

COMMENT

Exclusionary Advertising? The Case for Cautious Enforcement of 42 USC § 3604(c) Against Minority-Language Housing Advertisements

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Section 804(c) of the Fair Housing Act (FHA), codified at 42 USC § 3604(c), prohibits advertisements that “indicate[] any preference” on the basis of race, national origin, and other protected categories. The text of the FHA, however, is ambiguous regarding its applicability to the language in which housing advertisements appear, raising the specter of potential liability in communities where residents speak and write in multiple languages. Using Chicago’s Chinatown as a case study, this Comment examines whether the exclusive use of Chinese-language advertisements for housing in Chinatown violates § 3604(c). I begin by enumerating a series of factors that courts should consider: (1) the demographics of the relevant community, (2) the identities and language capabilities of the parties, (3) how an “ordinary reader” in the relevant community would perceive the advertisement, and (4) translation costs. The goal of this approach is to strike a workable balance between minority-language advertisements’ inclusive effect with respect to immigrant landlords and prospective residents, while acknowledging Congress’s intent to combat exclusionary housing messages.

Furthermore, I argue that even if such advertisements technically run afoul of § 3604(c), courts should interpret the FHA as a legislative scheme that protects minority communities’ housing rights, rather than uncritically mandating integration and assimilation. Minority-language communities generate network effects by bringing together speakers and readers of a common language. To avoid unnecessarily jettisoning these benefits, courts should construe § 3604(c) to permit advertisements that convey the existence of a language community. Such advertisements signal that individuals who may be unwelcome elsewhere are welcomed in the community, but they do not necessarily “indicate” that nonspeakers and nonreaders are unwelcome. Thus, courts should hesitate before enforcing § 3604(c) against Chinese landlords and newspapers absent extrinsic evidence of discriminatory intent.

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INTRODUCTION

Apartment listings in Chicago’s Chinatown neighborhood are notoriously difficult to find.¹ Geographic searches on apartment rental websites yield a curious absence of hits where the neighborhood, concentrated at the intersection of Cermak Road and Wentworth Avenue on the city’s near southwest side, should be. A recent local news investigation revealed that “most Chinatown apartments are rented to Chinese tenants through exclusively Chinese networks.”² As a result, prospective tenants must find apartments via Chinese-language newspapers, Chinese-language

¹ Monica Eng, *Why Chicago’s Chinatown Is Practically Invisible on Apartment Rental Sites* (WBEZ, Oct 29, 2017), archived at <https://perma.cc/DMD2-7VNV>.

² *Id.*

signs around the neighborhood, Chinese social media websites, or word of mouth. Off the record, some Chinese landlords have admitted that they prefer to rent to Chinese tenants, citing cultural familiarity and a shared understanding that tenants are responsible for their own maintenance needs.³

This departure from typical advertising practices raises the question: Does the exclusive use of Chinese-language advertisements for housing in Chinatown violate the Fair Housing Act⁴ (FHA)? Professor Allison Bethel says the practice might not violate the letter of the law, “[b]ut it definitely violates the spirit of the law, which, after all, is to foster more open communities.”⁵ On the one hand, such advertisements may send an implicit message of *exclusion*, suggesting that non-Chinese residents are not welcome.⁶ On the other hand, Chinese-language advertisements also send a message of *inclusion* to recent immigrants and Chinese Americans who communicate primarily or exclusively in Chinese.⁷

Pondering the legality of minority-language housing advertisements is not merely an academic exercise. As the United States transitions from a majority-white nation to a majority-minority nation,⁸ judges will undoubtedly confront difficult questions arising from the interaction of diverse populations.⁹ The United States looks (and sounds) very different than it did several

³ Id.

⁴ Pub L No 90-284, 82 Stat 81 (1968), codified as amended at 42 USC § 3601 et seq.

⁵ Eng, *Why Chicago's Chinatown Is Practically Invisible* (cited in note 1).

⁶ See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich L Rev 1835, 1854–55 (2006) (discussing the ways in which residential advertising can communicate “exclusionary vibes”).

⁷ Some real estate developers explicitly cater to residents who want to live in a community centered around a common heritage. See, for example, Dennis Rodkin, *Retirement Community Focuses on Indian-Americans* (Crain's Chicago Business, Oct 18, 2018), archived at <https://perma.cc/72XG-Y8GA>.

⁸ See *Older People Projected to Outnumber Children for First Time in U.S. History* (US Census Bureau, Mar 13, 2018), archived at <https://perma.cc/8F66-SSW6> (“By 2020, less than half of children in the United States are projected to be non-Hispanic white alone.”); William H. Frey, *The US Will Become ‘Minority White’ in 2045, Census Projects* (Brookings, Mar 14, 2018), archived at <https://perma.cc/898A-JJMD>.

⁹ For an example in the employment discrimination context, see generally *EEOC v Consolidated Service Systems*, 989 F2d 233 (7th Cir 1993) (addressing whether a small business's use of word-of-mouth hiring, which resulted in an overwhelmingly Korean workforce, violated Title VII of the Civil Rights Act). For an example in the housing discrimination context, see *Reyes v Waples Mobile Home Park Ltd Partnership*, 903 F3d 415, 428–29 (4th Cir 2018) (concluding that Latino residents of a mobile home park stated a prima facie case of national origin discrimination because the landlord's policy requiring proof of documentation had a disparate impact on Latinos), cert denied, 139 S Ct 2026 (2019).

decades ago.¹⁰ To take one example, between 2000 and 2010, the Asian population in the United States grew four times faster than the total US population—outpacing any other racial group.¹¹ Accordingly, Chicago’s Chinatown provides a practical case study for examining how the FHA should apply in minority-language communities.

Passed in 1968, the FHA prohibits discrimination on the basis of “race, color, religion, sex, familial status, or national origin” in the sale or rental of a dwelling.¹² Section 3604(c) also makes it illegal to

make, print, or publish, or cause to be made, printed, or published *any notice, statement, or advertisement*, with respect to the sale or rental of a dwelling *that indicates any preference, limitation, or discrimination* based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.¹³

Subsequent court decisions have clarified that the FHA imposes liability not only on landlords, but also on newspapers and other media that publish discriminatory housing advertisements.¹⁴

As of this writing, I am unaware of any cases in which prospective tenants or homeowners have sought to impose liability on Chinese landlords or publishers under § 3604(c). In fact, there is scant case law addressing the broader issue of whether and

¹⁰ See, for example, Camille Ryan, *Language Use in the United States: 2011* *7 (US Census Bureau, Aug 2013), archived at <https://perma.cc/B6ZH-TAMY> (noting that from 1980 to 2010, the use of languages other than English at home increased by 158.2 percent).

¹¹ Elizabeth M. Hoeffel, et al, *The Asian Population: 2010* *3–4 (US Census Bureau, Mar 2012), archived at <https://perma.cc/NDZ6-J3KH>.

¹² FHA § 804(a), (b), 82 Stat at 83, codified at 42 USC § 3604(a), (b).

¹³ FHA § 804(c), 82 Stat at 83, codified at 42 USC § 3604(c) (emphases added).

¹⁴ See *United States v Hunter*, 459 F2d 205, 210–15 (4th Cir 1972) (holding that application of § 3604(c) to newspapers does not violate the First Amendment). See also Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 Fordham Urban L J 187, 214 (2001).

