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Familial-Status Discrimination: A New Frontier in Fair Housing Act Litigation

ABSTRACT. A key provision in the Fair Housing Act (FHA)—the Housing for Older Persons Act (HOPA) exemption—has allowed municipalities to weaponize senior housing to discriminate against families, obstruct affordable housing, and perpetuate race and class segregation. This Note documents the nature, stakes, and origins of this pattern and advances three main prescriptive claims. First, advocates can and should work within the existing HOPA framework to hold municipalities accountable for exclusionary decisions. Second, courts should interpret the HOPA exemption to better reflect the goals of the FHA. Third, federal and state governments should make changes to fair-housing law to respond to its widespread abuse.

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NOTE CONTENTS

INTRODUCTION	795
I. THE UBIQUITY OF FAMILIAL-STATUS DISCRIMINATION	799
A. Familial-Status Discrimination in Action	800
1. Arlington, Texas	800
2. Suburban Connecticut	803
3. Yonkers, New York	806
B. Discrimination Is the Rule, Not the Exception	807
C. Who Hates Children?	813
D. Familial-Status Discrimination Matters	819
1. The Cost of Familial-Status Discrimination	819
2. An Opportunity for Fair-Housing Enforcement	821
II. THE DOCTRINAL LANDSCAPE OF FAMILIAL-STATUS DISCRIMINATION	824
A. Understanding FHA Liability	826
B. The Fair Housing Act and Families with Children	830
C. Housing for Older Persons Act: The Critical Exemption	832
III. BUILDING A CLAIM AND RESHAPING THE DOCTRINE	841
A. A Typical Case	842
B. Building a Claim Under <i>Putnam</i>	844
C. Reinterpreting the HOPA Exemption	845
1. Cabin HOPA's Reach	846
2. Require an Affirmative Burden to Demonstrate Intent to Promote Elderly Housing	848
IV. NON-JUDICIAL SOLUTIONS	850
A. Legislative Reforms to HOPA	850
1. Nationwide FHA Reform	851
2. State FHA Reform	853
B. A Regulatory Solution	854
	793



C. Non-FHA Solutions	857
CONCLUSION	860

INTRODUCTION

Like many American cities, Arlington, Texas does not have enough affordable housing.¹ As of 2015, the city reported that more than 24,000 of its low-to-moderate-income renter households were significantly burdened by their rent payments, spending more than 30% of their income on housing.² Nationally, rent-burdened households account for 46% of American renters³ and often face difficulty affording even basic necessities like food and medical care.⁴ So, it should have come as welcome news to Arlington’s City Council when, in 2017, a developer offered to build eighty-eight units of new affordable housing for the city’s low-income residents.⁵ The Council saw things differently—it refused to endorse the proposal and killed the project before it ever broke ground.⁶

Arlington rejected the development proposal because, a year earlier, the City Council had instituted a policy stating that it would only endorse affordable housing that was restricted to elderly residents.⁷ The 2017 housing proposal included housing for families, so it did not meet this requirement. At first glance, Arlington’s preference for senior housing may seem understandable. One could

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1. See Andrew Aurand, Dan Emmanuel, Matthew Clarke, Ikra Rafi & Diane Yentel, *The Gap: A Shortage of Affordable Rental Homes*, NAT’L LOW INCOME HOUS. COAL. 2 (Apr. 2022), https://nlihc.org/sites/default/files/gap/Gap-Report_2022.pdf [<https://perma.cc/6HH4-76D4>] (“Extremely low-income renters in the U.S. face a shortage of approximately 7 million affordable and available rental homes.”); *id.* at 10 (ranking the Dallas-Fort Worth-Arlington metropolitan area as having the sixth “most severe” affordable-housing shortage among the fifty largest U.S. metropolitan areas).
 2. ARLINGTON, TEXAS, 2015-2019 CONSOLIDATED PLAN, CITY OF ARLINGTON, TEX. 28 tbl.9 (2014), https://cdn5-hosted.civiclive.com/UserFiles/Servers/Server_14481062/File/City%20Hall/Depts/Office%20of%20Strategic%20Initiatives/Grants%20Management/Community%20Development/2015-2019-Consolidated-Plan.pdf [<https://perma.cc/L3ST-NB5E>]. This data dates from 2011, which is the most recent estimate available. Low-to-moderate-income renters are those that fall in the 0-80% Area Median Income (AMI) range. The consolidated planning guidelines define “rent burdened” as spending 30% or more of annual income on rent. This definition is derived from the United States Department of Housing and Urban Development (HUD) policies and is standard in the housing field. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-417, RENTAL HOUSING: AS MORE HOUSEHOLDS RENT, THE POOREST FACE AFFORDABILITY AND HOUSING QUALITY CHALLENGES 14 (May 2020).
 3. THE STATE OF THE NATION’S HOUSING: 2021, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. 4 (2021), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf [<https://perma.cc/CB5T-2UFH>].
 4. Off. Pol’y Dev. & Rsch., *Rental Burdens: Rethinking Affordability Measures*, U.S. DEP’T HOUS. & URB. DEV., https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html [<https://perma.cc/W8MC-W2XD>].
 5. Complaint at 8, *United States v. City of Arlington*, No. 22-cv-00030 (N.D. Tex. Jan. 13, 2022).
 6. *Id.* at 10.
 7. *Id.* at 6-7, 9.

argue that the city only wished to serve the housing needs of its elderly population. The reality, however, is that Arlington's decision to favor seniors was a tried-and-true strategy to obstruct developers from building housing for a group the city wished to exclude: low-income families with children. In public meetings, both officials and members of the public made it clear that its decision was motivated by prejudice.⁸ The result was that the dire housing needs of Arlington's lower-income families went unmet.

These events in Arlington reflect a striking pattern that plays out in towns and cities across the country. Opposition to affordable housing often coalesces around a bare hostility toward low-income families with children. When faced with proposals to build affordable housing, municipalities demand that developers build with age restrictions or not at all. In many cases, developers choose the latter. Ultimately, municipal officials end up deploying the policy levers at their disposal to obstruct new housing and steer affordable building toward lower-income, less-resourced areas, entrenching patterns of segregation along both race- and class-based lines.⁹ Municipalities have long used their power to maintain residential segregation, and the type of discrimination practiced by Arlington is one of the most potent and pernicious tools they use to achieve these ends.¹⁰

Critically, exclusionary municipalities do not oppose *all* forms of housing for families. Local policymakers rarely raise objections to single-family homes, whose occupants are, on average, wealthier and whiter than residents of multifamily housing.¹¹ Instead, they reserve their antifamily objections for forms of

8. See *infra* Section I.A.1.

9. See generally Kate Walz & Patricia Fron, *The Color of Power: How Local Control over the Siting of Affordable Housing Shapes America*, 12 DEPAUL J. SOC. JUST. 1 (2018) (explaining how “hyper-local control” over affordable housing has helped “maintain racial segregation” in Chicago); Jacqueline Rabe Thomas, *Separated by Design: How Wealthy Towns Keep People with Housing Vouchers Out*, CONN. MIRROR (Jan. 9, 2020), <https://ctmirror.org/2020/01/09/separated-by-design-how-wealthy-towns-keep-people-with-housing-vouchers-out> [https://perma.cc/E5G8-7JGE] (explaining how Connecticut towns have used municipal policymaking to maintain racial and class segregation); Katherine Levine Einstein, *The Privileged Few: How Exclusionary Zoning Amplifies the Advantaged and Blocks New Housing—and What We Can Do About It*, 57 URB. AFFS. REV. 252 (2021) (explaining how exclusionary zoning retrenches residential segregation); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (explaining how residential segregation is a result of deliberate government choices both nationally and locally).

10. See *infra* Sections I.A-B.

11. See Ann Owens, *Building Inequality: Housing Segregation and Income Segregation*, 6 SOC. SCI. 497, 500 (2019) (noting the widely documented finding that multifamily housing “is often more affordable for lower-income households,” and “large single-family homes . . . are attractive to and affordable for affluent households”). Ann Owens continues: “Because white

housing that tend to serve lower-income communities and communities of color. These forms of housing include subsidized developments, like the one proposed in Arlington, that are explicitly restricted to low-income renters. They also include market-rate multifamily housing developments, which are typically more affordable than comparable single-family housing.¹² The precise form of discrimination that this Note describes is not merely directed at families with children, but at families who inhabit lower-cost housing. Thus, opposition to housing for families should be understood both as a proxy for and a manifestation of racial and socioeconomic bias in municipal-housing policy.

Despite its significance, legal scholars have paid little attention to municipal discrimination against children and families. Likewise, although this form of discrimination is unlawful under the Fair Housing Act (FHA),¹³ housing advocates have made few successful claims against municipalities on these grounds.¹⁴ While scholars have written about familial-status discrimination – the practice of discrimination against families with children – they have primarily done so in the context of private housing-market transactions.¹⁵ By contrast, there are few extended discussions of *municipal* familial-status discrimination in the legal literature, and none which propose the particular combination of solutions advocated in this Note.¹⁶

households have higher average incomes than [B]lack or Hispanic households,” multifamily housing tends to have more Black and Hispanic occupants than single-family housing. *Id.*; see also Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1134-35 (2010) (linking “the construction of high-density multifamily housing” to “the supply of affordable housing”).

12. See Owens, *supra* note 11, at 500.
13. 42 U.S.C. §§ 3604-3606 (2018).
14. The most promising example is a complaint filed by the Department of Justice (DOJ) against Arlington, Texas in January 2022. However, the city entered into a consent agreement, and the case did not proceed. Consent Decree, *United States v. City of Arlington*, No. 22-cv-00030 (N.D. Tex. Jan. 18, 2022).
15. See, e.g., Daniel Barkley, *Familial Status Under the Fair Housing Act*, 6 J. AFFORDABLE HOUS. & CMTY. DEV. L. 93 (1997); John Nelson, *The Perpetuation of Segregation: The Senior Housing Exemption in the 1988 Amendments to the Fair Housing Act*, 26 T. JEFFERSON L. REV. 103 (2003).
16. Scholars have discussed municipal familial-status discrimination, but none consider the pattern described here. See Daniel R. Mandelker, *Zoning Discrimination Against Group Homes Under the Fair Housing Act*, 46 LAND USE L. & ZONING DIG. 3 (1994) (describing the application of familial-status discrimination to group homes); John R. Dorocak, *De Facto Disparate Impact Familial Discrimination (Housing for Older Persons Age Fifty-Five and Over) Under the Fair Housing Act: Is It Legal? Is It Constitutional?*, 21 GEO. MASON U. C.R. L.J. 1 (2010) (arguing that senior-only housing has a disparate impact on communities in which children are more likely to live with grandparents or other elderly caregivers).

This void derives from a key exemption to the FHA: the Housing for Older Persons Act (HOPA).¹⁷ HOPA allows both private and public actors to construct and maintain elderly-only housing without running afoul of the FHA's prohibition on discrimination against families with children.¹⁸ This means that building and operating an assisted living facility or a fifty-five-and-over community is not a per se violation of the FHA.

HOPA was enacted as a narrow exemption to the FHA to allow communities to provide specialized housing for seniors.¹⁹ However, in the decades since its passage, municipalities have weaponized the exemption to shield themselves from liability for obstructing affordable housing, perpetuating residential segregation, and denying housing to low-income families with children. By expressing a preference for seniors, cities and towns like Arlington appear to qualify for the HOPA exemption even when their true motivations have little to do with preserving elderly housing. While only one circuit court has addressed the issue, it largely enabled discriminatory policymaking by erecting a needlessly deferential standard for applying the HOPA exemption.²⁰ Put simply, between poor judicial construction and underenforcement, there is a gap in the middle of the FHA through which a massive amount of discrimination is able to slip.

This Note aims to close that gap. Part I demonstrates that familial-status discrimination in municipal land-use policy is a pervasive problem contributing to the twin crises of housing affordability and residential segregation. Although this phenomenon is well-known to housing advocates, this Note's discussion of municipal familial-status discrimination constitutes the first attempt at a cohesive account of the nature and stakes of the problem. Part I argues that municipal familial-status discrimination has three devastating consequences. First, it unlawfully and unconscionably denies safe and affordable housing to countless children. Second, it blocks the construction of badly needed affordable housing more generally. Third, it functions as a pernicious form of racial and socioeconomic discrimination that creates and perpetuates segregation.²¹ Additionally, Part I argues that municipal familial-status discrimination matters because local-government officials are often open and honest about their animus toward low-income children. Many instances of municipal familial-status discrimination contain elements of racial discrimination, both in the intent behind the policies

17. 42 U.S.C. § 3607(b) (2018).

18. *Id.*

19. *See, e.g.,* *Waterhouse v. City of Am. Canyon*, No. C 10-01090, 2011 WL 2197977, at *6 (N.D. Cal. Jun. 6, 2011) (“The prohibition against familial-status discrimination is the primary goal, and housing for older persons is an exception. For this reason, . . . the exception must be construed narrowly, and its requirements must be strictly met.”).

20. *Putnam Fam. P’ship v. City of Yucaipa*, 673 F.3d 920 (9th Cir. 2012); *see infra* Section II.C.

21. *See infra* Section I.C.

and the disproportionate burden they place on Black and Brown communities. However, for reasons that Part I explains, racial-discrimination claims under the FHA can be challenging to mount. Familial-status discrimination claims can provide another powerful tool for advocates planning to bring intentional-discrimination suits in situations where these harder-to-prove claims may not be feasible. In sum, Part I asserts that municipal familial-status discrimination is a consequential phenomenon that demands urgent and sustained attention.

Parts II and III demonstrate the flaws in the few existing judicial interpretations of the HOPA exemption and present a viable roadmap for housing advocates seeking to use the FHA to combat municipal familial-status discrimination. Part II describes the doctrinal landscape of familial-status discrimination, as well as the legislative origins of the FHA's familial-status protections and its carve-out for older persons. Further, Part II argues that existing applications of HOPA to municipal familial-status discrimination are dangerously deferential to local governments. Part III then argues that, within this broad landscape, familial-status claims are both viable and indispensable. It offers a guide for building a claim under existing doctrine and then presents an alternative framework that courts and advocates might use to interpret the HOPA exemption. The argument is that this construction best respects HOPA's goal of preserving housing opportunities for elderly persons without diminishing the FHA as a tool for combatting discrimination. Part IV follows by proposing a series of legislative and regulatory reforms to the HOPA exemption that could make it easier for attorneys to bring familial-status discrimination cases. Part IV also offers potential legislative and regulatory solutions to municipal familial-status discrimination that do not involve amending the FHA.

I. THE UBIQUITY OF FAMILIAL-STATUS DISCRIMINATION

Across the United States, exclusionary communities openly discriminate against low-income families in their municipal land-use decisions.²² This behavior deprives children of high-quality housing, obstructs the construction of affordable units, and contributes to racial and socioeconomic segregation.²³ This Part proceeds by first providing three descriptions of familial-status discrimination in action, with an emphasis on how local governments weaponize senior-only housing as a tool of exclusion. Next, it establishes that these practices are widely deployed by offering additional evidence of discrimination from diverse communities across the country. This Part then describes communities' potential motivations for discriminating against families. Finally, it argues that those who

22. See *infra* Sections I.A-B.

23. See *infra* Section I.D.1.

care about fair housing should also care about municipal familial-status discrimination because it both inflicts high economic and social costs and potentially offers a pathway for plaintiffs to hold municipalities liable for race and class discrimination under the FHA.

A. Familial-Status Discrimination in Action

Discrimination against families living in affordable and multifamily housing comes in a variety of forms. This Section offers three examples of familial-status discrimination in action in differing contexts. First, it examines a midsized city in Texas where municipal officials blocked developers from accessing federal funding for subsidized family housing by adopting a policy preference for senior-only housing. Second, it highlights a small and wealthy suburb in Connecticut where municipal officials attempted to preserve their community's exclusivity by forcing a developer to maintain dilapidated senior housing instead of building modern, affordable family housing. Third, it reinterprets a famous racial-discrimination case from a diverse city in New York where municipal officials enforced patterns of internal, racial segregation by placing subsidized senior housing in white neighborhoods and affordable family housing in Black neighborhoods.

1. Arlington, Texas

In 2016, the city of Arlington, Texas attempted to block the construction of family-oriented affordable housing by enacting a policy preference for Low-Income Housing Tax Credit (LIHTC) developments targeted at seniors rather than those targeted at families. LIHTC is a dollar-for-dollar tax credit intended to incentivize private investment in affordable housing.²⁴ This tax credit is the federal government's primary tool for encouraging the development and rehabilitation of affordable rental housing.²⁵ States administer the LIHTC program on behalf of the federal government and allocate credits to proposed housing developments in a competitive bidding process with the goal of efficiently meeting the needs of low-income residents.²⁶ In many states, developers can win extra "points" in the Qualified Allocation Process (QAP) if they gain the backing of the municipalities in which they plan to build. These extra points are won

24. MARK P. KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 1 (June 23, 2022).

25. *Id.*

26. *Id.* at 4.

with a “letter of support” or zoning approval from the relevant planning body.²⁷ On the flip side, local governments can reduce the viability of a developer’s bid for tax credits by withholding their support.

Arlington realized it could use its power over state LIHTC funding decisions to influence the type of affordable housing built within its borders.²⁸ In 2016, its City Council adopted a housing tax-credit review policy stipulating that the city had a “preference for new development of senior housing or redevelopment of senior and/or workforce housing.”²⁹ This policy meant that Arlington would presumptively refuse to support developers’ proposals for new family-oriented affordable housing, dooming LIHTC applications for non-senior housing projects and cutting developers off from the largest source of affordable-housing financing in the country.³⁰ The result was effectively a ban on new family-oriented affordable housing.

In meetings to discuss the “senior preference” policy, Arlington officials made it clear that their rationale for adopting the policy had less to do with supporting aging residents and more to do with excluding poor families. One council member stated that she favored the new policy because “the community said ‘I don’t want to live next to a three-year-old; the only thing worse than living next to a three-year-old is living next to an eight-year-old.’”³¹ Another railed against older non-age-restricted affordable housing in his district and explained that the city needed to “move away from this particular genre of housing.”³² Arlington’s Deputy City Manager stated that he preferred not to “encourage new tax credits for non-senior[s],”³³ meaning that he wanted to keep new family-

27. See, e.g., 2022-2023 LIHTC Scoring Criteria, MICH. STATE HOUS. DEV. AUTH. [6] (2022), https://www.michigan.gov/mshda/-/media/Project/Websites/mshda/developers/lihtc/assets/liqap/mshda_li_qap_2022_2023_score_sum_final_pdf [<https://perma.cc/MEQ4-66M7>] (rewarding points to developments that win a letter of support as part of a community revitalization plan); *California Tax Credit Allocation Committee Regulations Implementing the Federal and State Low Income Housing Tax Credit Laws*, CAL. CODE REGS. tit. 4, § 10325(c)(9) (2021) (using letters of intent as a tiebreaker); see also *Low-Income Housing Tax Credit: 2022 and 2023 Qualified Allocation Plan*, CONN. HOUS. FIN. AUTH. 8 (July 30, 2021), [https://www.chfa.org/assets/1/6/FINAL_2022-23_QAP_\(July_2021\).pdf](https://www.chfa.org/assets/1/6/FINAL_2022-23_QAP_(July_2021).pdf) [<https://perma.cc/A9U6-2NAV>] (requiring that developers receive the support of local authorities before points are even allocated).

28. Complaint, *supra* note 5, at 6.

29. *Id.* at 7.

30. *Id.* at 1-2.

31. *Id.* at 6-7.

32. *Id.* at 6.

33. *Id.*

oriented affordable housing out of Arlington. In his words, “If it is non-senior then it has to be redevelopment.”³⁴

As Arlington enacted its senior-preference policy, the city’s own reports painted a dark picture of its need for new family-oriented affordable housing. Arlington’s “2015-2019 Consolidated Plan” showed that roughly 12,465 low-to-moderate income-renter households within the city’s borders paid more than 50% of their income for housing.³⁵ Of those households, the Department of Justice (DOJ) alleged that 10,930, or roughly 88%, did not include an elderly individual.³⁶ Arlington’s families direly needed affordable housing, yet the City Council only wished to support a sliver of its residents.

In 2017, a developer approached Arlington proposing to construct a new affordable housing development with eighty-eight units set aside for low-income families.³⁷ The project was highly competitive for a LIHTC grant under state guidelines, and there was no indication that it would have required any local-government financing.³⁸ But because the proposed development did not receive support from the City Council, it did not win the coveted federal tax credit.³⁹ Despite its knowledge of the regional affordable-housing shortage for families, the Council declined to support the proposal based on its senior-preference policy, effectively rejecting it.⁴⁰ Because of this decision, the development did not receive crucial points in the LIHTC bidding process and consequently did not receive a funding award.⁴¹ The project collapsed, depriving the city’s low-income families of eighty-eight units of affordable housing.⁴²

34. *Id.* (suggesting that all family-oriented affordable-housing developments should be renovations or expansions to existing housing developments).

