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Civil Rights—Title VIII Litigation: Demise of the Prima Facie Case Doctrine in the Seventh Circuit—Metropolitan Housing Development Corp. v. Village of Arlington Heights

TITLE VIII LITIGATION: DEMISE OF THE PRIMA FACIE CASE DOCTRINE IN THE SEVENTH CIRCUIT—*METROPOLITAN HOUSING DEVELOPMENT CORP. v. VILLAGE OF ARLINGTON HEIGHTS*

With the enactment of Title VIII of the Civil Rights Act of 1968[1], Congress indicated its intention[2] to eradicate racial[3] discrimination in the housing market. Although lower federal courts have construed Title VIII liberally,[4] the Supreme Court has yet to authoritatively mandate a uniform standard for assessing a plaintiff's claim. The Seventh Circuit, in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*[5] (*Arlington Heights II*), articulated a new test[6] for determining what circumstances constitute a Title VIII viola-

1. Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1970). The Act's scope is not limited to private discrimination. It also prohibits federal, state and local governmental discrimination. *Id. See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977).

2. "It is the policy of the United States to provide, within constitutional limitation, for fair housing throughout the United States." 42 U.S.C. § 3601 (1970). Because Title VIII was passed on the floor as an amendment to the Civil Rights Act of 1968, the only available legislative history is in the congressional debates. For a general discussion, see Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149 (1969).

3. 42 U.S.C. § 3604(a) (1970), *as amended* by Fair Housing Act Amendments of 1974, Pub. L. No. 93-383, 808(b)(1), 88 Stat. 729. The Act's proscription is not limited to racial discrimination. Also made unlawful is discrimination on the basis of color, religion, sex, or national origin. *Id.*

4. "Courts have consistently interpreted civil rights laws as remedial legislation to be liberally construed so that their beneficial objectives may be realized to the fullest extent possible." Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 158-59 (1976) [hereinafter cited as *Harvard Comment*]. *See* Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (applying Civil Rights Act of 1866); United States v. L & H Land Corp., 407 F. Supp. 576, 579 (D.C. Fla. 1976) (Title VIII); United States v. Hughes Memorial Home, 396 F. Supp. 544, 548 (D.C. Va. 1975) (Title VIII); Zuch v. Hussey, 394 F. Supp. 1028, 1046 (E. D. Mich. 1975) (Title VIII).

5. 558 F.2d 1283 (7th Cir. 1977).

6. *Id.* at 1290-93.

tion.[7]

7. Fair housing plaintiffs have two other possible remedies, §§ 1982-1983 of the Civil Rights Act of 1866 and the fourteenth amendment's Equal Protection Clause. 42 U.S.C. § 1982-1983 (1970); U.S. CONST. amend. XIV, § 1. Section 1983, which gives a cause of action to any individual who has been deprived of "any rights, privileges, or immunities secured by the Constitution," has been used to remedy both private and governmental discrimination in housing. *See* Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974) (exploitation of existing residential segregation held to be prima facie violative of § 1983); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (city government's failure to rezone to allow a low-cost housing development to be built held to be racially motivated and violative of § 1983).

Section 1982, which gives to all persons the same rights to "inherit, purchase, lease, sell, hold, and convey real and personal property" as white citizens, was revitalized in Jones v. Mayer Co., 392 U.S. 409, 417-37 (1968). The Court held that § 1982 prohibits private, as well as public, racial discrimination in the sale or rental of property. *See also* Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973) (per curiam) (refusal of real estate broker to direct black buyers to houses in substantially white neighborhoods held violative of § 1982); Smith v. Adler Realty Co., 436 F.2d 344 (7th Cir. 1971) (landlord's refusal to rent apartment to prospective tenant, based partially on racial considerations, held violative of § 1982).

The Equal Protection Clause is available to plaintiffs as a means of attacking governmental discrimination in the housing market. Statutes that have racial classifications on their face, Hunter v. Erickson, 393 U.S. 385 (1969) (city ordinance requiring referendum approval of any city council action that involves racial discrimination in housing), or that encourage private discrimination, Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitution gives private individuals absolute discretion to discriminate in the sale or rental of property); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state is so closely related to the operation of a restaurant located in a public parking garage that the restaurant's racial discrimination is considered to be state action), violate the Equal Protection Clause.

