WEAPONIZING CODE ENFORCEMENT

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INTRODUCTION

Zoning has captured the nation's attention in recent years: community activism has led cities and states to revisit their zoning codes as a means to increase access to affordable housing.[1] The primary focus has been on single family zoning[2] and its exclusionary effect in reinforcing segregation.[3] Yet, zoning codes regulate far more than new developments: they regulate the structure of a property through building codes, the exterior through public nuisance ordinances, as well as the use of a property with landlord or rental permit ordinances. Even more, the discretionary nature of defining and enforcing the city codes—by the local government and individual officials—empowers cities with substantial authority to shape

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1 *See, e.g.,* Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES (June 18, 2019) https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/F5LC-3SA4] (observing that cities and suburbs across the country are reconsidering single-family zoning policies to address housing affordability).

2 In 2019, Minneapolis, Minnesota was the first major city in the United States to eliminate single family zoning. Erick Trickey, *How Minneapolis Freed Itself From the Stranglehold of Single-Family Homes*, POLITICO (July 11, 2019), https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265/ [https://perma.cc/YP8W-C6RL]. Soon after, Oregon passed a bill requiring all cities with more than 10,000 people to allow duplexes on all residential land. H.B. 2001, 80th Or. Legis. Assemb., Reg. Sess. (Or. 2019). And in 2021, the city council of Berkeley, which was the first city to enact single-family zoning, voted unanimously to remove single-family zoning. Supriya Yelimeli, *Berkeley Votes for Historic Housing Change: An End to Single-Family Zoning*, BERKELEYSIDE.ORG (Mar. 25, 2021), https://www.berkeleyside.org/2021/03/25/berkeley-single-family-zoning-city-council-general-plan-change [https://perma.cc/WF5F-4CA6].

3 There is a long history of Supreme Court cases upholding zoning decisions that block affordable housing developments. *See, e.g.*, City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003) (holding that submitting to voters a facially neutral referendum petition to repeal constructing a low-income housing complex lacks discriminatory intent); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that plaintiffs failed to plead a prima facie case to prove local authorities' discriminatory intent in refusing to change a tract of land from a single-family to a multi-family classification).

the composition of the community.

The general legal authority for municipalities to define and abate public nuisances has not changed in nearly a century,[4] but the nuisance issues facing cities have changed significantly in the last decade as a consequence of the 2008 financial crisis. The foreclosure crisis changed the demographics of municipalities across the nation. Institutional investors and entrepreneurial landlords purchased foreclosed properties and began renting them, converting the composition of suburbs from owners to renters.[5] In response to changing demographics and misplaced fear of crime, local governments enacted ordinances requiring permits to be a landlord or renter.[6] Additionally, because of higher vacancy rates and loss of city revenue, cities increased both the penalty and enforcement of existing public nuisance ordinances to deter violators and generate revenue to reimburse their public maintenance expenses.[7]

While public nuisance ordinances can be justified as rationally related to a public health, safety, or general welfare concern, there are countless examples of municipalities—in their desire to protect property values or community character—stretching the bounds of what can be legally declared a nuisance.[8] What is more, most municipal codes

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4 RESTATEMENT (SECOND) OF TORTS, § 821B, cmt. c., f. (AM. L. INST. 1979).

5 "Nationwide, institutional investors purchased an estimated 350,000 homes from 2011 through 2013," and these were concentrated in cities with high numbers of bank-owned homes and the likelihood of future home price appreciation. Elora Lee Raymond, Richard Duckworth, Benjamin Miller, Michael Lucas, & Shiraj Pokharel, *From Foreclosure to Eviction: Housing Insecurity in Corporate-Owned Single-Family Rentals,* 20 CITYSCAPE 159, 164–65 (2018).

6 *See, e.g.*, ZION, ILL., CODE ORDINANCES § 10-180 (2019) (requiring that lessors of residential properties obtain a "certificate of compliance" with various City housing regulations to lawfully rent a property). In an open forum for landlords, the City's mayor asserted that the City was suffering from an "overabundance of non-owner-occupied residential rental properties." Lozano v. City of Zion, No. 19-cv-06411, 2021 WL 4318077, at *2 (N.D. Ill. Sept. 23, 2021). The City found it problematic that "60% of the residential living spaces in Zion are rental" when a healthy city should, in its view, have half of that. Complaint at 5, Lozano v. City of Zion, 1:19-cv-06411 (N.D. Ill. Sept. 23, 2021).

