

## COMMUNITY PREFERENCE IN NEW YORK CITY

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### I. INTRODUCTION

New York City (“the City” or “NYC”) is one of the most segregated metropolitan areas in the United States.<sup>1</sup> “[M]unicipal and neighborhood segregation didn’t just drop from the sky,” nor is it purely the result of self-selection and the workings of the economic marketplace.<sup>2</sup> Rather, this problem “was created by explicitly discriminatory conduct [on] the part of both public and private actors over the course of decades.”<sup>3</sup> Years of state condoned discrimination have resulted in, and continue to permit, major racial disparities in education, employment, and beyond.<sup>4</sup> The plaintiffs in *Winfield v. City of New York*, Janell Winfield, Tracey Stewart, and Shauna Noel (“Plaintiffs”) brought a lawsuit against the City in July 2015 to contest New York City’s subtle, but potentially discriminatory “community

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<sup>1</sup> For example, a study by the University of Michigan that examines the 1990-2010 decennial census suggests that the New York metropolitan area is second only to Milwaukee, Wisconsin in metro areas with a population greater than 500,000 in terms of the residential segregation of blacks and whites. William H. Frey, *Brookings Institution and University of Michigan Social Science Data Analysis Network’s Analysis of 1990, 2000, and 2010 Census Decennial Censuses*, POPULATION STUD. CTR., <http://www.psc.isr.umich.edu/dis/census/segregation2010.html> (last visited Feb. 27, 2017). See also Complaint ¶¶ 40–41, *Winfield v. City of New York*, No. 1:15-cv-05236 (S.D.N.Y. July 7, 2015) (“Among the largest cities in 2010, New York City was still the second most segregated in terms of the dissimilarity index as measured between African-Americans and whites. Among the largest cities in the United States in 1980, New York City was the fourth most segregated in terms of the dissimilarity index as measured between Latinos and whites.”) [hereinafter Compl.].

<sup>2</sup> Daniel Denvir, *The Ten Most Segregated Urban Areas in America*, SALON (March 29, 2011), [http://www.salon.com/2011/03/29/most\\_segregated\\_cities/slide\\_show/9](http://www.salon.com/2011/03/29/most_segregated_cities/slide_show/9) (quoting Craig Gurian, executive director of the Anti-Discrimination Center).

<sup>3</sup> *Id.*

<sup>4</sup> For example, a recent Civil Rights Project at UCLA concluded that New York City has the most segregated schools in the country. John Kucsera & Gary Orfield, *New York State’s Extreme School Segregation: Inequality, Inaction and a Damaged Future*, ESCHOLARSHIP U. OF CAL. (March 26, 2014), <http://escholarship.org/uc/item/5cx4b8pf>.

preference” policy.<sup>5</sup> Enacted under Mayor Ed Koch in 1988, the policy currently provides a 50% preference to residents of a community district in the lottery system for affordable housing constructed in their district.<sup>6</sup>

New York City is also the most expensive city in the world to live in.<sup>7</sup> The burden to find affordable housing falls most heavily on low income residents, many of whom are African-American or Latino. The Fair Housing Act (FHA), passed in 1968, declared that the government has an obligation to affirmatively further access to fair housing across the country.<sup>8</sup> This mandate, however, has not been fully realized.<sup>9</sup> Nevertheless, the policies and regulations of the Department of Housing and Urban Development (HUD) should not allow, let alone encourage, discriminatory practices of any kind. However, plaintiffs Winfield, Stewart, and Noel contend that this is exactly what is happening: the women allege that New York City’s housing policies, specifically its lottery system for low-income housing, perpetuates a pattern of residential segregation.<sup>10</sup> Effectively, African-Americans and Latinos are unable to move to more privileged areas because they never had the opportunity to live there in the first place. Therefore, this results in the systematic denial of opportunities to low-income New York City residents of color.

The City maintains that the community preference policy was not a deliberate or backhanded attempt to discriminate against its black and Latino residents.<sup>11</sup> Rather, the City enacted the community preference policy to curb the negative effects of gentrification, most

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<sup>5</sup> See Compl., *supra* note 1.

<sup>6</sup> *Id.* ¶ 3.

<sup>7</sup> Nick Timiraos, *The Most Expensive Place in the World to Live*, WALL STREET J. (Sept. 22, 2015), <http://blogs.wsj.com/economics/2015/09/22/the-most-expensive-place-in-the-world-to-live/>. The prices of goods and services are only higher in two cities, Zurich and Geneva, but both were less expensive once rent entered the equation. See *id.*

<sup>8</sup> Although the Supreme Court has not found that housing is a fundamental right under the Constitution, the efforts of the Department of Housing and Urban Development (HUD) certainly illustrate the importance of this issue. See *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>9</sup> See generally Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act’s Integrationist Purpose*, 88 N.Y.U. L. REV. 2182 (2013) (arguing that most state and local governments have “rarely risen above mere boilerplate” in meeting their obligation to affirmatively further fair housing.)

<sup>10</sup> Compl., *supra* note 1, ¶ 6.

<sup>11</sup> See generally Defendant’s Memorandum of Law in Support of Motion to Dismiss, *Winfield v. City of New York*, No. 1:15-cv-05236 (S.D.N.Y. July 7, 2015) [hereinafter *Def. Br.*].

notably, the displacement of long-time residents.<sup>12</sup> Gentrification is rapidly devouring affordable housing options for many City residents, and most of these displaced residents are people of color.<sup>13</sup> The City initiated the community preference policy so that local residents would have the opportunity to remain in their communities as rents rise and neighborhoods develop.<sup>14</sup> Therefore, the City is concerned that an important policy tool, used to maintain “stable, diverse neighborhoods in the face of continuing gentrification and housing price increases,” may be threatened.<sup>15</sup>

This comment will examine contemporary affordable housing policies in New York City that seek to achieve urban integration. Specifically, this comment will analyze the *Winfield* case and its challenge to the “community preference” or “outsider-restriction” policy, alongside efforts to control gentrification in the wake of the recent Supreme Court decision concerning disparate impact liability in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* Part II of this comment will address the community preference policy and tell the story of the ongoing *Winfield* lawsuit and its subsequent procedural history. Part III of this comment will focus on the history of residential segregation and racial inequality in New York City and help illustrate how and why it remains so segregated today. Part IV will discuss legal precedent relevant to the *Winfield* case, specifically the Supreme Court’s holding in the *Inclusive Communities* case, as well as new HUD regulations regarding disparate impact. Finally, Part V offers a view of how this case *should* be decided, and explores the practical implications of the future of integrative policies in housing in New York City. Ultimately this comment will argue that regardless of what *happens* in court, a revised and improved policy is necessary to not only appease both sides, but also to adequately work towards a more integrated New York City.

There is an obvious tension at play here, but also a convergence. While the arguments on both sides have merit, the City, these women, and many of their peers want to ensure the same thing to citizens of New York: choice. Low-income residents of color—encumbered by decades of government condoned discrimination, outright racism,

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<sup>12</sup> Rafael Cestero, *An Inclusionary Tool Created by Low-Income Communities for Low-Income Communities*, NYU FURMAN CTR. (Nov. 2015), [http://furmancenter.org/research/iri/essay/an-inclusionary-tool-created-by-low-income-commu](http://furmancenter.org/research/iri/essay/an-inclusionary-tool-created-by-low-income-communities-for-low-income-commu).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

and the lingering effects of such policies and practices—are entitled to a real choice about where to live. Concerns about displacement mirror concerns about being stuck in a disadvantaged neighborhood because they both strip NYC residents of their autonomy.

## II. THE POLICY, THE COMPLAINT & THE LAWSUIT

### A. *Outsider-Restriction Policy a.k.a. “Community Preference”*

In 1988, as Mayor Koch led the initiative to restore vacant buildings in various neighborhoods throughout New York, the City introduced the community preference policy.<sup>16</sup> Under this plan, the City provided a 30% preference to residents of a community district where new affordable housing developments were built.<sup>17</sup> As it stands today, however, the community preference policy requires that 50% of affordable housing units be set aside in the housing lottery for residents of the local community districts.<sup>18</sup>

As rents rose and it became increasingly difficult to afford to live in certain neighborhoods, this policy allowed the City to protect historical enclaves such as Chinatown and Harlem.<sup>19</sup> Both Mayors Michael Bloomberg and Rudolph Giuliani continued to enforce this policy, and it remains viable under Mayor Bill de Blasio today.<sup>20</sup> According to the Plaintiffs, the City has rejected proposals to eliminate this policy since at least 2005.<sup>21</sup> Although Mayor de Blasio chooses not to comment on the lawsuit, he stands by the policy as “very fair.”<sup>22</sup>

Our current policy is leading to a huge amount of new

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<sup>16</sup> Compl., *supra* note 1, ¶ 81; Laura Kusisto, *City Housing Rules Examined*, WALL STREET J. (Feb. 19, 2015), <http://www.wsj.com/articles/hud-reviews-new-york-city-affordable-housing-policy-1424399380>; *see also* Emily Nonko, *Redlining: How One Racist, Depression Era Policy Still Shapes New York Real Estate*, BRICK UNDERGROUND (Nov. 5, 2015), [http://www.brickunderground.com/blog/2015/10/history\\_of\\_redlining](http://www.brickunderground.com/blog/2015/10/history_of_redlining) (discussing Mayor Koch’s plan to revitalize parts of the city that had been subject to abandonment, arson, and disinvestment over the previous two decades through an ambitious affordable housing initiative).

