2019).

61. Bailey, *supra* note 60, at 227–28.

62. Myron Orfield & William Stancil, *Challenging Fair Housing Revisionism,* 2 N.C. C.R. L. REV. 32, 58 (2022); Massey, *supra* note 10 at 575; Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, *in* THE FIGHT FOR FAIR HOUSING 189 (Gregory D. Squires ed., 2017).

63. *See* Orfield & Stancil, *supra* note 62, at 33.

64. *Id.*

65. *Id.* at 65.

66. 409 U.S. 205, 212 (1972) ("We can give vitality to §810(a) [of the Fair Housing Act] only by a generous construction . . . .").

67. Restoring Affirmatively Furthering Housing Definitions and Certifications, 86 Fed. Reg. 30781 (proposed June 10, 2021) (to be codified at 24 C.R.R. pts. 5, 91, 92, 570, 574, 576, 903) (explaining the FHA's "broad remedial purpos[e]" within the context of the Affirmatively Furthering Fair Housing rule).

discriminatory community development activities."[68] The FHA's broad implementation notwithstanding, uncertainty accompanying the Act's scope is twofold. Scholars question what forms of discrimination the FHA reaches and debate whether the Act's purpose was to affirmatively integrate development or prevent segregation.[69] The former issue stems from the FHA's textual ambiguity and implicates EJ plaintiffs' capacity to prove discrimination in discriminatory siting cases.[70]

C. Proving Discriminatory Siting and Plaintiffs' Challenges

Although there are benefits to bringing EJ claims under the Fair Housing Act as opposed to Title VI of the Civil Rights Act of 1964, namely that an FHA claim does not require the municipality sued to be a recipient of federal funding,[71] EJ plaintiffs face myriad challenges in bringing discriminatory siting cases under the FHA.[72] The first barrier to recourse is the *McDonnell Douglas* burden-shifting framework courts have established for FHA discrimination claims.[73] Not only is it challenging for EJ plaintiffs to prove discriminatory intent when a siting practice appears facially neutral or non-discriminatory, but it is also difficult for plaintiffs to show that siting will have a discriminatory *effect* on a particular community—that is, whether siting will disparately impact that community absent of intent. As such, *very* few discriminatory siting

68. Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act)*, 14 VA. ENV'T L.J. 741, 743 (1995).

69. *Compare* Orfield & Stancil, *supra* note 62 (arguing that the FHA's requirement of the federal government to ensure racial integration is well established), *with* EDWARD G. GOETZ, THE ONE-WAY STREET OF INTEGRATION (2018) (arguing that the FHA does not require the federal government to actively pursue integration but instead emphasizes its role in community development).

70. *See* Brown & Lyskowski, *supra* note 68, at 743–44.

71. *The Fair Housing Act (FHA): A Legal Overview*, CONG. RSCH. SERV. (Feb. 2, 2016), https://crsreports.congress.gov/product/pdf/RL/95-710 [https://perma.cc/7QF7-8HYV].

72. *Id.*

73. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the burden-shifting framework for discrimination cases under Title VII of the Civil Rights Act of 1964). This same burden-shifting framework is applied to FHA discrimination claims. *See* U.S. DEP'T HOUS. & URB. DEV. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, CHAPTER 2: THEORIES OF DISCRIMINATION, TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION WORKBOOK (8024.1). If the plaintiffs meet their prima facie burden to show an act was discriminatory by a preponderance of the evidence, the burden shifts to defendants to "articulate some legitimate, nondiscriminatory reason" for its action. *Id.* "[I]f the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance of evidence that the legitimate reasons asserted by the defendant are in fact mere pretext." *Id.*

cases have been tried in court under the FHA and even fewer have prompted a HUD investigation. Additionally, HUD has lacked certainty about its jurisdictional capacity and an overall strategy to investigate claims and make referrals to the Department of Justice (DOJ).

i. *Arlington Heights* and Discriminatory Intent

The Supreme Court established the legal framework for proving discriminatory intent in FHA and Title VI cases in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[74] In this seminal case, the Court established six factors a court may consider to find circumstantial evidence probative of intent.[75] A court or agency utilizes these factors to assess whether plaintiffs have met their *McDonnell Douglas* burden of showing that a "discriminatory purpose motivated a [defendant's] actions . . . ."[76] These factors include: (1) "[s]tatistics demonstrating a 'clear pattern unexplainable on grounds other than' discriminatory ones"; (2) "[t]he historical background of the decision"; (3) "the specific sequence of events leading up to the challenged decision"; and (4) "[d]epartures from . . . normal procedures."[77]

In discriminatory siting cases there is often a lack of both direct and circumstantial evidence of decisionmakers' racial bias for siting polluting industry in a particular area.[78] For example, under the "historical background" factor, plaintiffs may fail to show that previous siting of undesirable land uses was made by the same public entity and thus probative of discriminatory intent.[79] Such evidence may be stored away in historical records where it is difficult to find. Under the "sequence of events" and "departures" factors, plaintiffs struggle to prove the entity "violated any procedural or substantive requirements."[80] Adding to plaintiffs' struggles to meet their own burden of proof, courts frequently

74. 429 U.S. 252 (1977).

75. *Id.* at 266–68; *see* U.S. DEP'T OF JUST., *Title VI Legal Manual: Section VI: Proving Discrimination – Intentional Discrimination* (providing helpful overview of the *Arlington Heights* factors for the burden-shifting framework within Title VI discrimination analysis).

76. *Title VI Legal Manual: Section VI*, *supra* note 74.

77. *Id.*

78. Foster, *supra* note 23, at 139; *see* R.I.S.E. v. Kay, 768 F. Supp. 1141 (E.D. Va. 1991), *aff'd* 977 F.2d 573 (4th Cir. 1992).