35. *Id.* at 7 (citing ARLINGTON, TEXAS, 2015-2019 CONSOLIDATED PLAN, *supra* note 2, at 28).

36. *Id.* These numbers ignore the even greater need across the entire Dallas-Fort Worth region. Virginia Mingorance, *DFW Will Need to Build 19,000 New Apartments Each Year to Meet Demand*, LOC. PROFILE (July 28, 2022), <https://localprofile.com/2022/07/28/dfw-needs-19000-apartments-year-demand> [<https://perma.cc/E9A3-62ZV>] (“[T]here’s currently a deficit of 600,000 apartments, with a greater demand for affordable units.”).

37. Complaint, *supra* note 5, at 8.

38. *Id.* at 9-10.

39. *Id.* at 10.

40. *Id.* One councilmember stated that the proposal was “kind of in violation of our City requirements . . . [and] doesn’t work for us right away, so I think [I] could make a determination on that one without taking a look at it. It just doesn’t fit the criteria.” *Id.* at 9.

41. *Id.* at 10.

42. *Id.* at 9-10 (explaining that the City Council not only refused to issue a Resolution of Support or a Resolution of No Objection for the project, but also recommended two senior-only proposals instead).

What happened in Arlington is a prime example of municipal familial-status discrimination in a diverse American city—roughly 14% of Arlington families live below the poverty line and only around 38.5% of the populace is white.⁴³ While Arlington justified its decision under the guise of protecting seniors, comments from local officials provide powerful evidence that its preference was a pretext for familial-status discrimination. Indeed, DOJ and the Department of Housing and Urban Development (HUD) agreed with this interpretation of events. In a first-of-its-kind action, both charged Arlington with violating the FHA’s ban on familial-status discrimination.⁴⁴ In response, Arlington entered into a consent decree with DOJ, agreeing to repeal its discriminatory policy while refusing to admit wrongdoing.⁴⁵ The federal government’s choice to hold Arlington accountable for its discrimination is encouraging, but as discussed in Section I.D, it has had little impact on municipal decision-making.

2. Suburban Connecticut

In 2017, a small wealthy suburb in Connecticut sought to prevent its own housing authority from redeveloping a decaying and non-ADA compliant senior-housing property into affordable housing for families.⁴⁶ When the housing authority initially presented its proposal to the town’s Planning and Zoning Commission (PZC), the body rejected the project, which would have replaced fifty crumbling and nearly uninhabitable age-restricted units with a new structure and produced twenty-one additional units of family-oriented housing.⁴⁷ To

43. *QuickFacts: Arlington City, Texas*, U.S. CENSUS BUREAU (2021), <https://www.census.gov/quickfacts/arlingtoncitytexas> [<https://perma.cc/FBL9-LRYU>]. The latter statistic refers to white residents who did not identify as Hispanic or Latino.

44. *See* Charge of Discrimination at 1, Sec’y, U.S. Dep’t of Hous. & Urb. Dev. v. City of Arlington, No. 06-17-8202-8 (HUD OHA Sept. 23, 2020); Complaint, *supra* note 5, at 11.

45. *See* Consent Decree, *supra* note 14. For a discussion of DOJ’s complaint against Arlington and its implications for this Note, see *infra* Section I.D.

46. Jacqueline Rabe Thomas, *No Children Allowed. Are Wealthy CT Towns Building Elderly Housing to Keep out Poor Families?*, CT MIRROR (June 20, 2021), <https://ctmirror.org/2021/06/20/no-children-allowed-are-wealthy-ct-towns-building-elderly-housing-to-keep-out-poor-families> [<https://perma.cc/V3QB-7785>] (“Attempts over the past nine years to raze and replace the three deteriorating buildings have all failed, however, because of local opposition to the housing authority’s plan to lift the age restriction for the complex. Instead of housing 39 older residents, the new complex would accommodate 126 people of all ages . . .”).

47. Pam Johnson, *Branford’s ‘Parkside’ Affordable Housing Expansion: Public Hearing Oct. 19*, ZIP06 (Oct. 16, 2017, 6:33 AM EST), <https://www.zip06.com/news/20171016/branfords-parkside-affordable-housing-expansion-public-hearing-oct-19> [<https://perma.cc/9FLW-3QPE>]; Steven M. Mazzacane, *Parkside Village, A Low-Income Housing Facility, Looks at a Major Overhaul*, BRANFORD SEVEN (June 28, 2021), <https://www.branfordseven.com/news/local/parkside->

justify their denial, officials complained that the town needed to exclude new families because any population increase would create traffic snafus and cause parking headaches.⁴⁸ These officials also argued that new children, housed in two-bedroom apartments, would be an expensive burden on the school system and could force the town to raise property taxes.⁴⁹

Notably, one PZC Commissioner stated that “an age restricted community” would have a key benefit over a general occupancy development: “community acceptance.”⁵⁰ This Commissioner seems to have paid close attention to the words of residents who were even more vocally opposed to welcoming families to their town than members of the PZC. One commenter at the zoning permit public hearing stated: “Retirees, disabled, old people—I have no objection to renovat[ing] the whole place and mak[ing] it nice for them. But don’t get too much of that riffraff in. There will be lots of riffraff . . . With a project like this, you need security guards in the area.”⁵¹ According to a reporter on the scene, the commenter was “hardly alone in his opposition.”⁵² For some residents, the existence of low-income children and their parents seemed like an existential threat

village-a-low-income-housing-facility-looks-at-a-major-overhaul/article_93bdb3f4-75do-11e6-a945-db6719da1f6a.html [https://perma.cc/56JF-DCF2].

48. One Planning and Zoning Commissioner stated that residents of the development’s existing units “for the most part don’t drive, don’t own cars.” Transcript of Audio tape: Town of Branford Planning and Zoning Commission Public Hearing 12 (May 30, 2019) [hereinafter Comm’r Russo statement] (statement of Comm’r Fred Russo, Town of Branford Plan. & Zoning Comm’n) (transcript on file with authors). The redevelopment’s expansion, he continued, was actually a “deceptive number,” since those units would include “two bedrooms, or one bedroom and two bedrooms” skewing the numbers of residents “up to a couple hundred people.” *Id.* Opening the development to a wider variety of people beyond just seniors would, thus, increase the “chances [that] more of them are going to drive.” *Id.* at 14.
49. One Planning and Zoning Commissioner noted that new units would house “adults and families” rather than two seniors at maximum. Transcript of Audio tape: Town of Branford Planning and Zoning Commission Public Hearing 60-61 (Oct. 19, 2017) (statement of Marcia Palluzzi, Comm’r, Town of Branford Plan. & Zoning Comm’n) (transcript on file with authors). Because of this, she asked the applicants to provide “any data on what additional child population for the schools” would bring because she was worried about the “cost of children” to the town. *Id.*
50. Transcript of Audio tape: Town of Branford Planning and Zoning Commission Public Hearing 13-14 (Nov. 2, 2017) (statement of Chairman Chuck Andres, Town of Branford Plan. & Zoning Comm’n) (transcript on file with authors).
51. Rabe Thomas, *supra* note 46. The same commenter argued that without age restrictions, “[t]he drug addicts are going to be here, believe me.” *Id.* For more information on Fair Housing Act (FHA) liability derived from comments by the public, see discussion *infra* Section II.A.
52. Rabe Thomas, *supra* note 46.

to the town's way of life. Young people would bring crime and destroy the "character" of the neighborhood – residents and commissioners chose to forestall this outcome by demanding only renovations to the existing senior housing.⁵³

While the town's PZC initially rejected the housing authority's application to build new family-oriented affordable housing, its decision was thrown out by a judge when the project's developer sued the town under Connecticut housing law.⁵⁴ Pursuant to a court order, the PZC granted the requested permit but only after multiple commissioners stated they were voting against their conscience.⁵⁵ Still, opposition to the project continued. In 2021, at a public meeting of the Board of Selectmen, the town's First Selectman⁵⁶ wondered whether the redevelopment should not go forward because it would take valuable housing opportunities away from the municipality's seniors and harm the existing development's older residents.⁵⁷ The First Selectman made this argument despite the fact that each resident of the existing building was guaranteed a unit in the new building, the new development would be open to seniors, and the existing building's tenants' association supported the redevelopment proposal.⁵⁸

This example from Connecticut is representative of familial-status discrimination in wealthy suburban communities that seek to wall themselves off from their less prosperous urban neighbors.⁵⁹ It shows that even in a town that was

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53. *See id.* (explaining that town residents and commissioners were using delay tactics).
54. To be precise, the developer had to sue the town twice under a Connecticut statute, CONN. GEN. STAT. § 8-30g (2022), which governs the affordable-housing land-use appeals procedure and provides a builder's remedy. The developer sued once to overturn the Planning and Zoning Commission's (PZC) first denial, and a second time to vacate unwarranted conditions placed on the subsequently awarded zoning permit that were impossible to meet. *See Hous. Auth. of Branford v. Town of Branford Plan. & Zoning Comm'n*, 67 Conn. L. Rptr. 348 (Conn. Super. Ct. 2018); *Hous. Auth. of Branford v. Town of Branford Plan. & Zoning Comm'n*, No. HHD-CV20-6122425, 2020 WL 8455465 (Conn. Super. Ct. Oct. 8, 2020).
55. Pam Johnson, *Branford RTM Accepts Sliney Road Easement from Branford Housing Authority*, ZIP06 (Feb. 14, 2022, 6:16 AM EST), <https://www.zip06.com/news/20220213/branford-rtm-accepts-sliney-road-easement-from-branford-housing-authority> [<https://perma.cc/4ZH7-T28N>] (“[W]ith 4 of 5 commissioners voting in the affirmative but ‘under protest,’ the PZC unanimously approved a resolution containing court-ordered modifications to the Town’s approved . . . redevelopment site plan and coastal site plan.”).
56. The town's elected executive. *Branford's Office of the First Selectman*, TOWN OF BRANFORD, CT, <https://www.branford-ct.gov/boards-commissions-committees/board-selectmen> [<https://perma.cc/9CXQ-XTVX>].
57. *See* Memorandum from the Branford Housing Authority to First Selectman Jamie Cosgrove 1, 2, 7 (Apr. 20, 2021) (on file with Branford City Hall) (“Questions Raised During the April 7th Board of Selectmen Meeting.”).
58. *Id.*
59. Other examples include Colts Neck, New Jersey and Woodbridge, Connecticut. Both are cited throughout this Note.

legally compelled to build affordable housing, residents still attempted to evade the spirit of this mandate by only accepting units that were occupied by seniors. Finally, this case also illustrates how towns are willing to use requests to build senior-only housing to drag out affordable-housing fights for years and thereby pressure developers who cannot afford the cost to either give up or come to the table to negotiate.⁶⁰

3. *Yonkers, New York*

In Yonkers, a diverse and dense city, local officials famously maintained racially segregated housing and school systems.⁶¹ The city only took steps to ameliorate these problems after settling a massive twenty-seven-year-long fair-housing action that DOJ commenced in 1980.⁶² During its investigation, DOJ alleged that Yonkers racially segregated its housing and schools in part by discriminating against families when deciding the locations for new public-housing units.⁶³

The city maintained segregated schools and residential communities by using its zoning power to reject nearly all proposals for family-oriented public housing in majority-white neighborhoods. This prevented low-income Black children from living within the geographic boundaries of white school-attendance zones and stopped Black families from living near their white peers.⁶⁴ When Yonkers officials had no choice but to allow subsidized housing in white neighborhoods—as was often the case—they practically only built housing for seniors.⁶⁵ Residents and politicians assented to the construction of senior housing

60. The town, in this case, strung out legal battles with the developer for more than five years. See *supra* notes 46 & 54.

61. See LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* (2015) (describing the events of the case and politics surrounding it in a widely read nonfiction book that was adapted as an HBO mini-series).

62. For a compilation of all decisions in the case, see *United States v. Yonkers, C.R. LITIG. CLEARINGHOUSE*, <https://www.clearinghouse.net/detail.php?id=11075> [<https://perma.cc/R63L-6PFS>].

63. *United States v. Yonkers Bd. of Educ. (Yonkers I)*, 624 F. Supp. 1276, 1292 (S.D.N.Y. 1985) (“[S]ubsidized housing for families has been equated with minority housing, and for that reason, has been confined to the disproportionately minority areas of the City—most often, the downtown area of Southwest Yonkers. Subsidized housing for senior citizens is alleged to have been less consistently identified with minority housing, and therefore less consistently confined to minority areas. Nonetheless, according to plaintiffs, it, too, has met racially influenced resistance from area residents, often based on the concern that it might be converted to housing for families.”).

64. See *United States v. Yonkers Bd. of Educ. (Yonkers II)*, 837 F.2d 1181, 1187-88 (2d Cir. 1987).

65. *Id.* at 1186.

in white neighborhoods because they believed it would not impact the city's system of segregation, as elderly-only buildings contain no school-age children and a higher proportion of white residents.⁶⁶ In fact, one of the only affordable housing developments built in a majority-white neighborhood was a senior building constructed by a local church group explicitly to prevent the construction of a family-oriented development: at trial, a witness testified that “members of the group had said that they ‘feared an influx of [B]lacks into the neighborhood’ would result if the [family] project were built.”⁶⁷

The Yonkers investigation illustrates a local government's use of familial-status discrimination not to wall off a city from unwanted outsiders but to divide its *own* communities. Unlike this Section's previous examples, Yonkers was not outright hostile to the construction of family-oriented affordable and multifamily housing. Rather, it selectively placed differently aged populations in certain neighborhoods to maintain racial and socioeconomic segregation. While the race-based FHA case against Yonkers ultimately succeeded, one can imagine a world in which city officials were better able to hide their prejudice to avoid liability for racial discrimination. In this circumstance, DOJ may have been able to succeed on a familial-status discrimination claim.⁶⁸

While the events in the preceding examples eventually led to the construction of new family-oriented housing, it is important to note that this Note is only able to examine these stories in detail because legal advocates brought cases on other grounds. The typical case of familial-status discrimination is never charged or litigated and therefore is not recorded in granular detail. As Section I.B will show, in most cases, municipalities engaged in familial-status discrimination successfully obstruct the family-oriented housing they seek to prevent.

B. Discrimination Is the Rule, Not the Exception

The conduct in the three examples detailed above is not isolated. Throughout the country, municipalities openly use the powers at their disposal—including zoning, permitting, and LIHTC approval—to exclude low-income families

66. See *Yonkers I*, 624 F. Supp. at 1311 (“The few sites in white areas that prompted little or no opposition were for senior-citizen or middle-income (Mitchell-Lama) housing, whose occupants were more likely to be heavily white.”); *Yonkers II*, 837 F.2d at 1189 (“Such housing, so long as not denominated ‘low-income,’ was not perceived as being for minorities and met with little or no community opposition.”).

67. *Yonkers I*, 624 F. Supp. at 1321. The witness was Walter Webdale, the Director of Yonkers Urban Renewal Agency. The court's opinion stated that Webdale “had reason to believe the church group's opposition to the family project was racially based.” *Id.*

68. See *infra* Section I.D.2.

from enclaves of affluence. This Section describes the pervasiveness of these practices.

Scholars of housing economics and urban planners have long noted that, when forced to choose between the two, residents of wealthy communities generally prefer affordable housing for seniors to affordable housing for families. Kurt Paulsen, a professor of urban planning at the University of Wisconsin, has stated that “[m]any local governments seem more willing to approve age-restricted developments than housing for families.”⁶⁹ This is because “[w]hen direct fiscal impact analyses are conducted, senior housing generates a fiscal surplus because no school-age children are generated.”⁷⁰ In other words, funding new seats in schools can be expensive, so local governments tend to take steps to avoid having to create them. Similarly, as Daniel Carlson and Shishir Mathur have pointed out, “Most observers note that senior housing is the only type of new affordable housing tolerated in many communities; its impact on schools and other public facilities is perceived to be less than that of housing for lower-income families with children.”⁷¹ The literature on “fiscal zoning” is not lacking additional generalizable and theoretical accounts of the municipal preference for senior-only housing over housing for families.⁷² Indeed, economists have given close attention to the subject, in some cases finding that the fiscal consequences of family-oriented housing are, in fact, different from senior-only housing.⁷³

More concrete reports of attitudes toward the construction of multifamily and affordable housing confirm these reports of a preference for senior-only housing over family housing. A study documenting how residents of Riverside

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69. Kurt Paulsen, *The Effects of Land Development on Municipal Finance*, 29 J. PLAN. LITERATURE 20, 33 (2014). For a response to Paulsen, see *infra* note 131.
70. *Id.* It is important to note that Kurt Paulsen believes these fiscal analyses are often incomplete because seniors who move from single-family homes to age-restricted units will often be replaced by families with school-age children in their original home. Additionally, some observers note that this short-term fiscal windfall often gives way to a graying and shrinking tax base in the long run. Sloan W. Dawson, *ARAActional Exuberance: Lessons and Prospects for Age-Restricted Active Adult Housing Development in Massachusetts* 32 (June 23, 2010) (M.C.P. thesis, Massachusetts Institute of Technology), <https://dspace.mit.edu/bitstream/handle/1721.1/59721/669033048-MIT.pdf> [<https://perma.cc/TGV8-E8WD>].
71. Daniel Carlson & Shishir Mathur, *Does Growth Management Aid or Thwart the Provision of Affordable Housing?*, in *GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 20, 59 (Anthony Downs ed., 2004).
72. See, e.g., Anna J. Frantz, *Doing Their Part? Proactive Planning and Deliberate Avoidance of Affordable Housing by Massachusetts Communities in Response to Chapter 40B*, at 84-91 (June 28, 2005) (M.C.P. thesis, Massachusetts Institute of Technology), <https://dspace.mit.edu/handle/1721.1/33013> [<https://perma.cc/G7FA-G8K6>]; William A. Fischel, *Fiscal Zoning and Economists' Views of the Property Tax* 17-18 (Lincoln Inst. Of Land Pol'y, Working Paper No. WP14WF1, 2013); Dawson, *supra* note 70, at 9-10.
73. See Frantz, *supra* note 72, at 16-17.

County, California viewed those living in affordable housing found that locals had “negative perceptions of families in affordable housing while senior housing is more acceptable.”⁷⁴ In San Diego, California, researchers interviewed residents who believed that “those who live in affordable housing units are more likely to threaten the safety of the community and exhibit ‘frightening behavior.’”⁷⁵ Many interviewees suggested that, to address these issues, new affordable housing should be limited to seniors, whom they believed were safer and less threatening as a class.⁷⁶ Similarly, a survey of residents in Woodbridge, Connecticut uncovered widespread opposition to affordable housing for families, but less skepticism toward senior housing. One commenter bluntly affirmed a popular opinion:

I support affordable housing for senior Woodbridge residents only, who would like to stay in town and have paid taxes for many years. Since they are on fixed incomes it has become very difficult to afford. I do not support housing for families who just want to live in Woodbridge. The strain on our schools and maintenance to the town will have a negative effect on our town and increase our taxes even more.⁷⁷

Negative perceptions of affordable housing intended for families do not exist in a vacuum. Instead, these perceptions impact the types of affordable and multifamily housing that are built around the country. This is supported by both individualized and aggregate evidence from municipal-planning decisions. Individualized evidence of familial-status discrimination abounds in discrete zoning and funding choices. In one Pennsylvania community, a study of zoning decisions uncovered explicit discrimination against family-oriented housing in zoning hearings. When questioned about the differences between an approved affordable-housing complex and a rejected yet similar development, a local official involved in the decision stated that the approved development “was a little bit

74. Stefany K. Nelson, *A Social Construction of Affordable Housing and NIMBY in a Southern California County* 64 (June 2014) (M.S.W. thesis, California State University, San Bernardino), <https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1087&context=etd> [https://perma.cc/8MUD-YL4L].

75. Mounah Abdel-Samad, Brian E. Adams, Mike Williams & Kate DeConinck, *Community Perceptions of Affordable Housing in San Diego*, CTR. FOR REG'L STABILITY 7 (Dec. 2020), https://crs.sdsu.edu/_resources/files/community_perceptions_of_affordable_housing_in_san_diego_research_report_dec2020.pdf [https://perma.cc/MST4-38T2].