<sup>17</sup> Kusisto, *supra* note 16.

<sup>18</sup> *See* Compl., *supra* note 1.

<sup>19</sup> Kusisto, *supra* note 16.

<sup>20</sup> *Id.* Former housing commissioner, Jerilyn Perine, was quoted saying, “People in communities who take a stand to make it better, aren’t these the people who we want to have remain?” *Id.*

<sup>21</sup> Compl., *supra* note 1, ¶ 138.

<sup>22</sup> Mayor Bill de Blasio, Mayor of N.Y., Mayor de Blasio Announces a Record-Breaking 20,325 Affordable Apartments and Homes Financed in Last Fiscal Year, Enough for 50,000 New Yorkers (July 13, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/484-15/transcript-mayor-de-blasio-record-breaking-20-325-affordable-apartments-homes>.

affordable housing and preserved affordable housing. We believe this policy is going to increase the likelihood of a more integrated city. We believe it's fair, also, because it recognizes the opportunity for local residents to receive some of this affordable housing, but also maintains a share of the affordable housing for anyone in the city. So we think it's a very balanced plan that maximizes opportunity and will help us move forward on fair housing. So we stand by it.<sup>23</sup>

When asked about the challenges this policy may pose for integration, the Mayor did not answer the question and instead directed attention at the need to ensure access to affordable housing to people within their communities.<sup>24</sup>

Despite the Mayor's positive endorsement, there is no evidence that the City has ever evaluated whether this policy actually perpetuates residential segregation.<sup>25</sup> Without any form of monitoring or evaluation by the City, in 2002, the Bloomberg administration increased the preference percentage to 50%.<sup>26</sup> This policy has remained unchanged since 2002, and the Plaintiffs therefore take issue with the City's failure to determine the policy's effects on residential segregation.<sup>27</sup> Moreover, the City continues to operate this policy despite the fact that City staff have never received instructions on how this policy may affect integration, or how it relates to the goal of affirmatively furthering fair housing.<sup>28</sup>

Of the remaining 50% that is not "preferred" for local residents, the government also makes available an additional 12% to protect certain groups: 5% goes to applicants with mobility impairments, 5% to applicants who are municipal employees, and 2% for applicants with visual or auditory impairments.<sup>29</sup> Therefore, only 38% of affordable units are available without restriction to every applicant.<sup>30</sup> Additionally, the community preference policy does not require a resident of a district to have lived in that area for any specific amount of time.<sup>31</sup> Thus, a person who lives in a community district for one day has the

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Compl., *supra* note 1, ¶ 82.

<sup>26</sup> *Id.* ¶¶ 83–85; *see also* JULIE MENIN, CHAIRPERSON MANHATTAN COMMUNITY BOARD 1 AFFORDABLE HOUSING TASK FORCE JUNE 2011, AFFORDABLE HOUSING IN LOWER MANHATTAN 16 (2011), [http://www.nyc.gov/html/mancb1/downloads/pdf/About\\_District/AH\\_REPORT.pdf](http://www.nyc.gov/html/mancb1/downloads/pdf/About_District/AH_REPORT.pdf).

<sup>27</sup> Compl., *supra* note 1, ¶¶ 85–87.

<sup>28</sup> *Id.* ¶ 156.

<sup>29</sup> *Id.* ¶¶ 88–89; MENIN, *supra* note 26, at 16.

<sup>30</sup> *Id.*

<sup>31</sup> Compl., *supra* note 1, ¶¶ 92–95; MENIN, *supra* note 26, at 16.

same opportunity as a second-generation resident who has called that neighborhood home for his whole life and may have “persevered through years of unfavorable housing conditions.”<sup>32</sup>

Regardless of how the City resolves this lawsuit, one potentially valuable outcome is that it may actually pressure the City to evaluate this mechanism.

### B. *Complaint*

Ms. Winfield, an African-American resident of Manhattan, entered the lottery for affordable housing units in Manhattan Community Districts 5, 6, and 7.<sup>33</sup> Similarly, Ms. Stewart, an African-American resident of Brooklyn, entered the lottery for a place to live in Manhattan Community District 5.<sup>34</sup> Likewise, Ms. Noel, an African-American resident of Queens, entered the lottery to obtain a home in Manhattan Community Districts 6 and 7.<sup>35</sup> As affordable housing applicants, these numbers have significance to the three named Plaintiffs in the lawsuit. New York City is broken down into fifty-nine community districts.<sup>36</sup> The women requested to live in community districts that are disproportionately white and considered “neighborhoods of opportunity.”<sup>37</sup> The Plaintiffs’ complaint defines a “neighborhood of opportunity” as one with “high quality schools, health care access, and employment opportunities; well-maintained parks and other amenities; and relatively low crime rates.”<sup>38</sup> The City did not select any of these three women to be interviewed for units in these areas; however, all of them continue to be interested in and intend to continue to apply for affordable homes,<sup>39</sup> including those in “neighborhoods of opportunity.”<sup>40</sup>

On July 7, 2015, these women filed a complaint against the City of New York in the Southern District of New York<sup>41</sup> that alleged NYC’s community preference policy perpetuates residential segregation on the basis of race, ethnicity, and national origin.<sup>42</sup> More specifically, the Complaint alleged that “the City has given and continues to give

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<sup>32</sup> MENIN, *supra* note 26, at 16.

<sup>33</sup> Compl., *supra* note 1, ¶ 13.

<sup>34</sup> *Id.* ¶ 14.

<sup>35</sup> *Id.* ¶ 15.

<sup>36</sup> Compl., *supra* note 1, ¶ 47.

<sup>37</sup> *Id.* ¶ 100.

<sup>38</sup> *Id.* ¶ 7.

<sup>39</sup> *Id.* ¶¶ 13–15.

<sup>40</sup> *Id.* ¶ 7.

<sup>41</sup> This case is currently pending before Federal Judge Laura Taylor Swain.

<sup>42</sup> Compl., *supra* note 1, ¶ 1.

preference in [the] affordable housing lottery . . . based on residency.”<sup>43</sup> The Plaintiffs, with the help of the Anti-Discrimination Center (ADC), challenged the City’s “community preference” policy.<sup>44</sup> The result, Plaintiffs allege, is that this policy continues to entrench segregation whereby access to neighborhoods with low crime rates and high educational, health, and employment opportunities are “effectively prioritized for white residents who already live there and limited for African-American and Latino New Yorkers who do not.”<sup>45</sup> Effectively, African-Americans and Latinos who currently reside in particular neighborhoods in the City are further restricted from moving to wealthier, safer neighborhoods because they never had the chance to acquire residency in the first place. As a result, minorities continue to be systematically denied access to opportunities that remain commonly available in predominantly white neighborhoods.

### C. *Subsequent Filings & Arguments*

On October 2, 2015, the City moved to dismiss the lawsuit, asserting the Plaintiffs’ lack of standing to sue in federal court.<sup>46</sup> The court’s determination of this issue is crucial,<sup>47</sup> but if the court finds the Plaintiffs have standing,<sup>48</sup> then the court will assess the viability of

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<sup>43</sup> *Id.* ¶ 7.

<sup>44</sup> In their complaint, the Plaintiffs refer to this policy as the “outsider-restriction policy.” *Id.* For the purposes of this comment, I will refer primarily to it by the name the City has given the policy, “community preference.” The City calls this “community preference,” as it is aimed to allow people to remain in the community where they come from; the Plaintiffs call this “outsider-restriction policy,” as it keeps out people who hope to call a safer, more affluent neighborhood their home. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See Def. Br., *supra* note 11.

<sup>47</sup> The Supreme Court in *Texas Department of Housing & Community Affairs* emphasized the importance of a ruling at the pleading stage. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2523 (2015). “A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.” *Id.* Although there has not yet been an opportunity for discovery, the facts alleged likely provide sufficient material to proceed.

<sup>48</sup> As a threshold matter, the City argues that the Court lacks subject matter jurisdiction because the Plaintiffs lack standing. See Def. Br., *supra* note 11. In its motion to dismiss, the City points to New York State Real Property Tax Law, Section 421-a, which functions similarly to the community preference policy but on a state level. See Def. Br., *supra* note 11, at 10. The City argues that the buildings the Plaintiffs applied to are governed by the State policy, not the City policy. *Id.*

The Plaintiffs assert that the City relied on its own policy, not the State policy because Section 421-a only applies if a federal law, like the FHA, does not preempt it. Plaintiff’s Memorandum of Law in Opposition of Motion to Dismiss at 10–16, *Winfield v. City of New York*, No. 1:15-cv-05236 (S.D.N.Y. July 7, 2015) [hereinafter Pl. Opp. Br.]. Because the FHA has advanced regulations to affirmatively further fair housing and

Plaintiffs' three legal theories: (1) disparate impact; (2) perpetuation of segregation; and (3) disparate treatment.

### 1. The Theory of Disparate Impact

The FHA forbids discrimination against "any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in a provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."<sup>49</sup> The Plaintiffs therefore assert that the outsider restriction policy caused Plaintiffs "to suffer a disparate impact based on race in the opportunity to compete for affordable housing opportunities."<sup>50</sup> In 2015, the Supreme Court affirmed the disparate impact standard.<sup>51</sup>

The Second Circuit maintains that to establish a prima facie case, plaintiff must show: (1) facially neutral practices and (2) a "significantly adverse or disproportionate impact" that has resulted from defendant's practices, but it does not require a showing of intent.<sup>52</sup>

In their complaint, Plaintiffs point to statistics to illustrate the extent of segregation in the City. The 2010 Census indicates that approximately 22.8% of the NYC population is African-American.<sup>53</sup> Seventeen community districts (there are fifty-nine total districts in Manhattan) have an African-American population over 50%, and six

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overcome patterns of segregation, Plaintiffs maintain that the State does not actually require this policy, which puts it back in the bounds of City authority. *See* Pl. Opp. Br. At 11.