There has been litigation attempting to hold websites like Craigslist liable for discriminatory housing advertisements. See, for example, *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc v Craigslist, Inc*, 519 F3d 666, 668–72 (7th Cir 2008). In that case, Craigslist managed to escape liability thanks to the Communications Decency Act of 1996, which states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 USC § 230(e)(1).

when the language of a housing advertisement constitutes discrimination on the basis of national origin.¹⁵ Given that the statute and its accompanying regulations¹⁶ are silent as to whether notices, statements, or advertisements must appear in a particular language, several possible conclusions regarding the legality of Chinese-language advertisements come to mind.

First, the exclusive use of Chinese-language advertisements may be a clear violation of the FHA because language is correlated with national origin, and advertisements in Chinese therefore “indicate[] a [] preference” for people of Chinese origin.¹⁷ This approach is analogous to the so-called human-models cases, in which the exclusive use of white models in housing advertisements was sometimes found to violate § 3604(c).¹⁸

Second, even if these advertisements technically violate the FHA, courts may hesitate before imposing liability in light of the historical discrimination that pushed Chinese immigrants into ethnic enclaves in the first place.¹⁹ The overarching legislative purpose of the FHA was to combat racial segregation in housing—particularly, discrimination against African Americans—not to penalize residents of ethnic enclaves for advertising in their native language.²⁰ Thus, a court might disregard the plain meaning of § 3604(c) as applied to Chinese landlords and publishers.²¹

¹⁵ One unreported case addressed the possibility that Spanish-language advertisements might indicate a discriminatory preference for Hispanics. See *Guevara v UMH Properties, Inc.*, 2014 WL 5488918, *6 (WD Tenn) (concluding that “[p]laintiffs’ allegation that Defendant only advertised in Spanish language media outlets is sufficient to state a claim because it . . . denies non-Spanish speaking segments of the housing market, who are overwhelmingly non-Hispanic, information about housing opportunities”), citing 24 CFR § 100.75.

¹⁶ See 24 CFR § 100.75.

¹⁷ 42 USC § 3604(c). For a proponent of this view, see R. Ian Forrest, Note, *Kàn Bú Tài Động: The Fair Housing Act, Language Discrimination, and Chinese Classifieds*, 101 Ky L J 839, 858–59 (2013). But see note 174 (critiquing the assumption that language is correlated with national origin).

¹⁸ See Part II.C.3.

¹⁹ On the rise of Chinatowns as a response to racism and exclusion, see generally Sucheng Chan, ed, *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943* (Temple 1991); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Illinois 1973). Of course, the formation of ethnic enclaves was not due entirely to exclusion; recent immigrants also sought out these communities because of family connections and cultural familiarity. See notes 33–34 and accompanying text.

²⁰ See notes 48–51 and accompanying text.

²¹ The classic prototype of this argument is *Holy Trinity Church v United States*, 143 US 457, 459 (1892) (“[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”). This purposivist approach to statutory interpretation has fallen out of favor due to the growing

Finally, such advertisements may not violate the FHA at all, unless the plaintiff is a member of a protected class, such as African Americans or Hispanics. While this asymmetrical approach²² has some normative appeal, it is not a promising option under current law, which makes clear that anyone with standing may bring an FHA claim.²³

This Comment makes two significant contributions to the nascent literature on minority-language housing advertisements. First, I identify a series of factors that courts should consider when faced with such advertisements, including: (1) the demographics of the relevant community, (2) the national origin and language abilities of the landlord and prospective renter or buyer, (3) whether an “ordinary reader”²⁴ would consider the advertisement to indicate a preference on the basis of national origin, and (4) translation costs. The goal of this approach is to strike a

influence of textualism. See, for example, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum L Rev 1, 29–30, 36 (2006) (noting that “few judges or scholars today espouse the strong purposivism that textualists set out to discredit two decades ago,” but arguing that the two schools of thought are actually converging). But see *Zuni Public School District No 89 v Department of Education*, 550 US 81, 108 (2007) (Scalia dissenting) (criticizing the majority for declining to apply the plain meaning of a federal labor statute: “[T]oday *Church of the Holy Trinity* arises, Phoenix-like, from the ashes.”).

See also Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale?*, 44 Wm & Mary L Rev 1521, 1534 (2003) (arguing that private communities’ use of “ethnically-conscious preferential practices . . . should, for the most part, be allowed to exist within the ‘pale’ twilight of the law”).

²² See Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 Wis L Rev 69, 73 (describing the asymmetrical approach as “oppos[ing] only those uses of a protected trait that harm the disadvantaged group, and thus favor[ing] an asymmetrical ban that would allow only members of the disadvantaged group to utilize the law”). See also Bradley A. Areheart, *The Symmetry Principle*, 58 BC L Rev 1085, 1123–29 (2017) (arguing that asymmetrical approaches to discrimination law may be appropriate in some situations).

²³ See, for example, *Trafficante v Metropolitan Life Insurance Co*, 409 US 205, 212 (1972) (holding that a white tenant had standing to sue a landlord for discrimination against nonwhites); *Mayers v Ridley*, 465 F2d 630, 640–41 (DC Cir 1972) (en banc) (recognizing that white home sellers were harmed by racially restrictive covenants recorded on their property deeds); *Guevara*, 2014 WL 5488918 at *5–6 (concluding that Hispanic plaintiffs stated a claim for a violation of § 3604(c) when their landlord advertised extensively in Spanish-language print and radio, thereby allegedly “depriving them of the benefits of a racially and culturally diverse environment”). See also Schwemm, 29 Fordham Urban L J at 216–19 (cited in note 14).

Similarly, in employment discrimination law, courts have made clear that protection from race and sex discrimination is symmetrical under Title VII of the Civil Rights Act of 1964. See *McDonald v Santa Fe Trail Transportation Co*, 427 US 273, 280, 286–87 (1976) (race); *Martinez v El Paso County*, 710 F2d 1102, 1104 (5th Cir 1983) (sex).

²⁴ The “ordinary reader” standard was first introduced in *Hunter*, 459 F2d at 215. See Part II.A.3.

workable balance between minority-language advertisements' inclusive effect with respect to Chinese landlords and prospective residents, for example, while acknowledging Congress's intent to combat exclusionary housing messages by passing § 3604(c).

Going further, this Comment draws on antisubordination theory²⁵ to argue that courts should interpret the FHA as a legislative scheme that protects minority communities' housing rights, rather than uncritically mandating integration and assimilation.²⁶ Minority-language communities generate network effects by bringing together speakers and readers of a common language.²⁷ To avoid unnecessarily jettisoning these benefits, courts should construe § 3604(c) to permit advertisements that convey the existence of a language community.²⁸ Such advertisements signal that individuals who may be unwelcome elsewhere are welcome in the community, but do not necessarily "indicate[]" that nonspeakers and nonreaders are unwelcome.²⁹

This Comment proceeds as follows. Part I provides essential background on Chinatowns and the FHA. Part II deconstructs the provisions of § 3604(c), noting the lack of clear guidance from the applicable regulations and case law. Finally, Part III proposes factors that a court should consider when faced with a minority-language advertisement, and argues that the FHA should be interpreted to reflect antisubordination goals more generally.

²⁵ On the antisubordination principle, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil & Pub Affairs 107, 157 (1976) (arguing that the Equal Protection Clause prohibits laws or official practices that "aggravate[] . . . the subordinate position of a specially disadvantaged group").

²⁶ For more on antisubordination theory, see Part II.D.