79. Melissa Kiniyalocts, *Environmental Justice: Avoiding the Difficulty of Proving Discriminatory Intent in Hazardous Waste Siting Decisions* 12 (Univ. of Wis. Land Tenure Ctr. Working Paper no. 36, 2000).

80. *Id.* at 11–12.

accept facially neutral, nondiscriminatory reasons defendants cite for placing polluting industry in a certain area.[81] Examples include a site being previously zoned for industry or the site's close proximity to transportation routes for industrial vehicles.[82]

ii. *Inclusive Communities* and Disparate Impact

Compared to discriminatory intent, the burden of proof for FHA disparate impact claims is considerably lower for EJ plaintiffs. Therefore, these claims are more common. In *Texas Department of Housing & Community Affairs Project v. Inclusive Communities Project*, the Supreme Court ruled that disparate impact claims are cognizable under the FHA.[83] The ruling affirmed previous appellate decisions that had recognized the legitimacy of such claims.[84] Under a disparate impact claim, an EJ plaintiff may show discrimination by first providing evidence that the siting of polluting industry has a disparate adverse impact on communities of color in low-income and federally subsidized housing. The burden then shifts to the municipality to show that it had a legitimate, non-discriminatory reason for its siting decision.

Unlike with a discriminatory intent claim, plaintiffs do not bear the burden of showing direct, circumstantial, or other evidence of intent. Instead, they must prove an act's negative effects. This is useful with facially neutral laws and policies.[85] Plaintiffs may meet their burden of proof with statistical evidence that the siting would disproportionately limit the availability of housing and harm the wellbeing of Black families, for example.[86]

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81. Foster, *supra* note 23, at 139.

82. *Id.*

83. 576 U.S. 519, 521 (2015) ("Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability.").

84. *See* Bradley Pough, *Neighborhood Upzoning and Racial Displacement: A Potential Target for Disparate Impact Litigation*, 21 U. PA. J.L. & SOC. CHANGE 267, 273–74, 280–81 (2018).

85. Brian Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. L. 785, 803 (2016).

86. *See* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Anti-Discrimination Principle*, 47 EMORY L.J. 409 (1998).

II. Analysis

A. Implications of the General Iron Case

HUD's Letter of Findings in *Southeast Environmental Task Force v. City of Chicago* may signal HUD's willingness to investigate discriminatory siting claims under several civil rights statutes.[87] The Department began its investigation of the General Iron metal recycling facility's proposed relocation in October 2020.[88] In its complaint, the environmental non-profit Southeast Environmental Task Force claimed that the city discriminated on the basis of race and national origin by facilitating the relocation of the facility from Lincoln Park, a predominantly white neighborhood on Chicago's Northside, to its predominantly Black and Latine Southside.[89] After General Iron announced its plan to relocate in 2018, the City provided a slew of regulatory permits enabling the relocation.[90] In May 2021, however, the EPA recommended the City reconsider the facility's environmental impact, and the City denied General Iron's final permit in February 2022.[91]

HUD's investigation, which concluded in July 2022, found that the City violated Title VI and the Community Development Act of 1974 by supporting the proposed relocation even though it knew the facility would worsen Southside residents' environmental burdens.[92] The Letter states that the City "pushed hard for the relocation" by "pressur[ing] General Iron to close its lawfully operated North Side facility," and took responsibility for the relocation through a press release.[93] The Letter asserts that the facility's relocation would disparately impact marginalized residents under *Arlington Heights* by "bring[ing] environmental benefits to a neighborhood that is 80% White and environmental harms to a neighborhood that is 83% Black and Hispanic."[94] In addition to claiming that the City worked closely with General Iron and departed from normal permitting procedures, the Letter also alleges that the City "continued a historical pattern and broader

87. 42 U.S.C. § 2000d; 42 U.S.C. § 5309; 42 U.S.C. §§ 3601–19.

88. Env't Task Force v. City of Chicago, Case No. 05-20-0419-6/8/9, 2 (U.S. Dep't of Hous. & Urb. Dev. July 19, 2022) (Letter of Finding of Noncompliance with Title VI and Section 109).

89. *Id.*

90. *Id.* at 3.

91. *Id.* at 2.

92. *Id.* at 18.

93. *Id.* at 7.

94. *Id.* at 17.

policy of directing heavy industry to Black and Hispanic neighborhoods" by facilitating the relocation.[95]

Although HUD's Letter did not find the City of Chicago violated the FHA, it provides a helpful framework for HUD to investigate similar discriminatory siting claims under the Act. The evidentiary standards for proving both Title VI and FHA discrimination are nearly identical. Disparate impact liability, however, is a unique option for FHA plaintiffs unavailable to Title VI plaintiffs.[96] The six non-exhaustive *Arlington Heights* factors the Letter cites are the same criteria used for FHA analysis.[97] The fact pattern in Chicago, moreover, is similar to those elsewhere: when a municipality zones for industry in a marginalized neighborhood, there is a corollary of *not* zoning for industry in white neighborhoods.[98] Based on the Letter alone, HUD could apply similar reasoning in its analysis of the plaintiffs' FHA claim. Why HUD has delayed processing of the plaintiffs' FHA claim is unknown, but it likely has concerns about its jurisdiction for investigating and making a finding of housing discrimination when the underlying facts are environmental in nature.

B. The FHA's Statutory Text

i. Affirmatively Furthering Fair Housing (AFFH) and Implementing Regulations & HUD Objectives

Another highly consequential FHA tenet is the Affirmatively Furthering Fair Housing provision.[99] Section 3608(d) requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of the FHA.[100] This mandate "aims to overcome the effect of historical patterns of segregation and prevent the continuation of segregated communities."[101] It is commonly held that 3608(d) encourages "proactive integration of housing" through government policies and not simply abolishing discrimination, although

95. *Id.*

96. *See Title VI Legal Manual: Section VI*, *supra* note 74.

97. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

98. Flint Rising v. Genesee Twp., HUD Administrative Complaint (Dec. 15, 2021).

99. *See generally* Bostic & Acolin, *supra* note 63 (outlining the AFFH mandate's history and its renewed regulatory implementation).

100. 42 U.S.C. § 3608(e)(5).

101. Bostic & Acolin, *supra* note 62, at 190.

arguments favoring the latter proposition have become more common.[102]

While HUD actively pursued its first FHA mandate to investigate discrimination claims through its Office of Fair Housing and Equal Opportunity (FHEO), fewer resources have been devoted to carrying out its AFFH mandate.[103] 'Analyses of Impediments' are reports jurisdictions receiving HUD funding develop to assess the status of housing choice and housing segregation within their communities.[104] They also detail localities' plans to affirmatively further fair housing.[105] Prior to 2015, HUD scarcely monitored Analyses of Impediments.[106] Grantees of HUD grant programs, such as the Community Development Block Grant (CDBG), are required to perform these analyses.[107] Thus, in 2015, HUD promulgated a rule mandating its funding recipients to complete various fair housing assessments and commit to standards governing neighborhood segregation, lack of housing choice, and housing access.[108] After the Trump Administration suspended the rule's implementation, the Biden Administration reinstated the rule in 2021[109] and simplified it in 2023.[110] HUD committed to leveraging the 2015 rule to carry out EJ policy in its 2016 to 2020 Environmental Justice Strategy.[111]

ii. 42 U.S.C. §§ 3604 (a)–(b) and Post-Acquisition Discrimination

The first two provisions of the FHA, Sections 3604(a) and (b), are relevant for determining whether the Act reaches "post-acquisition conduct," or discrimination *after* a person has taken possession of the property.[112] Section 3604(a) bars "any

102. Orfield & Stancil, *supra* note 62, at 41–45, 61.

103. Bostic & Acolin, *supra* note 62, at 190, 195.

104. U.S. DEP'T HOUS. & URB. DEV. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, FAIR HOUSING PLANNING GUIDE, 4-2 (VOL. 1).

105. *Id.*

106. Bostic & Acolin, *supra* note 62, at 195.

107. *Id.* at 196.

108. *Id.* at 197–99; Press Release, Department of Housing and Urban Development, HUD Restores Affirmatively Furthering Fair Housing Requirement (June 10, 2021).

109. Reinstatement of HUD's Discriminatory Effects Standard (to be codified at 24 C.F.R. pt. 100).

110. 24 C.F.R. pt. 100 (2023).

111. U.S. DEP'T HOUS. & URB. DEV., HUD ENVIRONMENTAL JUSTICE STRATEGY 2016–2020, DRAFT VERSION FOR PUBLIC COMMENT (2016).

112. *See, e.g.*, 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); Aric

discriminatory conduct that has the effect of depriving people of housing," such as "harassment or discriminatory terms and services," so long as the behavior has the effect of "making housing unavailable."[113] Plaintiffs frequently employ 3604(a) in cases involving discriminatory real estate transactions and advertising.[114] Section 3604(b) states that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services of facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[115]

While many courts have found 3604(a) and (b)'s language applicable to post-acquisition conduct, others have held the provisions do not apply.[116] The Seventh Circuit's decision in *Halprin v. Prairie Single Family Homes of Dearborn Park Association* was the first to discuss 3604's temporal limitations.[117] The court established a narrow reading of 3604(a) and (b) by holding that the provisions only implicated conduct related to access to housing.[118] In a subsequent case reversing *Halprin*, the Seventh Circuit in *Bloch v. Frischholz* held on rehearing that discriminatory conduct under 3604(a) need not relate to the "physical condition of the premises" and that discrimination may make housing unavailable after possession.[119] There, residents sued their condominium

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Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006).

113. Oliveri, *supra* note 111, at 20; 42 U.S.C. § 3604(a) (stating that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, 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.").

114. *See, e.g.*, Shivangi Bhatia, *To "Otherwise Make Unavailable": Tenant Screening Companies' Liability Under the Fair Housing Act's Disparate Impact Theory*, 88 FORDHAM L. REV. 2551, 2566–80 (2020) (analyzing Section 3604's application to tenant screening companies' FHA liability).

115. 42 U.S.C. § 3604(b).

116. *See, e.g.*, Treece v. Perrier Condo. Owners Ass'n, 2022 WL 860418 (E.D. La. Mar. 23, 2022) (citing Cox v. City of Dall., 256 F.3d 281 (5th Cir. 2005)) (holding that 3604(a) reaches post-acquisition conduct, stating, "[a]s other circuit courts have noted, 'nothing in section 3604 limits its scope to discriminatory conduct occurring before or at the time of signing a lease.'"). The Department of Justice also supports the view that 3604(a) reaches post-acquisition discrimination. *See* UNITED STATES STATEMENT OF INTEREST *in* Drayton v. McIntosh Cnty., Ga., 2016 WL 3963063 (S.D. Ga. Apr. 21, 2016).

117. Bailey, *supra* note 60, at n.100; *see* Jessica D. Zietz, *On Second Thought: Post-Acquisition Housing Discrimination in Light of* Bloch v. Frischolz, 66 U. MIAMI L. REV. 495, 505–06 (2012).

118. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) ("The Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but *access* to housing.").