Plaintiffs further emphasized the severity of their potential future injury if the community preference policy remains intact. *See* Pl. Opp. Br. At 11. "[A] person who is likely to suffer [a discriminatory] injury need not wait until the discriminatory effect has been felt before bringing a suit." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995). It was the "missed opportunity to compete for suburban housing on an equal footing with local residents," that constituted injury, not the failure to obtain actual housing assistance. Pl. Opp. Br. at 20. In this case, it was the missed opportunity to compete for housing in neighborhoods of opportunity that constitutes their injury, and this lost opportunity is easier to show. *Id.*

This is an important threshold issue, but in the event that the judge dismisses the motion at this stage, Plaintiffs have a few potential alternatives. Plaintiffs could re-file a complaint after December 21, 2015, when the state law is no longer in affect, or simply apply to a different housing development and bring the suit if and when they are rejected again.

<sup>49</sup> 42 U.S.C. § 3604(b) (2012).

<sup>50</sup> Compl., *supra* note 1, ¶ 184.

<sup>51</sup> *See generally Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2510; discussion *infra* Part IV.B.

<sup>52</sup> *Tsombanids v. West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003). *See also Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2513.

<sup>53</sup> Compl., *supra* note 1, ¶ 49.

have an African-American population greater than 65%.<sup>54</sup> To demonstrate the extent of residential segregation, Plaintiffs compare where 50% of the citywide population of major racial groups live.<sup>55</sup> For example, 50% of Caucasians live in less than one quarter of the City's community districts, whereas 50% of African-Americans live in only approximately 15% of the City's community districts.<sup>56</sup> The "center of gravity," where approximately 50% of the black population lives in New York City, only consists of nine of the fifty-nine districts.<sup>57</sup> The equivalent white "center of gravity" consists of thirteen districts.<sup>58</sup> Not one of the twenty-two "centers of gravity" community districts overlaps. Not a single district is a "center of gravity" district for both races.<sup>59</sup> The Plaintiffs further note that residential segregation exists not only among the general population of New York City, but also specifically among low income households that are eligible for affordable housing.<sup>60</sup> The Plaintiffs link this and other statistical data to the outsider restriction policy.<sup>61</sup> The Plaintiffs contend that because there are more affordable housing applicants residing outside local communities than inside, outsiders are less likely to be selected for an available affordable housing unit.<sup>62</sup> Plaintiffs maintain that, if the City abolished this community preference policy, applicants could compete for these units on equal terms, which would consequently reduce racial segregation in the City.<sup>63</sup>

In its motion to dismiss, the City argues that Plaintiffs failed to allege facts that constitute disparate impact, and that the statistical analysis they put forward does not demonstrate a causal link between the City's policy and racial segregation in New York City.<sup>64</sup> The City claims that Plaintiffs have only cited broad statistics about general segregation in New York City and therefore have failed to prove that the challenged policy actually causes segregation and other disparities.<sup>65</sup>

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<sup>54</sup> *Id.* ¶¶ 50–51.

<sup>55</sup> *Id.* ¶ 76.

<sup>56</sup> *Id.*

<sup>57</sup> *New York City Outsider-Restriction Policy Challenged*, ANTI-DISCRIMINATION CTR., <http://www.antibiaslaw.com/orp> (last visited Apr. 14, 2016).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Compl., *supra* note 1, ¶ 61.

<sup>61</sup> *Id.* ¶ 7.

<sup>62</sup> *Id.* ¶ 100.

<sup>63</sup> *Id.* ¶¶ 8–10.

<sup>64</sup> Def. Br., *supra* note 11, at 11.

<sup>65</sup> *Id.* at 11–15.

In response, Plaintiffs maintain that the facts alleged far exceed the low bar required at the pleading stage.<sup>66</sup> Relying on statistical data set forth in the brief, the Plaintiffs reiterate that it is “predictable that the ultimate racial composition of that housing will be less African-American than if the policy did not exist.”<sup>67</sup> They once again emphasize that the ultimate focus is not the bottom line result, but the impact on the practice itself, that African-Americans are at a disproportionate disadvantage to attain housing in neighborhoods of opportunity.<sup>68</sup> “[T]he outsider-restriction policy effectively caps African-American participation at more than 50 percent of what it would otherwise be and places a floor under white participation in these districts at 100 percent plus the extent of overrepresentation.”<sup>69</sup>

## 2. Theory of Perpetuation of Segregation

Under their second theory, Plaintiffs assert that the outsider restriction policy perpetuates residential segregation based on race in New York City in violation of N.Y.C. Admin. Code § 8-107(17).<sup>70</sup> To successfully plead this cause of action, the

mere existence of a statistical imbalance . . . is not alone sufficient to establish a prima facie case . . . unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant and there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.<sup>71</sup>

Moreover, the Second Circuit has recognized that the FHA prohibits “harm to the community generally by the perpetuation of segregation.”<sup>72</sup>

Plaintiffs allege that to truly see the effect of racial segregation, it requires examination on the community district level.<sup>73</sup> Although 22.8% of the City’s population is black, there are seventeen community districts where the black population is less than 5%.<sup>74</sup> Similar to the disparate impact claim, Plaintiffs argue that if the City eliminates the

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<sup>66</sup> Pl. Opp. Br., *supra* note 48, at 23.

<sup>67</sup> *Id.* at 26.

<sup>68</sup> *Id.* at 27.

<sup>69</sup> *Id.* at 29.

<sup>70</sup> Compl., *supra* note 1, ¶ 186.

<sup>71</sup> N.Y.C. Admin. Code § 8-107(17)(b).

<sup>72</sup> *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988).

<sup>73</sup> Compl., *supra* note 1, ¶ 48.

<sup>74</sup> *Id.* ¶¶ 49–50.

outsider restriction policy, it would allow applicants to compete for affordable housing on equal terms regardless of their current address.<sup>75</sup> Plaintiffs assert that this would reduce racial segregation in the City. In contrast, the City once again asserts that Plaintiffs have not pled sufficient facts and the analysis is not robust enough.<sup>76</sup>

### 3. Theory of Disparate Treatment

Finally, Plaintiffs claim that the City's outsider restriction policy constitutes "intentional discrimination on the basis of race"<sup>77</sup> pursuant to 2 U.S.C. § 3604(a) and 42 U.S.C. § 3604(b). To establish a prima facie showing of such disparate treatment, the plaintiffs must show that "animus against the protected group was a significant factor" of the responsible decision-maker's installment of this policy.<sup>78</sup> The court will look to five factors to determine if intentional racial discrimination motivated the challenged policy: "(1) the discriminatory impact of the governmental decision; (2) the decision's historical background; (3) the specific sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequences; and (5) departures from normal substantive criteria."<sup>79</sup> The Plaintiffs argue that the City's outsider restriction policy constitutes intentional discrimination because its decision to "establish, maintain, and expand the policy"<sup>80</sup> was made with knowledge of a history of discrimination and segregation, which evidences rejection of more pro-integrative alternatives, and is thus "reflective of the City's consciousness of what policies it thought that particular racial and ethnic groups 'wanted.'"<sup>81</sup> The City contends that Plaintiffs have not alleged that the City intentionally treated Plaintiffs differently based on race, and the fact they identify as African-Americans is not enough to connect data to these allegations.<sup>82</sup>

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<sup>75</sup> *Id.* ¶ 101.

<sup>76</sup> Def. Br., *supra* note 11, at 11.

<sup>77</sup> *Id.* ¶ 188.

<sup>78</sup> *Smith v. N.Y.C. Hous. Auth.*, 410 F. App'x 404, 406 (2d Cir. 2011).

<sup>79</sup> *Tsombanids v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003).

<sup>80</sup> Daniel Beebe, *New York City Defends its Community Preference Policy*, DORSEY & WHITNEY LLP (Oct. 27, 2015), <http://www.jdsupra.com/legalnews/new-york-city-defends-its-community-13412/>.

<sup>81</sup> Compl., *supra* note 1, ¶ 8.

<sup>82</sup> *See generally id.*

#### D. *Conclusions*

The City maintains that the Plaintiffs' statistical analysis is inadequate even under the Supreme Court's recent affirmation of the FHA.<sup>83</sup> This assertion provides insight into how New York City's law department interprets its obligations under the FHA, and also indicates what extent of statistical analysis is adequate—or inadequate.<sup>84</sup> Nevertheless, Plaintiffs do have sufficient evidence to survive at the pleading stage. These statistics present alarming examples of segregation in the City, and the Court need not look far to see the negative implications that are apparent in educational and workforce data. Even if the Court does not find that the community preference policy contributes to residential segregation, this challenge, especially in regard to the City's failure to review the policy, merits a response. City leaders ought to address the concerns of their residents, and therefore, even an unsuccessful suit can still have a positive impact on the New York City community.