7 *See, e.g.*, CHI., ILL., MUN. CODE § 7-28-120 (2011) (City Council raised the penalties for weeds twice in 2010: the minimum fine increasing from $100 to $600, and the maximum from $300 to $1,200). Chris Coffey, *Gardeners Challenge Chicago Weed Control Rules*, NBC CHICAGO (July 31, 2014), https://www.nbcchicago.com/news/local/gardeners-challenge-chicago-weed-control-rules/1982568/ [https://perma.cc/L79B-6RSY] (weed control ordinance violations netted $6,031,954 for Chicago in 2013, a far increase from the 2009 collections of $1,647,306).

8 For example, crime-free housing ordinances, such as chronic nuisance

impose strict liability on the tenant or owner of a dwelling for a code violation, even when the tenant should not be held at fault.[9] Plus, aesthetic nuisance analysis is privileged and not subject to traditional nuisance balancing, which allows local governments to exercise more control. Each ordinance can be thought of as a grant of discretion to give a city the *option* to enforce as a de facto regulatory system. Thus, cities are incentivized to enact additional nuisance ordinances that are intentionally broad and easy to violate in order to have the power to issue a citation to any owner or tenant that they see as objectionable. Also, ordinances transfer discretion to individual officials to decide how to enforce, who to target, or when to intervene on a case-by-case basis. Nevertheless, enforcement can be targeted against certain properties, such as rentals, or against certain neighborhoods within a city.

Municipalities with landlord or renter registration requirements maintain a list of all rental properties in the jurisdiction, which they can use to facilitate targeted enforcement. Municipalities can also obtain a list from the local housing authority of all residents using Section 8 vouchers within their jurisdictions to advance targeted code enforcement, disproportionately penalizing vulnerable populations, particularly elderly, low-income, and immigrant residents, as well as communities of color. To further this initiative, cities can provide these lists to their police department so that law enforcement officers can perform

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ordinances that designate rental properties as "nuisances" based on a certain number of calls to the police from a property or about a property, encourage or require private landlords to evict tenants. Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 187 (2019). Another example is a New York City ordinance that makes it a violation to place trash receptacles outside for collection too early or to keep it in front of a dwelling for too long after collection. N.Y.C., N.Y., ADMIN. CODE § 16-120(c) (2018). Those that regulate aesthetics under the guise of safety are city codes that regulate holes, cracks, and other deficiencies in sidewalks on private property.

9 *See* Shinn v. City of Chicago, 2017 Ill. App. 161148 (Ill. App. Ct. 2017). Despite cleaning the garbage from his property every two days, Shinn was repeatedly issued citations (and lost on appeal) for garbage strewn along the bottom of his fence for several feet. *Id.* at *2. Shinn testified that the wind blows the garbage from the street onto his property but he obviously could not stand outside constantly to pick it up. *Id.* In his administrative hearing, the ALJ "explained [that] the issue was not how the garbage got onto the property or who put it there. The issue was whether or not there was, in fact, an accumulation of garbage on plaintiff's property." *Id.* at *7. Thus, even when a property owner or tenant cannot feasibly prevent a code violation, they can still be fined heavily. For instance, over the two years predating this trial, Shinn paid nearly $3,000 in fines, which is unaffordable for most. *Id.* at *3.

periodic drive-by checks of the properties. This remarkably effective scheme is not a violation of the Fair Housing Act on its face because it can be justified as ensuring landlords are not treating renters unfairly, especially those serving vulnerable Section 8 renters. However, a violation of the Fair Housing Act occurs when selective enforcement forces tenant evictions or increases the cost of being a landlord in order to intentionally reduce the availability of housing for low-income, often minority, people.

Although exclusionary zoning is commonly believed to be an issue in affluent areas,[10] rental unit registration programs are more often a problem for middle or lower-income towns, which typically are the only places accessible to renters. Because the local governments of these lower-income cities have less funding and resources to devote to code enforcement efforts, they need to be strategic in where to target. As a result, they often rely on stereotypes to decide which types of properties would be the likely offenders.[11]

This Essay will describe how landlord or rental registration requirements, coupled with selective heightened enforcement of building codes and frequent law enforcement checks, can be an Fair Housing Act violation. It will also explain how the current disparate impact claim framework makes it difficult to prove a claim against a local government—a municipality can justify its practices as designed to improve the quality of life for all residents and a resident cannot point to a less discriminatory means to do so.