Other cases show that a racially discriminatory effect establishes a violation of the Equal Protection Clause. *See* United Farmworkers of Fla. Hous. Project v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (city's refusal to tie in low-cost housing development to water and sewer system has a racially discriminatory effect); Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) (per curiam) (denial of municipal services has racial effect); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (per curiam) (city's failure to issue building permit for apartments on properly zoned land); Kennedy Park Home Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970) (dictum) (city moratorium on new subdivisions); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (unintentional effect of urban renewal put urban displacees in a housing market that discriminated against non-whites). These cases have been implicitly overruled by the Supreme Court's holding in Washington v. Davis, 426 U.S. 299, 245 n.12 (1976), that a discriminatory intent must be shown to prove a constitutional violation. *See* note 25 *supra*.

The Supreme Court also rejected any equivalence between income classifications and racial classifications for equal protection purposes. James v. Valtierra, 402 U.S. 137, 141 (1971). *Valtierra* involved an equal protection challenge to a California statute requiring local and county referendum approval of any low-cost housing project built or owned by the state. *Id.* at 139. The Court refused to invalidate the referendum mechanism since the statute only mentioned "low-cost" housing and

Metropolitan Housing Development Corporation (MHDC), a non-profit, low-cost housing developer, purchased a tract of land in the Village of Arlington Heights for the purpose of developing federally subsidized low- and moderate-income housing.[8] Upon the Village Board of Trustees denial of MHDC's petition for rezoning,[9] MHDC and three minority individuals filed suit in federal court alleging that the village's refusal to rezone "perpetuated segregation and denied MHDC the right to use its property in a reasonable manner in violation of the Equal Protection Clause" and the Fair Housing Act (Title VIII).[10] The United States Supreme Court affirmed[11] the district court's holding that, absent racial motivation, governmental action having only a racially disproportionate impact does not establish a *constitutional* violation.[12] The Court, however, remanded the case for a determination of whether the Village's conduct violated the Fair Housing Act. On remand, the Seventh Circuit held that under "some circumstances a violation of § 3604(a) [of Title VIII] can be established by a showing of discriminatory effect without a showing of discriminatory intent."[13]

Congress enacted Title VIII for the express purpose of guarantee-

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avoided racial classification. *Id.* at 141. Justice Douglas, in dissent, viewed the law as an invalid wealth classification. *Id.* at 143. *See generally* Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159 (1953); *Harvard Comment, supra* note 4, at 133-50.

8. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 209 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd and remanded*, 429 U.S. 252 (1977).

9. *Id.* at 210. Plaintiff's land was zoned solely for single-family residences. Plaintiff sought a rezoning to allow construction of multiple-family dwellings.

10. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 411 (7th Cir. 1975), *rev'd and remanded*, 429 U.S. 252 (1977).

11. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

12. *Id.* at 264-65. The Court held that, in light of Washington v. Davis, 426 U.S. 229 (1976), plaintiff's equal protection challenge must fail absent a showing of discriminatory intent. *See* note 25 *infra*.

The Court did not reverse the Seventh Circuit's finding that the village's actions practiced a racially discriminatory "ultimate effect." *See* note 18 *infra*. Rather, the Court deemed a "discriminatory 'ultimate effect' to be without independent constitutional significance." 429 U.S. at 271. *See generally* Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977); Wolff & Keyko, *Property*, 1976 ANN. SURVEY AM. L. 711, 746-49; 7 LOY. CHI. L.J. 141 (1976); 55 N. CAR. L. REV. 733 (1977); 14 URBAN L. ANN. 307 (1978).

13. 558 F.2d 1283, 1290 (7th Cir. 1977). Section 3604(a) of the Fair Housing Act states that it shall be unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make*

ing equal access to housing.[14] Courts have utilized Title VIII[15] to eliminate barriers against fair housing.[16] Some courts have held that, in order to establish a prima facie violation[17] under Title VIII, a plaintiff need only show that a defendant's action, or inaction, has a racially discriminatory effect.[18] Under this approach, proof of de-

unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604(a) (Supp. V 1975) (emphasis added).

