USING DISPARATE-IMPACT THEORY UNDER THE FAIR HOUSING ACT TO ADDRESS AGGRESSIVE POLICING TACTICS IN NEW YORK CITY PUBLIC HOUSING COMMUNITIES

Madeline Brown*

ABSTRACT

This Note will suggest bringing a Fair Housing Act ("FHA") disparate-impact claim to combat aggressive policing practices in New York City Public Housing Authority ("NYCHA") communities. Part I will explore the relationship between policing and public housing communities in New York. It will examine how police officers use high-crime doctrine and trespass law to justify stops of residents and vertical sweeps of buildings. These practices lower community trust and perpetuate the public-housing-to-prison pipeline in New York City. Part II will describe how § 3604(b) of the FHA can be used as a tool to challenge the discriminatory impact of policing on Black and Latino residents in NYCHA communities. It will explore cases where disparate-impact claims addressing aggressive police behavior have been recognized as viable by the Southern District of New York. Part III will examine the requirements of making an FHA disparate-impact claim. This Note suggests that providing evidence to demonstrate statistical proof of disproportionate impact will be the largest challenge for NYCHA plaintiffs in a disparate-impact claim. Although tailored to New York, the recommendations of this Note are relevant to FHA Plaintiffs throughout the country.

* J.D. from Georgetown University Law Center (2025); B.A. from Vanderbilt University (2019). I would like to thank Professor Nicole Summers for her thoughtful feedback and suggestions to this Note, and Professor Jonah Perlin for teaching me the art of legal writing. I would also like to thank the staff and editors of the American Criminal Law Review, especially Therese Goding, for providing invaluable technical and substantive edits.

INTRODUCTION

Imagine that every time you leave the house to grab a gallon of milk or pick your kids up from school, you have to walk by one, two, or even three police officers, scanning you up and down. Imagine that, upon your return, an officer asks why you are in the building, despite them having witnessed you leave some thirty minutes prior. This officer may demand identification or conduct a search for weapons. From there, you could be arrested for any number of reasons: if you cannot provide a name and apartment number for yourself, if you provide outdated identification, or if you are at a public housing building that you no longer reside in. Once arrested, it is easier for you to plead guilty to a violation than to fight the charge. Bringing a case to court would require you to miss days of work, and you cannot lose your job. Moreover, fighting a case risks a permanent misdemeanor conviction that may exclude you from the very public housing community you reside in.[1]

This is the reality of over a quarter-million people living in New York City Public Housing ("NYCHA") communities.[2] Less than 4% of NYCHA residents are white, while 43% are Black, and 46% are Latino.[3] Despite efforts to reform public housing policing—including settlement agreements, court-appointed monitors, and reformed patrol guides—aggressive policing tactics continue to be deployed throughout NYCHA communities.[4]

---

1. Such is the reported experience of residents living in New York City Housing Authority communities. *See To Protect and Serve? The Uneasy Relationship Between Police and Public Housing Residents*, CENTER FOR NEW YORK CITY AFFAIRS (Dec. 10, 2012), https://www.centernyc.org/child-welfare-nyc/2012/12/to-protect-and-serve-the-uneasy-relationship-between-police-and-public-housing-residents [https://perma.cc/US4X-TCHY].

2. *See* N.Y.C. Hous. Auth., *Resident Data Book Summary*, NYC.GOV (Feb. 1, 2023), www.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Book-Summary-2023.pdf [https://perma.cc/BZU9-27QD]. Of the remaining 7%, 6% are Asian and 1% do not fit into the aforementioned categories. *Id.*

3. *See id.*

4. Press Release, The Legal Aid Soc'y, Legal Aid, *Legal Defense Fund Condemn NYPD for Chronic Underreporting of Civilian Police Stops* (Oct. 7, 2024) ("The NYPD's chronic underreporting of their encounters with civilians—which has only worsened since 2022—shows a startling lack of interest in complying with court orders intended to keep New Yorkers safe and informed."); *BDS Testimony Before the New York City Council*

This Note will argue that Black and Latino NYCHA residents are frivolously arrested or harmed by stop-and-frisks and vertical patrols, and they should challenge the discriminatory effects of these policies through the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(b).[5] Part I describes the history and current state of policing in NYCHA—including the use of high-crime jurisprudence and trespass law to justify stop-and-frisk and vertical patrol policies. Part I also examines the negative impacts these tactics have on NYCHA residents and the broader community. Part II presents a brief history of the FHA and examines the extent to which courts have recognized § 3604(b) as a viable means of challenging insufficient police response—in the case of *Committee Concerning Community Improvement v. City of Modesto*[6]—and aggressive police behavior—in the cases of *Davis v. City of New York*[7] and *Ligon v. City of New York*[8]. Part II concludes with the advantages of proceeding under the FHA as opposed to the legal solution most frequently deployed against police today: 42 U.S.C. § 1983.[9] Part III describes the current law governing FHA disparate-impact claims and proposes a three-part framework on how to use the FHA to challenge aggressive police behavior in NYCHA communities. Additionally, Part III provides insight into the challenges advocates should prepare for when making an FHA disparate-impact claim.

I. POLICING IN NEW YORK CITY PUBLIC HOUSING

Public housing and crime have been closely linked in popular discourse for decades,[10] largely due to the arsenal of legal and tactical tools available for police to deploy in public housing communities.[11] This Part examines the development of policing in NYCHA communities and describes the courts' deferential stance toward police officers' subjective judgments when labeling an area as "high-crime."[12] This Part explains how New York's trespass law[13] is used to justify the deployment of stop-and-frisks and vertical patrols throughout NYCHA communities. This Part

---

Committee on Public Housing on Safety and Security in NYCHA, BROOKLYN DEFENDERS (Feb. 24, 2021), https://bds.org/latest/bds-testimony-before-the-new-york-city-council-committee-on-public-housing-on-safety-and-security-in-nycha [https://perma.cc/2QSS-QBLF] ("The NYCHA residents we serve report repeated harassment by the police for minor issues or for no reason at all.").

5. 42 U.S.C. § 3604(b).

6. 583 F.3d 690, 711–15 (9th Cir. 2009).

7. 902 F. Supp. 2d 405 (S.D.N.Y. 2012).

8. 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

9. 42 U.S.C. § 1983.

10. Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697, 699 (2012).

11. *See infra* Parts I.B–I.C (describing high-crime area jurisprudence, surveillance tactics, stop-and-frisks, and vertical patrols). For information on the "hypersurveillance" of public housing developments see Lisa Lucille Owens, *Concentrated Surveillance Without Constitutional Privacy: Law, Inequality, and Public Housing*, 34 STAN. L. & POL'Y REV. 131, 133 (2023) (describing the "omnipresent cameras located in the myriad communal spaces in [NYCHA] buildings—entrances, doorways, elevators, and playgrounds").

12. *See* Fagan et al., *supra* note 10, at 697.

13. N.Y. PENAL LAW § 140.10(e), (f) (McKinney 2025).

concludes by describing how these policing tactics harm and further marginalize Black and Latino residents in these communities.