²⁷ See Mark A. Lemley and David McGowan, *Legal Implications of Network Economic Effects*, 86 Cal L Rev 479, 483 (1998) ("[A] network effect exists where purchasers find a good more valuable as additional purchasers buy the same good."). For example, a single telephone has no communicative utility on its own but becomes more valuable as other consumers purchase telephones. *Id.* at 488–89. Similarly, language has "negligible inherent value to the first speaker and increasing value over the range of additional speakers." *Id.* at 489. See also Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 Am U L Rev 1259, 1269 (2004) (observing that network analysis has implications beyond economics).

²⁸ By contrast, housing advertisements featuring exclusively white models send a message of racial preference without a plausible nondiscriminatory justification, and therefore present a stronger case for § 3604(c) liability. See Part II.C.3.

²⁹ 42 USC § 3604(c).

I. HISTORICAL CONTEXT

This Part begins with a brief overview of the history of American Chinatowns and Chicago's Chinatown in particular. Notably, Chicago's Chinatown is one of the only Chinatowns in the United States that is still growing.³⁰ The neighborhood is situated in close proximity with other minority neighborhoods, such as Bronzeville and Pilsen, which are predominantly African American and Hispanic, respectively.³¹ As such, Chicago's Chinatown provides a valuable case study for potential litigation concerning minority-language advertisements. Part I.B discusses the passage of the FHA, the legislative history of § 3604(c), and how the FHA is enforced.

A. Chinatowns

Chinatowns first emerged on the West Coast in the mid-nineteenth century, when many Chinese immigrants came to the United States in search of work opportunities as railroad laborers and miners.³² In the face of discrimination, harassment, and violence, Chinese immigrants sought refuge in ethnic enclaves.³³

³⁰ Anna Clark, *The Unlikely Boom of Chicago's Chinatown* (Next City, Feb 22, 2016), archived at <https://perma.cc/GT7Y-JS8G>. By contrast, New York and San Francisco's Chinatowns are shrinking. See Bonnie Tsui, *The End of Chinatown* (The Atlantic, Dec 2011), archived at <https://perma.cc/NDT7-9BVM>. On the problem of gentrification in east coast Chinatowns, see Bethany Y. Li, et al, *Chinatown Then and Now: Gentrification in Boston, New York, and Philadelphia* (Asian American Legal Defense and Education Fund, 2013), archived at <https://perma.cc/BG7Z-TF8Q>.

³¹ For a map of Chicago's nine districts and seventy-seven community areas, see *Chicago Neighborhoods* (The Chicago 77, 2019), archived at <https://perma.cc/UPH2-7WA3>. For brief descriptions of the cultural and ethnic identities of these neighborhoods, see *Explore Chicago's 77 Neighborhoods* (Choose Chicago, 2019), archived at <https://perma.cc/6S3G-FG93>.

³² Sandmeyer, *The Anti-Chinese Movement in California* at 12–15, 24 (cited in note 19); Huping Ling, *Chinese Chicago: Race, Transnational Migration, and Community Since 1870* 29–30 (Stanford 2012). For an excellent transnational history of Chinese migration to and from the United States, see generally Madeline Yuan-yin Hsu, *Dreaming of Gold, Dreaming of Home: Transnationalism and Migration Between the United States and South China, 1882–1943* (Stanford 2000).

³³ See L. Eve Armentrout Ma, *Chinatown Organizations and the Anti-Chinese Movement, 1882–1914*, in Chan, ed, *Entry Denied* 147, 160–66 (cited in note 19). Professor Eve Ma notes that American Chinatowns were products of a much larger phenomenon of “overseas Chinese,” who formed similar communities in Southeast Asia, Canada, and Latin America. *Id.* at 160–61. Hence, the profusion of Chinese self-help organizations “[cannot] be attributed *solely* to an attempt by Chinese in the United States to protect themselves from the racism of non-Chinese Americans.” *Id.* at 162 (emphasis added).

Chinatowns provided vital social services and community networks otherwise unavailable to immigrants,³⁴ particularly after the Chinese Exclusion Act³⁵ erected legal barriers to citizenship.³⁶ At the same time, Chinese immigrants often had nowhere else to go due to intense housing and labor discrimination.³⁷

The first Chinese immigrants came to Chicago from California in the 1870s.³⁸ Chicago's Chinatown was originally located in the Loop on Clark Street between Van Buren and Harrison Streets.³⁹ In the 1910s, rising rents drove Chinese residents and businesses out of the Loop to the Near South Side. The construction of the Dan Ryan and Stevenson highways in the 1950s cut the new "South Chinatown" in half and led to a severe housing shortage, but the community recovered and eventually outgrew its previous boundaries.⁴⁰ Today, the neighborhood is concentrated at the intersection of Cermak Road and Wentworth Avenue.⁴¹ Chinatown's population increased by 26 percent between 2000 and 2010,⁴² and many Chinese immigrants now reside in nearby Bridgeport and McKinley Park.⁴³

Chinatown's expansion into other neighborhoods has not been without tension. In the 1980s and 1990s, Chinese American developers began building townhomes in Bridgeport that were

³⁴ Id at 147 ("Chinese exclusion in particular, and the anti-Chinese movement in general, forced [Chinatown] social organizations to come to terms with organized, institutionalized opposition to the very presence of Chinese.")

³⁵ Pub L No 47-126, 22 Stat 58 (1882). In addition to prohibiting the immigration of new Chinese laborers, the Act barred Chinese immigrants who were already working in the United States from obtaining citizenship. Id at 61. See also Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 64 (Princeton 2004).

³⁶ Chinese immigrants were not passive in the face of exclusion. See Charles J. McClain and Laurene Wu McClain, *The Chinese Contribution to the Development of American Law*, in Chan, *Entry Denied* 3, 21 (cited in note 19) (arguing that Chinese litigants during the exclusion era made significant contributions to due process and equal protection jurisprudence under the Fourteenth Amendment).

³⁷ See Braden Goyette, *How Racism Created America's Chinatowns* (Huffington Post, Dec 6, 2017), archived at <https://perma.cc/F2PC-T2MG>. On the transformation of stereotypes about Asian Americans from the "yellow peril" to the "model minority," see generally Ellen D. Wu, *The Color of Success: Asian Americans and the Origins of the Model Minority* (Princeton 2013).

³⁸ Ling, *Chinese Chicago* at 30–32 (cited in note 32).

³⁹ Id at 32, 52 (providing an illustration).

⁴⁰ Id at 216–17.

⁴¹ Id at 53, 218–20. See also Clark, *The Unlikely Boom of Chicago's Chinatown* (cited in note 30).

⁴² Clark, *The Unlikely Boom of Chicago's Chinatown* (cited in note 30).

⁴³ Eng, *Why Chicago's Chinatown Is Practically Invisible* (cited in note 1). On the rising Chinese population in Bridgeport, see Ling, *Chinese Chicago* at 220–22 (cited in note 32).

marketed specifically toward Chinese immigrants and Chinese Americans.⁴⁴ White residents have sometimes responded to the growing Chinese population with violence, including assaults on Chinese American teenagers and an arson attack on a Chinese restaurant in Bridgeport.⁴⁵

At the very least, demographic shifts on Chicago's south side will increase the likelihood that people who cannot read or speak Chinese will encounter advertisements that they do not understand. Non-Chinese prospective residents may turn to the FHA as a tool to challenge the exclusive use of Chinese-language housing advertisements. The next Section provides historical context for the FHA's passage and explains how it is enforced.