14. 42 U.S.C. § 3601 (1970). *See generally* Note, *Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches*, 4 FORDHAM URB. L.J. (1975).

15. *See* note 4 *supra*.

16. *See* United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975), *citing* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Although *Griggs* was an equal employment opportunity (Title VII) case, Title VII and Title VIII have been interpreted by some courts as embodying the same broad purposes. *See* notes 28-29 and accompanying text *infra*.

The Supreme Court has allowed a wide range of plaintiffs to file suit under the Fair Housing Act. For example, in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Court construed "person aggrieved," 42 U.S.C. § 3610(a) (1970), to include a white apartment dweller who alleged that his right to live in an integrated community had been violated by defendant's racially discriminatory rental policies. *Id.* at 208-12. *See also* Mayers v. Ridley, 465 F.2d 630, 633-34 (D.C. Cir. 1972) (construing § 3604(c) broadly so as to prohibit the City Recorder from "publishing" any deeds containing racially restrictive covenants). *See generally* Carey, Matish & Richman, *An Analysis of Recent Housing Discrimination Cases*, 52 J. URB. L. 897 (1975).

17. "The proper meaning of 'prima-facie case' is that quantum of evidence tending to prove each material fact that a plaintiff must introduce to sustain his burden of going forward with the evidence, *i.e.*, render himself immune from a nonsuit." Rehm v. United States, 183 F. Supp. 157, 159 (E.D.N.Y. 1960).

18. "Discriminatory effect" is subject to many definitions. One definition equates discriminatory effect with "disparate impact," *i.e.*, the challenged action has an effect that burdens blacks (or other minorities) more than whites. Disparate impact can be measured absolutely, as in Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (D.C. Pa. 1976), where the court looked to the fact that more blacks than whites were affected, or proportionately, as in Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 111 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), where a city's subdivision moratorium prevented low-cost housing construction, thus perpetuating the segregation of 98.9% of the city's blacks in one area.

Discriminatory effect may also be grounded in the "historical context" and "ultimate effect" of the challenged action. "Historical context" refers to the past history of residential segregation in a metropolitan area. "Ultimate effect" looks beyond the immediate effect of a challenged action to its impact upon the whole metropolitan area. *See* United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). In *Black Jack*, the court found that the city's zoning ordinance, prohibiting new multiple-family dwellings, had the ultimate effect of excluding 85% of all metropolitan blacks from living in suburban Black Jack. *Id.* The court also found that the ordinance had a metropolitan impact of restricting blacks to inner city housing. *Id.* For further discussion, see text accompanying notes 30-33 *infra*. *See also* Mulkey v. Reitman, 64 Cal. 2d 529, 534-35, 413 P.2d 825,

fendant's racial motivation is not essential to establish a Title VIII violation.[19]

This discriminatory effect[20] test for Title VIII is not spelled out in the statute itself. Rather, those lower courts that have adopted the "effect" test in fair housing litigation have analogized Title VIII cases to equal employment opportunity (Title VII)[21] cases. In *Griggs v. Duke Power Co.*,[22] the Supreme Court, for the first time, addressed the issue of what burden of proof an employee must meet to establish a prima facie case of employment discrimination under Title VII. The Court held that Congress, in enacting Title VII, "directed the

828-29, 50 Cal. Rptr. 881, 884 (1966), *aff'd*, 387 U.S. 369 (1967) (Court considered past efforts of state legislature to prohibit discrimination); Bogen & Falcon, *The Use of Statistics in Fair Housing Cases*, 34 MD. L. REV. 59 (1974); *Harvard Comment, supra* note 4, at 165.

Prior to *Arlington Heights II*, only two circuit courts expressed opinions as to the proper Title VIII standard of review. The Eighth Circuit considered the question in a number of cases. *See* Smith v. Anchor Bldg. Corp. 536 F.2d 231, 233 (8th Cir. 1976); United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974). These cases agree that a racially discriminatory effect creates a prima facie Title VIII violation. However, the cases differ as to a defendant's burden once a prima facie case has been established. *See* note 33 *infra*.