76. *Id.*

77. *Woodbridge Housing Survey*, WOODBRIDGE, CONN. 3 (Mar. 4, 2022), <https://www.woodbridgect.org/DocumentCenter/View/5047/Woodbridge-Housing-Survey-Closed-March-4-2022-Responses-to-Question-16> [https://perma.cc/2GQF-P38N].

different because it was senior housing.”⁷⁸ The official noted that the public perceived senior-only low-income housing more positively than low-income housing for families.⁷⁹ He also observed that the decision to reject family-oriented housing turned on “[p]eople[’s] tend[ency] to think [elderly individuals on fixed incomes] pose no threat to their community.”⁸⁰

Zoning adjudications further South also provide individualized evidence of familial-status discrimination. In Baltimore, Maryland, activists in a middle-class area attacked a city-backed plan to build thirty units of family-oriented affordable housing, demanding that the developer only construct twenty-five units for seniors and five for nonelderly disabled residents.⁸¹ One of the group’s leaders summed up his fear of housing for younger residents by stating: “I’m worried about crime in the neighborhood. I’m worried about maintenance of the property. I don’t need that next door to me.”⁸² With additional pressure from the developer, who also wished to build senior-only housing, the city ultimately backed down from its support for family-oriented housing, and the site was opened as an age-restricted community.⁸³

These examples of discrete planning decisions driven by familial-status discrimination are certainly not exhaustive.⁸⁴ In fact, antifamily attitudes often preclude the construction of family-oriented housing before it is even proposed. As

78. Russell Brown, *NIMBY Effects on Low-Income Housing Policy: A Case of Two Cities* 41 (May 2012) (M.A. thesis, Duquesne University), <https://dsc.duq.edu/cgi/viewcontent.cgi?article=1368&context=etd> [<https://perma.cc/2L3N-72VM>].

79. The official stated, “There is that perception of low-income versus senior low-income, because senior low-income is ‘I’m on a fixed income,’ and what are you going to do about that?” *Id.*

80. *Id.* at 42.

81. Eric Siegel, *Apartment Plan Stirs Hamilton Residents*, *BALT. SUN* (Apr. 11, 2007, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-2007-04-11-0704110179-story.html> [<https://perma.cc/XX3V-BT95>].

82. *Id.*

83. *John Manley House*, HABITAT AM., <https://www.habitatamerica.com/communities/john-manley-house> [<https://perma.cc/8GLH-Z2T2>].

84. See, e.g., Email from Anthony Mauro to Colts Neck, New Jersey, Planning & Zoning Board (Sept. 28, 2021, 10:33 EST) (on file with author) (“[We] oppose the approach the township is taking to satisfy the town’s low income housing requirement. We support building 350 units that satisfy the low income housing criteria (e.g. group homes for autistic children, Alzheimer, and veterans, etc.)”); Roger D. Colton, *Massachusetts Analysis of Impediments to Fair Housing: Fiscal Zoning and the “Childproofing” of a Community*, MASS. DEPT. HOUS. & CMTY. DEV. 9 (Dec. 2, 2013), http://www.fsconline.com/downloads/Papers/2013%2012%20MA_Analysis_of_Impediments.pdf [<https://perma.cc/SH6E-SGQS>] (“Belmont’s local decisionmaking on such issues as zoning is frequently driven by an explicit desire *not* to provide additional housing opportunities for families with children.”); WOODBRIDGE PLAN. & ZONING COMM’N, MEETING MINUTES 7 (June 6, 1994) (discussing residents fighting against affordable housing

Professor Tim Iglesias notes, “Some developers avoid local opposition problems by . . . only proposing politically acceptable developments (e.g., senior housing, ownership, or mixed income).”⁸⁵ This means that developers sometimes proactively choose to build senior housing to avoid a permitting rejection or delay. Internal firm decisions will never be visible in news clippings or local-government meeting minutes, but they still prevent the construction of family-oriented housing. Nevertheless, the effects of these choices emerge in aggregate descriptions of affordable-housing construction trends.

Aggregate evidence of familial-status discrimination is primarily derived from information on different types of affordable housing that states or regions tend to construct. In Minnesota, for instance, a review of construction in ten suburban communities in the Twin Cities metropolitan area revealed that, compared to family-oriented affordable-housing projects, “communities have been more receptive to [helping finance] new housing for seniors.”⁸⁶ In many of these communities, the policy of solely aiding age-restricted housing was paired with residential downzoning, which similarly worked to restrict the construction of affordable housing for families.⁸⁷

Reports on affordable and multifamily housing construction in the Northeast show that very little affordable housing built in some states is targeted at families. According to one study, “[O]ver 60 percent of the communities in eastern Massachusetts have permitted age restricted housing in locations, or at densities, not otherwise allowed. As a result, there has been a proliferation of age restricted development, but production of housing for younger families . . . has stalled.”⁸⁸ Similarly, in Connecticut, nearly two-thirds of all state-funded affordable housing is age-restricted as opposed to family-oriented.⁸⁹ Those family

by stating that “the school system . . . would be overburdened with the additional students,” potentially jeopardizing the “excellent education” currently available to their children).

85. Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 78, 102 n.7 (2002).
86. Barbara L. Lukermann & Michael P. Kane, *Land Use Practices: Exclusionary Zoning, de Facto or de Jure?*, U. MINN. CTR. URB. & REG’L AFFS. [25] (1994), <https://conservancy.umn.edu/bitstream/handle/11299/204426/H1015.pdf> [<https://perma.cc/LP6A-AG5W>].
87. *See id.*
88. Bonnie Heudorfer, *Age Restricted Active Adult Housing in Massachusetts*, CITIZENS’ HOUS. & PLAN. ASS’N 5 (June 2005), https://www.chapa.org/sites/default/files/f_122952789640BUUpdateDec2008_4.pdf [<https://perma.cc/M82Q-AP6Q>].
89. *See* Erin Boggs & Lisa Dabrowski, *Out of Balance: Subsidized Housing, Segregation and Opportunity in Connecticut*, OPEN CMTYS. ALL. 22 (Sept. 2017), https://d3n8a8pro7vhmx.cloudfront.net/opencommunitiesalliance/pages/359/attachments/original/1510154235/Out_Of_Balance_Report_-_Final_-_Revised_11-8-17.pdf [<https://perma.cc/Z8DZ-7JE7>].

units that do exist are more concentrated in low- and moderate-opportunity areas than senior-only units.⁹⁰

In cities and suburbs across the country, municipal officials and residents find ways to weaponize familial status to stymie housing development. It is worth noting, however, that this may be more common and visible in some places and scenarios than others. Many of the examples listed above are from the Northeast, where a handful of states have passed moderately successful laws to push communities to build affordable housing. To varying degrees, laws in Massachusetts, New Jersey, and Connecticut enable developers to force towns to grant permits for multifamily affordable-housing projects if a town's housing stock does not contain enough units that are set aside for low-income individuals.⁹¹ In these localities, antihousing activists must think creatively to minimize the impact of affordable housing because they cannot refuse to grant permits outright. Thus, in zoning hearings, instead of asking whether to accept affordable housing, activists will ask: "What type of affordable housing should we accept?" Once this question is posed, residents tend to lobby strongly for senior housing.

States with "builder's remedies" and affordable-housing mandates exhibit high levels of familial-status discrimination to avoid complying with the spirit of affordable-housing law.⁹² This is because when local governments *must build* affordable housing, they feel the need to take more creative measures to make sure this housing is less disruptive.⁹³ This has important implications. States like California are now bolstering their own affordable-housing mandates.⁹⁴ If these states do not actively encourage the construction of family housing over senior-only housing — measures proposed and discussed in depth in Part IV — their programs will fail to achieve their goals.

Despite the geographic concentration of familial-status discrimination in the Northeast, familial-status discrimination is a nationwide problem with national

90. *See id.* at 12, 22.

91. *See* MASS. GEN. LAWS ch. 40B, § 21 (2022); *Mount Laurel Doctrine. What Is the Mount Laurel Doctrine?*, FAIR SHARE HOUS. CTR., <https://fairsharehousing.org/mount-laurel-doctrine> [<https://perma.cc/7ZW3-W8FU>]; CONN. GEN. STAT. § 8-30g (2022).

92. A builder's remedy is a law entitling developers to reduced regulatory barriers if a jurisdiction fails to meet its allocated share of affordable housing. Christopher S. Elmendorf, *A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance*, CAL. ENV'T L. & POL'Y CTR. 3 (Mar. 29, 2022), <https://law.ucdavis.edu/sites/g/files/dgvnski0866/files/media/documents/Builder%27s%20Remedy%20Primer-1.pdf> [<https://perma.cc/J928-47YE>].

93. *See, e.g., supra* Section I.A.2.

94. *Omnibus Housing Bill Adds Teeth to Housing Element Law Enforcement*, BEST BEST & KREIGER LLP (Oct. 14, 2019), <https://www.bbklaw.com/news-events/insights/2019/legal-alerts/10/omnibus-housing-bill-adds-teeth-to-housing-element> [<https://perma.cc/U8SV-VP4K>].

solutions. This Note aims to develop a legal framework that will inevitably be refined with the particularities of local geographic and legal contexts.

C. *Who Hates Children?*

American municipalities' widespread aversion to housing low-income children and their families may seem a bit odd on first reflection. Politicians across the political spectrum craft their platforms around serving the nation's families, and a family teeming with kids is seen as the epitome of the American Dream.⁹⁵ How, then, can one explain discrimination against families? Why do communities want to keep kids out?

Most of the purported motivations for familial-status discrimination can be grouped into three categories: (1) genuine concern for seniors and those with disabilities; (2) homevoting; and (3) prejudice. This does not exhaust the range of potential categories, but it covers most of the territory. Opponents of family-oriented housing can be driven by one of these motivations or all of them at once. While the lines between some of these categories blur, they are still useful for gaining a basic understanding of how individuals justify their opposition to families. In fact, the blurring is the point. The purpose of this account of the reasons for familial-status discrimination is to give readers an understanding of how community opposition to housing for families can and does use neutral language as a smokescreen for racial and class discrimination.

First, there are undoubtedly individuals who push for municipalities to build and approve senior housing for altruistic reasons. Many advocates believe that elderly individuals require separated housing that is specialized for their needs.⁹⁶ Specifically, they argue that elderly individuals deserve unique services like age-appropriate community spaces, easy access to medical care, maximal accessibility, and safety – all of which, they contend, are best provided in facilities that are

95. See Christa C. Bryant, *Democrats and Republicans Vie to be 'the Party of Parents,'* CHRISTIAN SCI. MONITOR (Nov. 4, 2021), <https://www.csmonitor.com/USA/Politics/2021/1104/Democrats-and-Republicans-vie-to-be-the-party-of-parents> [<https://perma.cc/6746-9BZ8>].

96. “[S]eniors should be allowed to live in safe, quiet communities congenial to them. Most importantly, they should be able to do so regardless of their income.” S. REP. NO. 104-172, at 5 (1995). Congress passed an amendment to the Housing for Older Persons Act (HOPA) exemption in 1995 because of evidence of the advantages of senior communities. *Id.* at 2, 13.

built for the exclusive purpose of housing elderly individuals.⁹⁷ While some debate the merits of these advocates' position,⁹⁸ there is nothing inherently pernicious about those who wish to provide elderly individuals with senior-only housing options but still support family-oriented affordable-housing proposals. To the contrary, it is essential that housing policy provide community members—both old and young—with high-quality, affordable homes from which they can access the services and infrastructure they need.⁹⁹

Second, individuals may try to block new housing for families because they have a strong self-interest in maintaining the status quo. In the classic book *The Homevoter Hypothesis*, Professor William A. Fischel argues that homeowners rally against the construction of new housing in their backyards because they fear that development will lower their property values and affect their finances.¹⁰⁰ They are especially mobilized to fight development because home equity is the most important financial asset for a wide swath of American homeowners.¹⁰¹ If homeowners believe that an influx of low-income children into their neighborhood would lower their property values, it is unsurprising that they would band together to block the development of family housing.¹⁰²

97. See Off. Pol'y Dev. & Rsch., *Should Age-Restricted Communities Be Exempt from Civil Rights Laws?*, U.S. DEP'T HOUS. & URB. DEV., https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_071213.html [<https://perma.cc/UX4W-FRD7>] (describing Mark Bauer's comments on senior housing to HUD's Office of Fair Housing and Equal Opportunity). At a PZC for the Connecticut development discussed in Section I.A, one commenter stated that "seniors don't deserve kids running up and down the hallway." Transcript of Audio tape: Town of Branford Planning and Zoning Commission Public Hearing 13-14 (Nov. 2, 2017) [hereinafter Petrowski statement] (statement of Todd Petrowski) (on file with authors); Marcia Chambers, "Riffraff" Phobia Emerges at Parkside Hearing, NEW HAVEN INDEP. (Nov. 9, 2017, 11:02 AM), https://www.newhavenindependent.org/article/the_riffraff_phobia_emerges_at_parkside_hearing [<https://perma.cc/VZ5Q-9BXD>].

98. For a debate over the merits of senior-only housing, see Peter R. Ulhenberg, *Integration of Old and Young*, 40 GERONTOLOGIST 276 (2000).

99. To that end, some scholars advocate a "comprehensive, all ages, planning approach" that "deliver[s] supportive services across the life cycle." Mildred E. Warner & Xue Zhang, *Planning Communities for All Ages*, J. PLAN. EDUC. & RSCH. 1, 1-2 (2019). They rightly view housing for older persons and housing for families as mutually constitutive and in critically short supply.

100. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4 (2001).

101. *Id.*

102. Residents also tend to complain about sewage and water capacity without any understanding of their town's infrastructure. For an example of applicants undermining residents' assumptions about sewer and water, see Thomas Breen, *Suburb Housing Quest Enters New Phase*, NEW HAVEN INDEP. (Apr. 7, 2021, 12:06 PM), https://www.newhavenindependent.org/article/woodbridge_zonings [<https://perma.cc/P4WB-2E9L>].

Homeowners seeking to guard their property values see families as a threat for a few reasons. They believe that an influx of children to their town will compel their local government to increase spending on its most significant expense: schools.¹⁰³ In wealthier areas that heavily rely on property taxes to fund schools, each new child enrolled in school could be perceived as an accounting liability that must be paid for at the expense of homeowners.¹⁰⁴ Residents believe that municipalities can either raise taxes to pay for these students' education or reduce public services.¹⁰⁵ The wealthy New Jersey suburb of Colts Neck offers one example of this rationale for rejecting families in action. There, residents complained that non-senior housing would cause harmful school overcrowding even though Colts Neck schools were under capacity.¹⁰⁶

Incumbent residents also tend to fret about "overpopulation" and its impact on quality of life.¹⁰⁷ To these individuals, families with children often represent more cars on increasingly congested morning commutes, fewer empty parking spaces at the grocery store, and more crowding in the parks.¹⁰⁸ In comparison to

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103. See Fischel, *supra* note 72, at 17-18; see, e.g., Email from Bruce Thompson to Members of the Woodbridge Town Plan. & Zoning Comm'n (Jan. 3, 2021, 9:34 AM), <https://www.woodbridgect.org/DocumentCenter/View/3873/January-4-2021-email-comments-for-hearing-record-scan-3> [<https://perma.cc/3P3T-HCWP>] ("Multi-family housing, because it allows more people to live in a designated space, means population growth. More people means a greater strain on the services provided by the town: schools, police, fire fighting, wear and tear on the roads, refuse disposal, etc. that will require more tax revenue to cover.").
104. In jurisdictions that primarily receive state funding for schools, additional children should have a comparatively reduced impact on municipal or school-district spending.
105. Fischel, *supra* note 72, at 17-18. The economics of school funding pushed by antihousing activists are dubious. When new students are introduced to a school district, fixed costs will not necessarily rise; only variable costs are guaranteed to increase. The families of the new children will at least partially cover these costs with the new tax revenue they bring. *Id.* at 18.
106. See Email from Valerie Sudol to Colts Neck Plan. Bd. (Oct. 11, 2021) (on file with authors) ("Township schools are currently under capacity but are facing pressure from this and other affordable housing projects as well as students from Earle Naval Depot."); Dan Radel, *Colts Neck Considering Closing Elementary School*, ASBURY PARK PRESS (Oct. 2, 2014, 4:58 PM ET), <https://www.app.com/story/news/education/2014/10/02/colts-neck-considers-conover-elementary-school/16603041> [<https://perma.cc/3B74-C46J>]; Peter Elacqua, *Planning Board Gives Go-Ahead to Colts Neck Manor Apartment Complex*, CENTRALJERSEY (Dec. 8, 2021), <https://centraljersey.com/2021/12/08/360-housing-units-reluctantly-approved-by-colts-neck-planning-board> [<https://perma.cc/SV3K-M6C9>].
107. See David Roberts, *Making Cities More Dense Always Sparks Resistance. Here's How to Overcome It*, VOX (Jan. 30, 2019, 2:27 PM EST), <https://www.vox.com/2017/6/20/15815490/toderian-nimbys> [<https://perma.cc/KBC9-36S7>].
108. See, e.g., Comm'r Russo statement, *supra* note 48. For residents who believe that their property is valuable because of the slightly less crowded nature of their neighborhood, any new density brought by families is also a threatening risk. See M. Farrugia, *How Much Does a Busy Road*

an influx of children, those who fear overcrowding see senior housing as less concerning. Every unit of senior-only housing only represents a population increase of one or two individuals, whereas when a family moves into a new housing unit, they bring many more new residents.¹⁰⁹ In Connecticut, commenters at a public hearing for the aforementioned property redevelopment made this link explicit. One resident explained that she viewed elderly renters as a “car light population,” but she feared a new non-age-restricted development because “families [and] homes with some substantial income” would “probably . . . have cars with their families.”¹¹⁰ This would cause traffic increases that another resident claimed would have a “tremendous impact on both the health and safety of virtually all [town] residents and many in surrounding towns.”¹¹¹

Third, many of the economic and lifestyle concerns listed above can be pretexts for racial and socioeconomic prejudices that go hand in hand with animus toward families. In other words, while homeowners may say they are concerned by falling property values, skyrocketing tax bills, or nebulous changes in their community’s “character,”¹¹² some either consciously or subconsciously wish to exclude families from their town to wall themselves off from people of color and people with low incomes.¹¹³

Lower Real Estate Value?, SFGATE, <https://homeguides.sfgate.com/much-busy-road-lower-real-estate-value-84306.html> [<https://perma.cc/U6RL-X9RH>] (describing the conventional thinking of realtors and homeowners).

109. See Andrew W. Roberts, Stella U. Ogunwole, Laura Blakeslee & Megan A. Rabe, *The Population 65 Years and Older in the United States: 2016*, U.S. CENSUS BUREAU 6 (Oct. 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf> [<https://perma.cc/BKW4-2F2A>].
110. Transcript of Audio tape: Town of Branford Planning and Zoning Commission Public Hearing 49 (Apr. 4, 2019) (statement of Carolyn Sires) (on file with authors).
111. *Id.* at 44 (Nov. 2, 2017) (statement of Gene Canaban).
112. See Devin Wallace, *More Development Would Ruin Our Neighborhood’s Character and that Character Is Systemic Racism*, MCSWEENEY’S (July 28, 2021), <https://www.mcsweeneys.net/articles/more-development-would-ruin-our-neighborhoods-character-and-that-character-is-systemic-racism> [<https://perma.cc/KK52-GCA6>] (satirizing the pushback on building more housing as being rooted in the neighborhood “character” of systemic racism). Courts have noted that the phrase “community character” is regularly deployed as a racial dog whistle. See, e.g., *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 609 n.5 (2d Cir. 2016) (citing *Yonkers II*, 837 F.2d 1181, 1192 (2d Cir. 1987) (“[*Yonkers II*] implicitly recognized the relevance of code words in the context of legislators acting responsively to citizen animus by specifically invoking residents’ use of words like ‘character.’”).
113. See Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 446 (2020); Belinda Creel Davis & Valentina A. Bali, *Examining the Role of Race, NIMBY, and Local Politics in FEMA Trailer Park Placement*, 89 SOC. SCI. Q. 1175, 1185 (2008); Conor Dwyer Reynolds, *The Motives for Exclusionary Zoning* 2-6 (Sept. 18, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3449772> [<https://perma.cc>

As courts adjudicating fair-housing claims have long recognized, few local-government officials are willing to admit outright that they favor racial or income segregation.¹¹⁴ As such, animus toward families and concern for the elderly have taken on a role as more socially acceptable public rationales for maintaining exclusive enclaves. The Yonkers case illustrates this dynamic. Yonkers was willing to place family-oriented public-housing developments in majority-Black neighborhoods but blocked nearly all attempts to place the same type of housing in majority-white neighborhoods.¹¹⁵ Only when Yonkers had to build public housing in white neighborhoods did the city permit construction. But even then, it only built age-restricted housing.¹¹⁶ This policy, of course, perpetuated Yonkers's stark pattern of racial segregation.¹¹⁷ One Yonkers councilmember eventually acknowledged that allowing senior-only housing in certain areas but not family housing was a deliberate strategic choice.¹¹⁸ He admitted that

his publicly stated reasons for opposing [a family affordable housing project as opposed to senior only housing] were pretextual, and that his opposition in fact was in response to his constituents' racially influenced opposition. . . . Senior citizen housing created less opposition, according to [the councilmember], so long as the words "low income" were avoided.¹¹⁹

The link between familial-status discrimination and class or race discrimination is not limited to racially-diverse-yet-segregated cities like Yonkers. When affluent and majority-white suburbs are required to build affordable housing, they too use familial-status discrimination to limit its desegregating effects. For example, in the Connecticut town examined in Section I.A, residents mostly deployed familiar arguments about the fiscal or lifestyle cost of families, but a few

/NZK9-DZAK]; Norman Williams, Jr., *Planning Law and Democratic Living*, 20 L. & CONTEMP. PROBS. 317, 344 (1955).