I
LANDLORD AND RENTAL REGISTRATION REQUIREMENTS

Most municipalities maintain code enforcement programs to ensure the safety and welfare of their residents. Traditionally, building code inspectors inspect residences during construction or renovation, as well as in response to complaints from the public. If a violation is found, the local government would then begin enforcement proceedings. [12]

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10 *See* RICHARD F. BABCOCK & FRED P. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S 90 (Praeger 1973) ("[O]ne need only attend a few public hearings on controversial zoning changes in suburban areas to realize that the people consider their right to pass judgment upon their future neighbors as sacred.").

11 *See infra* Section II.

12 There are three means of enforcement of a housing code: administrative enforcement that is carried out within the local government, civil enforcement in

Rental registration programs allow communities to regulate rental units differently—inspections are proactive and periodic to ensure they are compliant with the building code and that community property values are maintained.[13]

The first step municipalities take to regulate the rental housing stock in their jurisdiction is to require registration of landlords or renters. The centralization of residence addresses and contact information for all renters in the jurisdiction enables municipalities to track the performance of building inspections and law enforcement check-ups.[14] Because inspections can be costly for a local government, it is strategic to target particular neighborhoods or demographics of renters within the program.[15] A sensible example of this was in Sacramento, California: initially Sacramento targeted two neighborhoods that contained a large number of rental properties with a high incidence of unsafe building or code enforcement cases and police and fire calls for service.[16] However, a more alarming practice is when a city targets residences with tenants using Section 8 vouchers by utilizing a list of properties obtained from their local housing

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the court system, which is typically for egregious instances, and criminal enforcement when a housing code considers a violation to be a misdemeanor or infraction. *Code Enforcement*, LOCAL HOUS. SOLS., https://localhousingsolutions.org/housing-policy-library/code-enforcement/ [https://perma.cc/45W5-V6S9].

13 *Id.* As contrasted with reactive inspections that are initiated after a neighbor or tenant complaint, local governments are increasingly turning to 311 citizen complaints and service reports to inform policy and planning. Yet many studies have demonstrated that 311 can be problematic, because it often under-represents certain demographic groups that are less comfortable reporting issues because of fear of retaliation or immigration status, among other reasons. Constantine E. Kontokosta & Boyeong Hong, *Bias in Smart City Governance: How Socio-Spatial Disparities in 311 Complaint Behavior Impact the Fairness of Data-Driven Decisions,* 64 SUSTAINABLE CITIES & SOC'Y 1 (2021) (finding that despite greater objective and subjective need, low-income and minority neighborhoods are less likely to report street condition or nuisance issues).

14 *See* Allison Sloto, *Targeted Rental Licensing Programs: A Strategic Overview*, 48 URBAN LAW. 639, 640 (2016).

15 Cities often fund code enforcement programs through revenue received from the licenses, permits, and fees or penalties related to housing regulation or rental registration. *See* LOCAL HOUS. SOLS., *supra* note 12.

16 Amy Ackerman, *A Guide to Proactive Rental Inspection Programs*, CHANGELAB SOLS. 8 (2014), https://www.changelabsolutions.org/sites/default/files/Proactive-Rental-Inspection-Programs_Guide_FINAL_20140204.pdf [https://perma.cc/LDX3-AZVH]; *see also,* Robin Powers Kinning, *Selective Housing Code Enforcement and Low-income Housing Policy,* 21 FORDHAM URB. L. J. 159 (1993) (noting that selective code enforcement can address systemic problems and ensure safe and decent housing without causing rent increase).

authority.[17]

Because these regulatory functions depend on reasonable entry onto private property, local governments often require advance consent as a condition of issuing a license or permit—rather than seek a court warrant for each inspection—to enter residential property.[18] Some cities claim that unannounced inspections protect vulnerable populations from mistreatment or that government-initiated inspections are necessary because renters will not report noncompliance to the city for fear of retaliation from their landlord. Yet, when an occupant does not consent, empowering a local official to inspect a rental property without obtaining an administrative warrant arguably violates the renter's privacy and Fourth Amendment rights. Even more, some municipalities issue fines against a landlord if a tenant does not consent to a regulatory search, essentially coercing a renter to waive her Fourth Amendment rights.[19]

The purpose of an inspection is to ensure compliance with a municipality's housing codes that are specific to rental properties.[20] Housing codes can either be too precise or vague, both of which are difficult for an owner to comply with, and lead to unequal enforcement, because such enforcement depends heavily on the subjective judgment of individual inspectors. A precise housing code may require each property to comply with things such as the width of sidewalks leading up to a front door, the height of a front stoop, or other health-based requirements regarding lead and rodents. In

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17 *See e.g., Recent Accomplishments Of The Housing And Civil Enforcement Section*, U.S. DEP'T OF JUST. (Mar. 2, 2022), https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section [https://perma.cc/L5J9-YFXH] ("The amended complaint [in *United States v. City of Hesperia*] alleges that the City and Sheriff's Department created and enacted the ordinance with the intent to drive African American and Latino renters out of their homes and out of Hesperia, and that the Sheriff's Department, acting on behalf of the City, discriminatorily enforced the ordinance against African American and Latino renters and in majority-minority areas of Hesperia.").