In contrast, the Second Circuit rejected the effect test for Title VIII cases. In Boyd v. Lefrak Organization, 509 F.2d 1110 (2d Cir. 1975), *cert. denied*, 423 U.S. 896 (1975), plaintiff challenged a landlord's use of income criteria in selecting tenants. *Id.* at 1112. Although the income requirements had the effect of excluding more blacks than whites, the Second Circuit rejected the argument that *income*-based criteria is equivalent to *racial* criteria so as to invoke Title VIII. *Id., citing* James v. Valtierra, 402 U.S. 137 (1971).

Judge Mansfield's dissent in *Boyd* presents an eloquent argument in favor of the "effect test." *Id.* at 1115-18. The dissent argued that *Valtierra*, dealing with an Equal Protection violation, is inapposite to the *Boyd* Title VIII violation. *Id.* at 1116. Judge Mansfield urged the use of objective standards over subjective evaluations of racial motivation in Title VIII cases. *Id.*

The Third Circuit, six weeks after *Arlington Heights II*, also adopted the effect test. In Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *aff'g* 425 F. Supp. 987 (E.D. Pa. 1976), the court held that Philadelphia's cancellation of a low-income housing development had a racially discriminatory effect sufficient to establish a Title VIII violation. *Id.* at 149-50.

19. United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United States v. Pelzer Realty Co., 484 F.2d 438, 443 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); United States v. L & H Land Dev. Corp., 407 F. Supp. 576, 579 (D.C. Fla. 1976).

20. *See* note 18 *supra*.

21. 42 U.S.C. §§ 2000e-2000e-15 (1970), *as amended* by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17 (Supp. IV 1974).

22. 401 U.S. 424 (1971).

thrust of the Act to the *consequences* of the employment practices."[23] Therefore, a showing of racially discriminatory *effect*[24] will establish a prima facie Title VII violation.[25] Additionally, the Court held that once a prima facie case is established, the burden of proof shifts to the employer to show that the challenged requirement has a manifest relationship to the employment in question."[26]

Two circuits have applied this prima facie case doctrine to Title VIII cases.[27] These courts based the extension of the prima facie case

23. *Id.* at 432 (emphasis in original). The challenged practices consisted of the employer's criteria for hiring new employees and promotion of incumbent employees. A high school diploma and satisfactory performance on two aptitude tests, which were not job related, were the source of controversy. Because black workers generally had lower educational backgrounds, the challenged practices effectively "froze" the results of past discrimination. *Id.* at 430. *See* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 63 (1972).

24. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." 401 U.S. 424, 431 (1971). *See* Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 59 HARV. L. REV. 387 (1975).

25. Title VII and the Equal Protection Clause require different standards of proof. Washington v. Davis, 426 U.S. 229 (1976), delineates the different standards. In order to prove a constitutional violation, an employee must show intentional discrimination by the employer. A showing only of disparate impact will not establish a constitutional violation. *Id.* at 238-42. *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp. [Arlington Heights I], 429 U.S. 252 (1977) (Court applies the discriminatory equal protection intent requirement to zoning challenge); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) (Effect test applied to Title VII suit challenging police department hiring policies).

The Court emphasized the difference between Title VII and constitutional cases when it noted that "[h]owever this [Title VII] process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." Washington v. Davis, 426 U.S. 229, 247 (1976).

A number of recent cases recognize that only discriminatory effect need be shown to establish a prima facie Title VII violation. *See* Dothard v. Rawlinson, 433 U.S. 321, 328 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); United States v. City of Chicago, 549 F.2d 415, 435 (7th Cir. 1977).

26. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). To rebut an employee's prima facie case of employment discrimination, the employer must show that the challenged requirement is a "business necessity." In *Griggs*, this meant the employer had to prove the challenged requirements (adequate performance on two non-job related aptitude tests and a high school diploma) were related to the jobs in question. *Id.* at 436. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (employer must "articulate some legitimate, non-discriminatory reason" to rebut a plaintiff's prima facie case of employment discrimination).