114. See *Yonkers I*, 624 F. Supp. 1276, 1369 (S.D.N.Y. 1985) ("The task of determining intent is further complicated by the likelihood that there may be little or no direct evidence of discriminatory intent, especially with respect to actions taken during the past few decades, due to the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior.").

115. See *supra* Section I.B.

116. *Yonkers I*, 624 F. Supp. at 1321 ("[T]he church group received Planning Board and City Council approval for its proposed senior citizens project within a matter of months.").

117. See *id.*

118. *Id.* at 1322.

119. *Id.*

explicitly drew the link from their demand for senior-only housing to their racially charged desire to keep low-income and urban “criminals” out of town.¹²⁰ One commentator at a public hearing put this complaint in stark terms. While he “[didn’t] think anyone [at the hearing was] opposed to seniors,” he did believe that seniors “shouldn’t be mixed in with low-income or Section 8 people. That brings a different element to the town. Seniors don’t deserve kids running up and down the hallway. And also, what kind of crime is going to happen?”¹²¹

Familial-status discrimination has also long served as an effective method of maintaining racial and socioeconomic segregation as a simple result of demographics. The United States’s white population is significantly older, on average, than the nonwhite population. In 2019, the median age of white residents was 43.7 years old, compared to 29.8 for Latinos or Hispanics, and 34.6 for Black residents.¹²² Thus, the proportion of family renters who are people of color is usually larger than the proportion of senior renters who are people of color. Given this dynamic, senior-only developments are generally whiter than family developments.¹²³

Moreover, scholars have pointed out that hostility toward families with children “is related to stereotypes about single women, especially single African American mothers.”¹²⁴ Thus, familial-status discrimination is not just a tool for achieving racial segregation, but itself a product of gendered and racialized attitudes toward families. It is also important to note that familial-status discrimination often has a racially discriminatory effect because Black and Latinx households are statistically more likely to have children than comparable white families.¹²⁵ This means that a policy banning family housing will have a disparate impact on these groups.

120. See Chambers, *supra* note 97.

121. *Id.*; Petrowski statement, *supra* note 97.

122. William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS INST. (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted> [<https://perma.cc/3YXE-TUHU>].

123. This dynamic was observed in Yonkers. See *Yonkers I*, 624 F. Supp. at 1311; see also John Nelson, *The Perpetuation of Segregation: The Senior Housing Exemption in the 1988 Amendments to the Fair Housing Act*, 26 T. JEFFERSON L. REV. 103, 105 (2003) (explaining that the racial composition of apartments in the United States became “predominantly white as more and more families with children were forced to leave” in the 1970s and 1980s).

124. Vincent J. Roscigno, Diana L. Karafin & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 SOC. PROBS. 49, 59 (2009).

125. Jeffrey S. Passel, Gretchen Livingston & D’Vera Cohn, *Explaining Why Minority Births Now Outnumber White Births*, PEW RSCH. CTR. (May 17, 2012), <https://www.pewresearch.org/social-trends/2012/05/17/explaining-why-minority-births-now-outnumber-white-births> [<https://perma.cc/HRS6-XJSK>].

As the House of Representatives explicitly recognized in its report when adding familial status as a protected class in the 1988 amendments to the FHA, racial, socioeconomic, and familial-status discrimination go hand in hand.¹²⁶ To examine one without the others only leads to an impoverished understanding of the intersectional dynamics of discrimination.¹²⁷

D. *Familial-Status Discrimination Matters*

There are two reasons why familial-status discrimination matters. First, the exclusionary land-use policies brought about by familial-status discrimination significantly impact the lives of many people living in low-income communities and communities of color. These policies both exacerbate the national affordable-housing shortage and maintain the American system of housing segregation. Second, the sheer ubiquity of familial-status discrimination in exclusionary land-use decisions can supply housing advocates with innovative and effective new strategies to bring viable FHA suits.

1. *The Cost of Familial-Status Discrimination*

At a time when many urban areas in America are experiencing an affordable-housing shortage,¹²⁸ familial-status discrimination exacerbates the crisis. Scholarship has well established that adopting policies that reduce the supply of housing in areas with high housing demand leads to elevated housing costs.¹²⁹ Familial-status discrimination produces just such policies. For instance, when

126. The report stated: “Discrimination against families often has a racially discriminatory effect, because minority households are more likely to have children.” H.R. REP. NO. 100-711, at 21 (1988).

127. It is important not to silo statements from planning commissioners and town residents as examples of either familial-status discrimination or another form of discrimination. Scholars instead analyze comments about familial status through an intersectional lens, acknowledging that both forms of discrimination run hand-in-hand. See Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 463 (2018).

128. See Aurand et al., *supra* note 1, at 4 (detailing how “[h]ouseholds with higher incomes have a cumulative surplus of affordable homes” while “[a]pproximately 6.8 million renter households have very low incomes”).

129. See Jared Bernstein, Jeffery Zhang, Ryan Cummings & Matthew Maury, *Alleviating Supply Constraints in the Housing Market*, WHITE HOUSE (Sept. 1, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/09/01/alleviating-supply-constraints-in-the-housing-market> [<https://perma.cc/2CYG-5PMX>]; Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1614-17 (2021); Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism:*

residents delay construction of a new family-oriented, mixed-income development for years with demands that it only house seniors, money is wasted on lawyers and planners, and fewer units of housing are introduced to the market. And when city councils refuse to grant “letters of consent” to concrete, high-quality, family-oriented LIHTC proposals, states instead fund less efficient projects with fewer units of affordable housing. In places like Connecticut, where the state’s department of housing recognizes that there is a shortage of 86,000 affordable units,¹³⁰ creating roadblocks to affordable housing is unconscionable. Regions with skyrocketing housing prices cannot build their way out of their crisis when governments reject housing by using excuses rooted in discrimination.¹³¹

Housing Supply and Affordability 7 (Aug. 20, 2018) (unpublished manuscript), https://furmancenter.org/files/Supply_Skepticism_-_Final.pdf [<https://perma.cc/76WP-SP2K>]; Edward Glaeser, Jenny Schuetz & Bryce Ward, *The Price Is (Not) Right: Large Lots and Other Requirements Drive Up the Cost of Bay State Homes*, COMMONWEALTH MAG. (Jan. 1, 2006), <https://commonwealthmagazine.org/uncategorized/how-large-lot-zoning-and-other-town-regulations-are-driving-up-home-prices> [<https://perma.cc/GS2A-8MDF>]; William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENV’T L. 105, 110 (2006).

130. Christie Stewart, Peter A. Tatian, Lydia Lo, Kelly Davila & Fay Walker, *Housing Connecticut’s Future: Meeting the State’s Affordable and Accessible Housing Needs*, URB. INST. 28 (Feb. 4, 2021), https://www.urban.org/sites/default/files/publication/103553/housing-connecticuts-future_o_o.pdf [<https://perma.cc/8JT8-HGMH>].

131. Kurt Paulsen outlines a potentially powerful objection to the argument that building solely senior housing can exacerbate the housing crisis. Paulsen, *supra* note 69, at 33. If cities create new housing for elderly residents, might those elderly residents move into that housing from affordable housing suitable for families, and open up housing supply for families? In other words, to the extent that elderly-only housing generally increases a city’s housing capacity, could it have pass-through effects which benefit families with children?

When senior housing is built en masse, this “trickle down” to families might indeed occur, but this Note argues that not-in-my-backyard (NIMBY) communities often only build senior housing when their hand is forced by state law. See, e.g., discussion *supra* Section I.A.2 (showing how a Connecticut town only pushed for senior housing because it had no choice but to provide some affordable housing). In many communities, the supply of new senior housing is simply too limited to make a dent in prices in many localities. *Id.* Moreover, Paulsen’s trickle-down argument is an empirical claim that requires substantiation. For senior housing to be a perfect substitute for new affordable family housing, the pass-through effect Paulsen hopes for would need to be almost perfectly efficient and immediate.

Additionally, building subsidized housing only for the elderly leaves the poorest families to fend for themselves, with little aid in an expensive marketplace. Housing prices will never drop low enough to allow the families with the lowest incomes to afford reasonable accommodations since there is simply no profit incentive for private developers to serve these individuals—they cannot break even with low rents. Spencer Bokart-Lindell, *America’s Housing Crisis Is a Choice*, N.Y. TIMES (Aug. 10, 2021), <https://www.nytimes.com/2021/08/10/opinion/housing-crisis-eviction.html> [<https://perma.cc/EAD4-XZAH>]. Providing subsidized units for families will always be a requirement for a well-rounded housing policy. *Id.* Building units

Like all forms of exclusionary land-use policy, municipal familial-status discrimination also reinforces segregation. Despite hopes that the FHA would integrate American neighborhoods, housing segregation is alive and well in America today. In fact, 81% of large metropolitan areas in the United States were more segregated in 2019 than they were in 1990, and 83% of the communities that were “redlined” in the 1930s under federal mortgage policies were still highly segregated communities of color in 2010.¹³² The costs of this segregation are terrible, as illustrated by Raj Chetty, Nathaniel Hendren, and Lawrence F. Katz’s study of HUD’s Moving to Opportunity experiment.¹³³ In a randomized control trial, the study found that children who moved to low-poverty communities before turning thirteen years old reaped *substantial* benefits in lifetime earnings and incomes.¹³⁴ Familial-status discrimination closes the door to effective integration and opportunity. Without consequences for the decision to discriminate based on familial status, towns simply claim that they “are full” and close their doors to families who most need their resources (e.g., good schools, safe streets, a clean environment).¹³⁵

2. *An Opportunity for Fair-Housing Enforcement*

Municipal familial-status discrimination also matters because it could serve as a uniquely effective gateway for government officials and housing advocates to hold municipalities liable for their exclusionary practices using the FHA. Building an FHA case against a municipal land-use policy is difficult in 2023, in part because eight years ago, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court limited one of the advocates’ primary tools to challenge land-use policies — disparate-impact liability.¹³⁶ *Inclusive Communities* has not halted municipal land-use suits, but it has placed

only for elderly individuals cuts low-income families off from access to non-market-rate affordable housing.

132. Stephen Menendian, Samir Gambhir & Arthur Gales, *The Roots of Structural Racism Project*, OTHERING & BELONGING INST. [2], [7] (June 21, 2021), <https://belonging.berkeley.edu/roots-structural-racism> [<https://perma.cc/RU5R-A6UK>].

133. See Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

134. *Id.* at 899.

135. See *supra* Section I.A.

136. 576 U.S. 519, 521 (2015).

a severe burden on plaintiffs by requiring a new showing of “robust causality” for those bringing a disparate-impact claim.¹³⁷

Intentional discrimination (or disparate-treatment discrimination) cases against municipalities have also grown more difficult to win. As Robert G. Schwemm—one of the most prolific scholars of fair-housing law—notes, fifty years after the civil-rights movement, not-in-my-backyard (NIMBY) government officials are more likely to leave their racial animus unspoken than they might have been in the past.¹³⁸ Overt racial discrimination in housing quickly “taper[ed] off” after the passage of the FHA, even as housing providers developed “neutral” housing restrictions which tended to maintain segregation.¹³⁹ This decline in explicit discrimination may have occurred because modern opponents of affordable housing are less racially biased than they once were, because opponents are more socially cautious about voicing their true feelings, or because municipal attorneys have coached local officials to strategically use pretextual rationales to reject housing. Regardless of the reason, the lack of explicit racial animus on display in municipal land-use public hearings makes it difficult for contemporary attorneys to bring intentional racial-discrimination cases against exclusionary practices.

This difficulty has allowed exclusionary land-use policies to flourish, but familial-status discrimination claims under the FHA may offer an opportunity for attorneys seeking a new pathway to crack down on these practices. While municipal officials are cagey about making decisions and statements that overtly display racial prejudice, they often speak unguardedly about their distaste for low-income families and children when explaining their reasons for certain exclusionary decisions. This is, after all, exactly the conduct displayed by officials in Texas, Pennsylvania, and Connecticut.¹⁴⁰ As evidenced by these examples, municipal officials often both feel no shame when talking about how they wish to discriminate against families and are unaware that familial-status discrimination is outlawed by the FHA. Thus, with a strong familial-status claim, attorneys can effectively keep a race-discrimination case alive even if officials have cau-

137. *Id.*; 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, 690 (2016).

138. Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 754-55 (1993). Disparate-treatment liability is logically distinct from disparate-impact liability, and follows its own proof structure, which typically requires evidence of intent. *See infra* note 174 (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

139. Schwemm, *supra* note 138, at 754-55.

140. *See* discussion *supra* Sections I.A & I.B.

tiously avoided the issue of race. Additionally, while socioeconomic discrimination is not banned by the FHA,¹⁴¹ familial-status discrimination can often serve as a pretext for such discrimination. This means that a familial-status suit could alleviate some patterns of socioeconomic discrimination.

Despite the promise of familial-status intentional-discrimination claims, few attorneys have attempted to construct this kind of case against municipalities. This is primarily because the FHA's HOPA exemption complicates enforcement of the FHA's ban on familial-status discrimination by shielding the development and preservation of elderly housing from litigation.¹⁴² But the HOPA exemption is not insurmountable. If attorneys can navigate the tricky waters of HOPA, which Parts II and III attempt, familial-status discrimination cases could open the door to a raft of new FHA cases against exclusionary local-government practices.

There is already cause for hope that it is possible to thread this needle. As previously noted, the federal government took a first crack at using the FHA's ban on familial-status discrimination to curb municipal malfeasance in Arlington, Texas. In September 2020, HUD charged the City of Arlington with violating the FHA by discriminating against families with children.¹⁴³ The HUD charges showcased Arlington councilmembers' brazen discrimination. One councilmember, for instance, was quoted in the charge saying, "[W]e specifically [tried] to get away from . . . allow[ing] workforce housing . . . We were trying to differentiate between senior living and workforce living."¹⁴⁴ DOJ followed HUD in January 2022 with a complaint alleging that Arlington's LIHTC review policy and its rejection of a nonelderly affordable-housing proposal each were unlawful acts of discrimination.¹⁴⁵ DOJ's complaint similarly supported these claims with quotes from City Council members expressing their opposition to affordable housing that might be occupied by families with children.¹⁴⁶ It also detailed just how Arlington had abused state LIHTC regulations with the goal of gaming the system to bar affordable family housing.¹⁴⁷ Mere days after DOJ

¹⁴¹. 42 U.S.C. § 3604(a) (2018). However, a ban on source-of-income discrimination does offer a proxy for a ban on socioeconomic discrimination in states that list source-of-income as a protected class in their individual state FHAs.

¹⁴². *Id.* § 3607(b)(1). See *infra* Section II.C.

¹⁴³. See *City of Arlington*, FHEO No. 06-17-8202-8 (U.S. Dep't of Hous. Sept. 23, 2020) (setting out the charge of discrimination).

¹⁴⁴. *Id.* at 3.

¹⁴⁵. See *Complaint*, *supra* note 5, at 6-9.

¹⁴⁶. *Id.* at 9-11.

¹⁴⁷. *Id.* at 6-7, 9-10.

filed its complaint, the City entered into a consent decree and was enjoined from enacting its discriminatory LIHTC review policy.¹⁴⁸

The Arlington case is a first sign that the federal government can win municipal familial-status discrimination cases, but it does not mean that this avenue for challenging discrimination has been firmly established. First, HUD's charge and DOJ's complaint are the only instances of agencies holding local governments to account for using senior housing as a tool for achieving familial-status discrimination. Despite the widespread use of municipal-housing policy to discriminate against low-income families with children, neither agency has followed up their actions by crusading to enforce the FHA in such cases. Second, the Arlington matter cannot serve as precedent in future litigation because the City admitted no wrongdoing, and the case did not go to trial.¹⁴⁹ Third, DOJ's complaint crucially did not address the HOPA exemption, instead flatly stating that Arlington's LIHTC policy violated the FHA while only mentioning HOPA in passing.¹⁵⁰ Arlington would only have raised HOPA as an affirmative defense had the case proceeded.

The Arlington case presents a moment of opportunity. It signals that lawyers for the federal government do not consider the HOPA exemption to be an insurmountable obstacle to using the FHA to combat municipal familial-status discrimination. The fact of the matter, however, is that federal officials have yet to write the briefs to bring this idea to fruition. In short, DOJ and HUD have cracked a door open to the claims this Note advocates. This Note aims to kick that door wide open.

II. THE DOCTRINAL LANDSCAPE OF FAMILIAL-STATUS DISCRIMINATION

In light of the brazen pattern of familial-status discrimination this Note has described, one might wonder how the FHA factors in. The FHA makes it unlawful “[t]o . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹⁵¹ For decades, fair-housing advocates have used the FHA to challenge municipal policies, from one-off

148. See Consent Decree, *supra* note 14, at 3.

149. See *id.* at 2.

150. See Complaint, *supra* note 5, at 3-4, 10.

151. 42 U.S.C. § 3604(a) (2018).

land-use decisions¹⁵² to broader zoning regulations,¹⁵³ for their discriminatory origins and impacts. Yet successful challenges to the manner of discrimination at issue in this Note – opposition to housing for lower-income families with children – are vanishingly rare. Despite the apparent willingness of government officials to say the quiet part out loud, very few municipal policies have ever been struck down for violating familial-status protections. The origins of this phenomenon can be traced to a key statutory exemption to the FHA: HOPA.¹⁵⁴

HOPA allows municipalities and private actors to build, maintain, and legislate in favor of housing for elderly individuals. The statute states, in relevant part, that the FHA’s familial-status protections do not “apply with respect to housing for older persons.”¹⁵⁵ Its reach is limited by language that narrows the definition of “housing for older persons” to that which is generally intended for those who are fifty-five or older.¹⁵⁶ Without this exemption, a building with a fifty-five-plus age requirement would facially violate the FHA. HOPA also allows municipal zoning boards to grant land-use variances to prospective housing developers on the condition that they construct elderly housing. A town may have a dearth of elder-living facilities, and HOPA enables its government to legislate in response to that issue.¹⁵⁷

The problem, as Part I demonstrated, is that many municipalities openly maintain a preference for elderly housing in order to obstruct housing for families. While this Note suggests that these municipalities are also motivated by racially discriminatory views, local government officials are far less explicit about these motivations. By contrast, they often make clear that they want to block higher-density affordable housing from being built because it has the potential to house families with children. In practice, municipalities do not use the HOPA exemption solely for the salutary purpose of providing elderly individuals with housing. Rather, they use it to get away with precisely the type of discrimination that the FHA exists to prevent. This effect runs contrary to the purpose for which

152. See, e.g., *Hallmark Devs., Inc. v. Fulton Cnty.*, 466 F.3d 1276 (11th Cir. 2006); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp 120 (N.D.N.Y. 1992).

153. See, e.g., *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016); *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339 (S.D. Fla. 2007); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

154. 42 U.S.C. § 3607(b) (2018).

155. *Id.* § 3607(b)(1).

156. *Id.* § 3607(b)(2)(C).

157. Importantly, HOPA is not an exemption to other forms of FHA discrimination besides familial status. For instance, a municipality that openly maintained a preference for elderly housing in order to block housing for people of color would still be liable for racial discrimination under the FHA.

HOPA was enacted,¹⁵⁸ but it has been enabled by an expansive and deferential interpretation by certain federal courts.