B. The Fair Housing Act

The FHA followed a series of landmark civil rights achievements, including the 1964 Civil Rights Act⁴⁶ and the 1965 Voting Rights Act.⁴⁷ Congress had been considering fair housing legislation since 1966,⁴⁸ but it was not until 1968, in the wake of Dr. Martin Luther King's assassination and the release of the Kerner Commission Report,⁴⁹ that Congress ultimately passed the FHA.⁵⁰ The legislative history indicates that promoting racial integration in housing was a major goal of the FHA.⁵¹ As enacted, the FHA

⁴⁴ Ling, *Chinese Chicago* at 221 (cited in note 32).

⁴⁵ Id at 221–22. See also Jenny J. Chen, *First-Ever Tracker of Hate Crimes Against Asian-Americans Launched* (NPR, Feb 17, 2017), archived at <https://perma.cc/Y9BQ-ELHT> (observing that “national statistics on hate crimes against [Asian Americans and Pacific Islanders] are still scanty,” but reporting growing concern in recent years).

⁴⁶ Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 2000a et seq.

⁴⁷ Pub L No 89-110, 79 Stat 437, codified as amended at 52 USC § 10101 et seq.

⁴⁸ See Schwemm, 29 *Fordham Urban L J* at 197–98 & n 34 (cited in note 14), citing Lyndon B. Johnson, *Special Message to the Congress Proposing Further Legislation to Strengthen Civil Rights*, 1966 Pub Papers 461, 467–69.

⁴⁹ National Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders* *1 (1968), archived at <https://perma.cc/XDP3-UK8M>. The Report painted a grim portrait of an increasingly segregated nation, warning that the United States was “moving toward two societies, one black, one white—separate and unequal.”

⁵⁰ Schwemm, 29 *Fordham Urban L J* at 194 (cited in note 14). See also *Texas Department of Housing and Community Affairs v Inclusive Communities Project, Inc.*, 135 S Ct 2507, 2516 (2015) (“Congress responded [to the assassination of Dr. King] by adopting the Kerner Commission’s recommendation and passing the Fair Housing Act.”).

⁵¹ Schwemm, 29 *Fordham Urban L J* at 212–13 (cited in note 14).

prohibited housing discrimination on the basis of race, color, national origin, and religion, but subsequent amendments added sex, disability, and familial status as protected categories.⁵²

Section 3608(d) of the FHA contains a cryptic instruction that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner *affirmatively to further* the purposes of this title.”⁵³ The provision applies to state and local governments that receive federal grants and to public housing agencies.⁵⁴ The Department of Housing and Urban Development (HUD) codified its regulatory interpretation of this “affirmatively furthering fair housing” (AFFH) requirement in 2015,⁵⁵ but the Department announced in 2018 that it is in the process of amending the rule.⁵⁶ Although the future of AFFH is uncertain, the rule underscores the FHA’s goal of achieving more integrated communities.

1. Legislative history of § 3604(c).

As Part II will show, the text of § 3604(c) is ambiguous regarding its application to minority-language advertisements. When the text of a statute is unclear, it is appropriate to turn to the legislative history for guidance.⁵⁷ Yet the legislative history of

⁵² Housing and Community Development Act of 1974, Pub L No 93-383, § 808, 88 Stat 633, 728; Fair Housing Amendments Act of 1988, Pub L No 100-430 § 800, 102 Stat 1619, 1619–20.

⁵³ FHA § 808(d), 82 Stat at 84–85, codified at 42 USC § 3608(d) (emphasis added).

⁵⁴ 24 CFR §§ 5.152, 5.154(b).

⁵⁵ See Department of Housing and Urban Development, *Affirmatively Furthering Fair Housing*, 80 Fed Reg 42272, 42272–73 (2015), amending 24 CFR Parts 5, 91, 92, 570, 574, 576, 903.

⁵⁶ See *HUD to Revise Affirmatively Furthering Fair Housing Rule* (National Law Review, Aug 14, 2018), archived at <https://perma.cc/YJ4J-JM7L>; Department of Housing and Urban Development, *Affirmatively Furthering Fair Housing: Streamlining and Enhancements*, 83 Fed Reg 40713 (2018), amending 24 CFR Parts 5, 91, 92, 570, 574, 576, 903 (inviting public comment on amendments to the AFFH rule).

As currently written, 24 CFR § 5.150 requires HUD grant recipients to “[take] meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.” Specifically, 24 CFR § 5.152 defines “affirmatively furthering fair housing” in part as “replacing segregated living patterns with truly integrated and balanced living patterns” and “transforming racially and ethnically concentrated areas of poverty into areas of opportunity.” As of this writing, HUD has suspended assessments of fair housing submissions.

⁵⁷ See, for example, *Exxon Mobil Corp v Allapattah Services, Inc*, 545 US 546, 568 (2005) (“[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”).

§ 3604(c) is sparse,⁵⁸ more so than the rest of the FHA.⁵⁹ At least one senator expressed concern that the section might violate the First Amendment right of free speech,⁶⁰ but the section otherwise generated little debate.⁶¹ As a result, Professor Robert Schwemm observes that “the meaning of this provision must be derived almost exclusively from the words of the statute, unaided by additional materials.”⁶² Indeed, when the Supreme Court was first tasked with interpreting the FHA, the Court agreed that “[t]he legislative history of the Act is not too helpful.”⁶³ Nonetheless, Schwemm argues that “there is a good deal of evidence [Congress] was aware of the implications of the broad language it chose to use and intended this language to have its full and natural meaning.”⁶⁴

In the absence of much legislative history, some commentators have turned to contemporaneous antidiscrimination laws.⁶⁵ Specifically, § 3604(c)’s language closely parallels that of Title VII of the Civil Rights Act,⁶⁶ which prohibits employment discrimination “because of . . . race, color, religion, sex, or national origin.”⁶⁷ Section 3604(c) differs from Title VII, however, in that it does not require proof of either intentional discrimination or disparate impact.⁶⁸ Rather, a notice, statement, or advertisement need only “indicate” a discriminatory preference to an “ordinary reader” or

⁵⁸ See *Mayers*, 465 F2d at 633 (“Although the legislative history of this section is sparse, it indicates beyond doubt that, as the words themselves suggest, Congress intended to go beyond advertising to reach other sorts of ‘notices’ and ‘statements’ as well.”).

⁵⁹ Schwemm, 29 *Fordham Urban L J* at 197–200 (cited in note 14). For more on the legislative history of the FHA, see *id.* at 194 n 15 (collecting citations).

⁶⁰ *Civil Rights Act of 1967, Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S 1026, S 1318, S 1359, S 1362, S 1462, HR 2516 and HR 10805 (Proposed Civil Rights Act of 1967)*, 90th Cong 127 (1967) (statement of Sen Ervin) (opposing the bill because “[f]reedom of speech includes the right to express a preference”).

⁶¹ Schwemm, 29 *Fordham Urban L J* at 199 (cited in note 14).

⁶² *Id.*

⁶³ *Trafficante v Metropolitan Life Insurance Co*, 409 US 205, 210 (1972).

⁶⁴ Schwemm, 29 *Fordham Urban L J* at 211 (cited in note 14).

⁶⁵ See, for example, *id.* at 206 (observing that “many of the substantive provisions of the [Johnson] Administration’s [original] fair housing proposal, including its prohibition against discriminatory ads, notices, and statements, closely track the language adopted in Title VII”); Forrest, Note, 101 *Ky L J* at 841 (cited in note 17) (“The lack of clarity in the legislative history has required frequent reference to sister statutes like Title VII, whose debates are, at times, much more voluminous and instructive.”), citing *Trafficante*, 409 US at 205.