A. The Development of Policing in Public Housing

Stereotypes about the dangers of public housing are perpetuated throughout the press, the world of academia, and police departments.[14] This hardened perception of public housing began in the 1960s when public housing was described as a "central location in the distribution of drugs," with "widely publicized episodes of youth violence" and high "rates of drug-related violence."[15] The U.S. Department of Housing and Urban Development ("HUD") first initiated efforts to address crime in public housing in 1978 by focusing on design and environmental issues, including "lack of surveillance and lack of door and window locks."[16] This approach, however, was ultimately deemed a failure, and in 1990 it was replaced by more aggressive strategies as part of the ongoing War on Drugs.[17] These aggressive tactics emphasized "occupying the community" through increased officer presence, mini police stations within complexes, and "'[r]ound-em up' tactics focused on public nuisances, and undercover buy-and-bust operations . . . ."[18] Public housing's association with danger and crime has led law enforcement to place residents and their guests under near-constant surveillance.[19] Despite investigations and lawsuits challenging such tactics throughout the country, these enforcement programs aimed towards public housing have persisted.[20]

B. High-Crime Area Jurisprudence

Public housing communities are commonly labelled as high-crime areas in case law, subjecting individuals within such communities to substantial surveillance.[21] There is no one definition of what constitutes a high-crime area; some courts define a high-crime area as one of "expected criminal activity," others as an area known for drug activities, and others as an area under surveillance.[22] According to the New York Police Department's ("NYPD") training program, a high-crime area could be a city building, city block, precinct, or entire county.[23] Due to the

14. *See* Fagan et al., *supra* note 10, at 699.

15. *Id.*

16. Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RSRV. L. REV. 669, 680–81 (2019).

17. *Id.* at 681.

18. *Id.*

19. *See* Fagan et al., *supra* note 10, at 697.

20. *See* Karteron, *supra* note 16, at 684–86 (describing a number of lawsuits brought against police departments by housing residents due to aggressive policing practices).

21. *Id.* at 680, 700–01.

22. *Id.* at 700 (quoting Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587 (2008)).

23. *See* Karteron, *supra* note 16, at 700.

ambiguous definition of a high-crime area, the majority of courts accept a police officer's subjective determination that an area is high-crime.[24]

New York City courts frequently find NYCHA communities to be high-crime areas.[25] Specific buildings have been designated "troublesome," so as to cast reasonable suspicion on anyone around or within those buildings.[26] While one's presence in a high-crime area is not alone sufficient to justify a stop,[27] the United States Supreme Court and Second Circuit have found that a "location's characteristics are relevant in determining" reasonable suspicion.[28] High-crime jurisprudence makes stopping guests and residents of NYCHA communities "astonishingly easy": suspicion of any act in or around an NYCHA residence, including a non-criminal infraction, may give rise to a police stop.[29]

C. Enforcing Trespass Law Through Stop-and-Frisk and Vertical Patrols

The "vast majority" of arrests in NYCHA communities are for trespass.[30] Under New York Penal Law section 140.10, a person is guilty of criminal trespass when they "knowingly enter[] or remain[] unlawfully in a building or upon real property . . . where the building is used as a public housing project . . . ."[31] This law, coupled with the presence of a "high-crime area," enables police to stop and detain people without needing to witness any drug or violent crime.[32] Police routinely detain individuals for trespass and subject them to stop-and-frisk detentions when these individuals have legitimate reasons for being in an NYCHA building.[33]

---

24. *See id.* (describing how the majority of jurisdictions rely on officer testimony to determine that an area is a high-crime location). In New York, the Southern District has relied on testimony from officers to designate an area high-crime based on the "rate of crime in the overall area compared to that in other areas of the city." La Plaza Def. League v. Kemp, 742 F. Supp. 792, 802 (S.D.N.Y. 1990).

25. *See, e.g.*, *In re* Emmanuel O., 821 N.Y.S.2d 255 (N.Y. App. Div. 2d Dept. 2006) (finding public housing development in Brooklyn to be a high-crime area); Davis v. City of New York, 902 F. Supp. 2d. 405, 429 (S.D.N.Y. 2012) (finding New York Police Department (NYPD) captain's citing of high crime rates in area sufficient to designate public housing building lobby as high-crime area); U.S. v. Mason, 550 F. Supp. 2d 309, 312 (E.D.N.Y. 2008) (finding NYPD officer's description of "a mass of shootings and robberies" in area sufficient to designate public housing development as high-crime area); Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 85 (2015) (stating that NYPD officers "routinely claim" high-crime areas as the stop rationale in public housing sites).

26. United States v. Pitre, No. 05 Cr. 0078, 2006 WL 1582086, at *1, *4 (S.D.N.Y. June 6, 2006) (finding reasonable suspicion where individual entered troublesome building without a key and gave a nervous response to officers as to whether he lived in the building); Tarhaqa Allen v. N.Y.C. Police Dept., No. 07 Civ. 8682, 2010 WL 1790429, at *8 (S.D.N.Y. May 5, 2010) (same).

27. *See* Brown v. Texas, 443 U.S. 47, 52 (1979).

28. Illinois v. Wardlow, 528 U.S. 119, 123 (2000); *see* United States v. Muhammad, 463 F.3d 115, 123 (2d Cir. 2006).

29. Karteron, *supra* note 16, at 702.

30. Fagan et al., *supra* note 10, at 722.

31. N.Y. PENAL LAW § 140.10(e), (f) (McKinney 2025).

32. *See* Fagan et al., *supra* note 10, at 701.

33. *See* Dorielle E. Obanor, Note, *Dismantling Discrimination in the Stairways and Halls of NYCHA Using Local, State, and National Civil Rights Statutes*, 6 COLUM. J. RACE & L. 169, 171 (2016); *infra* Part I.D.

Trespass law is frequently enforced through stop-and-frisk tactics. Police may stop a person to question their presence in an NYCHA building based on any "objective credible reason," such as remaining in a "lobby. . .or common area for an unreasonable period of time."[34] Police may commence these "initial encounter[s]" without reasonable suspicion.[35] Based on the residents' responses, police are empowered to take further action, such as requesting "a key to the building or apartment."[36] To detain or frisk someone, the police must have reasonable suspicion that the person has committed, is committing, or is about to commit a felony or a Penal Law misdemeanor.[37] While the NYPD's training materials state that mere presence in an NYCHA building is not sufficient to establish reasonable suspicion for a stop-and-frisk, it does not specify what more may be required, leaving such determination to the discretion of the officer.[38]

Trespass law is also enforced through the use of vertical patrols: the "tactically planned patrol of the interior hallways, stairwells, lobbies, basements, rooftops, and other common areas," where officers must remain "alert for persons who may be engaged in criminal activity, including potential trespassers."[39] The NYPD conducts more than 25,000 vertical patrols per month in NYCHA communities.[40]

D. The Impact of Police Trespass Policies on NYCHA Communities

The NYPD's NYCHA trespass policies prevent residents from using and enjoying their residences because they do not feel "free to come and go as they wish."[41] The presence of police in NYCHA is so ubiquitous that residents have described them as an occupying force.[42] Vertical patrols have led to the fatalities of residents and officers alike in NYCHA buildings.[43] In one Manhattan building, 24% of those surveyed reported being stopped more than twenty times per year.[44] In a different survey, one-third of NYCHA residents reported that they or a family member had

34. NYPD, POLICE SCIENCE: INTERIOR PATROL Chapter 39, at 5–6 (April 2017), https://a860-gpp.nyc.gov/concern/nyc_government_publications/jq085k85s?locale=en [https://perma.cc/3QKL-XRXU].