119. Bloch v. Frischholz, 587 F.3d 771, 777 (7th Cir. 2009) (en banc) (clarifying

association for religious and racial discrimination when association rules prohibited them from placing a Jewish mezuzah in the hallway.[120] While the *Halprin* decision aligned with precedent affirming 3604(a)'s exclusive coverage of conduct preventing *acquisition* of property,[121] the court's suggestion in *Halprin* that 3604 applied to constructive eviction[122] led the *Bloch* court to reach the opposite conclusion about 3604(a)'s reach.[123] The *Bloch* court did not provide a definitive answer on 3604(b)'s reach.[124]

As for 3604(b), while some have held that a "privilege" extends to a person's inhabiting of the property, others have limited this language to the initial "sale or rental of a dwelling."[125] Likewise, some courts have held that "services" include only those associated with the initial possession, whereas others extend "services" to those pertaining to one's use and enjoyment of their property.[126] The variance centers on the meaning of the phrase "in connection therewith."[127] If it is "unlawful . . . to discriminate . . . in the provision of services or facilities in connection [with the sale or rental of a dwelling]," then post-acquisition discrimination (after sale or rental) is *outside* of 3604(b)'s scope.[128] If it is unlawful to discriminate "in the provision of services or facilities in connection [with a dwelling]," then it is *within* 3604(b)'s scope.[129]

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that "[a] defendant can engage in post-sale practices tantamount to 'redlining' that make a plaintiff's dwelling 'unavailable,'" thereby reversing an earlier panel decision that did not apply 3604 to post-acquisition discrimination).

120. *Id*.

121. *Id.* at 328–29 (citing NAACP v. Am. Family Mutual Ins. Co., 978 F.2d 287 (7th Cir. 1992)); San Pedro Hotel Co. v. City of L.A., 159 F.3d 470 (9th Cir. 1998); Hamad v. Woodcrest Condo. Ass'n, 328 F.3d 224, 229–31 (6th Cir. 2003); Hogar Agua y Vida en el Desierto Inc., 36 F.3d 177 (1st Cir. 1994); *contra* Trafficante v. Metro. Life. Ins. Co., 409 U.S. 205 (1972) (reasoning that "[t]he language of the Act is broad and inclusive," the Supreme Court applied the FHA to post-acquisition discrimination, albeit without analysis of the FHA's statutory language).

122. *Bloch*, 587 F.3d at 329.

123. *Bloch*, 587 F.3d 771 (overruling *Halprin*, 388 F.3d 327).

124. *See* Bailey, *supra* note 60, at 240.

125. Benjamin A. Schepis, *Making the Fair Housing Act More Fair: Permitting Section 3604(b) to Provide Relief for Post-Occupancy Discrimination in the Provision of Municipal Services–A Historical View*, 41 TOL. L. REV. 411–12 (2010).

126. *Compare Cox*, 256 F.3d 281, *with* Comm'n Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009) ("There are few 'services or facilities' provided at the moment of sale, but there are many 'services or facilities' provided to the dwelling associated with the occupancy of the dwelling. Under this natural reading, the reach of the statute encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling.").

127. *City of Modesto*, 583 F.3d at 711.

128. *Id.*

129. *Id.*

Yet more courts have also examined the issue of 3604's scope. The D.C. Circuit in *Webb v. U.S. Veterans Initiative* held that 3604(a) prohibited post-acquisition discrimination when the District discriminated against Latine tenants by selectively enforcing housing code violations.[130] The Fifth Circuit in *Cox*, by contrast, rejected the plaintiffs' argument that 3604(a) and (b) applied to post-acquisition discrimination involving illegal dumping in their predominantly Black neighborhood. It reasoned that the City's enforcement of its zoning laws, if a "service" under 3604(b), was not "connected" to the "sale or rental of a dwelling," remarking that holding otherwise would "[create] rights for any discriminatory act which impacts property values."[131] Solidifying its aforementioned *Webb* decision, the D.C. Circuit made nearly identical arguments to deny relief in *Clifton Terrace Associations v. United Technologies Corporation*.[132] In 2019, the Eleventh Circuit differed from *Cox*, as did the Ninth Circuit in 2009, in holding that 3604 did reach post-acquisition discrimination.[133] The Ninth Circuit notably held that 3604(b) did not require a constructive eviction.[134] In *Doe v. County of Kankakee*, the District Court for the Northern District of Illinois held that renters proved racial discrimination under 3604(a) when "aggressive anti-drug policing . . . made housing unavailable" to marginalized residents.[135] Section 3604(b) has also been held actionable in post-acquisition claims involving denial of pool access and janitorial services.[136]

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130. *See* Rachel Smith, *Policing Black Residents as Nuisances: Why Selective Nuisance Law Enforcement Violates the Fair Housing Act*, 34 HARV. J. RACIAL & ETHNIC JUST. 87, 108–09 (2018); 2922 Sherman Ave. Tenants Ass'n v. Dist. of Columbia, 444 F.3d 673, 685 (D.C. Cir. 2006) (holding that prohibiting tenants' occupancy after possession makes housing "unavailable"); Webb v. U.S. Veterans Initiative, 993 F.3d 970 (D.C. Cir. 2021) ("As our sister circuits have held, nothing in section 3604 limits its scope to discriminatory conduct occurring before or at the time of signing a lease.").

131. Cox v. City of Dall., 430 F.3d 734, 745–46 (5th Cir. 2005).

132. 929 F.2d 714 (D.C. Cir. 1991).

133. Georgia State Conference of the NAACP v. City of Lagrange, 940 F.3d 627, 632 (11th Cir. 2019) ("The statute does not contain any language limiting its application to discriminatory conduct that occurs prior to or at the moment of the sale or rental."); *City of Modesto*, 583 F.3d at 713 ("[W]e conclude that the [FHA] reaches post-acquisition conduct discrimination.").

134. *City of Modesto*, 583 F.3d at 713.

135. Smith, *supra* note 129 at 109; *see* Doe v. County of Kankakee, 2004 WL 1557970 (N.D. Ill. July 8, 2004).

136. *See* Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act,* 58 ALA. L. REV. 203 (2006) (providing examples of 3604(b)'s application to post-acquisition harassment as well as its disability provisions, (f)(1) and (f)(2)).