### III. HISTORICAL BACKGROUND

Until the 1960s, federal, state, and local governments purposefully enacted and subsidized *de jure* housing segregation nationwide.<sup>85</sup> These policies required, actively promoted, and condoned racial discrimination in housing.<sup>86</sup> In particular, "redlining" caused patterns of segregation to develop in the City, and the harmful, unjust implications remain in effect today. Ironically, these very patterns have set the stage for gentrification, which only leads to displacement and further segregation.<sup>87</sup>

#### A. *Redlining*

One of the first programs to serve this interest was the Home Owner's Loan Corporation (HOLC).<sup>88</sup> Passed in 1933, HOLC was the first government-sponsored program that introduced the use of the "long-term, self-amortizing mortgage with uniform payments" on a

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<sup>83</sup> Def. Br., *supra* note 11, at 11.

<sup>84</sup> Beebe, *supra* note 80.

<sup>85</sup> See generally DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) [hereinafter AMERICAN APARTHEID].

<sup>86</sup> *Id.*

<sup>87</sup> Emily Nonko, *Redlining: How One Racist, Depression-Era Policy Still Shapes New York Real Estate*, BRICK UNDERGROUND: THE INSIDER'S GUIDE TO NYC REAL ESTATE (Nov. 5, 2015), [http://www.brickunderground.com/blog/2015/10/history\\_of\\_redlining](http://www.brickunderground.com/blog/2015/10/history_of_redlining).

<sup>88</sup> AMERICAN APARTHEID, *supra* note 85, at 51.

mass scale.<sup>89</sup> American citizens were eager to seek assistance, and about 40% of all qualified mortgage properties took advantage of the program, supplying over three billion dollars from 1933 to 1935.<sup>90</sup>

In 1935, the Federal Home Loan Bank Board asked HOLC to create “Residential Security Maps” in 239 cities, including New York.<sup>91</sup> HOLC developed the rating system to evaluate “risks” of lending in a given neighborhood and determine eligibility for home loans and mortgage guarantees.<sup>92</sup> It established four categories, ranging from A, the safest for investments, to D, the riskiest.<sup>93</sup> The highest-rated areas were marked in green and consisted of those areas with new, well-planned buildings and homogeneous populations.<sup>94</sup>

These rankings considered the age and condition of the buildings in a neighborhood, but the most important factor “was the level of racial, ethnic, and economic homogeneity,” and whether a neighborhood consisted of a “lower grade population.”<sup>95</sup> In effect, a neighborhood was considered high risk merely if black and Latino people resided there.<sup>96</sup>

“Desirable” neighborhoods were predominantly inhabited by white professionals and remained in demand in good and bad times.<sup>97</sup> Throughout the five boroughs of the City, green neighborhoods were rare, but some examples include: Brooklyn Heights, Inwood, Riverdale, the Upper East Side, and a few blocks of Forest Hills, Queens.<sup>98</sup> Second on the list, blue areas, were still considered “good,” but not nearly as desirable.<sup>99</sup> These included neighborhoods such as Bay Ridge or the Upper West Side.<sup>100</sup> Yellow areas were deemed essentially undesirable; these typically bordered red areas and were

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<sup>89</sup> *Id.*

<sup>90</sup> Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 620–21 (1999).

<sup>91</sup> Rachel D. Godsil, *Post-Zoning: Alternative Forms of Public Land Use Controls: The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 330 (2013).

<sup>92</sup> *Id.*

<sup>93</sup> AMERICAN APARTHEID, *supra* note 85, at 51; Godsil, *supra* note 91, at 330.

<sup>94</sup> AMERICAN APARTHEID, *supra* note 85, at 51; Godsil, *supra* note 91, at 330.

<sup>95</sup> Godsil, *supra* note 91, at 330–31 (citing THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 44 (1996)).

<sup>96</sup> *Id.* at 331.

<sup>97</sup> AMERICAN APARTHEID, *supra* note 85, at 51.

<sup>98</sup> Nonko, *supra* note 87.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

and in transition or declining.<sup>101</sup> The final category was outlined in red; this is where the majority of African-Americans and other minorities lived and—as a result of this policy—had little mobility to leave. Huge areas of New York were redlined: much of North Brooklyn, Cobble Hill, Gowanus, Sunset Park, Dumbo, Fort Green, Bedford Stuyvesant, East New York, Coney Island, parts of Chinatown and the Lower East Side, Chelsea, much of the far east side up to 96<sup>th</sup> Street, Harlem, south and central Bronx, Astoria, Queens, Corona, Jamaica, and the area surrounding JFK International Airport.<sup>102</sup>

Residents of neighborhoods burdened with a C or D ranking could not obtain loans to purchase or improve their homes because the Federal Housing Administration would not insure their mortgages.<sup>103</sup> Likewise, banks and other lenders were advised not to make real estate investments in redlined areas, and therefore developers were unable to find funding to build in these areas.<sup>104</sup> HOLC systematically undervalued old, African-American and racially mixed neighborhoods.<sup>105</sup>

With so few areas marked green in New York City, much of the white population was encouraged to move into the suburbs. These areas were considered safer for home investment and were attached to buyer friendly terms such as smaller down payments and 30-year payment plans.<sup>106</sup> African-Americans, on the other hand, were unable to obtain mortgages to buy homes in their NYC neighborhoods.<sup>107</sup> Consequently, New York City property owners in redlined areas were often unable to invest in “their properties and [the] neighborhoods fell into decline.”<sup>108</sup>

These policies were not income-based.<sup>109</sup> African-Americans and Latinos who could afford to buy homes and receive financing were denied mortgages in a way that similarly situated, middle-income whites were not.<sup>110</sup> Today, many of these redlined neighborhoods remain some of the most dangerous and high poverty areas in the city.<sup>111</sup> The irony, of course, is that these are also some of the

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Godsil, *supra* note 91, at 331.

<sup>104</sup> Godsil, *supra* note 91, at 331; Nonko, *supra* note 87.

<sup>105</sup> AMERICAN APARTHEID, *supra* note 85, at 51.

<sup>106</sup> Nonko, *supra* note 87.

<sup>107</sup> *Id.*; *see also* Godsil, *supra* note 91, at 331.

<sup>108</sup> Nonko, *supra* note 87; *see also* Godsil, *supra* note 91, at 331.

<sup>109</sup> Godsil, *supra* note 91, at 331.

<sup>110</sup> *Id.*

<sup>111</sup> Nonko, *supra* note 87.

neighborhoods most rapidly gentrifying and experiencing swells in rental rates.<sup>112</sup>

Today, racial segregation continues to distort normal market dynamics nationwide. Black families own fewer homes than any other racial group.<sup>113</sup> The homes black families do own generally have less market value.<sup>114</sup> The consequences of this impact future generations—fewer black families are able to transfer economic advantages to their children.<sup>115</sup> This effect does not stop at one person, family, generation or neighborhood. A huge swath of the population cannot achieve economic prosperity<sup>116</sup> and persistence of residential segregation deprives people of essential opportunities and services.<sup>117</sup> This problem is worsened by the fact that most residents cannot afford to move to improving or gentrifying neighborhoods with ease.<sup>118</sup>

The Court has consistently recognized the intrinsic value in self-worth in circumstances analogous to residential segregation.<sup>119</sup> These

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<sup>112</sup> *Id.*

<sup>113</sup> Press Release, U.S. Census Bureau News, Residential Vacancies and Homeownership in the Third Quarter 2014 at 9 (Oct. 28, 2014) (on file at U.S. Census Bureau).

<sup>114</sup> Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, in INSTITUTE ON ASSETS AND SOCIAL POLICY 3 (2013).

<sup>115</sup> See Brief for NAACP Legal Defense & Education Fund, Inc. as Amici Curiae Supporting, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13–1371), 2014 WL 7477679 at \*14 (citing PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 115 (2013)) [hereinafter Brief for NAACP]; see also THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 3–10 (Xavier de Souza Briggs, ed., 2005).

<sup>116</sup> Brief for NAACP, *supra* note 115, at \*14.

<sup>117</sup> The persistence of segregated neighborhoods has negative implications. School segregation is closely linked to housing segregation. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 n.24 (1979). The consequences of segregation have long-term and potentially devastating consequences on a child's ability to receive a quality education. See Richard Rothstein, *Segregated Housing, Segregated Schools*, EDUCATION WEEK (Mar. 26, 2014), [http://www.edweek.org/ew/articles/2014/03/26/26rothstein\\_ep.h33.html](http://www.edweek.org/ew/articles/2014/03/26/26rothstein_ep.h33.html); Brief for NAACP, *supra* note 115, at \*11. Moreover, adults are deprived of meaningful professional opportunities. See generally ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 3 (2010) (“Segregation . . . isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence.”). See also Brief for Respondents at 14, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13–1371), 2014 WL 7477679 at \*11.

<sup>118</sup> Brief for NAACP, *supra* note 115, at \*15–16. (citing Kyle Crowder et al., *Neighborhood Diversity, Metropolitan Constraints, and Household Migration*, 77 AM. SOC. REV. 3, 325–53 (2012)).