27. The two circuits are the Third and Eighth. *See* note 18 *supra*.

doctrine to the Fair Housing Act on the ground that, since both deal "with similar purposes and policies in the area of civil rights,"[28] Title VIII should be accorded the same broad construction as Title VII.[29]

The Eighth Circuit adopted this Title VII-Title VIII analogy in *United States v. City of Black Jack*.[30] The *Black Jack* court held that the city's action,[31] when considered in light of its historical context and ultimate impact,[32] had a racially discriminatory effect on a minority's housing opportunities. With plaintiff's prima facie case established by this showing of discriminatory impact, the burden of proof shifted to the city to justify its discriminatory action.[33]

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28. *Harvard Comment, supra* note 4, at 158. *See* United States v. City of Black Jack, 508 F.2d 1178, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

29. *See* Davis v. Valley Distrib. Co., 522 F.2d 827 (9th Cir. 1975) (court noted that Title VII should be "liberally construed" in favor of discrimination victims). *See also* 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 72.05 (4th ed. 1974).

30. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). "Just as Congress requires . . . the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[,] Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), such barriers must also give way in the field of housing." *Id.* at 1184.

31. In June 1970, the Inter-Religious Center for Urban Affairs (ICUA) announced the approval of federal funding for an "alternative housing opportunity for persons of low and moderate income living in the ghetto areas of St. Louis." *Id.* at 1182. The "housing alternative," a development of 108 low-cost two-story townhouses, was projected for a parcel of land zoned for multiple family dwellings in an unincorporated area of St. Louis County, now within the city limits of Black Jack. Upon hearing of the ICUA's proposal, residents of Black Jack circulated an incorporation petition that was accepted by the St. Louis County Council. The City of Black Jack then adopted a zoning ordinance prohibiting the construction of multiple-family dwellings. The United States brought suit to enjoin Black Jack from enforcing its zoning ordinance. *Id.* at 1182-83. *See generally* E. BERGMAN, ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AREAS (1974); Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 & 1968*, 82 HARV. L. REV. 834 (1969).

32. *See* note 18 *supra*.

33. "The city asserted primarily the following governmental interests to justify the ban on further apartment building: (1) Road and traffic control; (2) Prevention of overcrowding of schools; and (3) Prevention of devaluation of adjacent single-family homes." United States v. City of Black Jack, 508 F.2d 1179, 1186 (9th Cir. 1974). The court found that none of the asserted governmental interests would be furthered by the challenged zoning ordiance. *Id.* at 1187.

Black Jack requires the defendant to justify its actions by demonstrating a "compelling interest." *Id.* at 1185 n.4. It is not clear, however, that the defendant's burden should be so heavy. The Third Circuit addressed this problem in Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977). The court noted that " 'compelling interest' analysis is not a part of Title VII doctrine," and concluded that this heavy burden should be reserved "not for Title VIII defendants, but for those who seek to justify denials of equal protection by *purposeful* discrimination." *Id.* (court's empha-

In *Arlington Heights II*, the Seventh Circuit recognized that governmental action resulting in a racially discriminatory effect may constitute a violation of the Fair Housing Act.[34] However, although finding a racially discriminatory effect in the village's refusal to rezone,[35] the Court refused to shift the burden of proof to the defendant; that is, *the court failed to invoke the prima facie case doctrine.* Instead, the court offered a new test designed to ascertain when conduct that produces a discriminatory impact is violative of Title VIII. The court isolated four "critical" factors to be considered:[36] (1) the strength[37] of the plaintiff's showing of discriminatory effect;[38] (2) the presence of discriminatory intent;[39] (3) the defendant's interest in taking the action that produced the discriminatory impact;[40] and (4)

sis). The court set out the goal of the defendant's burden: "a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id* at 149. *See generally Harvard Comment, supra* note 4, at 175-83.

34. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (3d Cir. 1977).

35. *Id.* at 1288.

36. The four factors that the court concentrated on were culled from other Title VIII cases. In none of those cases are the four factors cited by the Seventh Circuit explicitly relied upon to determine Title VIII liability. *See* cases cited at 558 F.2d 1283, 1290-93.