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 7–8.

39. *Id.* at 4–5; Fagan et al., *supra* note 10, at 702. Vertical patrols are increasingly described as "Interior Patrols" by the NYPD. *See* POLICE SCIENCE: INTERIOR PATROL, *supra* note 34, at 4–5.

40. Fagan et al., *supra* note 10, at 722; *see* Karteron, *supra* note 16, at 717 ("In NYCHA buildings alone, the NYPD conducts hundreds of thousands of vertical patrols each year.").

41. Davis v. City of New York, 902 F. Supp. 2d 405, 432 (S.D.N.Y. 2012).

42. *See* Davis v. City of New York, 959 F. Supp. 2d 324, 333–34 (S.D.N.Y. 2013).

43. *See* Obanor, *supra* note 33, at 170 (describing the shootings of Akai Gurley, Timothy Stansbury and thirteen-year-old Nicholas Heyward in NYCHA buildings during vertical patrols); Michael Schwirtz, *Public Housing Patrols Can Mean Safety or Danger*, N.Y. TIMES (Nov. 21, 2014), https://www.nytimes.com/2014/11/22/nyregion/housing-patrols-can-mean-safety-or-peril-to-residents.html [https://perma.cc/ZWG2-LTWQ] (describing "accidental" shooting of unarmed man in NYCHA building resulting during vertical patrol).

44. *See* Obanor, *supra* note 33, at 173. Sixteen percent report being stopped five to ten times per year and nineteen percent report being stopped ten to twenty times per year. *Id.*

been stopped by police in their own building.[45] Residents reported being stopped by the same officer on multiple occasions, even when the officer likely knew that the residents were not trespassing.[46]

Police concentration in public housing exacerbates the public-housing-to-prison pipeline in New York City.[47] Outside of incarceration, arrests can lead to job and home loss.[48] Jobs requiring licenses, like that of a security guard, may be automatically suspended upon arrest.[49] HUD requires public housing developments to evict entire households if one member engages in criminal activity, even if the tenant is unaware of the household member's criminal activity.[50]

On a broader scale, aggressive policing tactics lead to a decreased sense of trust in the government, reducing civil participation and voting turnout among historically marginalized groups.[51] White residents "escape the brunt of vertical patrol activity," as they tend to be older and clustered in more desirable buildings.[52] Communities subjected to the "brunt of programmatic stop-and-frisk" experience a reduction in "collective efficacy"—that is, a reduction in community trust and willingness to intervene, two social controls that help control crime rates.[53] Overall, these individual and community-wide harms resulting from aggressive law enforcement tactics in NYCHA communities further marginalize the very populations that these policies purport to protect.

II. THE FAIR HOUSING ACT AS A LEGAL TOOL

Section 3604(b) of the FHA can be used as a tool to challenge the discriminatory impact of policing on Black and Latino residents in NYCHA communities. Section 3604(b) makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[54] An FHA claim can be brought under the theory of disparate treatment liability—focused on an actor's discriminatory intent—or disparate-impact liability—focused on the consequences of an action.[55]

---

45. CAAAV: ORGANIZING ASIAN CMTYS, COMMUNITY VOICES HEARD, FAMILIES UNITED FOR RACIAL AND ECONOMIC EQUALITY, GOOD OLD LOWER EAST SIDE, MOTHERS ON THE MOVE, A REPORT CARD FOR THE NEW YORK CITY HOUSING AUTHORITY (NYCHA) 10 (2011).

46. *See* Obanor, *supra* note 33, at 174.

47. *See* Jay Holder, Ivan Calaff, Brett Maricque & Van C. Tran, *Concentrated Incarceration and the Public-Housing-to-Prison Pipeline in New York City Neighborhoods*, 119 PROCS. OF THE NAT'L ACAD. OF SCI. 1, 2–3 (2022).

48. *See* Karteron, *supra* note 16, at 721.

49. *See id*. at 721 n.266.

50. *See id*. at 721.

51. *See id*. at 722.

52. Fagan et al., *supra* note 10, at 702.

53. *See* Karteron, *supra* note 16, at 723.

54. 42 U.S.C. § 3604(b).

55. *See* Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545–46 (2015) (holding that disparate-impact claims are cognizable under the FHA). This Paper focuses exclusively on disparate-impact liability.

This Part examines how the legislative intent of the FHA—to address social concerns around the effects of segregated housing—supports the application of § 3604(b) beyond the provision of housing to the provision of municipal services, including policing. Although no FHA disparate-impact claim addressing police behavior has been fully litigated,[56] these claims have been recognized as viable by the Southern District of New York in *Davis v. City of New York*[57] and *Ligon v. City of New York*[58]. Moreover, in *Committee Concerning Community Improvement v. City of Modesto*,[59] a § 3604(b) claim challenging police behavior survived a motion for summary judgment. This Part concludes by highlighting the distinct advantages offered by the FHA in comparison to the more popular § 1983.

A. The History of the Fair Housing Act

The FHA was originally enacted as part of the Civil Rights Act of 1968.[60] On March 1, 1968, the Kerner Commission Report ("the Report") made its way to the Senate floor, stating that America is "moving toward two societies, one [B]lack, one white—separate and unequal."[61] The Report—focused on issues "of residential segregation and racial slum formation"—lends insight into the legislative intent of FHA because it, alongside the assassination of Martin Luther King Jr., prompted the Senate to pass the Fair Housing Bill into law.[62] Congress was concerned with the Report's findings that residential segregation was leading to social unrest.[63] The legislative intent of the FHA was not only to offer fair housing, but to combat the "effects that segregated housing patterns would have on other social issues."[64]

Emphasizing the FHA's role in moving towards a more integrated society, the Supreme Court formally recognized disparate-impact claims as part of housing discrimination law in the 2015 case *Texas Department of Housing & Community Affairs v. Inclusive Communities*.[65] The Court hoped to eliminate "artificial,

---

56. Once an FHA disparate-impact claim survives summary judgment, the parties often settle. *See infra* Part II.B; *see, e.g.*, Davis v. City of New York, 902 F. Supp. 2d 405 (S.D.N.Y. 2012); Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

57. 902 F. Supp. 2d at 445.

58. 925 F. Supp. 2d at 545.

59. 583 F.3d 690, 716 (9th Cir. 2009).

60. *On the 54th Anniversary of the Fair Housing Act, HUD Underscores its Commitment and Progress Toward Advancing Fairness and Equity in Housing*, U.S. DEP'T OF HOUS. & HUM. DEV., https://archives.hud.gov/news/2022/pr22-062.cfm [https://perma.cc/JZA4-GHD7] (Last visited Jan. 15, 2026).

61. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, Report of the National Advisory Commission on Civil Disorders 1 (1968); *see* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 5:2 (West 2024).

62. SCHWEMM, *supra* note 61, at § 5:2.

63. *See* Texas Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 529 (2015); NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 61, Ch. 6.

64. Benjamin A. Schepis, *Making the Fair Housing Act More Fair: Permitting Section 3604(B) to Provide Relief for Post Occupancy Discrimination in the Provision of Municipal Services—A Historical View*, 41 U. TOL. L. REV. 411, 423 (2010).