<sup>119</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (discussing the dignity of individuals and same-sex marriages); *Planned Parenthood v. Casey*, 505 U.S. 833,

principles apply with equal force here. “Segregated housing and lack of agency in housing decisions imposes a host of harmful conditions, connotations, and constraints that disrespect the inherent self-determination and dignity to which each individual is entitled.”<sup>120</sup>

#### IV. RELEVANT LEGAL BACKGROUND

##### A. *The Fair Housing Act*

On April 11, 1968, just one week after the assassination of Dr. Martin Luther King, Jr., President Lyndon B. Johnson signed the Fair Housing Act into law.<sup>121</sup> The context of its passage illustrates its dual purpose: the FHA was enacted both to forbid individual acts of private and public discrimination as well as to eradicate systematic segregation.<sup>122</sup> The FHA proclaimed the end of generations of legal discrimination in housing on the basis of race, religion, and national origin.<sup>123</sup> In addition, the FHA announced a positive obligation to “affirmatively” further fair housing.<sup>124</sup> Although the statute does not expressly refer to “integration,” the legislative history<sup>125</sup> and subsequent case law endorses that the intent and purpose of the FHA was residential integration.<sup>126</sup> This second goal, to mandate residential

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851 (1992) (analyzing the decisional autonomy and dignity in the course of “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (discussing the inherent dignity of people who have intellectual disabilities); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (discussing the dignity of intimate relationships).

<sup>120</sup> Brief for NAACP, *supra* note 115, at \*17.

<sup>121</sup> U.S. Dep’t of Hous. and Urban Dev., *History of Fair Housing*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/abouttheo/history](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/abouttheo/history) (last visited Feb. 28, 2017).

<sup>122</sup> See *King*, *supra* note 9, at 2184 (citing U.S. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 2 (1968)).

<sup>123</sup> Fair Housing Act, Title VIII of the Indian Civil Rights Act of 1968, 42 U.S.C. §§ 3601–19 (2006).

<sup>124</sup> 42 U.S.C. §§ 3608(d), (e) (5) (stating that the Secretary of Housing and Urban Development and all executive departments and agencies shall administer housing programs in a manner that “affirmatively” furthers fair housing).

<sup>125</sup> See 114 CONG. REC. 3421, 3422 (1968) (statement of Sen. Mondale); see also *id.* at 2278 (1968) (statement of Sen. Mondale) (criticizing “the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color”).

<sup>126</sup> *King*, *supra* note 9, at 2184 n.9 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (endorsing statement Sen. Mondale’s statement about legislative history); see also *Hills v. Gautreaux*, 425 U.S. 284, 299 (1976) (noting that the “wrong committed by HUD confined the respondents to segregated public housing”). Likewise, lower courts are in agreement. See, e.g., *Evans v. Lynn*, 537 F.2d 571, 576–77

integration, has been underdeveloped and underutilized.<sup>127</sup> Although the recent holding from *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* simply reaffirmed what lower courts had been applying for years, because it requires people to truly take race into account when constructing new units or enacting policies, it will hopefully encourage Americans to more vigorously enforce the FHA and fully realize its potential to integrate this nation.<sup>128</sup>

B. *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*

On June 25, 2015, the United States Supreme Court held that application of disparate impact is cognizable under the FHA.<sup>129</sup> “In contrast to a disparate-treatment case, where a ‘plaintiff must establish that the defendant had a discriminatory intent or motive,’ a plaintiff that brings a disparate-impact claim challenges practices that have a ‘disproportionately adverse effect on minorities’ and are otherwise unjustified by a legitimate rationale.”<sup>130</sup> This affirmation of the disparate impact analysis in the context of housing is relevant to how the Court will assess *Winfield*, and further, to what extent the FHA can be used in the future to affirmatively further fair housing and residential integration.

The Supreme Court heard this case just last year, but by this point, eleven of the twelve courts of appeals had decided on the issue and nine held that violations of the FHA may be established through a disparate impact standard of proof.<sup>131</sup> Moreover, the HUD regulation

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(2d Cir. 1975) (citing legislative history that endorses integration as a goal); *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation.”).

<sup>127</sup> See generally *King*, *supra* note 9, at 2182 (arguing that to reinvigorate the Act’s positive purpose, the United States must expand the “federal rule to define meaningfully this obligation through concrete, quantitative benchmarks”).

<sup>128</sup> Ariane de Vogue, *Court Upholds Key Tool to Combat Housing Discrimination*, CNN (June 25, 2015, 5:29 PM) <http://www.cnn.com/2015/06/23/politics/fair-housing-act-texas-supreme-court/> (“Attorney General Loretta Lynch said the Justice Department will make use of this ruling in the future . . . ‘to vigorously enforce the Fair Housing Act with every tool at its disposal.’”).

<sup>129</sup> *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty Project, Inc.*, 135 S. Ct. 2507, 2510 (2015).

<sup>130</sup> *Id.* at 2513 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). Although the Supreme Court has held that disparate impact is not cognizable under the 14th Amendment of the Constitution, certain federal laws have disparate impact provisions. See *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>131</sup> Joe Rich & Thomas Silverstein, *Symposium: The case for disparate impact under the*

passed in 2013, which will be discussed in detail later in this section, also called for disparate impact analysis.<sup>132</sup> Although Justice Kennedy affirmed the trend set by lower courts, his opinion actually places some limitations on the use of disparate impact analysis in practice.

The underlying dispute concerned a decision about where the City of Dallas should construct low-income housing: the inner city or the surrounding suburbs.<sup>133</sup> The respondent, the Inclusive Communities Project, Inc. (ICP), a Texas-based non-profit corporation that helps low-income families obtain affordable housing, argued that the Petitioner, Texas Department of Housing & Community Affairs (the “Department”), which distributes the tax credits, allocated too many tax credits to developers who built in predominantly African-American inner-city areas, and too few tax credits to builders who developed in chiefly white suburban neighborhoods.<sup>134</sup> Therefore, ICP alleged that the Department’s policies maintained a continued pattern of segregated housing.<sup>135</sup> The District Court found the statistical evidence compelling enough to establish a prima facie showing of disparate impact<sup>136</sup> and held in favor of ICP.

The Supreme Court was specifically interested in the phrase “otherwise make unavailable.” Justice Anthony Kennedy, writing for the majority,<sup>137</sup> focused on the use of this phrase and noted that it “refers to the consequences of actions and not just to the mindset of

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*Fair Housing Act*, SCOTUSBLOG (Jan. 6, 2015, 11:30 AM), <http://www.scotusblog.com/2015/01/symposium-the-case-for-disparate-impact-under-the-fair-housing-act/>; see *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 935–36 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977); *Smith v. Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1559, n.20 (11th Cir. 1984).

<sup>132</sup> See *infra* Part IV.C.

<sup>133</sup> *Texas Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2513.

<sup>134</sup> *Id.* at 2510.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 2514 (finding that “from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas. . . . “92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents”).

<sup>137</sup> Justice Kennedy was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen Breyer. Justice Samuel Alito dissented, joined by Chief Justice Roberts and Justices Antonin Scalia and Clarence Thomas. Justice Thomas also separately dissented.

actors.”<sup>138</sup> The Court analogized this phrase to the use of “otherwise adversely affect” found in sections of Title VII and the Age Discrimination in Employment Act (ADEA).<sup>139</sup> The Court’s decisions in *Griggs v. Duke Power Company* and *Smith v. City of Jackson*, likewise considered such language as indicative of Congressional intent to proscribe action that has a disparate impact.<sup>140</sup> The use of “‘otherwise’ signals a shift in emphasis from an actor’s intent to the consequences of his actions. . . . [T]he operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment.”<sup>141</sup>

Although the majority’s opinion clearly affirmed the use of disparate impact analysis and looked like a “win” for many fair housing advocates, it also imposed significant limits and could act as a “stern warning” rather than a “ringing reaffirmation” in practice.<sup>142</sup> The Court announced that disparate-impact liability must be controlled in a number of ways.<sup>143</sup> For example, a disparate impact claim that relies merely on statistical disparity will fail if the plaintiff cannot show that

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<sup>138</sup> *Texas Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2547 (2015).

<sup>139</sup> *Id.* at 2510–11.

<sup>140</sup> *Id.* at 2516–17; *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>141</sup> *Id.* at 2511. Justice Kennedy further relied on the post-enactment history of the FHA. By this time, nine of the eleven courts of appeals that addressed this issue concluded that the FHA includes disparate impact claims. *Texas Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2519. Aware of this near “unanimous precedent,” Congress made a “considered judgment to retain the relevant statute” and therefore accepted and ratified the courts of appeals’ holdings. *Id.* Hence, if a word or phrase in a statute was given a uniform interpretation by inferior courts, the later version of that same act which retains the same wording presumptively carries forward that interpretation. *Id.* at 2520.

The Court found additional support for its conclusion in the 1988 FHA amendments. *Id.* These three amendments contain three exceptions to liability that assume courts must enforce disparate impact liability. These exceptions are in regard to appraisals, drug convictions, and occupancy restrictions. *Id.* Such exceptions would be “superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA.” *Id.*

Finally, the Court acknowledged the legislative intent of the FHA and recognized that disparate impact claims are consistent with the central purpose of the FHA. *Id.* Similar to Title VII and the ADEA, the FHA was enacted to end discriminatory practices. The Court noted that unlawful practices, such as zoning laws and other similar housing restrictions frequently “function to exclude minorities from certain neighborhoods without sufficient justification.” *Id.* at 2521–22. The Court reasoned that disparate impact liability might be exactly what is necessary to overcome the significant and disparaging discriminatory practices America currently faces.

<sup>142</sup> Garret Epps, *The US Supreme Court Barely Saves the Fair Housing Act*, THE ATLANTIC (June 25, 2015) <http://www.theatlantic.com/politics/archive/2015/06/the-supreme-court-barely-saves-the-fair-housing-act/396902/>.