⁶⁶ Schwemm, 29 *Fordham Urban L J* at 206–07 & nn 78–79 (cited in note 14).

⁶⁷ 42 USC § 2000e-2.

⁶⁸ See *Inclusive Communities*, 135 S Ct at 2516–17 (noting that the Court has long recognized disparate-impact claims under Title VII).

“ordinary listener.”⁶⁹ In this way, § 3604(c) operates as a form of strict liability, such that intent to discriminate is not required.⁷⁰ However, evidence of discriminatory intent may weigh in favor of finding that an advertisement indicates a discriminatory preference.⁷¹

2. Enforcement.

The FHA permits both government and private enforcement.⁷² HUD has primary responsibility for interpreting, administering, and enforcing the FHA. Under § 3610, HUD receives complaints from “aggrieved person[s],”⁷³ or HUD may file its own complaint.⁷⁴ After receiving a complaint, HUD will prepare an investigative report and attempt to reach a conciliation agreement.⁷⁵ HUD may then refer the matter to the Department of Justice (DOJ) for enforcement.⁷⁶ HUD may also refer the matter to state or local housing authorities.⁷⁷

In some cases, the Attorney General will also commence a civil action.⁷⁸ Such an action is appropriate

[w]henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a *pattern or practice of resistance* to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this

⁶⁹ Schwemm, 29 Fordham Urban L J at 223 (cited in note 14).

⁷⁰ See *id.* at 308 (“[Section] 3604(c) may be violated without intent to discriminate.”). See also Robert G. Schwemm, *Housing Discrimination: Law & Litigation* § 15:1 (Thomson Reuters 2014).

⁷¹ See, for example, *Jancik v Department of Housing and Urban Development*, 44 F3d 553, 556 (7th Cir 1995) (“[E]vidence of such [discriminatory] intent is not irrelevant. Evidence that the author or speaker intended his or her words to indicate a prohibited preference obviously bears on the question of whether the words in fact do so.”).

⁷² But see *Trafficante*, 409 US at 211 (noting that because “the enormity of the task of assuring fair housing makes the role of the Attorney General . . . minimal, the main generating force must be private suits”).

⁷³ 42 USC § 3610(a)(1)(A)(i). See also 42 USC § 3602(i)(1)–(2) (defining an “aggrieved person” as any person who “claims to have been injured by a discriminatory housing practice” or “believes that such person will be injured by a discriminatory housing practice that is about to occur”).

⁷⁴ For more on the complaint process, which is overseen by the Office of Fair Housing and Equal Opportunity (FHOO), see *Learn About the FHOO Complaint and Investigation Process* (HUD), archived at <https://perma.cc/34YU-L7YG>.

⁷⁵ 42 USC § 3610(b).

⁷⁶ 42 USC § 3610(c), (e).

⁷⁷ 42 USC § 3610(f).

⁷⁸ 42 USC § 3614.

subchapter and such denial raises an issue of general public importance.⁷⁹

Alternatively, the Attorney General may take a case upon referral from the HUD Secretary.⁸⁰

HUD and DOJ do not bring the vast majority of fair housing claims. According to the National Fair Housing Alliance, HUD processed just 4.5 percent of all housing discrimination complaints in 2017, while DOJ handled a paltry 0.01 percent.⁸¹ By contrast, nonprofit fair housing organizations handled 71.3 percent of complaints, and state and local agencies funded by the federal Fair Housing Assistance Program (FHAP) processed approximately 23.9 percent.⁸² Very few complaints proceed to litigation. In 2017, HUD charged only nineteen cases and DOJ's Housing and Civil Enforcement Section brought just forty-one cases, of which twenty-four were pattern or practice cases.⁸³

Individuals also have a private right of action in state or federal court.⁸⁴ Plaintiffs may seek preventive relief,⁸⁵ monetary damages,⁸⁶ civil penalties,⁸⁷ and attorneys' fees (to a prevailing party other than the US government).⁸⁸ Standing is very broad. In *Trafficante v Metropolitan Life Insurance Co.*,⁸⁹ two white tenants sued their landlord, alleging that they had "lost the social benefits of living in an integrated community," "missed business and professional advantages," and were "stigmatized as residents of a white ghetto."⁹⁰ Concluding that the plaintiffs had standing, the Supreme Court interpreted "aggrieved persons" using "a generous construction which gives standing to sue to all in the same

⁷⁹ 42 USC § 3614(a) (emphasis added).

⁸⁰ See 42 USC § 3610(c), (e), or (g).

⁸¹ Shanti Abedin, et al, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report* *49 (National Fair Housing Alliance, 2018), archived at <https://perma.cc/P2H3-MQZL>.

⁸² *Id.*

⁸³ *Id.* at *56, 59. I have not been able to locate specific data on how many of those cases involved § 3604(c) claims.

⁸⁴ 42 USC § 3612(a), (o). Alternatively, aggrieved persons are entitled to a hearing before an administrative law judge. 42 USC § 3612(b).

⁸⁵ 42 USC § 3614(d)(1)(A).

⁸⁶ 42 USC § 3614(d)(1)(B).

⁸⁷ 42 USC § 3614(d)(1)(C).

⁸⁸ 42 USC § 3614(d)(2).

⁸⁹ 409 US 205 (1972).

⁹⁰ *Id.* at 208 (quotation marks omitted).

housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.”⁹¹

Later, in *Havens Realty Corp v Coleman*,⁹² the Court held that standing under the FHA extends to the full limits of Article III.⁹³ In that case, one of the plaintiffs was a nonprofit organization that sought damages for resources spent counteracting the defendants’ alleged racial steering practices.⁹⁴ The Court concluded that the resulting “drain on the organization’s resources” was a “concrete and demonstrable injury” sufficient to confer standing.⁹⁵ This line of cases indicates that “it is well established that a minority home seeker subjected to a § 3604(c) violative statement by a housing provider is entitled to sue the provider for the psychic injuries caused by that statement.”⁹⁶

* * *

This Part has provided historical context for thinking about how the FHA should apply in minority-language communities in general and Chicago’s Chinatown in particular. As Part I.B explained, the legislative history does not provide much for courts to go on, and § 3604(c) claims are most likely to come from private plaintiffs rather than government agencies. These considerations set the stage for a closer examination of § 3604(c) itself.

II. BREAKING DOWN § 3604(c)

In order to understand this Comment’s novel interpretation of the FHA as applied to minority-language advertisements, this Part unpacks the statutory provision at issue. First, Part II.A sets

⁹¹ Id at 210, 212.

⁹² 455 US 363 (1982).

⁹³ Id at 372–73. Standing derives from Article III, § 1 of the Constitution, which states that federal courts may only exercise jurisdiction over “Cases” and “Controversies.” See *Lujan v Defenders of Wildlife*, 504 US 555, 559–61 (1992) (outlining the three minimum requirements for constitutional standing: injury in fact, traceability, and redressability).

⁹⁴ *Havens Realty*, 455 US at 368–69.

⁹⁵ Id at 379. See also *Spann v Colonial Village, Inc*, 899 F2d 24, 27–31 (DC Cir 1990) (holding that an equal housing nonprofit had standing to sue under § 3604(c) in a case alleging that racially discriminatory advertisements imposed burdens on the nonprofit’s limited resources), citing *Havens*, 455 US at 379.