65. *See* 576 U.S. at 523, 545–46.

arbitrary, and unnecessary barriers" to a more integrated society, but warned against "abusive" FHA disparate-impact claims that would undermine valid government policies.[66] Under *Inclusive Communities*, FHA disparate-impact claims are now analyzed under a three-part burden-shifting framework.[67] This framework will be examined in detail in Part III.

B. Existing Case Law on Using the Fair Housing Act to Challenge Police Behavior

Although the FHA is typically associated with a property owner's refusal to sell or rent a dwelling, § 3604(b) applies more broadly to prohibit discrimination "in the provision of services . . . in connection therewith, because of race . . . ."[68] Many courts have recognized the viability of a § 3604(b) claim challenging the discriminatory impact of municipal services,[69] including policing services.[70] Plaintiffs brought § 3604(b) claims to challenge police services in *Davis*,[71] *Ligon*,[72] and *Modesto*[73]. These three cases demonstrate how plaintiffs have used the FHA to challenge police behavior.

In *Davis v. City of New York*, NYCHA residents filed a class action lawsuit against the City of New York and the NYCHA.[74] The resident-plaintiffs alleged that the city discriminated "on the bas[is] of race, ethnicity and/or national origin" in their provision of services in violation of § 3604(b) of the FHA.[75] The plaintiffs alleged a large disparity in how vertical patrols and trespass arrest policies affected Black people and Latinos compared to white people: stating that Black residents had a 25% higher chance of being arrested for trespass than white residents, and were stopped on suspicion of trespass two-and-a-half times more often than white residents.[76] The plaintiffs retained an expert, Dr. Jeffrey Fagan, who presented

66. *Id.* at 540, 544 (stating, for example, that the FHA would undermine its own purpose if FHA litigation prevented private developers from constructing housing for low-income individuals).

67. *See id.* at 527; Mhany Management, Inc. v. Cnty. of Nassau, 819 F.3d 581, 617 (2d Cir. 2016) ("The Second Circuit has outlined a burden-shifting test for a disparate impact claim.").

68. 42 U.S.C. § 3604(b).

69. *See, e.g.*, Ga. State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 634 (11th Cir. 2019) (finding that § 3604(b) covers municipality services because such services are "fundamental to the ability to inhabit a dwelling"); Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 711–15 (9th Cir. 2009) (holding § 3604(b) outlaws discriminatory municipal services to residents of minority neighborhoods).

70. *See* Davis v. City of New York, 959 F. Supp. 2d 324, 367–68 (S.D.N.Y. 2012) (upholding § 3604(b) claim alleging racial discrimination in city's provision of police services); Ligon v. City of New York, 925 F. Supp. 2d 478, 485–86 (S.D.N.Y. 2013) (upholding FHA disparate-impact claims for NYPD's discriminatory stop-and-frisk practices); Shaikh v. City of Chicago, 341 F.3d 627, 632 (7th Cir. 2003) (suggesting that municipal services like police protection are covered by § 3604(b)); Edwards v. Media Borough Council, 430 F. Supp. 2d 445, 453 (E.D. Pa. 2006) (same).

71. 959 F. Supp. 2d at 367–68.

72. 925 F. Supp. 2d at 485–86.

73. 583 F.3d at 711.

74. Complaint at 8, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) (No. 1:10-CV-00699).

75. *Id.* at 44.

76. *Id.* at 33.

evidence demonstrating that the NYPD's practice of stops and arrests in NYCHA communities "are more likely to affect Black [people] and [Latinos]."[77] The Southern District of New York recognized the viability of the plaintiffs' FHA disparate-impact claim and refused to adjudicate the defendant's summary judgment motion before examining the plaintiffs' evidence regarding the discriminatory provision of police services.[78] The disparate-impact claim was subsequently withdrawn before the court got the chance to examine it on the merits.[79]

In *Ligon v. City of New York*, a class of Black and Latino residents made a similar FHA disparate-impact claim, challenging the NYPD's stop-and-frisk practices in private apartment buildings enrolled in New York's Trespass Affidavit Program.[80] The plaintiffs alleged that the city deprived them of their FHA rights because of race and national origin.[81] This case settled before the court addressed the FHA claim on the merits.[82]

Though focused on inadequate—as opposed to aggressive—policing tactics,[83] a Ninth Circuit case demonstrates how a court examines the merits of a § 3604(b) claim challenging police services.[84] In *Committee Concerning Community Improvement v. City of Modesto*, the plaintiffs alleged that the time between a 911 call and the arrival of an officer on the scene was longer in majority-Latino neighborhoods compared to majority-white neighborhoods by almost one minute.[85] In making their prima facie case, plaintiff-residents presented data from the county's expert, using officer response time as the unit of measure and predominantly-white

77. Corrected Expert Report of Jeffrey Fagan, Ph.D. ("Fagan Report") at 1, *Davis*, 902 F. Supp. 2d 405 (July 18, 2012).

78. *See Davis*, 902 F. Supp. 2d. at 437 ("I cannot fully adjudicate defendants' summary judgment motion without examining the admissible evidence regarding the City's allegedly discriminatory provision of police services.").

79. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions for Partial Summary Judgment at 28 n.48, Davis v. City of New York, 959 F. Supp. 2d 324 (S.D.N.Y. 2013) (No. 1:10-CV-00699) (Pl. Opp. (01/07/13)); Davis v. City of New York, 959 F. Supp. 2d 324, 367 (S.D.N.Y. 2013). The plaintiffs did not provide the clear reasoning or strategy behind their choice to withdraw their disparate-impact claim. Pl. Opp. (01/07/13) at 28 n.48. The plaintiffs did, however, deny the City's argument that "FHA remedies only disparate impact discrimination" because such an argument had already been "rejected as a matter of law" in *Davis*. Pl. Opp. (01/07/13) at 28 (citing *Davis*, 902 F. Supp. 2d at 434).

80. *See* 925 F. Supp. 2d 478 (S.D.N.Y. 2013); Complaint at 21, Ligon v. City of New York, No. 12 CIV 2274 (S.D.N.Y. Mar. 28, 2012) ("The NYPD's stop, question, search, citation, and arrest practices . . . have a significant disparate impact on [B]lack [people] and Latinos in their enjoyment of housing and in their receipt of municipal services.").

81. *See* Complaint at 24, *Ligon*, No. 12 CIV 2274; *Ligon*, 925 F. Supp. 2d at 527.

82. *NYCLU Posts Notice of Ligon Settlement*, N.Y.C.L. UNION (Jun. 1, 2017), https://www.nyclu.org/court-cases/cleanhalls. The defendants from *Ligon* and *Davis* participated in a joint remedial process alongside the defendants from Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). *See Settlement Will End Unconstitutional NYPD Stops, Frisks and Arrests in Clean Halls Buildings*, N.Y.C.L. UNION (Feb. 2, 2017), https://www.nyclu.org/press-release/settlement-will-end-unconstitutional-nypd-stops-frisks-and-arrests-clean-halls [https://perma.cc/7WSL-9RE9].

83. A § 3604(b) disparate-impact claim challenging *aggressive* policing has not been examined on the merits and so cannot be used as an example here.