<sup>143</sup> *Texas Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523.

defendant's policies caused that disparity.<sup>144</sup> This "robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact'" and therefore safeguards defendants who find themselves in an unfortunate setting.<sup>145</sup> It is not yet clear how lower courts will interpret this requirement, but it has the potential to restrict the disparate impact analysis.<sup>146</sup> The Court urged the use of these "adequate safeguards" to prevent governmental and private entities from using numerical quotas that could inevitably raise serious constitutional questions.<sup>147</sup>

Disparate impact liability mandates that the government remove arbitrary and unnecessary hurdles, but it does not mandate that housing authorities actually affirmatively reorganize their policies. However, the FHA does require actors to take positive steps to further fair housing.<sup>148</sup> Justice Kennedy, conversely, focused his analysis on the developer's ability to avoid putting forward policies that have arbitrarily discriminatory effects.<sup>149</sup> In fact, the Court stated that housing authorities and private developers should even be afforded "leeway to explain the valid interest served by their policies."<sup>150</sup> The Court compares this to the "business necessity" standard under Title VII which allows for a workplace requirement that may cause a disparate impact so long as the requirement is a "reasonable measure[ment] of job performance."<sup>151</sup> Likewise, a housing authority may preserve a policy if it achieves a valid interest.<sup>152</sup> With the second mandate of the FHA in mind, it will be on the lower courts to diligently

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 2523 (quoting *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 653 (1989)).

<sup>146</sup> Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106 (2015), <http://columbialawreview.org/content/fair-housing-litigation-after-inclusive-communities-whats-new-and-whats-not/>.

<sup>147</sup> The state may not impose or pursue race or gender quotas. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson Co.* 488 U.S. 469 (1989); *Gutter v. Bollinger*, 539 U.S. 306, 338 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). In the private sector, if an employer pursues a numerical quota based on race or gender, it is suspect under Title VII. *See United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616, 640–42 (1987). More recently, the Court held invalid under Title VII employer actions that could lead to a "de facto quota." *See Ricci v. DeStefano*, 557 U.S. 557 (2009).

<sup>148</sup> King, *supra* note 9, at 2185–86 (noting the procedural nature of current policies, and the need to shift to more substantive changes to enforce this mandate).

<sup>149</sup> *Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2522.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 2523 (quoting *Griggs*, 91 S. Ct. at 436).

<sup>152</sup> *Id.* at 2523.

enforce *Inclusive Communities* to satisfy the FHA objectives within the confines of *Inclusive Communities*.

The *Winfield* case is only at the pleading stage, and therefore it is impossible to know for certain whether it will survive the motion to dismiss. The *Inclusive Communities* Court, however, pointed to the importance of this stage of the proceedings.<sup>153</sup> The plausibility standard requires that the Court disregard all conclusory allegations, including legal allegations.<sup>154</sup> Therefore, the Court will have to look at the statistical facts and narratives Plaintiffs have advanced rather than their legal conclusions about disparate impact, which are not entitled to the presumption of truth. A plaintiff's case will fail unless he can allege facts at the pleading state or produce statistical evidence that demonstrates a causal connection, and such limitations, the Court reasoned, are necessary to defend against abusive claims.<sup>155</sup> "If the specter of disparate-impact litigation" triggers private developers to halt renovation and construction of low-income housing units, the FHA will have "undermined its own purpose as well as the free-market system."<sup>156</sup>

Kennedy concluded "we must remain wary of policies that reduce homeowners to nothing more than their race."<sup>157</sup> The social, economic, and political inequalities that result from racial housing inequality suggest that a focus on race may be the only way to overcome such disparities. Such a conclusion, however, implies that any claim that falls outside of the "heartland," such as "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without sufficient justification"<sup>158</sup> would be without a strong claim. While these particular plaintiffs in *Inclusive Communities* have the facts to overcome Kennedy's statistical hurdle, the lower courts remain armed with tools sufficient to strike down novel applications of the new HUD regulations.<sup>159</sup>

The Court will likely find that there is sufficient statistical evidence

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<sup>153</sup> "A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." *Id.*

<sup>154</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>155</sup> *Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523. ("For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.")

<sup>156</sup> *Id.* at 2524.

<sup>157</sup> *Id.* at 2525.

<sup>158</sup> Epps, *supra* note 142.

<sup>159</sup> *Id.*

for a claim of disparate impact in *Winfield*. At the pleading stage, the standard does not require probability, but rather plausibility.<sup>160</sup> While a “robust” causal connection is required under *Inclusive Communities*, Plaintiffs have not asserted bare allegations. Plaintiffs’ statistics illustrate general patterns of racial imbalances in the City, but they also evidence patterns of segregation that align with, and may have been caused in part by, the community preference policy. There is a reduced probability that a low-income resident may obtain a unit in a preferred affordable housing district, and this provides a compelling nexus of fact. Plaintiffs may not address all evils of segregation, but they certainly address an obvious one. Even the barest factual assertion, that all people cannot access all of New York City’s neighborhoods, is troubling enough to permit this case to proceed for further discovery. Nevertheless, the Plaintiffs may need to present additional data that firmly asserts causation if they intend to show that this policy is a “politically convenient arrangement that ensures Black, White, and Latino neighborhoods will stay as segregated as they currently are”<sup>161</sup> and defeat Kennedy’s robust causality requirement and with it, the City.

### C. *New HUD Regulations*

On February 15, 2013, while the Department’s appeal was pending, the Secretary of HUD issued a “new” regulation entitled the “Implementation of the Fair Housing Act’s Discriminatory Effects Standard.”<sup>162</sup> This long-awaited ruling proclaimed a national standard and “formalize[d] the longstanding interpretation of the Fair Housing Act to include discriminatory effects liability and established[d] a uniform standard of liability for facially neutral practices that have a discriminatory effect.”<sup>163</sup> The legislative history of the FHA makes clear that residential integration and the advancement of equal housing opportunity are the Act’s main goals,<sup>164</sup> and therefore the Supreme Court followed accordingly and ruled in *Inclusive Communities* as it did. Although housing discrimination remains a visible problem in the United States, it now takes more subtle forms than it once did. If

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<sup>160</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>161</sup> Errol Louis, *Community Preferences Discriminate*, NYU FURMAN CTR. (Nov. 2015), <http://furmancenter.org/research/iri/essay/community-preferences-discriminate>.

<sup>162</sup> 78 Fed. Reg. 11,460 (Feb. 15, 2013).

<sup>163</sup> *Id.* at 11479.

<sup>164</sup> Senator Walter Mondale, the Act’s lead sponsor, explained at Senate debates that the “the broad purpose of the Act was to replace segregated neighborhoods with ‘truly integrated and balanced living patterns’ . . . and ‘undo the effects of these past discriminatory actions.’” *Id.* at 11467.

parties cannot point to a “smoking gun” example of NIMBYism, the disparate impact standard is an important tool that helps ensure that cities and towns across the United States integrate their residential communities.<sup>165</sup>

The HUD rule, in correlation with the Supreme Court’s holding, establishes a three-part burden shifting test to determine whether a practice with a discriminatory effect violates the FHA.<sup>166</sup> First, the plaintiff bears the burden of proving its prima facie case that a practice results in or may predictably result in, a discriminatory effect on the basis of a protected characteristic, such as race.<sup>167</sup> Second, if the plaintiff proves a prima facie case, the burden of proof shifts to the defendant to prove that this challenged practice is necessary to accomplish one or more legitimate, substantial, non-discriminatory interests.<sup>168</sup> Finally, if the defendant satisfies this burden, the plaintiff can still establish liability if he can prove that the legitimate, substantial, non-discriminatory practice could be accomplished by a practice that has a less discriminatory effect.<sup>169</sup>

*Inclusive Communities* was on appeal amidst HUD’s declaration. The case was not decided upon, nor does it directly address, the HUD rule.<sup>170</sup> Therefore, how the HUD rule is enacted will be shaped by the decisions of lower courts as they interpret the Supreme Court’s recent ruling. Taking into account the Court’s restrictions on the application of this theory, the enforceability of disparate impact liability as provided by the HUD rule may be in doubt.<sup>171</sup>

## V. LOOKING FORWARD

At any time in the coming months, the *Winfield* lawsuit could be settled, dismissed, or tried. How this case *should* be decided, however, presents a more interesting debate. The following section attempts to understand what the most practical and progressive course should be

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<sup>165</sup> Joseph D. Rich, *HUD’s New Discriminatory Effects Regulation: Adding Strength and Clarity to Efforts to End Residential Segregation*, LAW COMMITTEE FOR C.R. UNDER L. 6 (May 2013), <http://lawyerscommittee.org/wp-content/uploads/2015/08/HUDs-New-Discriminatory-Effects-Regulation.pdf>.

<sup>166</sup> 78 Fed. Reg. 11,460 (Feb. 15, 2013).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Kathleen A. Birrane, *Inclusive Communities: Supreme Court recognizes disparate-impact claims under FHA-implications for property insurers*, DLA PIPER (July 8, 2015), <https://www.dlapiper.com/en/northamerica/insights/publications/2015/07/inclusive-communities/>.

<sup>171</sup> *Id.*

for the community preference policy. At the heart of this matter are the initial and current justifications for the community preference policy. Therefore, by comparing similar cases in other jurisdictions, as well as the underlying issues facing New York City, this Comment will argue that the policy, though far from perfect, should be spared, but also substantially modified, if the City intends to retain it.