C. Support for HUD's Investigative Jurisdiction for Discriminatory Siting Claims Under the FHA

i. The Statutory Text of §§ 3604(a)–(b) Supports HUD's Investigation of Discriminatory Siting Claims as Claims of Housing Discrimination

Insofar as discriminatory siting "make[s] housing unavailable,"[137] and interferes with "privileges" and "services"[138] for marginalized residents in low-income and federally subsidized housing, the statutory text of 3604(a) and (b) warrants investigation of these claims under the FHA.[139] Discriminatory siting occurs where these communities already exist, suggesting that discrimination claims are typically actionable only if post-acquisition claims are within 3604's scope.[140] Notwithstanding the aforementioned circuit split, HUD has long viewed post-acquisition discrimination as actionable under 3604.[141] Therefore, the circuit split should not limit HUD's willingness to investigate under FHA Section 1983.[142]

As a practical matter, discriminatory siting can "make housing unavailable" by impacting marginalized residents' ability to live in low-income and federally subsidized communities.[143] For example, if the siting of an asphalt plant near a Section 8 or public housing development spews harmful emissions that make it harder for residents to breathe or go outside, then the siting "make[s] housing unavailable" by affecting the habitability of residents' homes.[144] Since Section 8 residents' vouchers are project-based, and thus tied to a particular development, there can be no actual eviction since

137. 42 U.S.C. § 3604(a); Oliveri, *supra* note 111, at 20.

138. 42 U.S.C. § 3604(b).

139. *Id.*

140. *Id.*

141. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants at 8, Paulk v. Ga. Dep't of Transp. (11th Cir. 2016) (No. 16-13406-D) ("Courts have applied the FHA to post-acquisition discrimination for more than two decades."); United States of America's Statement of Interest at 4, Drayton v. McIntosh Cnty., Ga. (S.D. Ga. 2016) (No. 2:16-CV-53) ("The language of the FHA and HUD's implementing regulations clearly support the application of the FHA to post-acquisition conduct.").

142. *Cf.* 42 U.S.C. § 1983 (permitting individuals deprived of their civil rights under the Fair Housing Act and other civil rights statutes to seek relief, including via the administrative process).

143. *See* Rossen & Pollack, *supra* note 21; Oliveri, *supra* note 111, at 20.

144. *See* United States of America's Statement of Interest, *supra* note 140, at 26 n.7 (citing *Bloch*, 587 F.3d at 777, to assert that 3604(a) prevents discrimination that "make[s] unavailable or denies" housing).

residents do not have the choice of moving.[145] The same applies to public housing residents, whose only option is to relocate to another public housing development, and to low-income tenants, who might only be able to afford rent in that particular neighborhood. However, since constructive eviction suffices to make housing unavailable under 3604(a), no actual eviction is required in HUD's view.[146]

Discriminatory siting can also interfere under 3604(b) with "privileges" of housing associated with housing's availability. *City of Modesto* clarified that "[t]he inclusion of the word 'privileges' implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling."[147] Judicial interpretations of similar "privilege" language in Title VII of the Civil Rights Act of 1964 support this reading.[148] Since HUD also supports this interpretation, it is reasonable that discrimination affecting the privilege of quiet enjoyment should be actionable and thus investigated. Using the same asphalt plant example, if the plant's noxious fumes make it difficult for marginalized residents to breathe or to go outside, this interferes with the "privilege" of quiet enjoyment of their dwelling.[149] If the same plant contaminates marginalized residents' water source or interferes with sewer access, then this could constitute interference with those residents' municipal "services."[150] Again, since HUD's position is that 3604(b) applies to post-acquisition discrimination, some courts' interpretations that 3604(b) discrimination is only actionable as it relates to the "sale or rental" of a dwelling is not a limiting factor.[151]

Critics of applying the FHA to discriminatory siting and environmental justice more generally may argue that it is impossible to gauge when a siting makes housing unavailable, interferes with privileges of a dwelling, or restricts access to municipal services. In theory, whether a constructive eviction occurs may depend on emissions and other data determining

145. POISONOUS HOMES, *supra* note 36, at 15.

146. United States of America's Statement of Interest, *supra* note 140, at 26 n.7.

147. *City of Modesto*, 583 F.3d at 713.

148. United States of America's Statement of Interest, *supra* note 140, at 12.

149. Roger Pilon, *Property Rights and the Constitution*, CATO INST. (2017), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution [https://perma.cc/G4ZV-JSZ4] ("Thus, a principled approach respects equal rights of quiet enjoyment—and hence environmental protection.").

150. *Id.*

151. *City of Modesto*, 583 F.3d 690.

residents' health and safety within their home.[152] Moreover, evaluating whether a constructive eviction occurs and whether a siting harms residents' use and enjoyment of their dwelling is a subjective exercise. Both arguments are sound and highlight the evidentiary barriers to proving discrimination. However, even if plaintiffs in some cases have tepid claims and cannot prove how siting is discriminatory, this does not affect HUD's jurisdictional and investigative authority. HUD has authority to investigate weaker claims and find that siting was *not* violative of the FHA. Lastly, plaintiffs' showing of a constructive eviction may not be sufficient to prove discrimination by itself. They must also show that a municipality intentionally discriminated in siting polluting industry in their neighborhood or that the siting has a discriminatory effect.

ii. HUD's Discriminatory Intent and Effect Standards Demonstrate HUD's Capacity to Investigate Discriminatory Siting as a Zoning Issue That Impacts Housing

Discriminatory Siting as a Land Use and Zoning Matter That HUD Has Authority to Investigate

Discriminatory siting is inherently a zoning issue insofar as local governments use and modify land use plans to site polluting industry near low-income communities of color in affordable and federally subsidized housing.[153] As a function of Euclidean zoning, in which municipalities separate land uses using zoning powers, low-income and multi-family communities are located apart from single-family districts, as are industrial ones from residential.[154] Consequentially, disparate environmental impacts are created when a developer or municipality zones for polluting industry, an 'unwanted land use.'[155] This is because, while industry may not be sited near single-family housing, it is instead sited near marginalized communities in multi-family and affordable housing.[156] Look no further than Chicago, where HUD found the City used its land use and permitting powers to site the General

152. Oliveri, *supra* note 111, at 24.

153. Patricia E. Salkin, *Environmental Justice and Land Use Planning and Zoning*, 32 REAL EST. L.J. 429, 430–31 (2003).

154. *See id*. at 238.