84. A Ninth Circuit case is used here because there is currently no opinion in the Second Circuit examining the merits of a § 3604(b) disparate-impact claim challenging police services.

85. *See* 583 F.3d 690, 699 (9th Cir. 2009).

neighborhoods as the comparator group.[86] The expert's findings demonstrated that the average response time in majority-Latino neighborhoods was 13.4 minutes, while the average response time in majority-white neighborhoods was 12.5 minutes.[87] The county defendant "offer[ed] no reason why dispatch times should be different between neighborhoods."[88] The Ninth Circuit found that one minute can be a meaningful difference and reinstated the plaintiffs' FHA claims regarding the timely provision of law enforcement services.[89] The parties subsequently settled the case.[90]

Notably, *Davis*, *Ligon*, and *Modesto* were all decided prior to the Supreme Court's decision in *Inclusive Communities*, where the Court endorsed and provided the current framework for FHA disparate-impact claims. Nonetheless, these three cases illustrate how plaintiffs have used § 3604(b) of the FHA to address police behavior.

C. The Unique Strengths of Fair Housing Act Claims

Police misconduct is frequently addressed through § 1983 claims where plaintiffs allege violations of their Fourth and Fourteenth Amendment constitutional rights against state or local officers and municipalities.[91] Although Congress has recognized the need to address and challenge police misconduct through measures like § 1983, this tool has fallen short of enacting real change within police departments.[92] Bringing a claim under the FHA has distinct advantages compared to bringing a § 1983 claim.

First, one cannot bring a § 1983 claim under the theory of disparate impact and instead must bring a § 1983 claim under the theory of discriminatory intent.[93] Proving conscious choice in discriminatory intent is extremely difficult for plaintiffs and leads to fewer victorious claims.[94] Under the FHA, however, one can bring a claim under the theory of disparate impact, the theory of discriminatory intent, or both.[95] Consequently, if there is an impact-only claim regarding municipal services, § 3604(b) provides an avenue for relief that § 1983 does not.[96]

Second, in order to render a local government liable under § 1983, plaintiffs must prove that actions pursuant to official policy caused the constitutional violation.[97] This standard requires proof of deliberate indifference on the part of high-level officials and

86. *See id.* at 708–09.

87. *See id.* at 708.

88. *Id.*

89. *See id.* at 708–09.

90. *See* Roberto Concepción, Jr., *The Untapped Potential of the Fair Housing Act in Addressing Aggressive Enforcement of "Walking While Black or Brown"*, 17 U. PA. J.L. & SOC. CHANGE 383, 397 (2014).

91. *See, e.g.*, Davis v. City of New York, 902 F. Supp. 2d 405 (S.D.N.Y. 2012); Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); Obanor, *supra* note 33, at 177.

92. *See* Concepción, *supra* note 90, at 391–392.

93. *See* Robert G. Schwemm, Cox, Halprin*, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 789 (2008).

94. *See* Obanor, *supra* note 33, at 178.

95. *See* Texas Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524, 527, 538 (2015); Obanor, *supra* note 33, at 185.

96. *See* Schwemm, *supra* note 93, at 790.

97. *See* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); Davis v. City of New York, 959 F. Supp. 2d 324, 338 (S.D.N.Y. 2013).

is extremely burdensome for plaintiffs.[98] Under the FHA, however, a municipality may be liable without a showing of governmental "policy or practice."[99]

Third, the FHA offers unique procedures and relief compared to § 1983. The standing to sue under the FHA is broader than under § 1983, as it extends beyond direct victims to all those injured by the challenged policy.[100] Additionally, FHA claims are subject to different statutes of limitations compared to § 1983 suits. While the statute of limitations for FHA claims is one year for administrative complaints and two years for private lawsuits, the time limit for § 1983 suits is governed by the local state's limitations period.[101] In some instances, this difference may mean that an FHA claim challenging government services is still viable while a § 1983 claim is time-barred.[102] An FHA claim may offer unique advantages compared to a § 1983 claim, and advocates should consider bringing an FHA claim alongside their § 1983 claim.

III. BRINGING A FAIR HOUSING ACT DISPARATE-IMPACT CLAIM TO CHALLENGE TRESPASS-ENFORCEMENT TACTICS

Inclusive Communities and HUD's regulations establish the three-part burden-shifting framework for making an FHA disparate-impact claim.[103] In Step One, the burden is on the plaintiff to make a prima facie case by (1) identifying a particular policy or practice of the defendant that is being challenged; (2) showing a sufficiently large disparity in how this policy affects a class of protected persons compared to others; and (3) proving that the disparity is caused by the challenged

98. *See* Obanor, *supra* note 33, at 177–178.

99. *See* Schwemm, *supra* note 93, at 789.

100. *See id.* at 790–91 (stating that standing under the FHA extends beyond local homeowners in a case to all injured by discrimination such as fair housing services).

101. *See id.* at 791.

102. *See id.*; *see, e.g.*, Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 187–88 (4th Cir. 1999); Edwards v. Media Borough Council, 430 F. Supp. 2d 445, 450–51 (E.D. Pa. 2006).

103. *See* Texas Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527 (2015); Mhany Management, Inc. v. Cnty. of Nassau, 819 F.3d 581, 617 (2d Cir. 2016). On April 23, 2025, President Donald Trump signed an executive order targeting disparate-impact liability. Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025). The Executive Order tells the Department of Justice, the secretary of HUD, and the heads of other agencies to stop pursuing disparate-impact claims. *See id.* As a result, HUD proposed eliminating the FHA's disparate-impact regulations. *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1475 (proposed Jan. 14, 2026). Should the proposed changes be implemented, federal courts may continue to recognize disparate-impact claims consistent with judicial precedent and the Fair Housing Act. *See id.* ("HUD's general statement of policy now is that this matter is best left to the courts. This document does not change any requirements or affect any rights or obligations."). Therefore, regardless of whether HUD implements the proposed changes, private plaintiffs should continue to bring disparate-impact claims because disparate-impact liability is embedded in the Fair Housing Act. *See Inclusive Cmtys*, 576 U.S. at 545–46. Moreover, under *Loper Bright*, federal courts may ignore HUD's decision to rescind its disparate-impact regulation. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024); Harry J. Kelly, *HUD Rescinds Disparate Impact Regulations*, NIXON PEABODY (Jan. 21, 2026), https://www.nixonpeabody.com/insights/alerts/2026/01/21/hud-rescinds-disparate-impact-regulations [https://perma.cc/KV5H-BLFC].

policy.[104] Once the plaintiff makes this prima facie case, the defendant must prove "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[105] If the defendant succeeds in Step Two, the burden shifts back to the plaintiff in Step Three to show that the "interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[106] This Part will describe the current standard for bringing an FHA disparate-impact claim, suggest how advocates addressing aggressive police behavior in NYCHA communities should plead their case, and examine the challenges that plaintiffs may face along the way.

A. The Prima Facie Case

To establish a prima facie case, the plaintiff must prove that (1) a challenged policy exists; (2) the policy disproportionately impacts a class of protected persons; and (3) the disparity is caused by the policy.[107] While the plaintiff will likely succeed in fulfilling elements one and three, the statistical proof required in the second element will be difficult to acquire given the lack of data available on the disparate impact of aggressive policing tactics within NYCHA communities. Because the second element will present the greatest challenge, it will be a large focus of this Section.