⁹⁶ Schwemm, 29 Fordham Urban L J at 302 (cited in note 14). But see *Bank of America Corp v City of Miami*, 137 S Ct 1296, 1304–05 (2017) (holding that the city had standing to sue on the basis of lost tax revenue and added municipal expenses because those harms fell within the FHA’s “zone of interests,” but declining to revisit the broad view of standing articulated in *Trafficante* and *Havens*).

out the elements of a § 3604(c) claim. Part II.B then demonstrates the lack of clear regulatory guidance. Given the dearth of cases addressing the language in which a housing advertisement appears, Part II.C highlights potentially analogous lines of FHA cases, including national origin discrimination, racial steering, and human models. Finally, Part II.D discusses theoretical considerations informing my proposed solution in Part III.

A. Elements of a § 3604(c) Claim

There are three basic elements of a § 3604(c) claim.⁹⁷ First, the defendant must have “ma[de], print[ed], or publish[ed], or cause[d] to be made, printed, or published” a “notice, statement, or advertisement.”⁹⁸ Second, the statement must have been made “with respect to the sale or rental of a dwelling.”⁹⁹ Liability does not result if a landlord simply expressed opposition to the FHA in general or made a “stray” racial remark.¹⁰⁰ Finally, the statement must “indicate[] a[] preference, limitation, or discrimination” based on a protected category or “an intention to make any such preference, limitation, or discrimination.”¹⁰¹

The remainder of this Section highlights several key points in § 3604(c) case law: (1) the provision applies to both landlords and publishers of discriminatory statements, (2) discriminatory intent is not necessary, and (3) the “ordinary reader” standard allows a court to determine whether an advertisement or series of advertisements violates the statute. These principles are essential for determining whether a minority-language advertisement violates the FHA.

⁹⁷ See Schwemm, 29 *Fordham Urban L J* at 213–16 (cited in note 14). Schwemm identifies four elements of a claim, but the second and third elements may be combined. *Id.* at 214.

⁹⁸ 42 USC § 3604(c). This Comment focuses primarily on advertisements, but statements may also include oral statements, typically by a landlord or her agent to a prospective tenant. See Schwemm, 29 *Fordham Urban L J* at 214–15 (cited in note 14). See also 24 CFR § 100.75(b) (“The prohibitions in [§ 3604(c)] shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling.”).

⁹⁹ 42 USC § 3604(c).

¹⁰⁰ See, for example, *Harris v Itzhaki*, 183 F3d 1043, 1055 (9th Cir 1999) (noting that if a landlord’s discriminatory statement is merely a “stray” remark “unrelated to the decisional process [and therefore] insufficient to show discrimination,” then the landlord is not liable). See also Schwemm, 29 *Fordham Urban L J* at 215 & n 119 (cited in note 14).

¹⁰¹ 42 USC § 3604(c).

1. Applicability to landlords and publishers.

Courts were initially uncertain whether § 3604(c) imposed liability only on landlords, or if newspapers that published housing advertisements could also be liable. In one of the first cases to address this ambiguity, *United States v Hunter*,¹⁰² the US Attorney General sought to enjoin a local newspaper's publication of an advertisement for a basement apartment in a "white home."¹⁰³ The Fourth Circuit held that "both landlords and newspapers are within the section's reach" based on the plain meaning of the statute, and that the advertisement clearly indicated a racial preference.¹⁰⁴ In addition, the court concluded that § 3604(c) did not contravene the First Amendment because Congress may regulate commercial advertising.¹⁰⁵ Finally, the court found no due process violation, in part because there is no "Mrs. Murphy" exception to § 3604(c).¹⁰⁶ Sections 3604(a) and (b) of the FHA allow private, small-scale landlords (like the apocryphal Mrs. Murphy) to discriminate in who they sell or rent to, but § 3604(c) does not contain such an exemption.¹⁰⁷ This distinction means that Chinese landlords who could otherwise escape liability under § 3604(a) and (b) may face liability under § 3604(c) for the exclusive use of Chinese-language advertisements.

2. Discriminatory intent is not necessary.

Unlike other substantive provisions of the FHA, which require a showing of discriminatory intent or disparate impact,¹⁰⁸ § 3604(c) establishes liability if an advertisement "indicates" that

¹⁰² 459 F2d 205 (4th Cir 1972).

¹⁰³ *Id* at 209.

¹⁰⁴ *Id* at 210, 215.

¹⁰⁵ *Id* at 211–13. But see *National Institute of Family and Life Advocates v Becerra*, 138 S Ct 2361, 2371–72 (2018) (imposing limits on the government's ability to regulate commercial speech in general and compelled speech in particular).

¹⁰⁶ *Hunter*, 459 F2d at 213–14. On the Mrs. Murphy exception, see 42 USC § 3603(b)(1)–(2) (stating that § 3604 does not apply to landlords who own no more than three single-family homes, or who rent rooms or units in dwellings that may be occupied by up to four families, provided that the landlords also live in the dwellings).

¹⁰⁷ See 42 USC § 3603(b) ("[n]othing in section 3604 of this title (*other than subsection (c)*) shall apply" to Mrs. Murphy landlords) (emphasis added). See also Schwemm, 29 *Fordham Urban L J* at 191–92 (cited in note 14) (noting that, ironically, only honest racists are punished because Mrs. Murphy is still free to discriminate, so long as she does not cite a race-based reason for refusing to a rent to someone).

¹⁰⁸ See *Inclusive Communities*, 135 S Ct at 2525 (holding that disparate-impact claims are cognizable under the FHA).

a particular group is preferred or not preferred.¹⁰⁹ Effectively, this means that § 3604(c) is a strict liability statute.¹¹⁰ Most FHA claims use discriminatory statements as evidence of a defendant's illegal motive under § 3604(a) or (b), rather than as the basis for a standalone claim.¹¹¹ In fact, plaintiffs sometimes neglect to seek liability under § 3604(c) at all, even if an advertisement or statement is obviously discriminatory.¹¹²

3. The “ordinary reader” standard.

The FHA does not specify how to determine whether an advertisement is discriminatory.¹¹³ Attempting to resolve this ambiguity, the Fourth Circuit in *Hunter* introduced the concept of an “ordinary reader.”¹¹⁴ Specifically, the court considered whether “the natural interpretation of the advertisements,” to an ordinary reader, “indicate[s] a racial preference in the acceptance of tenants.”¹¹⁵ Other appellate courts have subsequently adopted and expanded upon this approach.¹¹⁶

Most notably, in *Ragin v New York Times*,¹¹⁷ black prospective homeowners sued *The New York Times*, alleging that its housing advertisements featured almost exclusively white models.¹¹⁸ The complaint further alleged that “the few blacks represented are usually depicted as building maintenance employees, doormen, entertainers, sports figures, small children or cartoon characters.”¹¹⁹ The Second Circuit denied the newspaper's motion

¹⁰⁹ Schwemm, 29 Fordham Urban L J at 215 (cited in note 14). Compare 42 USC § 3604(c), with 42 USC §§ 3604(a)–(b), (d)–(f)(2), 3605, 3606.

¹¹⁰ Schwemm, 29 Fordham Urban L J at 216 (cited in note 14).

¹¹¹ *Id.* at 251.

¹¹² *Id.* at 255–60. Professor Schwemm urges fair housing litigators to use the provision more aggressively, rather than as a backup plan when a Mrs. Murphy exception would otherwise shield a landlord from liability. *Id.* at 262–63.