This Part will first lay out the doctrinal landscape applicable to municipal familial-status discrimination claims. To that end, it explains FHA liability in general and then describes how courts have applied it to familial-status cases brought against municipalities. Second, this Part makes two important conclusions about FHA doctrine. First, existing interpretations of the HOPA exemption are overly deferential and permit municipalities to discriminate in the ways described in Part I. These interpretations are inconsistent with Congress's intent both when amending the FHA to include familial status as a protected class and when enacting HOPA. Second, and more importantly, municipal HOPA doctrine remains unsettled in nearly every circuit. Only a handful of courts have considered the issue, meaning that the cramped construction this Part describes – and to which Part III responds – is not set in stone.

A. *Understanding FHA Liability*

Federal law forbids discrimination on the basis of race, color, religion, sex, familial status, disability, or national origin in both private-housing transactions and government-housing policy.¹⁵⁹ Thus, the FHA applies to municipal governments and government bodies (like zoning boards) just as it applies to private actors.¹⁶⁰ Successful FHA suits have been brought against cities,¹⁶¹ towns,¹⁶² villages,¹⁶³ and school boards.¹⁶⁴ The majority of FHA claims against municipalities arise out of land-use decisions,¹⁶⁵ like one-off approvals for developments

158. See *infra* Section II.C.

159. 42 U.S.C. §§ 3604-3606 (2018).

160. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 12B:5 (2022) (“A unit of local governments may be sued for a Fair Housing Act violation just like any other defendant.”); see *Eastampton Ctr., L.L.C. v. Township of Eastampton*, 155 F. Supp. 2d 102, 117 (D.N.J. 2001) (“The Fair Housing Act has been interpreted to prohibit municipalities from exercising their police powers to enact land use ordinances in a discriminatory manner.” (citing *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995))).

161. See, e.g., *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988).

162. See, e.g., *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988).

163. See, e.g., *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

164. See, e.g., *Yonkers II*, 837 F.2d 1181 (2d Cir. 1987).

165. A land-use decision governs lawful land uses on a given parcel or set of parcels. This can encompass general zoning policies that apply to entire regions, or one-off decisions to approve a proposed development or another individual use of land.

and broader zoning regulations.¹⁶⁶ For instance, courts have held municipalities liable for rejecting applications to build low-income housing on the grounds that the land-use decision constituted racial discrimination.¹⁶⁷

The FHA's doctrine follows that of many other civil-rights statutes, so municipalities can be held liable under both disparate-treatment and disparate-impact theories of discrimination.¹⁶⁸ Since disparate-impact claims are largely inapplicable to this Note's analysis, it omits an extended discussion of the issue.¹⁶⁹ Disparate-treatment claims "allege that a defendant made a covered housing decision based on 'a discriminatory intent or motive.'"¹⁷⁰

Plaintiffs in fair-housing suits can bring disparate-treatment claims against both facially discriminatory and facially neutral policies.¹⁷¹ To make a disparate-

166. SCHWEMM, *supra* note 160. Courts have found that this type of policy is impermissible based on § 3604(a)'s ban on actions that "otherwise make unavailable or deny" housing to people based on their membership in a protected class. 42 U.S.C. § 3604(a) (2018). *See, e.g.*, Leblanc-Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995) ("The phrase 'otherwise make unavailable or deny' has been interpreted to reach a wide variety of discriminatory housing practices, including discriminatory zoning restrictions.").

167. *See* Keith v. Volpe, 858 F.2d 467, 482-84 (9th Cir. 1988).

168. In 2015, the Supreme Court affirmed the existence of disparate-impact liability but cautioned that for plaintiffs to successfully prove a disparate impact, they must show that there is a robust causal link between the challenged policy and the disparate impact on a protected group. Tex. Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2534 (2015). A plaintiff seeking to make a prima facie case must "point to a defendant's policy or policies causing that disparity." *Id.* at 2523. If a plaintiff meets this burden, the defendant then has the opportunity to "explain the valid interest served by their policies." *Id.* at 2522. Finally, the plaintiff has the opportunity to present a less discriminatory alternative policy that would achieve the same interest. *See, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 616 (2d Cir. 2016).

169. The HOPA exemption precludes disparate-impact liability for municipalities pursuing elderly housing by dictating how courts should proceed through the standard burden-shifting framework of an FHA case. In a typical case, challengers of senior-only housing would have no trouble fulfilling the first step of disparate-impact analysis by establishing a prima facie case of disparate impact. *See supra* note 168 and accompanying text. This is because families with children, by definition, cannot live in elderly-only housing. As a result, age-restricted housing necessarily has a greater impact on such families. However, step two of the disparate-impact analysis allows the municipality to offer a nondiscriminatory reason for its policy. HOPA clearly states that a desire to build and preserve housing exclusively reserved for elderly people is not a discriminatory purpose. *See infra* Section II.C. Thus, the municipality would succeed at step two. Finally, step three allows the challengers of a policy to proffer a less discriminatory alternative. But there is no way to achieve the goal of elderly-only housing without disproportionately impacting families with children. So long as elderly-only housing is a valid, non-discriminatory goal, disparate-impact claims are likely impossible to win.

170. DAVID H. CARPENTER, CONG. RSCH. SERV., 95-710, THE FAIR HOUSING ACT (FHA): A LEGAL OVERVIEW 5 (2016).

171. *See id.* at 5-6.

treatment claim against a facially neutral policy like senior housing, plaintiffs must present evidence of discriminatory intent on the part of policymakers.¹⁷² To do so, plaintiffs frequently present both direct and circumstantial evidence.¹⁷³ Absent direct evidence of discriminatory intent, courts analyze disparate-treatment claims using the *McDonnell Douglas* burden-shifting framework originating from Title VII law.¹⁷⁴ Under this framework, plaintiffs bear the initial burden of establishing a prima facie case showing intentional discrimination against a protected group.¹⁷⁵

Crucially, plaintiffs may also build a prima facie case of intentional discrimination if such animus was a significant factor in the position taken by “those to whom the [municipal] decision-makers were knowingly responsive.”¹⁷⁶ Courts have repeatedly interpreted this to mean that discriminatory comments made by members of the public can, in certain circumstances, provide evidence of a prima facie case of discrimination.¹⁷⁷ For instance, one court found an FHA violation

172. See *id.* Evidence of “intent” may be either direct (like policymakers’ statements) or circumstantial. See *id.* at 5.

173. Direct evidence “show[s] a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding . . . that an illegitimate criterion actually motivated the adverse . . . action.” *Gallagher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010) (quoting *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004)). For a helpful summary of the difference between direct and indirect evidence of intentional discrimination, see CARPENTER, *supra* note 170, at 5–6.

174. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The Court in *McDonnell Douglas* considered a racial-discrimination claim brought under Title VII of the Civil Rights Act, but the framework was adopted for FHA claims as well. For an example of a circuit court adopting the *McDonnell Douglas* test in the FHA context, see 2922 *Sherman Avenue Tenants’ Ass’n v. District of Columbia*, 444 F.3d 673, 682 (D.C. Cir. 2006). In its analysis, the D.C. Circuit cited cases in which the Second, Seventh, and Ninth Circuits all adopted *McDonnell Douglas* for FHA intentional-discrimination claims. See *Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48–52 (2d Cir. 2002); *Kormoczy v. Sec’y of Dep’t of Hous. & Urb. Dev.*, 53 F.3d 821, 823–24 (7th Cir. 1995); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536–38 (9th Cir. 2003).

175. Plaintiffs establish a prima facie case by “presenting evidence that animus against the protected group was a significant factor in the position taken by the municipal decision-makers.” DANIEL R. MANDELKER, *LAND USE LAW* § 7.06 (2020). Evidence does not solely have to come from officials; it can also come from local opposition that impacts government decision-making. See *Yonkers I*, 624 F. Supp. 1276, 1369–70 (S.D.N.Y. 1985).

176. See *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995).

177. See, e.g., *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 612 (2d Cir. 2016) (holding that a prima facie case can be made if “local officials [] knowingly respond to race-based citizen opposition”); *United States v. City of Birmingham*, 727 F.2d 560, 564–65 (6th Cir. 1984) (same); *LeBlanc-Sternberg*, 67 F.3d at 425 (same).

where a housing commission “knowingly pursued policies that appeased [members of the public] who expressed [racially] bigoted views.”¹⁷⁸ Likewise, in the Yonkers case discussed in Part I, the Second Circuit held that because plaintiffs were able to develop an “unimpeachable” record that “racial animus was a significant factor motivating those white residents who opposed the location of low-income housing in their predominantly white neighborhoods, [Yonkers] may properly be held liable for the segregative effects of a decision to cater to this ‘will of the people.’”¹⁷⁹ Developing this type of evidentiary record can be essential when, as in many of the examples discussed in Part I, members of the public attend local legislative meetings and make discriminatory statements pressuring their elected officials into enacting exclusionary housing policies.

Most courts recognize FHA violations where an unlawful motive, such as hostility toward families with children, was a motivating factor in a decision even if it was not the sole nor dominant motivation.¹⁸⁰ Some courts have applied a different standard, adopted by the Supreme Court in *Price Waterhouse v. Hopkins*,¹⁸¹ which established a burden-shifting framework in which defendants are given the opportunity to prove that they would have made the same decision absent any discriminatory motive.¹⁸² Either way, once a plaintiff makes a successful prima facie showing, the defendant then bears the burden of providing a nondiscriminatory reason for the challenged action.¹⁸³ If the defendant can provide a nondiscriminatory purpose for their actions, the burden shifts back to the plaintiff to demonstrate that the reason offered was pretext for the defendant’s actual discriminatory goal.

178. *United States v. City of Birmingham*, 538 F. Supp. 819, 826 (E.D. Mich. 1982), *aff’d as modified*, 727 F.2d 560 (6th Cir. 1984).

179. *Yonkers II*, 837 F.2d 1181, 1226 (2d Cir. 1987).

180. SCHWEMM, *supra* note 160, § 10.3 (“Among the lower courts, a strong consensus developed over the first two decades of Fair Housing Act litigation that [the Fair Housing Act] is violated even if only one of the factors that motivated the defendant was unlawful.”). For a court evincing this “strong consensus,” Robert G. Schwemm cites *United States v. City of Parma*, 494 F. Supp. 1049, 1097 (N.D. Ohio 1980), *aff’d*, 661 F.2d 562 (6th Cir. 1981), which held that a Fair Housing Act claim is cognizable “where it was established that race was a partial reason for the denial of housing.”

181. 490 U.S. 228 (1989).

182. *See id.* at 250. *Price Waterhouse* was an employment-discrimination case, but for an example of a circuit applying its framework to the FHA context, see *Mhany Mgmt.*, 819 F.3d at 616.

183. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

B. The Fair Housing Act and Families with Children

In 1988, Congress passed the Fair Housing Amendments Act (FHAA), which added disability and familial status to the list of prohibited bases for discrimination in housing-related practices.¹⁸⁴ With this addition, Congress expressly protected families with children from housing discrimination.¹⁸⁵ At the time the Act was passed, 25% of the country's rental units were off-limits to children, while fully 50% "were subject to restrictive policies that limited the ability of families to live in those units."¹⁸⁶ These figures came from a 1980 HUD study¹⁸⁷ cited by the House Report accompanying the Act.¹⁸⁸ Congress cited another HUD study¹⁸⁹ that found, in a national survey, that 99% of respondents "reported numerous problems related to housing discrimination against children."¹⁹⁰ The House Report also emphasized that most states did not outlaw familial-status discrimination, and those that did had struggled to enforce their protections.¹⁹¹ Thus, Congress clearly recognized that housing discrimination against families with children was rampant and believed that a tool was needed to combat it.¹⁹²

Congress also believed that discrimination against families with children was linked to racial discrimination.¹⁹³ The House Report noted that minority house-

184. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in scattered sections of 42 U.S.C.).

185. 42 U.S.C. § 3602(k) (2018) ("Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody; or . . . the designee of such parent or other person having such custody . . .").

186. H.R. REP. NO. 100-711, at 19 (1988).

187. ROBERT W. MARANS, MARY ELLEN COLTEN, ROBERT M. GROVES & BARBARA THOMAS, OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV., A REPORT ON MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY (1980).

188. H.R. REP. NO. 100-711, at 19 n.32 (1988).

189. JANE G. GREENE & GLENDA P. BLAKE, OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV., A STUDY OF HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN (1980) (cited in H.R. REP. NO. 100-711, at 19 n.33 (1988)).

190. H.R. REP. NO. 100-711, at 19 (1988).

191. *Id.* at 20 (citing discrimination against children in three states—California, Connecticut, and New Jersey—that had outlawed familial-status discrimination).

192. Courts have consistently recognized Congress's intent with respect to familial-status protections. See, e.g., *Eastampton Ctr., LLC v. Township of Eastampton*, 155 F. Supp. 2d 102, 116 (D.N.J. 2001) ("This expansion of coverage [to include familial status] was supported by a Congressional finding that '[i]n many parts of the country families with children are refused housing despite their ability to pay for it.'" (quoting H.R. REP. NO. 100-711, at 19 (1988))).

193. See H.R. REP. NO. 100-711, at 21 (1988) ("Discrimination against families often has a racially discriminatory effect, because minority households are more likely to have children.").

holds were more likely to have children – thus, housing restrictions disproportionately impacted those groups.¹⁹⁴ Additionally, Congress viewed familial-status discrimination as an instrument for perpetuating patterns of segregation, stating that “because predominantly white neighborhoods are more likely to have restrictive policies, racial segregation is exacerbated by the exclusion of children.”¹⁹⁵ Congress recognized then what is equally true today: excluding families with children from housing opportunities has the consistent and predictable effect of making communities whiter.

Like the other protections under the FHA, the bar on familial-status discrimination extends to municipal land-use policies. For instance, a town would not be permitted to issue a zoning ordinance requiring that all residents in a neighborhood be at least eighteen years old. Such a facially discriminatory policy is clearly subject to an intentional-discrimination claim.

Importantly, a municipal policy would not need to impact *all* families with children in order to qualify as an unlawful act of discrimination. One court, for instance, invalidated an ordinance limiting foster-care homes to certain zones, holding that the rule was facially discriminatory based on familial status.¹⁹⁶ The court reached this finding notwithstanding the fact that the policy only impacted a small subset of the community’s children.¹⁹⁷

This point is crucial because, as Part I demonstrates, municipalities tend to discriminate specifically against residents of higher-density, affordable, multi-family buildings. Even if a town allows families with children to live in single-family dwellings, it would still be unlawful to obstruct and reject lower-cost housing on the grounds that it might house children. Similarly, a policy could be unlawful even if it affects all low-income individuals regardless of familial status.¹⁹⁸ Here, liability would arise from the fact that a disproportionate number of families with children fell into the low-income group that was adversely impacted by the land-use decision.

Clearly, the FHA is equipped with the tools to challenge the manner of discrimination discussed in Part I. Many municipalities are susceptible to inten-

194. *Id.*

195. *Id.*

196. *Diamond House of Se. Idaho, LLC v. City of Ammon*, 381 F. Supp. 3d 1262, 1274 (D. Idaho 2019).

197. *Id.* at 1274-75 (explaining that “even though most households with children are unaffected by [the ordinance], the fact that the ordinance does not apply to any households that do not contain children renders it facially discriminatory”).

198. *See id.* at 1275 (“The flip side of this last point is also true: that an ordinance also discriminates against individuals unprotected by the FHA does not eliminate an FHA violation.” (quoting *Child’s All. v. City of Bellevue*, 950 F. Supp. 1491, 1496 n.8 (W.D. Wash. 1997))).

tional-discrimination claims given the explicit comments made by municipal officials that evince an animus toward families with children. When municipalities engage in familial-status discrimination, there are often abundant examples of discriminatory animus toward low-income families with children. Consequently, the prospects of developing a compelling evidentiary record for intent claims are strong in many cases, and advocates can benefit from ready evidence of particularized animus toward low-income families with children. This is crucial to evaluating municipalities' real intent behind their action when examining the interactions between the FHA and HOPA, a doctrinal hurdle this Note explores later.

C. *Housing for Older Persons Act: The Critical Exemption*

Although one may think that familial-status discrimination suits would be common, they are, in fact, exceedingly rare. This is because Congress decided to qualify the FHA's ban on familial-status discrimination with HOPA, which adds a provision stating that the FHA does not apply to "housing for older persons."¹⁹⁹ With HOPA, Congress allowed governments and private actors to maintain a preference for elderly residents without running afoul of the FHA's prohibition on familial-status discrimination.²⁰⁰

Originally, in order for a development to qualify for the HOPA exemption, at least eighty percent of its units had to house at least one person age fifty-five or older, and the facility had to provide services specifically designed to support seniors.²⁰¹ However, in response to lobbying by advocates for senior-only communities, Congress further amended the exemption in 1995 to remove the requirement that communities provide services.²⁰² Advocates argued that doing so would increase access to affordable elderly housing and provide more freedom for elderly individuals.²⁰³ But even at the time, it was clear that lowering the bar to qualify for the HOPA exemption would substantially reduce housing opportunities for children.²⁰⁴ Senators Paul Simon, Edward M. Kennedy, and Russell

199. 42 U.S.C. § 3607(b)(1) (2018).

200. *See id.* § 3601.

201. *See* S. REP. NO. 104-172, at 2 (1995); Nelson, *supra* note 123, at 108.

202. *See* Nelson, *supra* note 123, at 111-12.

203. S. REP. NO. 104-172, at 9 (1995) (statement of Sen. Jon Kyl) ("Many of my constituents argue that the federally imposed definition of 'significant facilities' and services increases the cost of their housing and tells them how to live.").

204. *See* Nelson, *supra* note 123, at 112 ("Advocates for children view the legislation as a substantial setback, because it makes it easier to adopt an anti-child policy.").

D. Feingold jointly argued that the amendment could “have the unintended effect of increasing discrimination against families with children.”²⁰⁵ Then-Senator Joseph Biden called it “a retreat from a commitment we made to families with children.”²⁰⁶

Today, there are two primary routes for a community to qualify for the HOPA exemption. First, if the community is “intended for, and solely occupied by, persons 62 years of age or older,” it will be exempt.²⁰⁷ Second, if the community is “intended and operated for occupancy by persons 55 years of age or older,” it will be exempt.²⁰⁸ In order to qualify through the second route, “at least 80 percent of the occupied units [must be] occupied by at least one person who is 55 years of age or older.”²⁰⁹

Like the ban on familial-status discrimination, the HOPA exemption has also been understood to apply to municipal land-use decisions. Importantly, HOPA’s language is ambiguous on this point. The statute defines senior housing as a “housing facility or community” with a requisite age composition and, in certain circumstances, a set of age-restrictive “policies and procedures” designed to maintain that composition.²¹⁰ One could read this to have the same reach as the FHA’s familial-status protections, thus extending the exemption to municipal policies. By this reading, a housing facility or community could mean an individual housing development *or* a municipally zoned area.

HOPA means that elderly housing, so defined, is permitted to lawfully exist, whether it comes about because a private party decided to build age-restricted housing or because a government legislated it into existence. However, HOPA could also be read to merely carve out an exception for senior housing to exist without authorizing governments to enact age-restrictive housing policies. It is one thing for an apartment building to restrict its occupancy to elderly residents; it is another thing for a government to require private parties to enact or maintain age restrictions on their homes. One could plausibly read HOPA to authorize the former but not the latter.

205. S. REP. NO. 104-172, at 13 (1995) (statement of Sens. Paul Simon, Edward M. Kennedy, and Russell D. Feingold).

206. *Id.* at 15 (statement of Sen. Joseph Biden).

207. 42 U.S.C. § 3607(b)(2)(B) (2018).

208. *Id.* § 3607(b)(2)(C).

209. *Id.* § 3607(b)(2)(C)(i). To qualify for the exemption through this route, communities must further meet two minor provisions. *Id.* § 3607(b)(2)(C)(ii)-(iii). See *infra* note 210 and accompanying text.

210. See 42 U.S.C. § 3607(b)(2)(C)(ii)-(iii) (2018). The provision also provides a path to the HOPA exemption for any housing “provided under any State or Federal program that the [HUD] Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program).” *Id.* § 3607(b)(2)(A).