155. *Id.*

156. *See id.*

Iron plant near low-income communities of color.[157] Although HUD has yet to determine any FHA violation in that case, its findings of discrimination indicate the Department's view that siting decisions, as land use decisions, can be discriminatory.

HUD has jurisdictional authority to investigate land use decisions. Section 8024.1 of HUD's *Title VIII Complaint Intake, Investigation, and Conciliation Handbook* outlines rules HUD investigators should follow to determine HUD's jurisdiction for a complaint.[158] In the section entitled "Timeliness and Continuing Violations," addressing those violations that are "continuing in nature," the handbook notes "[d]iscriminatory zoning ordinances are one example" and provides a timeframe for complainants to make a timely complaint.[159] Later, in the section entitled "Activities Prohibited Under Section [3604]," the handbook states HUD "has jurisdiction to accept and investigate complaints of discriminatory application of zoning codes . . . ."[160] It also states that complainants alleging "manipulation of zoning codes" should file complaints under 3604(a) and 3604(b).[161] Insofar as siting involves discriminatory application of zoning codes to place polluting industry near low-income housing, HUD has authority to investigate claims of discrimination.

HUD's Discriminatory Intent and Disparate Impact Evidentiary Standards

HUD's discriminatory intent and disparate impact standards for FHA enforcement also provide support for its jurisdictional authority to investigate discriminatory siting claims. HUD may effectively use each standard to determine whether a siting is discriminatory. A 2016 Joint Statement by HUD and the DOJ "provide[d] an overview of the [FHA]'s requirements relating to state and local land use practices and zoning laws."[162] The joint statement explicitly lists the *Arlington Heights* factors as criteria for analyzing whether a land use or zoning practice is "enacted with

157. LETTER OF FINDING OF NONCOMPLIANCE, *supra* note 87, at 2.

158. U.S. DEP'T HOUS. & URB. DEV., TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK (8024.1) (2005), https://www.hud.gov/program_offices/administration/hudclips/handbooks/fheo/80241 [https://perma.cc/C6N4-55C2].

159. *Id*. at 3-5.

160. *Id*. at 3-28.

161. *Id*.

162. JOINT STATEMENT OF DEP'T HOUS. & URB. DEV. & DEP'T JUST.: STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF THE FAIR HOUSING ACT (2016) at 1.

discriminatory intent."[163] It also cites the Supreme Court's decision in *Inclusive Communities* to set forth "[t]he standard for evaluating housing-related practices with a discriminatory effect," which is codified in HUD's Discriminatory Effects Rule.[164]

A variety of housing cases illustrate how HUD may utilize its evidentiary standards to investigate discriminatory siting claims. Cases applying *Arlington Heights* or *Inclusive Communities* to zoning and land use decisions demonstrate how siting, as a land use decision, discriminates with either intent (i.e., treatment) or effect. They also demonstrate how siting decisions, like the land use decisions at issue in these cases, affect housing in a discriminatory manner, make housing "unavailable" within the meaning of 3604(a), and interfere with "privileges" and "services" of housing within the meaning of 3604(b).

Avenue 6E Investments, LLC v. City of Yuma

The Ninth Circuit's analysis in *Avenue 6E Investments, LLC v. City of Yuma* is useful for assessment of discriminatory siting claims under a theory of discriminatory intent. There, the first *Arlington Heights* factor, historical background, was particularly relevant. The court considered the defendant's decision to deny a developer's request for a zoning change accommodating a "moderately-priced" housing development in a predominantly white neighborhood.[165] Next, the court assessed the city's "historical patterns of segregation by race and class" and resulting housing stratification to suggest that these patterns were relevant for a showing of discriminatory intent.[166] On summary judgment, the court agreed with the plaintiff that denial of the zoning change request could plausibly have prevented Latine residents from moving to a predominantly white neighborhood, making housing "unavailable" to Latine residents under 3604(a).[167]

Avenue 6E Investments suggests that "historical patterns of segregation" in discriminatory siting cases can show evidence of municipalities' discriminatory intent.[168] Tying industrial siting to

163. *Id.* at 4.

164. *Id.* at 5.

165. Avenue 6E Invs. v. City of Yuma, 818 F.3d 493, 498 (9th Cir. 2016).

166. *Id.* at 508.

167. *See id.* at 508–09. The Ninth Circuit also noted as part of the historical background and "departure" criteria under *Arlington Heights* that the City had ignored its own planning experts' zoning recommendations encouraging it to adopt the developer's zoning request and that it did so to appease constituents' racial animus. *Id.* at 507.