37. By requiring that the village's failure to rezone must *totally* preclude the possibility of low-cost housing in Arlington Heights, *see* note 46 and accompanying text *infra*, the court apparently determined that only the strongest of discriminatory effects will violate Title VIII. *Id.* at 1291. This rigid approach, however, need not be adopted. *See Harvard Comment, supra* note 4, at 165; note 18 *supra.*

38. The court identified two different kinds of racially discriminatory effects arising from a racially neutral action: (1) disparate impact; and (2) perpetuation of racial segregation in the community. 558 F.2d at 1290. *See* note 18 *supra.*

39. This is the least important of the four factors. *Id.* at 1292. Because Title VIII plaintiffs are unable, in theory, to prove the existence of enough racial motivation to establish a constitutional violation, the court noted that the presence of partial evidence of intent will strengthen plaintiffs' equitable position. *Id.*

40. The court identifies three types of defendants and the level of scrutiny applicable to each. First, private individuals, protecting private rights, will not be accorded any deference by the courts and their actions will be carefully scrutinized. 558 F.2d at 1293. Second, a governmental body acting "outside the scope of its authority" will be subject to close scrutiny. *Id.* Third, courts will give great deference to actions of governmental bodies "within the ambit of legitimately derived authority." *Id.* The court, however, does not explain what "outside the scope of authority" or "within the ambit of legitimately derived authority" mean. Indeed, the two terms beg the question, since the court would not be able to determine if an act was outside a government's ambit until the court had closely scrutinized the act. *See* Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1663 (1971).

the type of relief, affirmative or prohibitory, sought by plaintiff.[41]

The court found that two of the factors, numbers 2 and 3, favored the village's position[42] while one of the factors, number 4, supported the plaintiff.[43] The resolution of this "close case"[44] turned on the strength of the ultimate discriminatory effect[45] of the village's refusal to rezone. The court held that if there was no land other than plaintiff's property within the village that was both properly zoned and suitable for federally subsidized housing, then the refusal to rezone constituted a violation of Title VIII.[46]

The four-part *Arlington Heights II* test marks a major departure from the prima facie case doctrine. In previous cases, the plaintiff's showing of discriminatory effect[47] shifted the burden of proof to the

41. This distinction is based on Lindsey v. Normet, 405 U.S. 52 (1972), which held that there is no constitutional right to decent housing. *Id.* at 74. Thus, where plaintiffs attempt to force a governmental defendant to build low-cost housing, courts are not likely to grant relief. *See* Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1067 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (no violation of fourteenth amendment when city abandoned plans for publicly-financed low-cost housing).

Plaintiffs in *Arlington Heights II* sought only injunctive relief to restrain defendants from interfering with plaintiff's project. 555 F.2d at 1293.

42. The court found no evidence of racial intent by the village. *Id.* The court also characterized the refusal to rezone as an act pursuant to a legitimate grant of the zoning power and consequently warranted great judicial deference. *Id.* Thus, the second and third factors were resolved in favor of defendant. By contrast the Eighth Circuit in *Black Jack* carefully scrutinized the city's zoning ordinance and its effect on the racial composition of the adjoining metropolitan area. United States v. City of Black Jack, 508 F.2d 1179, 1185-87 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). Interestingly, the *Arlington Heights II* court does not mention this aspect of *Black Jack*.

43. Plaintiff's case is strengthened since it merely asks the Court to enjoin the village from interfering with its attempts to build low-cost integrated housing. MHDC is not asking for affirmative action by the village. *See* note 41 *supra*.

44. This is a "close case" because, using the court's four-part Title VIII test, two factors favor defendant while one factor favors the plaintiff. 558 F.2d at 1293-94.

45. *See* note 38 and accompanying text *supra*.

46. 558 F.2d at 1294. Defendant has the burden of proving that a properly zoned tract of land exists. If a proper tract is not available, the village will have violated 42 U.S.C. § 3604(a) (Supp. V 1975) (Title VIII) because its decision not to rezone will have excluded *all* low-cost integrated housing from Arlington Heights. *Id.* Because the village alleged that a number of properly zoned tracts in Arlington Heights were available for plaintiff's purposes, the Court remanded the case to determine if any of the available tracts were both properly zoned and eligible for federal financing. *Id.* *See* United States Housing Act, 42 U.S.C. § 1437(f) (1970).