Notwithstanding this statutory ambiguity, a 1999 HUD rule stated that a “municipally zoned area” could qualify as a form of elderly housing under HOPA.²¹¹ Some challengers of elderly-zoned housing have criticized the inclusion of municipal zoning in this regulation, but no court has contradicted HUD’s interpretation of HOPA.²¹² While Part IV suggests that HUD consider an alternative interpretation of HOPA’s application to municipalities, the remainder of this Part takes the 1999 regulation at face value. Thus, this Note assumes that municipalities are permitted to expand or preserve access to housing for elderly persons, even if doing so has a disproportionate impact on families with children.²¹³ For instance, a municipality could conceivably condition a development’s approval on age restrictions.²¹⁴

But it does not follow from HOPA’s language that municipalities are free to intentionally discriminate based on animus against low-income children. Robert G. Schwemm and Michael Allen have observed, “[T]he courts have made clear that, because the FHA is remedial civil rights legislation that is to be accorded a generous construction, its exemptions are to be narrowly construed.”²¹⁵ This

211. Implementation of the Housing for Older Persons Act of 1995, 64 Fed. Reg. 16324, 16327, 16329 (Apr. 2, 1999).

212. See *infra* notes 223–228 and accompanying text.

213. See *Putnam Fam. P’ship v. City of Yucaipa*, 673 F.3d 920, 928 (9th Cir. 2012) (citing HUD regulations that include a “municipally zoned area” as a possible example of a practice that could qualify for the HOPA exemption); *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1075 (C.D. Cal. 2002) (holding that the HOPA exemption to municipal-zoning policies applies if the policy meets statutory criteria required to establish that exemption); *Waterhouse v. City of American Canyon*, No. C 10-01090, 2011 WL 2197977, at *6 (N.D. Cal. June 6, 2011) (explaining that while the municipality could access the HOPA exemption, the policy at issue failed to meet its requirements).

214. One possible consequence is that, by its plain terms, HOPA seems at least to shield municipalities from disparate-impact liability for familial-status discrimination when they produce elderly housing. See *supra* note 169.

215. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 156 (2004) (footnote omitted). For one such example, see *Massaro v. Mainlands Section 1 & 2 Civic Ass’n*, 3 F.3d 1472, 1475 (11th Cir. 1993), in which the court held that “[e]xemptions from the Fair Housing Act are to be construed narrowly, in recognition of the important goal of preventing housing discrimination.”

general approach extends to cases in which the HOPA exemption has been invoked.²¹⁶ Moreover, the HOPA exemption is only available as an affirmative defense, requiring defendants to meet the burden of persuasion.²¹⁷ Along with the legislative history surrounding it,²¹⁸ these maxims suggest that the HOPA exemption should be read as a meaningful yet limited avenue through which municipalities can provide for the elderly-housing needs of their communities.

In practice, courts have given the HOPA exemption a broader scope than appropriate. Although the history of municipal familial-status claims is sparse, in the small number of cases in which defendants have invoked the HOPA exemption, courts have tended to give municipalities wide latitude. The Ninth Circuit's decision in *Putnam Family Partnership v. City of Yucaipa* offers perhaps the clearest example of a court grappling with the tensions between familial-status discrimination and housing for older persons.²¹⁹ Unfortunately, that court took an approach that was far too deferential to municipalities and risked turning the HOPA exemption into a tool for judicially sanctioned discrimination. Crucially, however, outside of this lone decision, municipal familial-status discrimination's relationship with the HOPA exemption remains an entirely unsettled area of law.²²⁰

In *Putnam*, the owners of several mobile-home parks located in the City of Yucaipa, California challenged a city ordinance that created a "Senior Mobilehome Park Overlay district."²²¹ The ordinance required that at least one resident over fifty-five occupy "at least 80% of the spaces in mobilehome parks" within the overlay district.²²² Because the policy facially discriminated against families with children, the court was forced to consider whether the municipality could invoke the HOPA exemption. The owners of the mobile-home parks contended that "the plain text of the senior exemption . . . limits the central 'intent' requirement to the intent of the on-site housing provider, the party that controls

216. See, e.g., *Waterhouse*, 2011 WL 2197977, at *7 ("The prohibition against familial-status discrimination is the primary goal, and housing for older persons is an exception. For this reason . . . the exception must be construed narrowly, and its requirements must be strictly met.").

217. See *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 182 n.4 (1st Cir. 1994); *Massaro*, 3 F.3d at 1475.

218. S. REP. NO. 104-172, at 5, 13 (1995).

219. 673 F.3d 920, 927 (9th Cir. 2012).

220. Indeed, *Putnam* has thus far only been applied once within the Ninth Circuit. See *Waterhouse v. City of Lancaster*, No. CV 12-00923, 2013 WL 8609248, at *13 (C.D. Cal. Mar. 13, 2013).

221. *Mission Valley Oaks LLC v. City of Yucaipa*, No. EDCV 09-02203, 2010 WL 11530290, at *2 n.2 (C.D. Cal. Mar. 30, 2010), *aff'd sub nom.* *Putnam Fam. P'ship v. City of Yucaipa*, 673 F.3d 920 (9th Cir. 2012).

222. *Id.*

the use of the housing in the first instance.”²²³ Consequently, they believed that the exemption did not apply to the city’s ordinance because “the senior exemption requires that the housing provider intend to operate senior housing, and [they] lacked this intent.”²²⁴

Both the district court and the Ninth Circuit rejected the park owners’ argument. In particular, while the Ninth Circuit conceded that neither the text nor history of the FHAA offer a clear resolution to the question of whether HOPA covers a municipality’s intent to preserve housing for older persons,²²⁵ it ultimately sided with Yucaipa by deferring to the 1999 HUD regulations that identified municipal-zoning regulations as one possible means by which a community could demonstrate the requisite intent to provide senior housing under HOPA.²²⁶ Clearly, HUD’s regulations reasonably understood HOPA to permit municipalities to legislate in favor of senior housing. Thus, in the face of legislative ambiguity, the court applied the *Chevron* doctrine²²⁷ and adopted the agency’s interpretation of HOPA’s intent requirement.²²⁸

After determining that the city’s intent was relevant for purposes of qualifying for the HOPA exception, the Ninth Circuit ruled that the zoning ordinance satisfied Section 3607(b)(2)’s requirement that the subject housing be “intended . . . for occupancy by persons 55 years of age or older.”²²⁹ In the court’s view, this statutory language mandated that the city’s “true reason for the exclusion of families with children [be] to provide senior housing, rather than animus against families with children.”²³⁰ At first glance, this would appear to enable the court to consider the motivation behind a municipality’s preference for elderly housing. For instance, if a municipality created an elderly-only residential district with the clear purpose of excluding children, the “true reason” for their policy would seem to be “an animus against families with children.”²³¹ Purely by its terms, the Ninth Circuit’s discussion of intent suggests that such a policy may not be eligible for the HOPA exemption.

223. Brief for Appellants at 13, *Putnam*, 673 F.3d 920 (No. 10-55563).

224. *Putnam*, 673 F.3d at 924.

225. *Id.* at 930 (“As amended by HOPA, the FHAA thus does not expressly address whether a city’s intent can qualify housing for the senior exemption.”).

226. Implementation of the Housing for Older Persons Act of 1995, 64 Fed. Reg. 16324, 16332 (Apr. 2, 1999).

227. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

228. *Putnam*, 673 F.3d at 931.

229. 42 U.S.C. § 3607(b)(2) (2018).

230. *Putnam*, 673 F.3d at 931.

231. *Id.*

Yet neither the challengers to the city's ordinance, nor the *Putnam* court itself, considered the city's true motivation to be a relevant question. The challengers, with their focus on whether the city's intent was relevant at all, did not mount an argument that the *content* of the city's intent violated the FHAA. Meanwhile, the court concluded that "the most important aspect of the intent requirement is that intent be demonstrated in published policies, which give notice to tenants and potential tenants and ensure that age requirements are applied consistently."²³² This holding suggests that the court would defer to *any* evidence that a municipality plans to follow through on its stated intent to create elderly housing. Put differently, the court decided that it only cared whether a government intended to build elderly housing, not *why* they wanted to build that housing.

The *Putnam* court then elaborated on this standard, pointing to HUD regulations that provide a nonexhaustive list of four examples indicating how a local government might demonstrate its intent to provide senior housing through its zoning regulations:

1. The town could produce public zoning maps that contain reference to senior housing.
2. It could provide literature that it distributed describing the area as senior housing.
3. It could show that a senior housing designation is in the local property recording statutes.
4. It could show that the zoning requirements explicitly make reference to the fifty-five-or-older requirement.²³³

Applying this standard, the court upheld the ordinance at issue because the city explicitly stated that 80% of individuals living in mobile-home parks within the senior-zoned areas must be over fifty-five. Per the court, this clear public-policy statement demonstrated the municipality's intent to create and consistently maintain elderly housing in the relevant area. No further inquiry into their reasons for doing so was necessary.

The facts in *Putnam* make the court's cursory intent analysis even more disappointing. For one thing, the only housing to which Yucaipa's age restriction applied was mobile-home parks. The residents of mobile homes are poorer on average than the median American, and mobile homes play a "central role . . . as

²³². *Id.* (citation omitted).

²³³. *Id.* at 927 (citing Implementation of the Housing for Older Persons Act of 1995, 64 Fed. Reg. 16324, 16331-32 (Apr. 2, 1999)).

a source of low-cost and unsubsidized housing.”²³⁴ Thus, a policy that imposed age restrictions solely on this form of housing might have raised some alarm bells to a court more alert to the possibility of discriminatory intent focused on low-income families. Further, the challengers in the case point out that the city’s policy did not “carve out an area claimed to be uniquely well suited for senior housing,”²³⁵ but instead imposed age restrictions on mobile-home parks “that by sheer happenstance, operate[d] as ‘older persons’ at the time” the ordinance was passed.²³⁶ Although this characterization was contested by the city,²³⁷ it still raises doubt as to whether the city was sincerely motivated by a desire to preserve affordable senior housing. One could certainly imagine an alternative account of the city’s intent in which its true goal was to exclude low-income families with children – an account with which the *Putnam* court refused to grapple.

To be clear, this Note does not suggest that *Putnam*, based on its own facts, was wrongly decided. It is entirely possible – and perhaps even likely – that the ordinance reflected a good-faith effort to preserve an important source of housing for lower-income elderly residents of the city. Still, as Part I clearly demonstrates, such virtuous motivations should not be assumed. The *Putnam* court’s permissive application of intent, coupled with its expansion of HOPA to cover the legislative actions of local governments, could threaten to eliminate the FHAA’s protections for families with children. The challengers’ central claim – that HOPA does not authorize municipalities to require private-housing providers to maintain age-restricted housing – has considerable support within the legislative history of the FHAA.²³⁸ As the *Putnam* court conceded, it is far from clear that Congress intended HOPA to empower local governments to legislate in favor of elderly housing.²³⁹ In view of that uncertainty, it is even more important that courts meaningfully scrutinize legislation that restricts housing opportunities for families with children in favor of elderly housing.

The *Putnam* test has only been applied once since the case was decided. In *Waterhouse v. City of Lancaster*, the U.S. District Court for the Central District of California considered a city’s ordinance that placed “a 45-day moratorium on the conversion of any mobile home park in [the city’s] borders with at least 80% of

234. Gregory Pierce, C.J. Gabbe & Silvia R. Gonzalez, *Improperly-Zoned, Spatially-Marginalized, and Poorly-Served? An Analysis of Mobile Home Parks in Los Angeles County*, 76 LAND USE POL’Y 178, 179 (2018).

235. Brief for Appellants, *supra* note 223, at 10.

236. *Id.* (quoting Excerpts of Record 37, ll. 9-11).

237. See Appellee’s Corrected Answering Brief at 12, *Putnam*, 673 F.3d 920 (No. 10-55563); *Putnam*, 673 F.3d at 924.

238. See Brief for Appellants, *supra* note 223, at 17-41.

239. *Putnam*, 673 F.3d at 930; see also *infra* note 268 and accompanying text (describing how Congress intended to be “fair to both older persons and families with children”).

its residents aged 55 or older . . . to an all-age park.”²⁴⁰ This prevented the plaintiff, the operator of a fifty-five-plus mobile-home park, from converting the park to all-age use. In assessing whether the city’s policy qualified for the HOPA exemption, the court looked to the four examples cited in *Putnam* and concluded that its policy matched one of them, providing no further analysis.²⁴¹ For evidence of intent, the court pointed to the city’s policy of publishing zoning maps and city ordinances that use the term “Senior mobilehome park,” along with the specification that 80% of residents in such a park be at least fifty-five.²⁴² This mechanical analysis was the full extent of the court’s consideration of whether the city met the HOPA exemption’s intent requirement.

As with *Putnam*, the City of Lancaster’s age restriction only applied to mobile-home parks.²⁴³ Again, the focus on mobile homes does not guarantee that the city was motivated by discriminatory animus, but it should trigger some caution. Thus, while *Lancaster* is just one district court’s application of the *Putnam* approach to intent, it suggests that *Putnam* might be read as an analysis that many municipalities can easily pass. Moreover, it indicates that this is a test that enables discrimination against low-income families with children. Every municipality discussed in Part I could potentially demonstrate, through policy and practice, that they intend to reserve housing for elderly people. Even when a town is clearly motivated by a desire to keep low-income children out, it can escape FHA liability by credibly promoting elderly housing.

Importantly for advocates, the *Putnam* court did appear to cabin its holding to instances in which municipalities are preserving *existing* age restrictions.²⁴⁴ It noted that the ordinance in question only required mobile-home parks that already supported an 80% senior population and described themselves as “senior parks” to maintain their senior-only status.²⁴⁵ The decision also distinguished cases where an ordinance requires non-senior developments to become senior developments and explicitly left the question of HOPA application in these cases “for another day.”²⁴⁶

Two district-court rulings in the Ninth Circuit that predate *Putnam* support this narrower reading. First, in *Gibson v. County of Riverside*, a district court found

240. No. CV 12-00923, 2013 WL 8609248, at *1 (C.D. Cal. Mar. 13, 2013).

241. *Id.* at *18.

242. *Id.*

243. *Id.* at *2.

244. This distinction separates cases like *Arlington*, which was not preserving existing elderly housing, from cases like the Connecticut town that purported to be preserving an existing elderly-only housing development. See *supra* Sections I.A.1-2.

245. *Putnam Fam. P’ship v. City of Yucaipa*, 673 F.3d 920, 923 (9th Cir. 2012).

246. *Id.* at 927 n.3.

that a county's policy placing age restrictions on a zoning district did not qualify for the HOPA exemption.²⁴⁷ The court reached this conclusion for two reasons. First, the county was unable to provide admissible evidence that at least eighty percent of dwellings in the age-restricted area were occupied by at least one person fifty-five or older.²⁴⁸ Second, the county had failed to engage in any tangible procedures aimed at ensuring the area was reserved for elderly residents.²⁴⁹ On this second point, the court articulated a helpful standard, explaining that "[i]t is not enough that the person claiming the exemption published a policy demonstrating its intent to provide housing for persons 55 years of age or older if the entity did not adhere to a procedure demonstrating the same intent."²⁵⁰ The county had taken "no action to verify the ages of residents" living in the age-restricted area, nor had it engaged in any consistent practice of enforcing the age restriction. In fact, in some of its communications with residents, it incorrectly identified the age cutoff as fifty rather than fifty-five.²⁵¹ Because the county had failed to practically implement its intent to provide elderly housing, it could not qualify for the HOPA exemption.

In *Waterhouse v. City of American Canyon*, another district court reached the same conclusion for somewhat different reasons.²⁵² The City of American Canyon enacted moratoria preventing a senior-only mobile-home park from changing its status to an all-age park.²⁵³ Previously, although the park had a policy limiting its occupancy to elderly residents, it had never taken any steps to enforce that restriction and frequently had a substantial population of nonelderly residents. The court concluded that, because the park did not qualify for the HOPA exemption at the time the moratoria were enacted, the city's policies could not qualify for the exemption.²⁵⁴ This ruling, which narrowly predates *Putnam*, appears to conflict with the *Putnam* court's holding that only the municipality's intent matters for HOPA purposes. By contrast, the court in *Waterhouse* emphasized that the city had failed to demonstrate "intent on the part of the park to operate a housing development for older persons."²⁵⁵ Because it predates *Putnam* and was issued by a lower court, the *Waterhouse* holding should not be taken to modify *Putnam*'s standard. Still, taken together, these cases suggest that courts

247. 181 F. Supp. 2d 1057, 1077-78 (C.D. Cal. 2002).

248. *Id.* at 1077.

249. *Id.* at 1079.

250. *Id.* at 1078.

251. *Id.* at 1079.

252. No. C 10-01090, 2011 WL 2197977, at *6-7 (N.D. Cal. June 6, 2011).

253. *Id.* at *2.

254. *Id.* at *6.

255. *Id.*

are inclined to treat cases in which municipalities are maintaining existing, bona fide senior-only restrictions differently from cases in which they are imposing age restrictions where none existed before.

This construction of HOPA, even if it only applies in cases of existing senior housing, encourages courts to turn their eyes away from unmistakable evidence of unlawful discrimination. In doing so, it abandons the purpose for which the FHAA was passed. Such an expansive construction of HOPA enables municipalities to enact housing policy that bears disproportionately on low-income families with children and communities of color. These are exactly the groups that Congress had in mind when it outlawed familial-status discrimination.²⁵⁶ Moreover, this construction allows the exemption to swallow the rule. This stands in sharp contrast to the typical approach of narrowly construing exemptions to the FHAA.²⁵⁷ When courts examine potentially discriminatory conduct, this Note contends that the intent of the defendants should matter in their analysis. Put simply, *Putnam's* interpretation of the HOPA exemption is deeply misguided.

III. BUILDING A CLAIM AND RESHAPING THE DOCTRINE

While the *Putnam* court's application of its intent standard is troublingly deferential to municipalities, it does not foreclose the possibility of a successful familial-status claim even when the HOPA exemption is invoked. More importantly, in the vast majority of jurisdictions, there is no controlling standard that courts are bound to use when faced with claims of this kind. Outside the Ninth Circuit, there are a handful of notable instances in which courts have considered challenges to municipal policies on familial-status grounds,²⁵⁸ but none of these involved elderly housing or the HOPA exemption. Even in the Ninth Circuit, advocates can argue that *Putnam* only speaks to cases in which municipalities are seeking to preserve existing HOPA-eligible housing. Thus, there is ample opportunity to press a different interpretation of HOPA that balances the

256. See H.R. REP. NO. 100-711, at 19-21 (1988).

257. See, e.g., *Balvage v. Ryderwood Improvement & Serv. Ass'n, Inc.*, 642 F.3d 765, 776 (9th Cir. 2011) ("In interpreting the HOPA exemption, we bear in mind that '[e]xemptions from the Fair Housing Act are to be construed narrowly, in recognition of the important goal of preventing housing discrimination.'" (quoting *United States v. City of Hayward*, 36 F.3d 832, 837 (9th Cir. 1994))); *Massaro v. Mainlands Section 1 & 2 Civic Ass'n*, 3 F.3d 1472, 1475 (11th Cir. 1993) (same).

258. See, e.g., *Sierra v. City of New York*, 579 F. Supp. 2d 543, 544 (S.D.N.Y. 2008) (considering a plaintiff's familial-status claim challenging a provision in New York's Housing Maintenance Code that barred children from living in single-room-occupancy units); *Ortega v. Hous. Auth.*, 572 F. Supp. 2d 829, 840 (S.D. Tex. 2008) (holding that a city's requirement that public-housing residents have legal guardianship over minors living with them constituted familial-status discrimination).

twin goals of preventing housing discrimination and enabling towns to develop housing for elderly residents.

This Part offers a roadmap for building a disparate-treatment claim both within, and outside of, the cramped *Putnam* framework. With luck, this roadmap will serve not just as an academic daydream but rather as a guide for attorneys bringing future familial-status discrimination claims against intransigent local governments. In order to ground the analyses in this Part, Section III.A describes a typical case of municipal familial-status discrimination in which a disparate-treatment claim would be most realistic. Section III.B then discusses paths to FHA liability under the *Putnam* test. Finally, Section III.C describes two viable doctrinal innovations that could strengthen familial-status claims outside the Ninth Circuit and in cases that do not deal with already existing senior housing.

A. A Typical Case

To illustrate how familial-status claims can be brought against municipalities despite the HOPA exemption, this Section describes a typical case of discrimination in land-use policymaking. While this situation is hypothetical and by no means the only way towns exhibit familial-status discrimination, it is grounded in real events and is representative of many of the patterns laid out in Part I.