18 *See, e.g.,* L.A., CAL., MUN. CODE § 161.601 (2022) (authorizing entry onto residential rental properties between 8:00 a.m. and 6:00 p.m.); WASH. REV. CODE § 59.18.125 (2010) (enabling local municipalities to inspect rental housing); The City and County of Denver allow a general right of entry for all of its inspections. DENVER, COLO., MUN. CODE § 32-17(a) (2022) ("Inspectors and investigators shall be permitted to have access to licensed premises at all times, in the course of their duties, concerning the enforcement of the Charter, ordinances of the city and rules and regulations promulgated pursuant and thereto.").

19 *See, e.g.,* ZION, ILL., MUN. CODE § 10-180(9)(a) (2019) (each violation of noncompliance with an unwarranted regulatory search resulted in a $100 per day up to $750 per day fine). However, a landlord brought a suit challenging the ordinance and the City of Zion has since stopped enforcing that provision.

20 *See* Sloto, *supra* note 14, at 640.

contrast, other parts of a code may rely heavily on vague terms, such as the City of Baltimore's housing code that requires properties be in "good repair," "safe condition," and "fit for human habitation."[21] Each of these characteristics involves the need for discretion on the part of officials who enforce—or possibly over-enforce—the codes by demanding changes in the property that were not specified or intended when the code was enacted. For example, in *Ellis v. City of Minneapolis*, a landlord asserted that the City of Minneapolis targeted his properties with heightened housing code enforcement, applied above minimum housing standards, threatened to revoke his rental licenses, and issued invalid citations and orders for code violations that did not exist.[22] The Ellises claimed the inspector ordered them to "hire a lead abatement specialist even though only 'three small areas' required touch-up paint," and the inspector cited them for illegal wiring requiring an electrician when only a fuse needed to be replaced.[23] With the amount of discretion that each inspector has and the unavailability to appeal a citation in many municipalities, it is unsurprising that rental inspection programs can result in abuse of discretion.

Another issue with rental property requirements is that the requirements may not be sufficiently clear for a landlord, which hinders their ability to comply, grants extra discretion to enforcement officials, and increases the cost of letting properties. The law demands that an ordinance regulating a public nuisance must be sufficiently clear to not be void for vagueness and should have procedural safeguards, such as providing property owners with a detailed notice of defects or the chance to be heard.[24] However, an ordinance regulating property as a nuisance may be sufficient even if it contains only "[g]eneral descriptive words," as long as it is "practically unavoidable in view of the difficulty of anticipating every condition that might make a building liable to the remedies of repair or demolition."[25] This enables enforcement officers, while on-site conducting a periodic inspection without earlier

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21 H. Laurence Ross, *Housing Code Enforcement and Urban Decline, 6* J. AFFORDABLE HOUS. & CMTY. DEV. L. 29, 31 (1996).

22 Ellis v. City of Minneapolis, 860 F.3d 1106, 1108 (8th Cir. 2017).

23 *Id.* The Eight Circuit held that the housing providers, the Ellises, failed to plead a prima facie case of disparate impact under the Fair Housing Act.

24 Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances*, 43 ST. MARY'S L.J. 619, 629–30 (2012).

25 *Id.* (quoting Traylor v. City of Amarillo, 492 F.2d 1156, 1160 (5th Cir. 1974)).

complaints, to demand additional requirements from landlords that were not otherwise specified in the code, similar to what happened to the Ellises' property.

In addition, housing codes often express a city's desire for an ideal community. This idealism is based on an implicit purpose to provide a middle class home to all residents and to have an aesthetically pleasing community.[26] Because of this, enforcing these codes can also cause problems for landlords, particularly those leasing in low income neighborhoods. Requiring modifications to bring properties into compliance increases the cost of being a landlord. When owners cannot afford to make the required improvements or cannot pass the cost on to the tenant, the city may lose essential affordable housing supply and force poor and vulnerable populations into substandard unregulated make-shift apartments. And when an owner tries to pass the cost of complying with the code on to the renter, the renter probably cannot afford the increased rent, so she would still be forced to move. Hence, renter registration inspections can have the perverse effect of limiting the affordable housing supply in a community, counter to the goals of the Fair Housing Act.