47. *See* note 18 *supra*.

defendant.[48] However, the Seventh Circuit's test significantly relaxes the defendant's burden of justification by decreasing the significance of a plaintiff's showing of discriminatory effect. Prior to *Arlington Heights II*, a defendant could rebut the plaintiff's Title VIII case only by justifying its discriminatory actions.[49] After *Arlington Heights II*, however, a defendant may avoid Title VIII liability even when there is no justification for its actions. That is, if a plaintiff is unable to carry the burden on at least two of the four factors identified by the Seventh Circuit, the defendant will prevail. By advocating a test that does not shift the burden of proof upon a showing of discriminatory effect in Title VIII litigation, the Seventh Circuit signalled its willingness, despite language in its opinion to the contrary,[50] to disregard the doctrinal analogy between Title VII and Title VIII.[51]

This refusal to employ the prima facie case doctrine is not justifiable. First, the court purports to employ the same Title VIII analysis the Eighth Circuit used in *Black Jack*.[52] The *Arlington Heights II* court found, as in *Black Jack*, that the refusal to rezone produced a racially discriminatory impact upon the plaintiffs.[53] The *Arlington Heights II* opinion, however, ignores the *Black Jack* court's shifting of the burden of proof to the defendant. Additionally, the Seventh Circuit's *sub silentio* rejection of the prima facie case doctrine and the attendant heightened burden of proof does not comport with the broad objectives of the Fair Housing Act.[54]

By rejecting the prima facie case doctrine in Title VII litigation, the Seventh Circuit significantly decreases a plaintiff's chances of success in fair housing litigation. It is likely that more Title VIII claims will

48. *See* Smith v. Anchor Bldg. Corp., 536 F.2d 231, 232 (8th Cir. 1976); United States v. City of Black Jack, 508 F. 2d 1179, 1185-87 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); Williams v. Matthews Co., 499 F.2d 819, 827 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974).

49. *See* note 33 *supra*.

50. 558 F.3d at 1288-89.

51. *See* notes 27-30 and accompanying text *supra*.

52. The facts of *Arlington Heights II* and *Black Jack* differ in some respects. Black Jack's action was affirmative, *e.g.*, the city zoned the housing development out. *See* notes 31 and 33 *supra*. Arlington Heights, however, took no affirmative action but only refused to rezone to allow plaintiff in. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 210 (N.D. Ill. 1974). This difference in facts does not justify the Seventh Circuit's approach in *Arlington Heights II*. Although the Court is not bound by the Eighth Circuit's holding, it is arguable that the Seventh Circuit should have considered the Title VIII standard used in *Black Jack*.

53. *See* note 18 *supra*.

54. *See* text accompanying notes 49-52 *supra*.

be pressed upon the courts than in previous years[55] because of inherent difficulties in making out a constitutional case of racial discrimination.[56] Lacking any uniform standard of proof[57] for a Title VIII violation, litigation will undoubtedly be confusing and uncertain. Supreme Court review of a fair housing case would afford an opportunity to authoritatively establish an appropriate standard for Title VIII claims.[58]

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55. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977).

> However, given the increased burden of proof which *Washington v. Davis* and *Arlington Heights* [I] now place upon equal protection claimants, we suspect that Title VIII will undoubtedly appear as a more attractive route to nondiscriminatory housing, as litigants become increasingly aware that Title VIII rights may be enforced even without direct evidence of discriminatory intent. We conclude that, in Title VIII cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response.

Id.

56. *See* notes 12 and 25 *supra*. It is more difficult to prove a subjective state of mind than an objective fact. The Supreme Court recognized this problem and now allows intent to be established by indirect, as well as direct, evidence. Some indirect indicators of racial intent are: (1) historical background of the decision; (2) specific sequence of events leading up to the challenged action; (3) departure from normal procedures; and (4) legislative history of the challenged act. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977). *See also* Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977).

57. There is an apparent conflict among four circuits that should be resolved. The Third and Eighth Circuits have held that a showing of discriminatory effect is sufficient to establish a prima facie Title VIII violation. *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-50 (3d Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184-87 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); notes 18 and 27-30 *supra*. The Second Circuit flatly rejected the effect test in Title VIII litigation. *See* Boyd v. Lefrak Organization, 509 F.2d 1110, 1114 (2d Cir. 1975); note 18 *supra*. The Seventh Circuit, in *Arlington Heights II*, implicitly rejected the effect test by failing to apply the prima facie case doctrine.

58. The Supreme Court declined to review the Seventh Circuit's decision. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 752 (1978).