A developer approaches Town X seeking to convert an existing multifamily building into a larger, more modern apartment building. The building is one of the few high-density dwellings in this wealthy suburb and has traditionally housed elderly residents and people with disabilities. Most of its residents receive some form of housing assistance, making the building one of the few sources of affordable housing in the town. The developer has proposed to renovate the building, upgrading the quality of the units and increasing their number. The developer plans to make the building affordable, setting aside a substantial proportion of its units for those making no more than 30% of the area median income (AMI). Occupants of these units would receive rental-assistance vouchers. Importantly, the developer also proposes that the building will not maintain any age restrictions.²⁵⁹

In order to begin the project, the developer requires approval from Town X's zoning board. Once the proposal is announced, opposition in the town builds

259. Builders of affordable housing are sometimes encouraged through various policy levers to build non-age-restricted housing. For instance, Connecticut awards Low-Income Housing Tax Credit (LIHTC) funds using a selection criterion that preferences projects without age restrictions. See *infra* Section IV.C. Similarly, New Jersey separates LIHTC applications into family, senior, and supportive housing funding cycles. The largest proportion of the state's LIHTC funds is allocated to the family cycle. N.J. ADMIN. CODE § 5:80-33.4(a) (2022).

immediately. Residents post fliers indicating their opposition to any redevelopment of the existing building. At public hearings, they express their concern that a larger, affordable, multifamily building will alter the character of the neighborhood. Some say that adding children to the neighborhood will overcrowd the schools and nearby parks. Some argue that younger families may make the area noisier and less safe. Members of the commission lend voice to these fears, explaining their concern that families might bring more traffic, cause tax increases, and overwhelm local schools. Again and again, commissioners and members of the public make it clear that they do not want an influx of children into the town.

Finally, as the hearings end, the commissioners state to the developers that they would be willing to approve the development if an age restriction is added. At this point, one of two outcomes is possible: either the developer refuses and the project will be rejected, or the developer will agree to modify the proposal and shift to age-restricted housing. Either way, the town has blocked a multifamily housing development at least in part on the grounds that it does not want to welcome new low-income children. By couching its decision in terms of a preference for elderly housing, the town has entered the ambit of the HOPA exemption. Yet it is clear to anyone watching that decisionmakers were not motivated by a desire to prioritize housing for the elderly, but by an animus toward families with children.²⁶⁰

This scenario is a one-off land-use decision—whether to approve or reject a new development—rather than a general policy, like the overlay zone at issue in *Putnam*. However, the essential feature of the hypothetical is not what type of policy choice Town X has made, but that it has done so for potentially unlawful reasons.²⁶¹ Disparate-treatment analysis under the FHA can even apply to municipal decisions that are not zoning related, such as the funding policy for affordable housing at issue in the Arlington case.²⁶² Whether a government has rejected a development proposal or enacted a zoning ordinance, the primary burden on a party bringing a disparate-treatment challenge is to demonstrate that the municipal action was taken with discriminatory intent.²⁶³ The Sections that

260. As discussed, other forms of discriminatory animus can likely be inferred as well, but Town X's hostility toward children was expressed openly and explicitly.

261. See *supra* note 166 and accompanying text.

262. See *supra* Section I.A.1.

263. Granted, it may be easier to observe a municipality's intent in cases where there is a discrete policymaking moment. But general policies are just as likely as one-off decisions to be the product of a clear moment of municipal decision-making. Take *Putnam*, for example, where the city of Yucaipa's decision to enact an overlay zone created an opportunity to challenge the basis for its choice. Thus, while the Sections that follow consider litigation responses to a one-off land-use decision, they are equally applicable in cases of general policymaking. If Town X

follow consider how advocates can bring a claim to challenge Town *X*'s decision to condition land-use approval on age restrictions.

B. Building a Claim Under Putnam

To proceed with an FHA claim against Town *X*, fair-housing advocates would need to marshal evidence that animus against children was the decisive motivation behind the town's decision. Assuming for purposes of this analysis that they have successfully done so and thus proved intentional discrimination, Town *X* will invoke the HOPA exemption as an affirmative defense. The town would claim that its decision is exempted from FHA scrutiny because it maintains a preference for seniors, and it would likely find support for this proposition in both *Putnam* and *Lancaster*. As such, a court applying the *Putnam* standard may well consider the evidentiary record of discrimination to be irrelevant, ruling instead that the town's intent to build elderly housing is sufficient to qualify for HOPA.

Plaintiffs challenging Town *X*'s decision would still have two recourses. First, they could argue that *Lancaster* incorrectly applied *Putnam*'s intent requirement. Although it only appeared in dicta, the *Putnam* court was clearly worried about policies for which the true motivation is "animus against families with children."²⁶⁴ The court ultimately applied a fairly deferential conception of intent, but that does not obviate its concern about improper motivations. A case like that of Town *X* may be precisely what the *Putnam* court was cautioning against.

Should this argument fail, however, advocates would need to mount an argument within the narrow intent framework that the *Putnam* court authorized. To do so, they would need to argue that Town *X* does not actually intend to preserve or promote housing for elderly persons. One factual question would be whether the proposed development site met the numerical criteria for the HOPA exemption (i.e., whether eighty percent of the building's units were occupied by at least one person who is fifty-five or older).²⁶⁵ It would not be unheard of for a municipality to claim to be preserving the age-restricted status of a building

mandated that new affordable housing be built for seniors, rather than simply conditioning one development's approval on its age restrictions, advocates could still follow the same roadmap that this Part describes. One concern might be that long-standing general policies are more difficult to challenge because it is harder to glean the legislative intent that motivated them. But these policies are already beyond the scope of FHA challenge since private FHA claims are subject to a two-year statute of limitations. 42 U.S.C. § 3613(a) (2018).

²⁶⁴ *Putnam Fam. P'ship v. City of Yucaipa*, 673 F.3d 920, 931 (9th Cir. 2012).

²⁶⁵ See *infra* Section II.A.

that has not actually maintained the requisite residential composition.²⁶⁶ If this were the case, then Town *X* should fail to meet even *Putnam*'s limited standard for intent. It did not actually intend to maintain elderly housing because it took no additional steps to ensure that age restrictions were imposed and maintained.

A second inquiry is whether Town *X*'s subsequent actions demonstrated that it was actually interested in promoting low-cost elderly housing. This inquiry is particularly relevant in cases where a municipality rejects a proposal for entirely new housing, rather than a redevelopment of existing housing. In this situation where the municipality cannot claim to be preserving existing age-restricted housing, advocates could potentially demonstrate that its decision was not made with an intent to develop elderly housing. Since *Putnam* only dealt with a situation where existing elderly housing was preserved, its specific test would seem inapposite to the case of a town that rejects a proposed building on the grounds that it would prefer elderly housing. In these situations, advocates can argue that HOPA's intent standard requires that a town actually demonstrate some interest in promoting elderly housing beyond simply rejecting non-age-restricted alternatives.

Stepping back, this exercise demonstrates the need to revise the *Putnam* approach in cases like Town *X*.²⁶⁷ Clearly, the *Putnam* framework would ask a court considering Town *X*'s case to ignore the blatant record of discriminatory intent that lay behind the town's policy preference. It would also require plaintiffs to essentially ignore reality and advance only a narrow and limited set of arguments. Courts and advocates should not accept this weak reading of the FHA's protections. The Section that follows offers an alternative.

C. Reinterpreting the HOPA Exemption

The *Putnam* approach to the HOPA exemption may not be fatal to every familial-status claim, but it is far from ideal. More importantly, it is far from the approach Congress had in mind when it expanded the FHA umbrella to protect families with children. Congress never intended for the HOPA exemption to be used as a shield for communities wishing to prevent the construction of affordable housing for families with children. Indeed, the Senate Report for the HOPA amendment states that the bill was aimed at creating a system that was "fair to both older persons and families with children," since all its key supporters were

²⁶⁶. See *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1077 (C.D. Cal. 2002). As discussed in Part II, this case speaks to the viability of this type of argument and could be a model for fair-housing advocates dealing with municipalities that are derelict in maintaining their alleged age preferences.

²⁶⁷. See *infra* Section III.C for proposals to revise *Putnam*.

fundamentally opposed to endorsing familial-status discrimination.²⁶⁸ The judicial approach to a case like *Town X* should attend to the FHA's overriding purpose of protecting people from housing discrimination. This does not mean that courts should ignore the HOPA exemption; rather, they should treat it as a narrow carve out allowing communities to ensure that elderly persons have access to high-quality, accessible housing. This Section offers two doctrinal innovations that would better fulfill these goals while providing low-income families with protection against the widespread discrimination they currently encounter. These innovations operate in the context of a disparate-treatment claim.²⁶⁹ While we argue that both proposals should be adopted by courts, each alone would vastly improve existing doctrine.

1. *Cabin HOPA's Reach*

First, at a minimum, courts should read HOPA as an exemption to only the most direct forms of intentional discrimination. The HOPA exemption should merely focus the court's attention on statements containing *antichildren* animus, not just statements expressing support for elderly housing. Clearly the HOPA exemption ensures that municipal policies restricting certain areas or developments to elderly persons are not discriminatory based solely on their facial language.²⁷⁰ And expressing a preference for elderly housing should not constitute direct evidence of intentional discrimination against families.²⁷¹ By its terms, the HOPA exemption makes clear that a desire to provide elderly housing is not equivalent to a desire to exclude families with children. Consequently, a housing commissioner's statement that they want to ensure elderly residents have a place to live should not constitute evidence that a subsequent decision was motivated by discriminatory intent.

But HOPA should apply only to these narrow circumstances, and it should not put a thumb on the scale pushing courts to ignore evidence of discriminatory intent against families. Rather, courts should engage directly with evidence present in the record, since the essence of much FHA litigation is that facially neutral land-use decisions constitute unlawful discrimination because of the purposes

268. S. REP. NO. 104-172, at 5 (1995) ("As Mr. Bill Williams, president of the Federation of Mobile Home Owners of Florida, Inc., stated in his testimony before the subcommittee, 'this issue is not about discrimination against families.' We all oppose that.").

269. For an elaboration of our decision to focus exclusively on disparate-treatment claims because HOPA significantly undermines familial-status disparate-impact claims, see *supra* note 169.

270. See, e.g., *Town of Northborough v. Collins*, 653 N.E.2d 598, 598-99 (Mass. App. Ct. 1995) (finding that a town's zoning law restricting certain clusters of homes to people fifty-five-and-over did not violate the FHA's ban on familial-status discrimination).

271. See *supra* Section II.A for a discussion about direct and indirect evidence.

for which they were enacted.²⁷² A facially neutral policy—the decision to preference elderly housing—should nonetheless run afoul of familial-status protections if there is ample evidence that it was motivated by a desire to exclude children.²⁷³

Recall, for example, the City of Arlington’s preference for LIHTC developments targeted at seniors. While HOPA may render the policy facially neutral, it was clearly intended, at least in part, to limit housing opportunities for low-income families with children. The public-hearing record was replete with statements to that effect.²⁷⁴ Likewise, in a hypothetical suit against the suburban Connecticut town discussed in Part I, the town’s decision to condition land-use approval on maintaining age restrictions on the development would not, alone, constitute unlawful discrimination. However, the many public statements made by officials explaining the antifamily basis for their decision would be probative evidence that the town was engaging in unlawful discrimination.²⁷⁵ If advocates were able to prove that the age-restriction condition on this land-use approval was sufficiently motivated by an animus toward families with children, a court should have no trouble finding an FHA violation.

One reasonable objection to this change is that it would simply prompt towns to be more discrete about their hostility toward low-income families with children. Municipalities could avoid familial-status claims by couching their an-

272. See, e.g., 2922 Sherman Ave. Tenants’ Ass’n v. District of Columbia, 444 F.3d 673, 682 (D.C. Cir. 2006); Sanghvi v. City of Claremont, 328 F.3d 532, 536-37 (9th Cir. 2003).

273. This formulation tracks what some scholars have identified as “[t]he simplest and perhaps most intuitive form of ‘discriminatory intent.’” Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1242 (2018). In this account, a policy is rendered “invalid because its adoption was ‘born of animosity toward the class of persons affected.’” *Id.* at 1243 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)). This formulation distinguishes between the policy that lawmakers intend to enact and the reason for which they intend to enact that policy. Take, for instance, a straightforward case of employment discrimination. When an employer fires an employee because of their race, they intend for that employee to no longer work at their firm. Yet the employer could not justify that firing on the grounds that employers may lawfully decide who works for them. What matters, of course, is *why* they “intended” to terminate the employee. The elicited motivation for their decision—the race of the employee—is what transforms the facially lawful act into unlawful discrimination. In the same way, a municipality’s proximate intent—to build elderly housing—is not sufficient to justify a policy favoring elderly housing that was motivated by the municipality’s animus against children. Baked into this formulation is also the recognition that certain decision-making criteria are licit while others are not. *Id.* at 1245-51. In the familial-status context, a preference for elderly housing is a licit criterion, but a preference for families without children is not. Policy may therefore be made for the former reason but not for the latter.

274. See *supra* Section I.A.1.

275. See *supra* text accompanying notes 46-58.

tichildren preferences solely in terms of a preference for elderly housing. Anticipating this possibility, the following Section proposes a second change to HOPA doctrine.

2. *Require an Affirmative Burden to Demonstrate Intent to Promote Elderly Housing*

Courts should also ensure that governments invoking the HOPA exemption bear an affirmative burden to demonstrate their intent to promote elderly housing. In a case where a town preserves the age-restricted character of an existing property, the town might take a step toward fulfilling this burden by demonstrating that it actually enforces its age restriction.²⁷⁶ Beyond enforcing the age restriction, the town might make a further showing that it has engaged in a meaningful policymaking process demonstrating its need for senior-only housing. For instance, a town might commission a study documenting its housing needs or produce evidence of a regional need for additional senior-only housing.

Towns that are not preserving an existing age restriction and instead are rejecting or conditioning new housing on age restrictions would, conversely, have to demonstrate an intent to promote elderly housing outside of this one discrete land-use decision. The City of Arlington, for instance, could have been required to make a showing that it held a broader policy commitment to expanding access to elderly housing beyond its decision to funnel all its LIHTC approvals to age-restricted projects. Likewise, the Connecticut town that rejected a proposal to build mixed-age affordable housing on the grounds that it would prefer elderly housing but took no further steps to promote elderly housing should not benefit from the HOPA exemption. There are several ways that a municipality could promote elderly housing, and the purpose here is not to define precisely how municipalities can demonstrate their intent to do so. Rather, the argument is simply that governments should have to make some affirmative showing of their intent to preserve and promote elderly housing in order to qualify for an exemption that was enacted for precisely those purposes.

Applying these two doctrinal changes to Town X, the prospects of a successful disparate-treatment claim appear far more promising. The decision to condition approval on an age restriction would be considered facially neutral, and any comments public officials made expressing support for elderly housing would not be considered evidence of discrimination. However, this would not be the end of the story. Advocates would produce mountains of evidence from

276. See the discussion about *County of Riverside*, *supra* Section II.C, for an example of this type of inquiry.

public hearings that a zoning commission was substantially motivated by a desire to prevent children from moving into the new development. A court may well find this evidence sufficient to hold the town liable for familial-status discrimination.

Beyond looking to the evidence of animus toward families with children, the court would also require Town *X* to provide evidence of its own intent to promote elderly housing. Town *X* might satisfy this burden by showing that it has diligently maintained age restrictions on the property and conducted a study of its need for affordable senior-only housing. Recall, however, that this property was previously occupied by a mix of elderly residents and persons with disabilities. If the property did not actually maintain the requisite levels of elderly occupancy, the town would need to provide some additional evidence of its intent to promote elderly housing. This could perhaps be accomplished by reference to other town policies, but the burden would be on the town to produce this evidence.

Although we have based this Section on one hypothetical, the doctrinal framework we propose applies with equal force to the varieties of municipal familial-status discrimination presented in Part I. In Arlington, Yonkers, and suburban Connecticut, municipal officials engaged in a discrete policymaking process. The upshot of each process was a policy aimed at promoting elderly housing. Our proposed framework asks courts to inquire into the reasons for these policies, as they would any facially neutral policy with alleged discriminatory purposes. Further, it asks courts to place an affirmative burden on each municipality to prove that they mean what they say – that they do, sincerely, intend to promote elderly housing and are not simply using senior housing as a tool of discrimination and exclusion. Whether a municipality has rejected a proposed housing development, passed a zoning policy that applies to many properties, or enacted a LIHTC preference, our framework operates in the same way.

We do not intend this proposal to represent the only possible reconciliation of the FHA and HOPA. Rather, it is a framework to encourage fair-housing advocates to develop stronger arguments for fighting discrimination, and it better accords with the goals Congress had in mind when it passed the FHA and HOPA than does *Putnam*. As the law currently stands, municipalities are free to adopt a policy of promoting elderly housing without violating the FHA's prohibition on familial-status discrimination. However, they may not use elderly housing as a vehicle for achieving familial-status discrimination. The approach proposed here marries those twin ambitions and attends to the broader aspiration of meaningful housing justice.

IV. NON-JUDICIAL SOLUTIONS

While litigation offers one pathway to expand the scope of FHA claims, relying on courts for doctrinal reform of HOPA is not the only way to address municipal familial-status discrimination. If courts choose to adopt the narrowest version of the *Putnam* test laid out in Part II, Congress, state legislatures, and regulatory agencies can take action to improve plaintiffs' chances of victory in familial-status discrimination cases and to independently prevent municipalities from using senior housing as a tool of exclusion.

To illustrate the potential efficacy of legislative and regulatory reform, recall that in Arlington, the City Council was able to block LIHTC funding for family-oriented affordable housing by withholding its endorsement of the project and reducing the proposal's LIHTC point total.²⁷⁷ This act of discrimination was *only* possible because the Texas legislature and regulatory agency in charge of the LIHTC funding process gave local governments the power to veto projects.²⁷⁸ This Part points out that governments have the power to right wrongs like this one – if only they would exercise it.

This Part first proposes a series of legislative fixes to both federal and state FHAs that could make familial-status claims more viable. Next, it argues that HUD can alter its 1999 rule that served as the foundation of the *Putnam* decision. Finally, it advocates for tried-and-tested state-law reforms that would help prevent municipalities from blocking the construction of affordable housing for families without changes to the federal or state FHAs.

A. Legislative Reforms to HOPA

Amending the FHA is the most straightforward and effective way to ensure that plaintiffs can hold municipalities accountable for familial-status discrimination. Nationwide change to the FHA would render irrelevant any doctrinal differentiation between judicial circuits that could develop if some circuits choose to adopt the *Putnam* standard for familial-status discrimination and others choose a different path. It would also overcome pushback from courts that have historically cabined the reach of the FHA.²⁷⁹ But while congressional amendment is the simplest way to reform the FHA, it is also subject to partisan politics. This Section thus offers two strategies for congressional reform, each with different levels of political viability. Recognizing that Congress may never increase

277. Complaint, *supra* note 5, at 10.

278. See *id.* at 9-10.

279. See, for example, the discussion of *Inclusive Communities*, *supra* notes 136-137, and accompanying text.

the rigor of the FHA, this Section also proposes that state legislatures make changes to their FHAs to crack down on municipal familial-status discrimination.

1. *Nationwide FHA Reform*

This Note proposes two potential reforms to the federal FHA that would increase the viability of familial-status claims against municipalities. First, Congress could exclude municipalities from the HOPA exemption. This reform would allow plaintiffs to hold communities liable for familial-status discrimination if they attempt to pressure developers into constructing senior-only housing when those developers would prefer to build family units. It would also largely respect the aims of the HOPA exemption by allowing private developers to build and operate senior-only housing without facing liability.²⁸⁰ Essentially, this strategy would balance the need to prevent familial-status discrimination with Congress's desire to preserve housing for the elderly.

Advocates for senior-only housing would likely object to this proposal for the same reason they pushed for the 1995 FHA amendments that strengthened the HOPA exemption. That is, they would argue that investment in affordable housing for seniors would be reduced by any policy that increases the risk of liability for familial-status discrimination.²⁸¹ This is a fair point if one believes that senior-only housing is absolutely essential for the well-being of the elderly.²⁸² It may be that developers would build fewer units of senior-only housing if municipalities did not force them to build it. The problem with this argument is that the loss of senior-only facilities would likely be more than offset by the number of new affordable units constructed due to the amendment. If developers had less fear of extortion at the hands of municipalities, they would have

280. One of the major concerns during debates for the HOPA amendment was that private developers did not understand the vague definition of an elderly-housing facility. The amendment simplified this definition by removing any requirement for specialized facilities, thus reducing the risk of litigation to private housing providers. S. REP. NO. 104-172, at 5 (1995) (“Nobody, including the Government, can figure out what the phrase ‘significant facilities and services’ means. Further, the requirement discriminates against low-income senior citizens. As a result, seniors housing, particularly low-income seniors housing, is faced with the uncertainty and unfairness of a confusing Government policy, the threat of litigation and the resulting limitation on the availability of affordable housing for older persons.”).