1. The Challenged Policy

The first step in making a prima facie case requires the plaintiff to identify the challenged policy used by the defendant.[108] Policies and practices commonly challenged in FHA disparate-impact claims include exclusionary zoning, residency preferences, screening devices, home-insurance standards, and occupancy restrictions.[109] When bringing an FHA claim to challenge the trespass-enforcement tactics discussed in Part I, the plaintiff should identify the challenged policies as vertical patrols and trespass investigations in NYCHA buildings. Fulfilling this first element should not be difficult for the plaintiff because the "Interior Patrol" and "Trespass Investigation" policies are both described at length in the NYPD's training materials.[110]

---

104. 24 C.F.R. § 100.500(c)(1) (2025); *Inclusive Cmtys.*, 576 U.S. at 527.

105. 24 C.F.R. § 100.500(c)(2) (2025); *Inclusive Cmtys.*, 576 U.S. at 527.

106. 24 C.F.R. § 100.500(c)(3) (2025); *Inclusive Cmtys.*, 576 U.S. at 527.

107. 24 C.F.R. § 100.500(c)(1) (2025); *Inclusive Cmtys.*, 576 U.S. at 527. An FHA plaintiff should also consider bringing an FHA intentional discrimination claim in the same case. Such a claim is dealt with according to its own analytical framework that is beyond the scope of this Paper.

108. 24 C.F.R. § 100.500(c)(1) (2025); *Inclusive Cmtys.*, 576 U.S. at 527.

109. *See* Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After* Inclusive Communities, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 694 (2016).

110. *See* POLICE SCIENCE: INTERIOR PATROL, *supra* note 34, at 4–7.

2. Disproportionate Impact

The second step in making a prima facie case requires the plaintiff to present evidence that the policy has a greater impact on a protected class than it does on others, typically through statistical proof.[111] Neither *Inclusive Communities* nor HUD's regulations interpreting the FHA provide specific guidelines for what the statistical evidence in disparate-impact housing cases should entail.[112] Instead, both sources state that the plaintiff's burden is comparable to that of an employee in a Title VII impact case, that is, the plaintiff must prove significant discriminatory effects.[113] The Second Circuit describes the standard for statistical evidence as requiring a showing of "significantly adverse or disproportionate impact."[114] Robert G. Schwemm, a law professor specializing in housing discrimination litigation, provides the following guidelines for proving disproportionate impact.[115]

First, the plaintiff's statistics should focus on a "subset of the population affected by the challenged policy."[116] The group may be small—for example, if the policy affects one building—or large—for example, if the policy affects "all persons who make up the potential market for" a proposed housing development.[117] In challenging the aggressive policing policies of the NYPD in NYCHA communities, the affected population should be NYCHA residents.

Second, the plaintiff should define two comparison groups within the affected population to demonstrate how the policy affects the protected class compared to similarly situated individuals outside of the protected class.[118] For example, in a case where multiple plaintiffs alleged that they received different amenities based on race, the adequate comparison groups would be (1) Black and Latino affordable housing tenants and (2) white affordable housing tenants.[119] In addressing aggressive policing tactics, the plaintiff should focus on Black and Latino residents of NYCHA as one group and white residents of NYCHA as the other group.

Third, the plaintiff must show that the defendant's policy has a greater impact on the protected class compared to the non-protected class.[120] "[T]he statistical comparison should generally show the relative percentages of protected versus non-protected class members affected by the policy, as opposed to the absolute numbers of the groups

111. *See* Schwemm & Bradford, *supra* note 109, at 697.

112. *See id.* at 689–90.

113. *See id.* at 699.

114. Khalil v. Farash Corp., 277 F. App'x 81, 84 (2d Cir. 2008); *see* Schwemm & Bradford, *supra* note 109, at 699.

115. *See* Schwemm & Bradford, *supra* note 109, at 697–98.

116. *Id.* at 698.

117. *Id.*

118. *See* Moody v. Related Companies, L.P., 620 F. Supp. 3d 51, 58 (S.D.N.Y. 2022) (stating that plaintiffs failed to allege a proper comparator group "which the Court can then rely on to assess the alleged disparate treatment"); Schwemm & Bradford, *supra* note 109, at 698.

119. *See Moody*, 620 F. Supp. 3d at 58.

120. *See* Schwemm & Bradford, *supra* note 109, at 698–99 ("The plaintiff must also show that others were less harmed by the policy.").

affected" because percentages more accurately depict disproportionate impact.[121] For example, a no-criminal-record policy in affordable housing may affect more white people than Black people, that is, 500 white people and 100 Black people. However, the same policy could affect a larger percentage of the Black population if there were 10,000 white people and 500 Black people in the population subset, in which case, 5% of white people would be affected compared to 20% of Black people. Comparing the percentages of each affected group reveals the disproportionate impact in a way that comparing raw numbers would not. In regard to aggressive policing, a statistical expert should examine the percentage of Black and Latino NYCHA residents affected by vertical patrols and trespass stops compared to the percentage of white NYCHA residents affected.

Fourth, the disparity in impact between the two groups must be significant.[122] One test courts use to measure statistical significance requires dividing the percentage of protected individuals affected by the percentage of non-protected individuals affected.[123] If the ratio is greater than 1.25, the plaintiff's burden of showing a significant disparity is satisfied.[124] While this ratio is a guiding principle used by some courts, it is by no means an established principle.[125]

To prove a disproportionate impact from vertical patrol and trespass investigation policies, the plaintiff should present evidence comparing the percentage of Black and Latino residents stopped or arrested for trespass to the percentage of white residents stopped or arrested for trespass. If 30% of Black and Latino individuals are affected and 20% of white individuals are affected, the ratio would be 1.5 (greater than 1.25), and the plaintiff would prove statistical significance in the disparate impact. If 30% of Black and Latino individuals are affected and 25% of white individuals are affected, the ratio would be 1.2 (less than 1.25); therefore, the plaintiff would be less likely to succeed with a disparate-impact claim.

Acquiring the data to prove this substantial disproportionate impact will be the largest challenge for the plaintiff in making their prima facie case. The plaintiff should enlist the assistance of an expert to develop the necessary statistical analysis demonstrating the disparity. In both *Davis* and *Ligon*, for example, the plaintiffs relied on Dr. Jeffrey Fagan's statistical analysis of police stop-and-frisk forms.[126] Dr. Fagan has conducted extensive research on police enforcement in NYCHA communities.[127]

---

121. *Id.* at 699.

122. *See id.* at 699–700, 706.

123. *See id.* at 706. This methodology comes from Title VII-impact cases. *See id.*

124. *See id.* at 707.

125. *See id.* ("While this methodology is sound, the judicial recognition of the 1.25 standard in FHA cases is limited and certainly does not have anywhere near the established pedigree that Title VII's 0.80 standard does for acceptance rates.").

126. *See* Davis v. City of New York, 959 F. Supp. 2d 324, 352–53 (S.D.N.Y. 2013) (describing a statistical analysis performed by Dr. Fagan on UF-250 forms, which officers are required to complete after each stop); Ligon v. City of New York, 925 F. Supp. 2d 478, 510 (S.D.N.Y. 2013) (same).