¹¹³ See *Miami Valley Fair Housing Center, Inc v Connor Group*, 725 F3d 571, 577 (6th Cir 2013) (“The Fair Housing Act’s language is purposely broad and ‘the statute and regulations create no fixed and immutable rules to determine whether an advertisement is discriminatory.’”), quoting *Housing Opportunities Made Equal, Inc v Cincinnati Enquirer*, 943 F2d 644, 647 (6th Cir 1991).

¹¹⁴ *Hunter*, 459 F2d at 215.

¹¹⁵ *Id.*

¹¹⁶ See, for example, *Jancik v Department of Housing and Urban Development*, 44 F3d 553, 556 (7th Cir 1995); *Ragin v New York Times*, 923 F2d 995, 999–1000 (2d Cir 1991); *Housing Opportunities Made Equal, Inc*, 943 F2d at 646.

¹¹⁷ 923 F2d 995 (2d Cir 1991).

¹¹⁸ *Id.* at 998.

¹¹⁹ *Id.*

to dismiss, concluding that § 3604(c) is violated “if an ad for housing suggests to an *ordinary reader* that a particular race is preferred or dispreferred for the housing in question.”¹²⁰ The discriminatory message need not be as inflammatory as a “swastika or burning cross,” so long as the ad “would discourage an ordinary reader of a particular race from answering it.”¹²¹ At the same time, “[t]he ordinary reader is neither the most suspicious nor the most insensitive of our citizenry.”¹²² Thus, “[a]n ad depicting a single model or couple of one race that is run only two or three times would seem, *absent some other direct evidence of an intentional racial message*, outside Section 3604(c)’s prohibitions as a matter of law.”¹²³

Circuit courts are divided as to whether an advertisement must *discourage* an ordinary reader from responding, or if merely indicating a discriminatory preference is sufficient to violate § 3604(c). In the Second and Seventh Circuits, “preference” is read to “describe any ad that would *discourage* an ordinary reader of a particular race from answering it.”¹²⁴ By contrast, the Sixth Circuit expressly rejected this approach in *Miami Valley Fair Housing Center, Inc v Connor Group*.¹²⁵ Instead, the Sixth Circuit analyzes the message alone without considering whether it discourages a reader from responding to the ad.¹²⁶ Under the no-discouragement-required interpretation, anyone who encounters a discriminatory message may have standing to sue.

The ambiguity surrounding the application of the “ordinary reader” standard cuts two ways. On the one hand, courts may struggle to assess the strength of a § 3604(c) claim—an “ordinary reader” is arguably as nebulous as a “reasonable person.” On the other hand, as Part III explains, the standard is capacious enough

¹²⁰ *Id* at 999 (emphasis added).

¹²¹ *Ragin*, 923 F2d at 999–1000. See also *Jancik*, 44 F3d at 556 (“[C]ourts have not required that ads jump out at the reader with their offending message.”).

¹²² *Ragin*, 923 F2d at 1002.

¹²³ *Id* (emphasis added). See also *Housing Opportunities Made Equal, Inc*, 943 F2d at 648 (adopting the “ordinary reader” standard, but concluding that a single ad featuring a white model, standing alone, would not violate § 3604(c) as a matter of law); *Spann v Colonial Village, Inc*, 662 F Supp 541, 546 (DDC 1987) (holding that “absent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the [FHA] merely because models of a particular race are not used in one ad or a series of ads”).

¹²⁴ *Ragin*, 923 F2d at 999–1000 (emphasis added). See also *Jancik*, 44 F3d at 556 (adopting the Second Circuit’s approach in *Ragin*).

¹²⁵ 725 F3d 571 (6th Cir 2013).

¹²⁶ *Id* at 577–78 (“We decline to incorporate the discourage language into our ordinary-reader analysis.”).

to allow for creative arguments in light of the FHA's legislative purpose and antistatutory theory.

B. Lack of Regulatory Guidance

Like the text of the statute itself, the relevant subsection of the Code of Federal Regulations does not provide much clarity regarding the language in which advertisements should appear to comply with the FHA. 24 CFR § 100.75(b) states that the FHA applies to "*all written or oral notices or statements* by a person engaged in the sale or rental of a dwelling," indicating that word-of-mouth advertising in Chinese may run afoul of the FHA.¹²⁷ "Written notices and statements include any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling."¹²⁸

Furthermore, "[d]iscriminatory notices, statements and advertisements include, but are not limited to" the following:

- (1) Using *words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available* to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.
- (2) *Expressing* to agents, brokers, employees, prospective sellers or renters or any other persons *a preference* for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.
- (3) *Selecting media or locations* for advertising the sale or rental of dwellings *which deny particular segments of the housing market information about housing opportunities* because of race, color, religion, sex, handicap, familial status, or national origin.

¹²⁷ 24 CFR § 100.75(b) (emphasis added). See also Schwemm, 29 Fordham Urban L J at 214–15 (cited in note 14). For word-of-mouth advertising in the context of employment-discrimination claims under Title VII, see, for example, *EEOC v Consolidated Service Systems*, 989 F2d 233, 234 (7th Cir 1993).

¹²⁸ 24 CFR § 100.75(b).

- (4) *Refusing to publish advertising* for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.¹²⁹

Each of these subsections could present problems for landlords and newspapers that exclusively use Chinese-language advertisements. For example, under subsection (1), a plaintiff might argue that Chinese characters are “words” or “symbols” conveying that “dwellings are available” only to persons of Chinese descent.¹³⁰ Under subsection (2), Chinese-language advertisements might implicitly “[e]xpress[]” a preference for Chinese renters.¹³¹ Under subsection (3), a plaintiff could argue that posting fliers in Chinese around Chinatown “den[ies]” other minority groups the opportunity to learn about vacancies.¹³² Finally, under subsection (4), a landlord or publisher might be liable for “[r]efusing” to publish advertisements in languages other than Chinese.¹³³ Although I have not found cases making these precise claims, the growth of Chicago’s Chinatown makes such claims more likely in the future.

HUD has issued guidelines to its regulations indicating that the language in which advertisements appear may matter in some circumstances. For example, 24 CFR § 100.75(d) refers advertisers to 24 CFR Part 109, which “describes the matters the Department will review in evaluating compliance with the Fair Housing Act and in investigating complaints alleging discriminatory housing practices involving advertising.”¹³⁴ Specifically, HUD has stated that “*the exclusive use of media catering to the majority population in an area*, when, in such area, there are also available non-English language or other minority media, may have discriminatory impact.”¹³⁵ Depending on how a court defines an “area” and construes the “majority population” in that area, Chinese-language classifieds might discriminate against people who are not part of the neighborhood’s Chinese majority. In other words, the decision to define an area as a particular neighborhood as opposed to the city at large will likely change the composition

¹²⁹ 24 CFR § 100.75(c) (emphases added).

¹³⁰ 24 CFR § 100.75(c)(1).

¹³¹ 24 CFR § 100.75(c)(2).

¹³² 24 CFR § 100.75(c)(3).

¹³³ 24 CFR § 100.75(c)(4).

¹³⁴ 24 CFR § 100.75(d).

¹³⁵ Previously codified at 24 CFR § 109.25 (emphases added).

of the “majority population” in an area, potentially resulting in § 3604(c) liability.