281. Jonathan I. Edelstein, *Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995*, 52 U. MIA. L. REV. 947, 949 (1998) (“Furthermore, many critics argue that the FHAA has inhibited the creation of new senior communities due to the expense of meeting the exemption requirements and the possibility of expensive litigation thereunder.”).

282. See *supra* Section I.C.

more freedom to build affordable, multifamily developments that elderly individuals would have every right to live in.

Another major downside to this strategy is that it would likely be politically difficult to implement. The “senior lobby” intensely fought for the current, broad HOPA exemption.²⁸³ The lobby was only able to enact the amendment after the Republican Party claimed victory in the 1994 midterm elections and enacted large portions of the “Contract with America,” which included an expanded HOPA exemption.²⁸⁴ It is unlikely that these advocates would allow Congress to water down its major accomplishment without inflicting significant political damage on those enacting reform. We predict that few politicians would attempt to battle with such a powerful political constituency head-on.

Second, as this Note suggested in Part III, Congress could enact legislation requiring courts to construe the FHA differently. This plan includes two potential prongs. First, Congress could state that courts should only read the HOPA exemption to immunize facial discrimination and direct evidence of discriminatory intent when these actions are proelderly, not when they are antichildren. This provision would set the outer limit of HOPA’s protections in disparate-treatment cases, perhaps by specifying that housing “with respect to older persons” does not include housing policy created for the purpose of preventing family-oriented housing. Second, Congress could clarify the evidentiary framework applicable to the HOPA exemption by requiring municipalities to show their affirmative intent to promote or preserve elderly housing when invoking HOPA.

From a policy perspective, this second proposal is less ambitious than the first. Legislatively preempting the *Putnam* standard would merely clarify and limit HOPA, whereas the first proposal would entirely preclude cities from invoking HOPA. Of course, the limited nature of the second reform could make it more politically palatable than the first. Opposition to this proposal could be tempered by the fact that it holds liable only those towns that take transparently discriminatory actions. It will be harder for senior groups to argue against a bill that advocates can easily sell as a mechanism to *exclusively* curb the power of those who disparage children.

283. See Carl A.S. Coan, Jr. & Sheila C. Salmon, *The Fair Housing Act and Seniors’ Housing*, 27 URB. L. 826, 834-35 (1996) (stating that a proposed “Senior Citizens Equity Act,” including the Housing for Older Persons Act, was one portion of the “Contract with America”); Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L.J. AM. U. 297, 319 (1995) (“It is abundantly clear that children’s advocacy groups are no match for the well-funded seniors’ lobby.”).

284. Coan & Salmon, *supra* note 283, at 834-35.

2. State FHA Reform

If Congress fails to enact some form of federal FHA reform, states should change their own FHAs to aid plaintiffs. The federal FHA is only a floor for protection from discrimination and segregation. Individual states can and should go further. Forty-nine states and the District of Columbia have adopted their own version of the federal FHA.²⁸⁵ These state statutes are generally similar to the federal FHA in both language and content, and some include state versions of a HOPA exemption.²⁸⁶ But some states have made important additions to their housing laws. Fourteen states have FHA provisions that ban discrimination on the basis of source of income (i.e., discrimination against housing-voucher recipients).²⁸⁷ Twenty-two states ban discrimination on the basis of sexual orientation.²⁸⁸ Neither of these provisions are included in the federal FHA. Customization of state FHAs is thus unremarkable.²⁸⁹

States should change their FHAs to include the same provisions this Note has proposed at the national level. If a state legislature chooses, it can direct its courts to read state HOPA exemptions to immunize facial discrimination and direct evidence of discriminatory intent only when these actions are proelderly, or to read its HOPA exemptions to require municipalities to show their affirmative intent to promote or preserve elderly housing when invoking HOPA. State legislatures could also reform their FHAs to exclude municipalities from HOPA protection entirely. Each of these solutions would allow plaintiffs to successfully bring familial-status discrimination claims against municipal defendants in state court.

Politics is the key barrier to states enacting FHA reform. Unfortunately, state-housing politics are notoriously difficult to navigate. In coastal states with uniquely constrained housing markets, like California and Connecticut, housing is one of the most intensely debated policy issues of recent years.²⁹⁰ These states

285. *State Fair Housing Protections*, POL'Y SURVEILLANCE PROGRAM (Aug. 1, 2019), <http://lawatlas.org/datasets/state-fair-housing-protections-1498143743> [<https://perma.cc/P4VK-MLWJ>].

286. See, e.g., CONN. GEN. STAT. § 46a-64b (2022); TEX. PROP. CODE ANN. § 301.043 (West 2021).

287. *State Fair Housing Protections*, *supra* note 285.

288. *Id.*

289. In fact, many states were slow to add the HOPA exemption to their FHAs (at least twenty-one states added the exemption three years after HOPA passed). Edelstein, *supra* note 281, at 974 & n.202.

290. See Jerusalem Demsas, *A Fight over Housing Segregation Is Dividing One of America's Most Liberal States*, VOX (Mar. 29, 2021, 2:15 PM EDT), <https://www.vox.com/22335749/housing-prices-connecticut-segregation-zoning-reform-democrats-adu-parking-minimum> [<https://perma>

are also places where exclusionary zoning is especially pernicious because of its brutal impact on housing prices.²⁹¹ Consequently, they need FHA reform the most. As coastal-state housing politics stands today, a major worry is that suburban and rural Democrats and Republicans would join together to block fair-housing legislation they view as a threat to their interests, just as they often do with zoning reforms.²⁹²

However, pessimism about state fair-housing politics is not entirely justifiable. Fair-housing legislation that is targeted at clear acts of discrimination may be an easier sell than statewide exclusionary-zoning reform. Voters and legislators could see reforms to state FHAs as a narrowly tailored compromise aimed at only the worst actors. There is precedent for such successful reforms to FHAs. For example, even California was able to add a source-of-income discrimination provision to its FHA despite its notoriously unpleasant housing politics.²⁹³ In view of these recent successes, it may be possible to advance state-level FHA reforms that more thoroughly address familial-status discrimination.

B. A Regulatory Solution

Legislatures do not retain exclusive power to reform the application of the HOPA exemption—the federal executive branch can also use the rulemaking process to limit HOPA’s reach. Specifically, HUD could revise 24 C.F.R. § 100.304(b), which defines a “housing facility or community” in such a way that applies HOPA to all decisions made by municipalities.²⁹⁴ This solution would be a relatively low-profile strategy for significantly reforming the nation’s familial-status discrimination laws.

.cc/NFF3-SAB4]; Dan Walters, *California Housing Crisis Drifts Toward Political War*, CAL MATTERS (Dec. 1, 2021), <https://calmatters.org/commentary/2021/11/california-housing-crisis-political-bonta-initiative> [<https://perma.cc/K7Z5-W3YW>].

291. See *supra* note 129 (providing multiple articles which explain that exclusionary zoning is tied to the affordability crisis).

292. See, e.g., Jacqueline Rabe Thomas, *Senate Passes Controversial Zoning Reform Bill*, CT MIRROR (May 28, 2021), <https://ctmirror.org/2021/05/28/senate-passes-controversial-zoning-reform-bill> [<https://perma.cc/7RC6-29XX>] (discussing Republicans and suburban Democrats gutting a zoning reform bill in Connecticut).

293. CAL. GOV’T CODE § 12955(p)(1) (West 2022) (as amended by 2019 Cal. Legis. Serv. Ch. 600 (S.B. 329) (West)); Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573, 592 n.101 (2020) (describing how California amended its state FHA in 1999 and again in 2019).

294. 24 C.F.R. § 100.304(b) (2021).

As previously noted in Part II, the parties in *Putnam* posed the Ninth Circuit with the question of whose intent mattered for the purpose of the HOPA exemption: a municipal land-use body or the owners of a residential development.²⁹⁵ Plaintiffs in the case, owners of a mobile-home park, argued that only a property owner's intent to enact and enforce an age restriction was relevant for the purposes of HOPA analysis. This would have meant that if an owner of a development zoned with age restrictions did not intend to abide by those restrictions, the HOPA exemption would not apply to the enactment of the zoning restrictions.²⁹⁶ Conversely, defendant the City of Yucaipa argued that its intent to create an age-restricted community was relevant to determining whether the HOPA exemption applied.²⁹⁷ The Ninth Circuit agreed with neither interpretation of HOPA, holding that the language of the statute did not clearly answer this dispute.²⁹⁸ Yet, it ultimately sided with the defendant, narrowing plaintiffs' rights by applying the *Chevron* doctrine and deferring to HUD's interpretation of the HOPA exemption.²⁹⁹

HUD's definition of senior housing for purposes of the HOPA exemption offers the foundation for the doctrine that municipal intent to build elderly housing is enough to access the HOPA exemption. In 1999, HUD promulgated 24 C.F.R. § 100.304(b), which defined a "housing facility or community" for

295. *Putnam Fam. P'ship v. City of Yucaipa*, 673 F.3d 920, 928 (9th Cir. 2012).

296. *Id.* at 927.

297. *Id.* at 928.

298. *Id.* at 930-31.

299. *Id.* at 931; *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The court in *Putnam* explained that the statute was ambiguous because "[t]he senior-exemption provision's requirement that 'the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent' to provide senior housing makes clear that 'housing facility or community' also refers to the entity with the power to issue and enforce age restrictions." *Putnam*, 673 F.3d at 930. Since a zoning district cannot produce its own policies and procedures, the court held that it is ambiguous whether it can serve as a "housing facility or community" that is capable of intending to house seniors. *Putnam*, 673 F.3d at 930-31.

HOPA purposes as “any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions.”³⁰⁰ The regulation included a “municipally zoned area” as an example of one of these facilities or communities.³⁰¹ This definition was crucial in *Putnam* because, in addition to requiring that the facility be operated for occupancy by those who are fifty-five and older, HOPA mandates that “the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under [the] subparagraph.”³⁰² If a municipally zoned area counts as a housing facility or community, then the municipality’s publishing of and adherence to policies and procedures for the zoned area would be indicative of intent according to the Ninth Circuit, via HUD’s interpretation.³⁰³

The fact that *Putnam* is based on an agency interpretation of an ambiguous statute means that the executive branch could reopen the question presented in the case simply by changing the portion of 24 C.F.R. § 100.304(b) that defines a housing facility or community. The best way for HUD to make this change is for the agency to remove “[a] municipally zoned area”³⁰⁴ as an example of a housing facility or community and to add a clear statement to the regulation that municipal intent to create an age-restricted community is irrelevant for the purpose of the HOPA exemption. If a familial-status discrimination suit similar to *Putnam* is brought under this regulatory framework, it is likely that a court, applying

300. The full text of the definition is as follows:

(b) For purposes of this subpart, *housing facility or community* means any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions. A portion or portions of a single building shall not constitute a housing facility or community. Examples of a housing facility or community include, but are not limited to:

- (1) A condominium association;
- (2) A cooperative;
- (3) A property governed by a homeowners’ or resident association;
- (4) A municipally zoned area;
- (5) A leased property under common private ownership;
- (6) A mobile home park; and
- (7) A manufactured housing community.

24 C.F.R. § 100.304(b) (2021).

301. *Id.*

302. 42 U.S.C. § 3607(b)(2)(C)(ii) (2018).

303. *Putnam*, 673 F.3d at 931.

304. 24 C.F.R. § 100.304(b) (2021).

Chevron, would refuse to exempt discriminatory municipal-housing policies from liability under the FHA.³⁰⁵

Such a regulatory change would have the benefit of achieving balance between the twin goals of the FHA: protecting families from discrimination and senior housing from elimination. Ignoring municipal intent would clearly do much to prevent municipalities from using age restrictions to discriminate against children by stripping them of their ability to access the HOPA exemption simply by showing nominal signs of intent to house seniors while truly harboring animus toward low-income children. The policy would still protect elderly individuals by offering municipalities a pathway toward accessing the HOPA exemption if they can collaborate with housing providers that genuinely do wish to build or manage age-restricted housing.

Two examples illustrate the balance inherent in this regulatory change. First is a scenario where a local zoning board wishes to stop a developer from building affordable family housing by enacting an ordinance requiring that the developer build age-restricted housing. Under the status quo, if the municipality publishes policies and procedures showing an intent to provide housing to individuals older than fifty-five, the ordinance will likely withstand judicial scrutiny. In a world with a reformed regulation, the ordinance will violate the FHA because the builder never intended to provide housing to elderly individuals. Second is a scenario where a local zoning board enacts a zoning ordinance age-restricting residences built on a parcel of land, and the developer that owns the land fully intends to and wishes to comply with the regulation. Even with a newly reformed regulation, in this world the ordinance will withstand scrutiny because the property owner intends to provide elderly housing. These two examples demonstrate how families would gain new protections from discrimination with regulatory reform, and how municipalities would still retain some protection from suits using the HOPA exemption.

C. *Non-FHA Solutions*

If neither Congress nor individual states are willing to reform the HOPA exemption, they can and should still take steps to curb familial-status discrimination by other means. We propose the two reform strategies presented below because a handful of states have already implemented both successfully.

305. As noted in *Brand X*, agencies may reconsider their policy choices, shifting their interpretation of statutory ambiguities in the process, and courts must respect these changes in their decisions if the agency interpretation is reasonable. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

First, states should change their LIHTC bidding process to stop municipalities from gaming the system to block family-oriented housing. Part I of this Note described how state LIHTC QAPs award points to development proposals in a competitive bidding process if those proposals meet a series of project-quality criteria.³⁰⁶ States often grant points to developments that can obtain “letters of support” or zoning approval from municipalities.³⁰⁷ As illustrated by the Arlington case, awarding points for community support gives municipalities coercive power over family-oriented LIHTC development proposals because officials can threaten to withhold support unless the project in question is downsized or converted to senior-only housing.³⁰⁸ States could remove their preference for a letter of support or zoning approval from their QAP, which would take away municipalities’ de facto veto power. And this is not an outlandish proposal: Illinois has already adopted a QAP that awards no points for zoning approval, nor for a letter of intent.³⁰⁹

States could also change the criteria in their QAPs to award extra points to family-oriented affordable housing over senior-only housing. This would incentivize developers to propose family-oriented housing even when they know that they could face significant pushback from local communities. This strategy has been successfully implemented in Connecticut, where the state QAP awards extra points to a “Development Located in an Area of Opportunity,” which is defined to only include non-age-restricted projects.³¹⁰

These LIHTC reforms need not take place through state legislatures. State administrative agencies produce annual or semiannual QAPs and are required to hold a hearing on each new plan.³¹¹ Housing advocates can comment on QAP priorities during this process³¹² and thereby seek change outside the confines of divisive state-legislative politics. Additionally, Congress could decide to reform the LIHTC program nationwide to require states to protect family-oriented housing during the bidding process. Obviously, congressional reform would still face similar political difficulties as the proposals for FHA reform discussed in Section IV.A.

306. KEIGHTLEY, *supra* note 24, at 4.

307. *See supra* note 27 and accompanying text.

308. Complaint, *supra* note 5, at 4.

309. 2022-2023 *Low Income Housing Tax Credit Qualified Allocation Plan*, ILL. HOUS. DEV. AUTH. 34-50 (2021), https://df7qosnyqs6g.cloudfront.net/wp-content/uploads/2021/09/QAP_2022-2023_Website.pdf [<https://perma.cc/43FR-STQ7>].

310. *Low-Income Housing Tax Credit 2022 and 2023 Qualified Allocation Plan*, CONN. HOUS. FIN. AUTH. 25 (2021), [https://www.chfa.org/assets/1/6/FINAL_2022-23_QAP_\(July_2021\).pdf](https://www.chfa.org/assets/1/6/FINAL_2022-23_QAP_(July_2021).pdf) [<https://perma.cc/3QQ7-EU5J>].

311. KEIGHTLEY, *supra* note 24, at 4.

312. *Id.*

Second, states that require or encourage their municipalities to build affordable housing should give municipalities less credit for building senior housing compared to family housing. States like New Jersey and California require their municipalities to plan for and build a set number of affordable housing units during multiyear planning periods. In both states, if municipalities refuse to meet these requirements, either developer-plaintiffs or state agencies can drag them to court to force them to comply with the law.³¹³

Defining the phrase “affordable housing” is crucial, as a flexible definition can let municipalities easily defy the spirit of the law.³¹⁴ One strategy that towns use to try to avoid complying with the antisegregationist spirit of these housing laws is meeting their affordable-housing requirements using primarily senior-only housing.³¹⁵ Instead of introducing meaningful racial diversity and integrating schools, towns can build senior housing to keep the status quo mostly intact while following the letter of the law. States could prevent municipalities from using this “loophole” by refusing to count senior-only developments as affordable housing or by deciding that each unit of senior housing is only worth a fraction of a family-oriented unit for the purposes of affordable-housing requirements. In Connecticut, a housing unit rented to a family at 40% of the median income is worth five times more than an age-restricted unit toward the state’s affordable “builder’s remedy” program.³¹⁶

It is important to note that these last two proposals are no substitute for meaningful FHA reform. Connecticut has already adopted the second, yet the

313. See *Mount Laurel Doctrine. What Is the Mount Laurel Doctrine?*, *supra* note 91; *Growing List of Penalties for Local Governments Failing to Meet State Housing Law*, ASS’N OF BAY AREA GOV’TS (June 2021), <https://abag.ca.gov/sites/default/files/documents/2021-06/Consequences%20of%20Non-Compliance%20with%20Housing%20Laws.pdf> [https://perma.cc/H4QR-AFJX].

314. For instance, Greenwich, Connecticut proposed to define affordable housing to include units for workers at country clubs and private schools. Robert Marchant, *Greenwich Lawmakers Seek Changes in Affordable Housing Laws, Saying 8-30g ‘Has Failed Every Town,’* GREENWICH TIME (Feb. 8, 2022, 6:32 PM), <https://www.greenwichtime.com/news/article/Greenwich-lawmakers-seek-changes-in-affordable-16842753.php> [https://perma.cc/9XQ3-GFV6].

315. For example, one group of residents of Colts Neck, New Jersey attempted to use this strategy. See *supra* note 84.

316. CONN. GEN. STAT. § 8-30g(l)(6) (2021). But not all states with affordable-housing requirements have adopted such a policy. For instance, while California requires municipalities to meet their assigned targets for affordable-housing construction, the state still weighs age-restricted housing equally with family-oriented housing. *Housing Element Annual Progress Report Frequently Asked Questions (FAQs)*, CAL. DEP’T. OF HOUS. & CMTY. DEV. 4 (July 13, 2018), https://www.hcd.ca.gov/community-development/housing-element/docs/apr_faqs.pdf [https://perma.cc/6L3C-YXJD].

state remains one of the most segregated in the country.³¹⁷ But for advocates eager to explore various pathways for policy change, these proposals are an important and worthwhile starting point.³¹⁸

CONCLUSION

For too long, local governments have weaponized senior-only housing to deny families homes, obstruct affordable housing, and perpetuate racial and class segregation. This Note intends to document this practice and its stakes and develop strategies that will combat municipal familial-status discrimination. With luck, Part III will help attorneys formulate suits against local governments in order to hold them accountable for their exclusionary planning, and Part IV will push federal and state governments to take a second look at how their housing policies impact families.

It is disappointing that housing advocates have brought few municipal familial-status cases over the years, and that those cases which have been brought have mostly established problematic case law. But change is possible. Now is the time to revisit FHA doctrine and begin pushing to develop this very sparse area of law. The mounting evidence that local governments abuse their discretion to build senior-only housing, and the sheer severity of the ongoing housing crisis, have created a sense of urgency that municipal familial-status discrimination cases may have lacked in the past. The success of DOJ's case against Arlington has also provided strong evidence that familial-status suits are viable. While municipal familial-status claims may seem unconventional, we believe they can be a vital tool in the continuing work to advance meaningful housing justice.

317. CONN. GEN. STAT. § 8-30g(l)(6) (2021); *Connecticut Zoning and Discrimination 2021*, CONN. COMM'N ON HUM. RTS. & OPPORTUNITIES 20 (2021), <https://portal.ct.gov/-/media/CHRO/Publications/CHROs-Zoning-and-Discrimination-2021-Report.pdf> [https://perma.cc/XBN3-VTSW] (“[E]xclusionary zoning has a disparate impact on BIPOC residents and has caused Connecticut to remain one of the most segregated states in the country.”).

318. There are certainly additional creative ways to reduce familial-status discrimination at the state level. For instance, in 2021, Massachusetts enacted Mass. Gen. Laws ch. 40A, § 3A, which allows multifamily housing as of right in transit-rich areas. This law, however, only extends this right to housing, which is not age restricted. Going forward, this could be a model for states reforming their zoning codes.