127. *See, e.g.*, Fagan et al., *supra* note 10; Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); Jeffrey Fagan, Garth Davies &

In *Davis*, Dr. Fagan concluded "based on statistical evidence—including multivariate regression models—that the New York City Police Department has engaged in an unconstitutional pattern of stops and arrests of NYCHA residents and visitors that are more likely to affect Black [people] and [Latinos]."[128] Fagan "found that race and ethnicity play a significant role in the rate of trespass stops and arrests in public housing, even after controlling for" crime conditions, patrol strength, and socioeconomic conditions.[129]

Dorielle E. Obanor has also considered how NYPD's policy is less likely to impact white residents in NYCHA communities.[130] Public housing residents over the age of sixty-two are generally not targeted during vertical patrols and are less likely to be in common areas, where stop-and-frisks frequently occur.[131] In NYCHA communities, 42% of white NYCHA residents are over the age of sixty-two, compared to 18% of Black residents and 24% of Latino residents.[132] These demographics indicate "that the NYPD's policy is less likely to impact [w]hite NYCHA residents."[133]

While evidence suggests that trespass enforcement disproportionately impacts Black and Latino residents within NYCHA communities, finding an expert to produce the necessary data is a large barrier to making this claim. "Few litigants have the resources to hire an expert to develop the kind of statistical analysis often important to establish a prima facie case of disparate impact."[134] Well-funded litigants like the Department of Justice or the American Civil Liberties Union are more likely to prevail at the second step of making a prima facie case than individual resident-plaintiffs.[135] A less burdensome way for the plaintiff to prove significance is to show that the proportion of the protected class adversely affected by the challenged policy is higher than their proportion in the overall population.[136] For example, in a local population where 10% of the residents are Black, a showing that 50% of those adversely affected are Black "measures how the defendant's policy contributes to an 'under-representation' of the protected class living in the area."[137] However, this method has not always been viewed favorably by courts because it does not address whether there is a "*disparate* impact vis-a-vis the non-protected class."[138] Proving a *disparity* would require showing that the proportion

---

Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. ON POVERTY L. & POL'Y 415 (2006).

128. Declaration of Jeffrey Fagan at 1, *Davis v. City of New York*, 10 Civ. 699 (S.D.N.Y. 2012).

129. *Id.* at 2.

130. *See* Obanor, *supra* note 33, at 186–87.

131. *See id.*

132. *See* N.Y.C. Hous. Auth., *Resident Data Book Summary*, NYC.GOV (Feb. 1, 2023), www.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Book-Summary-2023.pdf [https://perma.cc/3SAD-RTXJ].

133. Obanor, *supra* note 33, at 186.

134. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 392 (2013).

135. *See id.* at 392 n.217.

136. *See* Schwemm & Bradford, *supra* note 109, at 703–04.

137. *Id.*

138. *Id.*

of white residents adversely affected versus their proportion in the overall population is lower than that of Black residents.[139]

3. Proving the Disparity is Caused by Defendant's Challenged Policy

The third step in making a prima facie case is proving causality: showing that the challenged policy is causing the statistical discrepancy.[140] This requirement ensures that racial imbalance alone does not establish a case of disparate impact.[141] Proving causality "will be easy in many cases."[142] For example, causation is clear when a landlord denies a dwelling unit to a plaintiff based on the plaintiff's use of a government voucher.[143] However, if other factors may be causing the statistical discrepancy, it is more difficult to prove causation.[144] For example, the Second Circuit found that evidence of a shortage of handicapped-accessible housing in a town did not adequately show that the town's zoning ordinance was the cause.[145] In *Quad Enterprises*, a town ordinance prevented plaintiffs from building multifamily age-restricted developments, not from building handicapped-accessible units.[146] Without offering any evidence that handicapped seniors had a greater need for age-restricted units compared to non-handicapped seniors, plaintiffs failed to prove that the policy at issue caused a shortage in handicapped-accessible housing in the town.[147]

Regarding trespass-enforcement tactics, the plaintiff must show that the NYPD's trespass policies cause a discriminatory effect in trespass stops and arrests. Proving that the racial discrepancies are actually caused by trespass-enforcement policies should not be difficult because—just as a landlord directly denies units to individuals based on a government voucher policy—the police are directly stopping individuals based on their policies regarding vertical patrols or trespass investigations. The NYPD's UF-250 form, known as the "Stop, Question and Frisk Report Worksheet," contains fields where an officer must report the circumstances leading up to and justifying the stop, and the nature of the stop.[148] Information from this form can and has been used to prove causality.[149]

---

139. *See id.* at 704–05. The following is an example of such a disparity: in a case where 50% of Black potential renters and 50% of white potential renters are disqualified, such a disparity would exist if 10% of all potential renters were Black while 90% were white. *Id.* In such a case, the proportion of white potential renters adversely affected compared to the overall population would be 5/9, lower than the proportion of Black renters adversely affected, which would be 5/1.

140. Schwemm & Bradford, *supra* note 109, at 695; *see* Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015).

141. *See Inclusive Cmtys.*, 576 U.S. at 542.

142. Schwemm & Bradford, *supra* note 109, at 695.

143. *Id.*

144. *See Inclusive Cmtys.*, 576 U.S. at 543 (stating that if the plaintiff cannot show a causal connection between a department's policy and disparate impact because federal law substantially limits the department's discretion, the case should be dismissed).

145. Quad Enterprises Co. v. Town of Southold, 369 F. App'x 202, 206 (2d Cir. 2010).

146. *Id.*

147. *Id.*

148. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 572 (S.D.N.Y. 2013).

149. *See* Davis v. City of New York, 959 F. Supp. 2d 324, 352–53 (S.D.N.Y. 2013); Ligon v. City of New York, 925 F. Supp. 2d 478, 510 (S.D.N.Y. 2013).

Once the plaintiff shows the existence of a policy, a disproportionate impact, and causality, they have successfully made a prima facie case.

B. The Defendant's Burden

After the plaintiff makes a prima facie case, the defendant must prove that its challenged policy is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[150] A substantial interest is a "core interest of the organization that has a direct relationship to the function of that organization."[151] A legitimate interest is a justification that is genuine and not false.[152] A nondiscriminatory policy does not itself discriminate based on a protected characteristic.[153] Whether an asserted interest qualifies as substantial, legitimate, and nondiscriminatory is a determination to be made by the factfinder on a case-by-case basis.[154]

In instances of aggressive law enforcement tactics, the defendant's stated goals often include public safety.[155] While a court would likely consider public safety to be a substantial, legitimate, nondiscriminatory interest, relying on a public safety interest is not itself sufficient to satisfy the defendant's burden in the second step.[156] "Bald assertions based on generalizations or stereotypes do not constitute a valid defense."[157] Rather, the defendant must show that its policies are *necessary* to accomplish the public safety interest.[158] The defendant will have to demonstrate that the trespass-enforcement tactics in NYCHA communities can be explained by crime conditions or instances of trespass in those communities,[159] which may be difficult, given that available data on levels of trespass stops and arrests in NYCHA communities cannot be explained by crime alone.[160]

---

150. 24 C.F.R. § 100.500(c)(2) (2025); Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527 (2015); *see* Schwemm & Bradford, *supra* note 109, at 692.

151. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11470–71 (2013).

152. *See id.* at 11470.