168. *Id.*

housing's location to show that siting "makes housing unavailable" is arduous.[169] Nonetheless, if plaintiffs can show how redlining, flood plain maps, or land use plans formed the siting decision's historical background and caused low-income housing to be situated by polluting industry, or vice versa, this could create presumptive intent.[170] One theory of intent would be that, historically, the municipality made a concerted effort to segregate marginalized residents from white neighborhoods by zoning for low-income housing near industry, or zoning for industry near low-income housing, while *not* zoning for industry in white neighborhoods. Therefore, historical patterns of segregation contribute to making housing "unavailable" to residents in low-income housing because the only housing available to them is near polluting industry, the risks of which jeopardize their health and use and enjoyment of their housing. Even if some, but not all, low-income housing is located near polluting industry, there need not be "a complete absence of desired housing" for residents to make a showing of discrimination.[171] Zoning practices may still be discriminatory if "they *contribute* to . . . mak[ing] housing unavailable" under 3604(a).[172]

Redlining, flood plain maps, and land use plans are forms of circumstantial evidence that may illustrate zoning patterns that confined marginalized residents to certain industrial neighborhoods.[173] On the other hand, even if redlining or land use plans did not *cause* low-income housing's proximity to industry *per*

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169. *Id.*

170. See Kriston Capps & Christopher Cannon, *Redlined, Now Flooding*, BLOOMBERG (Mar. 15, 2021), https://www.bloomberg.com/graphics/2021-flood-risk-redlining/ [https://perma.cc/WWS8-L69G] for a helpful report explaining higher flood risks in historically redlined neighborhoods and the much lower risks in predominantly white neighborhoods. The article's summaries of quantitative data collected by research teams at various nonprofits and academic institutions paints a picture of redlining's harmful effects. While redlining is not the only factor determining industrial siting, it can suggest a pattern of historical discrimination. *See also* Darryl Fears, *Redlining Means 45 Million Americans Are Breathing Dirtier Air, 50 Years After It Ended*, WASH. POST (Mar. 9, 2022), https://www.washingtonpost.com/climate-environment/2022/03/09/redlining-pollution-environmental-justice/ [https://perma.cc/89YZ-SXBE] (giving an in-depth overview of a recent study published in the journal *Environmental Science and Technology Letters*, which found that Black and Latine Americans are more likely to live in formerly redlined areas that are highly polluted when compared with white Americans).

171. *Ave. 6E Invs.*, 818 F.3d at 509.

172. Pac. Shores Props. v. City of Newport Beach, 730 F.3d 1142, 1157 (9th Cir. 2013) (quoting City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 805 (9th Cir. 1994)).

173. *Id.*

se, it can still be circumstantial evidence of a "pattern and practice" of racial discrimination, which discriminatory siting continues.[174] While a municipality might argue that the ubiquity of redlining alone could allow HUD to make a finding of discrimination more easily, this is unlikely. The "historical background" element under *Arlington Heights*, for which redlining may suffice in a siting claim, is only one criterion.[175] If redlining is part of a "pattern or practice" of housing discrimination, which the siting of industry perpetuates, a finding of discrimination may be more likely.[176] That said, plaintiffs' evidentiary burden is still difficult to satisfy.

The Ninth Circuit's reasoning in *Avenue 6E Investments* is also useful for siting claims under a disparate impact theory. The City of Yuma's refusal to rezone for multi-family housing created a disparate impact on Latine residents by creating two distinct zoning policies.[177] Given the city's propensity to accept rezoning requests, having not denied any of the seventy-six requests in the three years preceding its decision, one could reasonably infer that the City would grant single-family and other zoning requests in white neighborhoods.[178] Additionally, given the statistical prevalence of Latine residents in "substantially all of the available low- to moderate-income housing," the City's denial would have a "disproportionate effect" on Latine residents' housing access.[179] Even if housing is not 'blocked' in the same way it was in Yuma, evidence of two distinct zoning practices is evidence of a disparate impact in siting cases. If a municipality zones for industry near low-income, marginalized housing but does not in white neighborhoods, this may show disparate impact.

Mhany Management, Incorporated v. County of Nassau

The Second Circuit's decision in *Mhany Management v. County of Nassau* is also useful for assessing how EJ plaintiffs may show a siting decision's discriminatory intent and disparate impact. In *Mhany*, the court held that the County's rezoning of a non-residential area only accommodated single-family zoning, while restricting multi-family housing.[180] Fewer multi-family units would decrease housing options for the majority of families of color in the

174. *Id.*
175. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
176. *See id.*
177. *Ave. 6E Invs.*, 818 F.3d at 503.
178. *See id.* at 497.
179. *Id.* at 508.
180. Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619–20 (2d. Cir. 2016).

county who did not live in single-family homes.[181] This disparate impact on housing availability showed the county's zoning decision's discriminatory effect.[182] As for discriminatory intent, the court considered the "sequence of events" leading up to the zoning decision.[183] It described extensive public opposition against multi-family housing to conclude that the county intended to appease constituents' racially-motivated concerns about "undesirable" housing in their neighborhood.[184]

The Second Circuit did not explain a clear disparity in the County's zoning practices. That is, neither court outlined a policy guiding how the County zoned for housing in neighborhoods of color as opposed to white neighborhoods. However, the Second Circuit's analysis creates an inference that the county would not have rezoned for multi-family housing in single-family districts.[185] In the siting context, EJ plaintiffs may articulate a similar disparate impact. Even if there is no clear, intentional policy for zoning for industry in marginalized neighborhoods versus white neighborhoods, the municipality's decision to site industry near marginalized neighborhoods has the *effect* of concentrating industry there.

Moreover, the court's description of the county's response to public outcry creates an inference that public opinion would not have swayed the County's decision to rezone if it had been marginalized residents complaining about the presence of single-family zoning near multi-family housing.[186] Using this type of inference, EJ plaintiffs may argue that a municipality would not have zoned for industry near housing if it were located in a predominantly white neighborhood. Plaintiffs may also show opposition to affordable housing to prove discriminatory intent in the siting context. Even if this opposition did not occur in the "sequence of events" leading up to the siting decision, it may still serve as "historical background" for the decision.[187] Finding this evidence may require a look at historical records.