II
THE FAIR HOUSING ACT

The Fair Housing Act provides that it is unlawful to engage in any conduct relating to housing or services that denies or otherwise makes unavailable dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.[27] Because of the difficulty in proving that an actor had a discriminatory intent or motive, a plaintiff may instead bring a disparate impact claim under the Fair Housing Act, which challenges practices that have a disproportionately adverse effect on protected classes and are otherwise unjustified by a legitimate rationale.[28]

The first step of the disparate impact claim analysis is to plead a prima facie case: a resident or landlord would be required to allege facts demonstrating a robust causal connection between the landlord registration requirements or housing-code standards and the disparity in outcomes.

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26 Ross, *supra* note 21, at 32.

27 42 U.S.C. § 3604(a), (f).

28 Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 576 U.S. 519, 524 (2015).

However, a onetime decision by a municipality to enforce its building code on a rental unit could not establish the existence of an actual policy, therefore, residents and landlords effectively need to form a class or collect statistical data to assert a conceivable claim. But even then, because "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies," opponents to rental registration requirements still face a massive hurdle.[29] As the Court in *Inclusive Communities* stated, the "[Fair Housing Act] is not an instrument to force housing authorities to reorder their priorities," and local governments "must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes."[30]

The Court was careful to note that when zoning officials make decisions for the city, they should be able to consider subjective factors, such as preserving historic architecture, because even these more distinctive factors contribute to a community's quality of life and are legitimate concerns to address. [31] In employing subjective requirements on residences, a local government is able to further a policy goal to "rejuvenate a city core,"[32] and the Court does not believe that should subject a local government to Fair Housing Act liability.

In 2020, the Department of Housing and Urban Development ("HUD") promulgated regulations addressing the disparate impact claim, increasing the burden on plaintiffs in the pleadings stage. Then, at the beginning of his term, President Biden issued a memorandum to the Secretary of HUD to examine the recent regulatory actions that went into effect at the end of the Trump Administration.[33] It is unclear at this point how the revised regulations will differ in practice; however, a likely change will revise 100.500 to align the discriminatory effect rule with the disparate impact burden-shifting framework of *Inclusive Communities* or the 2013 HUD rule.

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29 *Id.* at 540 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

30 *Id.* at 540, 544.

31 *Id.* at 542.

32 *Id.*

33 *Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*, WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/ [https://perma.cc/K4A4-CGMC].

There was at least one addition in the 2020 rule that can be advantageous for residents bringing a claim against a local government that engages in prohibited practices that restrict housing to people in the protected classes. The rule added to regulation 100.70(d)(5) three additional examples of local government practices that the Fair Housing Act prohibits: "Enacting or implementing land-use rules, ordinances, procedures, *building codes*, *permitting rules*, policies, or *requirements* that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin."[34] According to HUD, this addition was "for clarity in connection with the changes HUD" was making to the discriminatory effect burden-shifting framework.[35] This rule would, in theory, make it easier to plead a prima facia case, given it expands the types of prohibited conduct that could be used to restrict housing in a community. Particularly useful to the practice of landlord registration requirements described above is the addition of building codes, permitting rules, and ordinances.

CONCLUSION

In the last decade since the 2008 foreclosure crisis, municipalities have found new and effective ways to regulate rental properties to address the increased renter-occupied housing stock. In response to changing demographics and misplaced fear of crime, community residents supported local government officials in creating renter registration requirements. The implementation of the renter registration system is a remarkably effective means to set and enforce housing standards as a tool for social control, yet the effects of such remain relatively overlooked compared to other zoning requirements. With the addition of each code requirement, the city is given the option to enforce and the discretion of how to enforce, or who to target enforcement against. And because local governments regulate their residential properties in pursuit of an ideal community, code enforcement against renters and landlords can be discriminatory in violation of the Fair Housing Act by excluding those that do not fit the city's

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34 24 C.F.R. § 100.70(d)(5) (2020) (emphasis added).

35 HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,857 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).

definition of an ideal resident. These rental registration programs can also limit the supply of affordable housing in a community, reducing access for low income families. Although a community may have the best intentions in ensuring everyone in their communities enjoys the same standard of living, their efforts to achieve such can have unintended, or possibility intended, consequences that call for the attention of fair housing advocates.