153. *Id.*

154. *Id.* HUD does not provide specific examples of substantial, legitimate, nondiscriminatory interests. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470–71.

155. *See* Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 544 (2015) (describing compliance with health and safety goals as legitimate objectives); Doe *ex rel.* Saulsbury v. Cnty. of Kankakee, No. 03 C 8786, 2004 WL 1557970 (N.D. Ill. July 8, 2004) (stating police goal of combating illegal drug trade and other crimes); Schwirtz, *supra* note 43 (quoting the Police Commissioner praising vertical patrols for their ability to ensure safety of residents in NYCHA buildings); Ligon v. City of New York, 925 F. Supp. 2d 478, 542 (S.D.N.Y. 2013).

156. DEP'T OF HOUS. & URBAN DEV., IMPLEMENTATION OF THE OFFICE OF GENERAL COUNSEL'S GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 6–7 (2022) (satisfying Step Two requires "reliable evidence that the policy or practice actually assists in protecting resident safety"). Though HUD was speaking in the context of landlords screening out applicants with criminal records, its message suggests that Step Two generally requires more than just a purported interest in public safety.

157. *Id.*

158. *Id.* at 7.

159. *See* Concepcion, *supra* note 90, at 399.

160. *See* Fagan et al., *supra* note 10, at 716–17.

While blanket applications of vertical patrols and trespass investigation policies to all NYCHA communities would likely fail to show that the challenged policy is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,"[161] more tailored policies that take into account the actual public safety risks present in a community may be deemed necessary. If a defendant is able to show that its policy distinguishes between NYCHA communities based on crime rates and risks to public safety, it will be more likely to meet this burden.

C. The Plaintiff's Final Burden

If the defendant is able to prove that one or more of the trespass-enforcement tactics is needed to achieve a substantial, legitimate, nondiscriminatory interest, the plaintiff may still prevail by proving that the defendant's interest could be served by a policy with a less discriminatory effect.[162] The proposed alternative need not be equally effective in advancing the policy interest,[163] but it "must be supported by evidence and may not be hypothetical or speculative."[164]

Mhany Management vs. City of Nassau[165] provides an instructive example of plaintiffs meeting this burden in the Second Circuit, post-*Inclusive Communities*. In *Mhany*, the defendants' asserted interest in the proposed residential-townhouse zoning was to reduce traffic.[166] The plaintiffs demonstrated that a different policy, multi-family zoning, served this interest and had less discriminatory effects than the proposed residential-townhouse zoning.[167] Regarding the interest in traffic conditions, the plaintiffs' statistical expert presented sufficient evidence demonstrating that multi-family homes would reduce traffic below current levels.[168] Moreover, the expert demonstrated that the alternative multi-family zoning was less discriminatory because it created a "pool of potential renters with a significantly larger percentage of minority households" than would be possible with townhouse zoning.[169]

In presenting less discriminatory alternatives to aggressive trespass-enforcement tactics, the plaintiff should advance multiple ideas to increase the chance that the

---

161. 24 C.F.R. § 100.500(c)(2) (2025); *see* Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527 (2015).

162. 24 C.F.R § 100.500(c)(3) (2025); *see* SCHWEMM, *supra* note 61, at § 10:6. More decisions are expected to develop on this third step since *Inclusive Communities* confirmed that this final burden is on the plaintiff to prove a less discriminatory alternative exists. *See Inclusive Cmtys*, 576 U.S. at 527.

163. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11473 (2013); Mhany Mgmt., Inc. v. Cnty. of Nassau, No. 05-cv-2301, 2017 WL 4174787 at *4 (E.D.N.Y. Sept. 19, 2017).

164. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11473.

165. Mhany Mgmt, Inc. v. Cnty. of Nassau, 819 F.3d 581 (2d Cir. 2016).

166. *See id*.

167. *Mhany Mgmt*., 2017 WL 4174787 at *5.

168. *See Mhany Mgmt*., 819 F.3d at 613–14; *Mhany Mgmt*., 2017 WL 4174787 at *12 ("[The Plaintiffs] did not have to show that [multi-residential] zoning would reduce traffic as much as [residential-townhouse] zoning, just that it would reduce traffic below the levels that existed under [the current] zoning.").

169. *See Mhany Mgmt*., 819 F.3d at 607.

court finds at least one alternative serves the stated policy interest.[170] Alternatives to current trespass-enforcement tactics include more discerning allocation of vertical patrols and police surveillance based on proven hot spots.[171] A more discerning allocation would require rigorous data analysis to identify actual high-crime areas, rather than blanket labeling all public housing communities as high-crime.[172] Law enforcement can then dedicate its attention to neighborhoods based on crime rates, instead of "stereotypes about the people who live there."[173] Other alternatives would be community policing or problem-oriented policing models, which have proven effective at addressing crime "without the collateral damage to the dignity, autonomy, and freedom of law-abiding people who live in public and patrolled housing."[174]

A Plaintiff challenging current trespass-enforcement policies must prove that their proposed alternative policies are less discriminatory but still further the public safety interest.[175] Such proof may include expert testimony or studies.[176] Like the comparison of traffic rates between the two zoning proposals in *Mhany*, the plaintiff's expert must show that less discriminatory alternatives maintain or have a minimal impact on crime rates in the NYCHA communities. Like the disproportionately impacted minority renters in *Mhany*,[177] the expert would need to show that proposed alternatives would result in a lower proportion of Black and Latino residents being stopped or arrested on suspicion of trespass. "Given the likely absence of readily available data to make such a comparison, a plaintiff might well have difficulty proving that the proposed alternative has a smaller discriminatory effect."[178]

CONCLUSION

Under the guise of public safety, current trespass-enforcement policies empower police officers to question, stop, and arrest public housing residents who are simply going about their daily lives. When aggressive policing tactics in NYCHA communities disproportionately impact Black and Latino residents, this Note suggests that the FHA provides a useful legal tool to challenge police behavior. While the legal history of using the FHA's disparate-impact theory to challenge aggressive policing is scarce, cases like *Ligon* and *Davis* demonstrate that these claims are

170. *See id.* at 617; Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 301 (D. Conn. 2020) (describing four less discriminatory alternatives proposed by the Plaintiffs).

171. *See generally*, Haci Duru & Halil Akbas, *Measuring Hot Spots Policing in Non-Research Settings*, 65 INT'L J. OF L., CRIME & JUST.1, 1 (2021) (describing the practice and implications of hot spots policing by the New York Police Department).

172. Karteron, *supra* note 16, at 728.

173. *Id.*

174. *Id.*

175. *See* Schwemm & Bradford, *supra* note 109, at 746–47.

176. *See id.*

177. *Id.* at 692.

178. *Id.* at 747.

viable and can be brought alongside § 1983 claims.[179] The requirements for bringing an FHA disparate-impact claim signal that further statistical research, like that of Dr. Jeffrey Fagan, is required for plaintiffs to make a successful prima facie case. Additionally, more quantitative and qualitative research is needed on the existence and effectiveness of alternative policing methods to justify their implementation in public housing communities. Although this Note focused on New York City, the issue of aggressive trespass-enforcement policies in public housing is not unique to New York, and plaintiffs should consider bringing FHA claims to challenge aggressive policing policies throughout the country.

179. *See supra* Part II.B.