The three-part burden-shifting framework<sup>172</sup> the *Inclusive Communities* Court adopted from HUD creates a mechanism to remove “artificial, arbitrary, and unnecessary barriers” that “function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.”<sup>173</sup> With the adequate statistical analysis to illustrate that the community is less diverse than the surrounding area, it should be relatively easy for a plaintiff to show a disparate impact, and thus that a policy causes a greater harm to a protected class than to others. Massachusetts District Court Judge Gertner exposes the reason for this in her opinion in *Langlois v. Abington Housing Authority*, a case comparable in some ways to *Winfield*.<sup>174</sup> There is an “overarching intuitive principle here: where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants, the selection process that favors its residents cannot but work a disparate impact on minorities.”<sup>175</sup> Likewise, the *Winfield* Plaintiffs easily point to basic statistical data to confirm the disparate impact on minority residents. *Inclusive Communities* creates tension about how easy this truly is, but given the racial makeup of the

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<sup>172</sup> The burden shifting framework is as follows: 1) burden on plaintiff to make prima facie showing of disparate impact; 2) if satisfied, burden shifts to defendant to show “legally sufficient justification” (a) practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests; (b) interest could not be served by less discriminatory practice; (c) justification must be supported by evidence, not speculative.); 3) if satisfied, plaintiff has burden to show that interests could be served by a different practice with a less discriminatory effect. See *supra* Part IV.C; Harry J. Kelly & Michael W. Skojec, *Disparate Impact Developments After the Inclusive Communities Decision*, NAT’L AFFORDABLE HOUSING MGMT. ASS’N (2015), <http://www.nahma.org/wp-content/uploads/2014/04/Disparate-Impact-Presentation-NAHMA-Meeting-Oct-2015.pdf>.

<sup>173</sup> *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

<sup>174</sup> Although *Langlois* is a Massachusetts District Court opinion, the facts create an analogous setting. The plaintiffs, four racial minority, lower income women, challenged Section 8 rental assistance residency requirement on the grounds that it discriminated against minorities and did not “affirmatively further fair housing.” See *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002).

<sup>175</sup> Robert G. Schwemm, *The Community Preference Policy: An Unnecessary Barrier to Minorities’ Housing Rights*, NYU FURMAN CTR. (Nov. 2015), <http://furmancenter.org/research/iri/essay/the-community-preference-policy-an-unnecessary-barrier-to-minorities-housin> (quoting *Langlois*, 234 F. Supp. 2d at 62).

City's neighborhoods, the court will likely be able to focus instead on steps two and three.

Once Plaintiffs meet their burden, the City will then have to show a "legally sufficient justification" for the challenged policy; this justification cannot be speculative, but rather, it must be supported by evidence.<sup>176</sup> There are essentially two interrelated justifications at play: first, to protect local residents from being displaced by gentrification; and second, to maintain the "fabric" of the neighborhood and the stability that is associated with that.<sup>177</sup>

#### A. *Gentrification*

Gentrification and displacement are the "new frontier of racial exclusion," and continue to drive re-segregation.<sup>178</sup> The dislodgment of individuals and disruption of communities disconnects people from their families, support systems, workplaces, houses of worship, and other important features of a community.<sup>179</sup> Gentrification is not created by construction of affordable housing units, but instead by the flood of high-income individuals to a community. The influx of primarily white professionals does not automatically create integrated neighborhoods; rather, it simply replaces local residents and deprives long-time residents of the stake they have built in their community.<sup>180</sup> In that sense, the community preference policy does not touch on the true cause of gentrification.<sup>181</sup> Therefore, some scholars question whether the community preference has less of an effect on gentrification, and instead simply allows the City to maintain a "politically convenient status quo."<sup>182</sup>

The community preference policy was originally adopted in the

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<sup>176</sup> 24 C.F.R. § 100.500 (b) (ii) (2) (2017).

<sup>177</sup> See Schwemm, *supra* note 175.

<sup>178</sup> Sam Tepperman-Gelfant, *Local Preferences Requires Local Analysis*, NYU FURMAN CTR. (November 2015), <http://furmancenter.org/research/iri/essay/local-preferences-require-local-analysis>. There is research to confirm that as opportunities increase in urban neighborhoods, minority populations are essentially treated as refugees and are driven out to suburbs and exurbs with fewer opportunities. "For example, between 1990 and 2010, San Francisco and Oakland lost thirty-five percent of their African-American residents—84,000 people—while the overall population grew by nine percent; and in Silicon Valley, African-Americans declined by forty-six percent while the region grew by sixteen percent." Often times this data is marked by city-wide data. *Id.* For instance, between 2000 and 2013, the Mission District in San Francisco, lost twenty-seven percent of its Latino population even though the city's overall Latino population rose by thirteen percent. *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Louis, *supra* note 161.

<sup>182</sup> *Id.*

1980s—at a time when the City struggled to improve conditions and suffered from disinvestment—in response to the demands of local, low-income residents who sought to remain in their neighborhoods.<sup>183</sup> The City cited that its goal is to help particular areas retain their traditional cultural identities.<sup>184</sup> Therefore, it is troubling that the City appears to have cited a goal of its policy, but failed to proffer evidence that it is actively working to complete this objective. If the City cites that its goal is to keep residents in their original communities, that merely defines what a residency preference is rather than actually justifying or explaining why New York City needs this policy to achieve its goal. Judge Gertner questioned the rationale of residency preferences by stating, “if I accepted these as legitimate justifications, residency preferences in and of themselves would forever justify the disparate impacts that they cause.”<sup>185</sup>

Instead, the City must produce a record of local conditions to explain why this practice is necessary.<sup>186</sup> As the second step of the HUD regulation and *Inclusive Communities* requires, the City cannot assume or simply state this policy works, but must instead show that it does.<sup>187</sup> If the Plaintiffs truly can make out their prima facie case, they may be well-positioned to illuminate the flaws of this program. One critique of this policy is that the City has never reviewed it.<sup>188</sup> Therefore, if the City chose to review this policy, and corroborate it with statistical data about shifting populations and demographics of the city, perhaps it would be easy to prove that this policy has advanced and continues to realize its goal. Even if the City can show this, however, it will have to prove that there is not a less discriminatory means to achieve it. Although the *Langlois* opinion required an event that truly hit the community “hard,”<sup>189</sup> a strong case can be made that a simple showing of displacement and the ill-effects it has on a community and the autonomy of local residents may be sufficient.

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<sup>183</sup> See Cestero, *supra* note 12.

<sup>184</sup> Compl., *supra* note 1, ¶ 164.

<sup>185</sup> Schwemm, *supra* note 175 (quoting *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 70 (D. Mass. 2002)).

<sup>186</sup> See also *Langlois*, 234 F. Supp. 2d at 70.

<sup>187</sup> 78 Fed. Reg. 11,460 (Feb. 15, 2013).

<sup>188</sup> See generally Compl., *supra* note 1.

<sup>189</sup> See *Langlois*, 234 F. Supp. 2d at 70 n.41.

### B. *Stability of the Community*

The community preference policy has evolved such that it now also serves a goal closely related to curbing the ill effects of gentrification: maintaining stability in the community. “The community preference policy reflects a belief that redevelopment is not just about building affordable housing, but about building communities. To rebuild the fabric of a neighborhood, it is essential to start with the people who are there.”<sup>190</sup> Residents that remained in certain neighborhoods while their community suffered hardship, whether by choice or out of necessity, are entitled to enjoy and participate in the redevelopment of their home and communities. Although the City may have a legitimate interest in stability, does the City proffer enough evidence that their program does this?<sup>191</sup> All things considered, the fact that New York City has maintained this policy for twenty-five years, but failed to evaluate it and show evidence of progress, is especially disconcerting.<sup>192</sup>

Errol Louis raised another interesting point in this debate: do segregated “fabrics” truly have any right to be preserved “whole cloth,” or is there an affirmative obligation on the City to ensure that this does not occur?<sup>193</sup> The FHA requires that no person be discriminated against in regard to housing, and even promotes an affirmative mandate to foster integration.<sup>194</sup> Therefore, any policy that works the same ill-effect on a macro level should be equally as suspect.

### C. *Less Discriminatory Alternatives*

Even if the practice is necessary to achieve the substantial, legitimate, and non-discriminatory objective of reduced gentrification and increased community stability, the City will also have to show that these interests could not be served by less discriminatory practices.<sup>195</sup> The City has not evaluated this policy; notably, the last time it modified this practice, the purpose was to increase the percentage.<sup>196</sup> Although much of this discussion points to the need to eliminate this policy all together, this second step of the burden shifting analysis offers an

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<sup>190</sup> See Cestero, *supra* note 12.

<sup>191</sup> See Schwemm, *supra* note 175.

<sup>192</sup> *Id.*

<sup>193</sup> See Louis, *supra* note 161.

<sup>194</sup> 42 U.S.C. § 3608 (1978).

<sup>195</sup> 78 Fed. Reg. 11,460 (Feb. 15, 2013).

<sup>196</sup> Laura Kusisto, *City Housing Rules Examined*, WALL ST. J. (Feb. 19, 2015), <http://www.wsj.com/articles/hud-reviews-new-york-city-affordable-housing-policy-1424399380>.

opportunity to review possible alterations to the policy that may offer a favorable compromise to both parties. Ultimately, the City wants to figure out a way to balance a stable community without unduly restricting individual choice and mobility.

First, it would be wise of the City to narrow the reach of this policy. The City increased the percentage, and therefore a simple solution would be to reduce the percentage back to thirty percent or perhaps even lower.