181. *Id.*
182. *Id.*
183. *Id.* at 608.
184. *Id.* at 607–08.
185. *Id.*
186. *Id.* at 588, 593, 597, 606.
187. *Id.*

United States v. City of Parma

The Sixth Circuit's decision in *United States v. City of Parma* emphasized the illegality of zoning decisions that have either discriminatory purpose or effect.[188] In that case, Parma, Ohio, residents alleged that the City discriminated against residents by denying building permits for a low-income housing development and by "refus[ing] to submit an adequate housing assistance plan in connection with its application for [Federal] Community Development Block Grant Funds."[189] Municipal officials claimed that the developer of federally subsidized housing "[failed] to comply with Parma's land use ordinances" causing the building permits' denial, but such compliance was not previously required.[190] The court affirmed the lower court's holding that the City had engaged in a "consistent policy of making housing unavailable to [B]lack persons" through both discriminatory intent and effect.[191] One particular ordinance required voter approval for low-income housing construction.[192] Municipal officials' public statements opposing affordable housing and departures from zoning practices contributed to a finding of "a pattern or practice of discrimination" that "ma[de] housing unavailable."[193]

Most notable was the Sixth Circuit's conclusion that although local communities like Parma have the right under *Village of Euclid* "to control land use by zoning ordinances and regulations," those which "have a racially discriminatory effect" violate the FHA.[194] While a siting decision is not a 'housing decision' identical to a denial of a building permit for affordable housing, it is a land use decision that can have the same effect of denying housing in a racially discriminatory manner. Just as a zoning ordinance "makes housing unavailable" to marginalized families by limiting the availability of affordable housing, a zoning ordinance allowing for the siting of industry near marginalized neighborhoods "makes housing unavailable" by constructively evicting residents who must tolerate harmful emissions at home.[195]

188. 661 F.2d 562 (6th Cir. 1981).
189. *Id.* at 566.
190. *Id.* at 567.
191. *Id.* at 568.
192. *Id.* at 567.
193. *Id.* at 575, 568.
194. *Id.* at 575.
195. *Id.*

iii. Investigating Discriminatory Siting Claims is Consistent with HUD's Stated Policy

Aside from HUD's jurisdictional authority, HUD's investigation of discriminatory siting claims would align with its stated goal of creating policy to address EJ concerns. HUD's most recent Environmental Justice Strategy states in its overview that "the mission of [HUD] is to create strong, sustainable, inclusive communities" and that these goals are "intrinsic to the concept of environmental justice."[196] Among goals to help "[i]dentify and address disproportionate environmental and human health impacts faced by low-income communities of color" is goal A.5: "[d]evelop guidance for complaint investigation, compliance reviews, and enforcement of the [FHA]."[197] Seven years later, FHEO has yet to issue such guidance, which it was allegedly "in the process of revising."[198] These stated yet unachieved policy goals suggest that leveraging HUD's investigative authority is in concert with this policy. Addressing discriminatory siting in communities receiving federal funding is also in concert with HUD's policy to "[l]everage the [AFFH] rule" to address environmental justice by enabling federal housing programs to "integrat[e]" segregated communities.[199]

iv. HUD is Given Deference for Its Interpretation of the FHA

Since HUD is entitled to deference for its FHA interpretations, if its investigations find a party discriminatorily sited and violated the FHA, such finding would not run afoul of HUD's regulatory authority. HUD's Letters of Finding are not regulations but are still provided *Chevron* deference.[200] In *City of Arlington v. FCC*, the Supreme Court held that agency jurisdictional determinations are afforded the same deference as other statutory interpretations.[201] In that case, the FCC issued a declaratory ruling specifying the

196. ENV'T JUS. STRATEGY 2016–2020, *supra* note 15, at 9.

197. *Id.* at 12.

198. *Id.*

199. *Id.* at 10.

200. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024). This Article was written and edited prior to the *Loper Bright* decision.

201. City of Arlington v. FCC, 569 U.S. 290 (2013); Daniel T. Shedd & Todd Garvey, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, CONG. RSCH. SERV. (Aug. 28, 2013), https://sgp.fas.org/crs/misc/R43203.pdf [https://perma.cc/B2UR-WF37] (describing how *City of Arlington* expanded the scope of the *Chevron* two-step test on page 2 of the report).

number of days for a state or local government to complete review of wireless service facility siting applications.[202] The issue was whether the FCC had authority under the Telecommunications Act of 1996 and "stayed within the bounds of its statutory authority."[203] The Court ruled that the *Chevron* two-step test was the proper method for answering this question.[204]

Here, the question of whether HUD may find a municipality violated the FHA by discriminatorily siting would be a question of HUD's jurisdictional authority in EJ cases. A court would inquire whether the FHA, as HUD's organic statute, defined the FHEO's administrative enforcement powers unambiguously in Section 3610 of the Act.[205] Since that Section does not define a "discriminatory housing practice" warranting investigation, a court would inquire whether HUD's interpretation of discriminatory siting as a "discriminatory housing practice" is permissible. HUD has long investigated municipal land use and zoning decisions, and the Secretary has broad authority to interpret HUD's regulations, which guide HUD's investigative procedure. Therefore, HUD's interpretation of discriminatory siting as within its jurisdiction is within the zone of reasonable interpretation.

Conclusion

For many years, a legal avenue did not exist for EJ plaintiffs to prove discriminatory siting of industry under the FHA either through the courts or administratively.[206] Federal agencies, including HUD, were uncertain of their jurisdiction to investigate discrimination claims and carry out EJ policy. HUD's General Iron Letter of Findings was the first of its kind, and while it left the FHA liability question unanswered, a possible framework exists for HUD to find FHA liability in the future. Using discriminatory intent and disparate impact as tools at its disposal, HUD may investigate discriminatory siting claims in a manner consistent with statutory text and its jurisdictional authority.

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202. *City of Arlington,* 569 U.S. at 293, 297.

203. *Id*. at 291.

204. *Id*. at 297.

205. 42 U.S.C. § 3610 (providing broad authority for the HUD Secretary to investigate housing discrimination and outlining the steps for the Department via the Secretary to receive and investigate complaints).

206. Haberle, *supra* note 7.