Second, the City may choose to use this policy in certain neighborhoods, and not others.<sup>197</sup> The major concern here is that this policy keeps neighborhoods segregated. Therefore, minority citizens, who are perhaps least financially equipped to deal, are forced to carry the burden of this imperfection. The consequences of this often last for generations. If this policy was retained in rapidly gentrifying neighborhoods, it would slow displacement that is caused by gentrification, while simultaneously maintaining the integrity of the community. Moreover, if this policy is rescinded in primarily white neighborhoods, residents such as the Plaintiffs would be given a more equal opportunity to move into the neighborhoods of opportunity they expressed an interest in. Plaintiffs have alleged significant statistical data that evidences the policy is racially isolating. On the other hand, this policy helps to preserve communities by creating options for low-income residents to stay in their neighborhoods. The policy is not perfect, but it also serves an important purpose. The policy prevents displacement, but also contributes to harmful segregation. Therefore, a compromise between these objectives is most appealing. The court in *Langlois* looked favorably upon this “tempered approach [that] would still help support local residents in their efforts to maintain their residencies in the defendant communities, while at the same time keeping the strategy from running afoul of the fair housing requirement of no disparate impact.”<sup>198</sup>

Third, the City may narrow the policy by including a restriction based on length of residency in a community. Currently, a person who moves in and establishes residency one day before the lottery has the same chance as someone who has lived in a certain community for generations.<sup>199</sup> Because this policy is intended to protect established residents, such a change would reduce the overall contest for protected units, and likely allow the percentage to be reduced while

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<sup>197</sup> Schwemm, *supra* note 175.

<sup>198</sup> See *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 70 (D. Mass. 2002); Schwemm, *supra* note 175.

<sup>199</sup> Compl., *supra* note 1, ¶ 92.

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maintaining the desired outcome.

Fourth, the people given priority can and should be changed depending on the true needs of the community. For example, local low-income workers, rather than only residents, may be given preference.<sup>200</sup> In addition, where displacement has occurred, former residents may be given preference along with current residents.<sup>201</sup> This would once again call on the City to evaluate its policy, but this sort of project would be well worth its cost.

If the City meets its burden and shows that less discriminatory alternatives will not achieve its goal, the burden would shift back to the Plaintiffs to show that their interests could be served by a different practice with a less discriminatory effect. Any of these suggestions discussed could be further modified to strike a favorable compromise.

To narrow the policy is one approach; however, that is not enough to solve all the problems the City faces. The City will have to implement and improve other policies. The community preference policy can only succeed, even if transformed, if used in conjunction with supplemental policies to encourage safe and secure neighborhoods of opportunity for low-income citizens. For example, cities also should re-evaluate policies, including “rent control and just cause eviction, minimum wages and middle-wage job creation, training and career pathways for people with barriers to employment, local business preservation, restrictions on conversion of apartments into condominiums or hotels, community-directed infrastructure investments, and affordable housing production strategies, to name a few.”<sup>202</sup>

If the court does find a disparate impact violation, the remedy must “concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies,” *or better yet, alternatives.*<sup>203</sup>

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<sup>200</sup> See Tepperman-Gelfant, *supra* note 178.

<sup>201</sup> *See id.*

<sup>202</sup> *Id.*

<sup>203</sup> Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2512 (2015).

## EPILOGUE

On October 24, 2016, The Honorable Laura Taylor Swain of the Southern District of New York responded to the defendant's motion. As predicted, the court denied the defendant's motion to dismiss the First Amended Complaint ("FAC"), and held that the Plaintiffs do not lack standing to challenge the City policy and have not failed to state a claim.<sup>204</sup>

## I. STANDING:

The court held that standing may be granted to anyone "who believes he 'will be injured by a discriminatory housing practice that is about to occur'" and therefore a "person who is likely to suffer such an injury need not wait until a discriminatory effect has been felt before bringing a suit."<sup>205</sup> A threatened injury is cognizable.<sup>206</sup> The City did not even dispute that the "missed opportunity to compete for [] housing on an equal footing with the local residents" could constitute a cognizable injury for the purposes of standing, but instead, contended that the City itself did not cause this injury to the Plaintiffs.<sup>207</sup>

The court cited to *Comer*, and noted that the Plaintiffs' injury relates to the denial of the "opportunity to compete on equal footing for fair housing in their desired neighborhoods, rather than from the failure to achieve a successful result in any particular lottery."<sup>208</sup> "The injury is not the failure to obtain housing assistance in the suburbs, but is the missed opportunity to compete for suburban housing on an equal footing with the residents."<sup>209</sup>

The court therefore held that Plaintiffs alleged sufficient facts to demonstrate that they "will be injured by a discriminatory house practice that is about to occur,"<sup>210</sup> and have standing to proceed with their challenge of this policy.<sup>211</sup>

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<sup>204</sup> *Winfield v. City of N.Y.*, No. 15CV5236-LTS-DCF, 2016 U.S. Dist. LEXIS 146919, at \*12 (S.D.N.Y. Oct. 24, 2016).

<sup>205</sup> *Id.* at \*8 (quoting *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995)).

<sup>206</sup> *See* 42 U.S.C. § 3602(i) (1998).

<sup>207</sup> *Winfield*, 2016 U.S. Dist. LEXIS 146919, at \*13–14 (citing *Comer v. Cisneros*, 37 F.3d 775, 794 (2d Cir. 1994)).

<sup>208</sup> *Id.* at \*15.

<sup>209</sup> *Comer*, 37 F.3d at 794.

<sup>210</sup> 42 U.S.C. § 3602(i) (1988).

<sup>211</sup> *Winfield*, 2016 U.S. Dist. LEXIS 146919, at \*16.

## II. FAILURE TO STATE A CLAIM:

Pursuant to F.R.C.P. 12(b)(6), the City also asserted that the FAC should be dismissed for failure to state a claim.<sup>212</sup> To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”<sup>213</sup>

A. *Disparate Impact*:

In 2015, the Supreme Court recognized that disparate impact claims are cognizable under the FHA.<sup>214</sup> “A prima facie case of disparate impact requires ‘(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant’s facially neutral acts or practices.’”<sup>215</sup> A party may prove a disparate impact claim by showing an adverse impact on a particular group or minority, or harm to the community generally by the perpetuation of segregation.<sup>216</sup>

The court noted that Plaintiffs have alleged that there is “significant racial segregation” within New York City at various income levels and throughout various community districts.<sup>217</sup> The court stated, “[t]here is an obvious causal link between a policy whose very purpose is to maintain the existing racial and ethnic makeup of local communities and the corresponding perpetuation of the racial and ethnic makeup of those communities.”<sup>218</sup> In addition, the Plaintiffs alleged that “neighborhoods of opportunity” (i.e., Manhattan Districts 5, 6, and 7) are disproportionately white.<sup>219</sup>

The court held that such factual allegations:

support plausibly the inference that the Community Preference Policy would operate to perpetuate residential segregation by, inter alia, giving a preference to local white applicants for housing in already disproportionately white community districts that have higher income levels and higher levels of services and benefits than community districts in which the existing residents are predominantly

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

<sup>214</sup> *Id.* at \*18 (citing *Texas Dep’t of Hous. and Comm. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2525 (2015)).

<sup>215</sup> *Id.* at \*18–19 (quoting *Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016)).

<sup>216</sup> *Id.* (citing *Catanzaro v. Weiden*, 188 F.3d 56, 65 (2d Cir. 1999)).

<sup>217</sup> *Winfield*, 2016 U.S. Dist. LEXIS 146919, at \*20–21.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at \*21.

minority group members.<sup>220</sup>

Although discovery may prove that eliminating this policy may have no impact on the racial composition of affordable housing applicants, the court held that Plaintiffs have plausibly plead disparate impact and that is all that is required at this stage.<sup>221</sup> “[T]hey are not required to prove causation or disparate impact through statistical evidence at the pleading stage.”<sup>222</sup>

The court held that the Plaintiffs met their burden of showing that it was plausible that the Community Preference policy perpetuates segregation.<sup>223</sup>

### B. *Disparate Treatment*

Discriminatory intent may be “inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”<sup>224</sup> Plaintiffs can demonstrate a prima facie case of disparate treatment “by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive.”<sup>225</sup>

The court held that, read in the light most favorable to the Plaintiffs, the FAC sufficiently pleads facts that permit an inference of discriminatory intent.<sup>226</sup> As the court found that Plaintiffs plausibly alleged disparate impact caused by the policy, this factor weighed in favor of also finding discriminatory intent.<sup>227</sup> The court noted the City’s historic discriminatory policies cited in the Complaint as well as more recent examples of unequal treatment of white and black neighborhoods.<sup>228</sup> Taken together, Plaintiffs’ allegations that this policy is racially motivated and that the City has withheld information to assess the policy, are sufficient for them to plead a plausible disparate treatment claim.<sup>229</sup>

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<sup>220</sup> *Id.* (citing Compl., *supra* note 1, ¶¶ 7, 117–18, 176–77).

<sup>221</sup> *Id.*

<sup>222</sup> *Winfield*, 2016 U.S. Dist. LEXIS 146919, at \*22.

<sup>223</sup> *Id.* at \*22.

<sup>224</sup> *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)) (“Because discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make a ‘sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’”).

<sup>225</sup> *Id.* at \*23 (quoting *Mhany*, 819 F.3d at 606).

<sup>226</sup> *Id.* at \*24.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* (citing Compl., *supra* note 1, ¶¶ 3, 25–30; 143–44)

<sup>229</sup> *Id.* at \*25–26. The Court also held that the Plaintiffs sufficiently pleaded their

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NYCHRL claims.