Part 109 also indicates that the selective geographic placement of advertising may give rise to liability:

Such selective use may involve the strategic placement of billboards; brochure *advertisements distributed within a limited geographic area* by hand or in the mail; advertising in particular geographic coverage editions of major metropolitan newspapers or *in newspapers of limited circulation* which are mainly advertising vehicles for reaching a particular segment of the community; or displays or announcements available only in selected sales offices.¹³⁶

Under this guidance, Chinese-language newspapers and other publishing outlets could be at risk of liability.

At least one court has stated that HUD guidelines are entitled to “great weight” when determining whether a § 3604(c) violation occurred.¹³⁷ But in *Spann v Colonial Village, Inc.*,¹³⁸ the District Court for the District of Columbia determined that although Part 109 gives notice to advertisers about when HUD will investigate housing complaints, these guidelines were not meant to apply to litigation in court.¹³⁹ Moreover, Part 109 was removed from the CFR in 1996 as part of a regulatory reform initiative.¹⁴⁰ In any event, the guidelines are now several decades old, so it is unclear if HUD would still adhere to them today.¹⁴¹

C. Guidance from Analogous Case Law

Because there have been no cases involving claims that the exclusive use of Chinese-language advertisements violates

¹³⁶ Previously codified at 24 CFR § 109.25(a) (emphases added).

¹³⁷ See *United States v Long*, Prentice-Hall Equal Opportunity in Housing Rptr ¶ 13,631, 14,091 (D SC 1974). See also *Trafficante*, 409 US at 210 (noting that HUD’s construction of “aggrieved persons” under the FHA “is entitled to great weight”).

¹³⁸ 662 F Supp 541 (DDC 1987), revd on other grounds, 899 F2d 24, 25–26 (DC Cir 1990).

¹³⁹ *Spann*, 622 F Supp at 545.

¹⁴⁰ Office of the Assistant Secretary for Fair Housing and Equal Opportunity, Regulatory Reinvention, Streamlining of HUD’s Regulations Implementing the Fair Housing Act, 61 Fed Reg 14378, 14378–80 (1996), amending 24 CFR Parts 100, 103 and removing 24 CFR Part 109.

¹⁴¹ Office of the Assistant Secretary for Fair Housing and Equal Opportunity, Implementation of the Fair Housing Amendments Act of 1988, 54 Fed Reg 3232, 3308–10 (1989), amending 24 CFR Parts 14, 100, 103, 104, 105, 106, 109, 110, 115, and 121. See also Schwemm, 29 Fordham Urban L J at 220 & n 142 (cited in note 14).

§ 3604(c),¹⁴² I have turned to related areas of FHA case law for guidance. A court faced with such a claim could look to national origin discrimination cases, racial-steering cases, and human-model cases as potential analogues. However, none of these approaches maps neatly onto the context of minority-language housing advertisements.

1. National origin.

FHA cases involving allegations of national origin discrimination are a logical place to start. In *Holmgren v Little Village Community Reporter*,¹⁴³ a Swedish American plaintiff sought to enjoin three Chicago neighborhood newspapers from publishing classified advertisements on the basis of national origin discrimination.¹⁴⁴ The advertisements expressed a preference for home buyers and tenants who spoke languages associated with “Polish, Bohemian, Slavi[c], German, Spanish and American” nationalities.¹⁴⁵ The defendants argued that the ability to speak a given language is not related to national origin, and that speaking a common language facilitates proper communication between contracting parties.¹⁴⁶ The court rejected that argument, observing that “to say that the ability to speak a certain language is not related to the country of origin of that language is mere sophistry.”¹⁴⁷ Ultimately, the court concluded that “ads which indicate a preference for a purchaser or a tenant who speaks a particular language are unlawful under § 3604(c).”¹⁴⁸ While this case might seem to suggest that Chinese-language advertisements inherently violate the FHA, it is distinguishable in that the court was not considering an ad written in a minority language; rather, the

¹⁴² But see *Guevara v UMH Properties, Inc.*, 2014 WL 5488918 *5–6 (WD Tenn) (concluding that Hispanic residents in a mobile home park stated a claim under § 3604(c) when defendants allegedly discouraged African Americans from applying by advertising exclusively in Spanish).

¹⁴³ 342 F Supp 512 (ND Ill 1971).

¹⁴⁴ *Id.* at 513.

¹⁴⁵ *Id.* at 513 n 1. The advertisements themselves seem to have appeared in English, but they specified that prospective buyers and tenants who spoke languages associated with the enumerated nationalities were preferred.

¹⁴⁶ *Id.* at 513.

¹⁴⁷ *Holmgren*, 342 F Supp at 513.

¹⁴⁸ *Id.*

ad indicated an explicit preference for residents of certain ethnicities.¹⁴⁹ Thus, *Holmgren* does not provide clear guidance for addressing the problem of Chinese-language advertisements.

More recently, in *Housing Rights Center v Donald Sterling Corp.*,¹⁵⁰ a group of African American and African Jamaican tenants sued their landlord, Donald Sterling, for national origin discrimination, alleging that Sterling instructed his staff to rent only to Korean American tenants because he did not like Hispanic or black tenants.¹⁵¹ The plaintiffs further alleged that the defendant's advertisements featured a Korean flag, thereby indicating a preference for Koreans.¹⁵² The judge determined that the landlord's use of a Korean flag in an announcement did not violate the FHA because an ordinary reader would likely view the flag as symbolic of the rental company's name, "American Korean Land Company."¹⁵³ Nonetheless, the court enjoined Sterling from using the word "Korean" in any of his apartment building names.¹⁵⁴ By enjoining explicit references to national origin in building names but permitting the use of a national symbol in housing announcements, *Donald Sterling Corp* suggests that Chinese-language advertisements, as symbols of the existence of a Chinese-language community, may not violate § 3604(c).

2. Racial steering.

Another potentially useful line of cases concerns advertising practices found to have a racial steering effect. The defendant in *United States v Real Estate One, Inc.*¹⁵⁵ placed advertisements for homes in "changing areas" of Detroit in a newspaper with a predominantly African American readership.¹⁵⁶ The court noted that this tactic conflicted with the defendant's usual practice of placing advertisements in general circulation newspapers. Accordingly, the court ordered the defendant to counterbalance its advertising

¹⁴⁹ *Id.* at 513 n 1. But see Forrest, Note, 101 Ky L J at 854 (cited in note 17) (citing *Holmgren* for the proposition that "language and national origin are correlated closely enough to make selecting for a foreign language impermissible discrimination"). Forrest concedes, however, that the case does not resolve the question of whether the language in which an advertisement is written may implicitly convey a discriminatory message, regardless of the underlying meaning of the text. *Id.*

¹⁵⁰ 274 F Supp 2d 1129 (CD Cal 2003).

¹⁵¹ *Id.* at 1134.

¹⁵² *Id.*

¹⁵³ *Id.* at 1138.

¹⁵⁴ *Sterling*, 274 F Supp 2d at 1138–41.

¹⁵⁵ 433 F Supp 1140 (ED Mich 1977).

¹⁵⁶ *Id.* at 1151.

in the predominantly black newspaper with advertising of the same homes in general circulation newspapers.¹⁵⁷

At the same time, courts are sympathetic to marketing campaigns intended to encourage integration. For example, the Seventh Circuit found no violation of § 3604(a) or (c) in *South-Suburban Housing Center v Greater South Suburban Board of Realtors*,¹⁵⁸ when a housing center implemented an affirmative marketing campaign to attract white residents to Park Forest, Illinois.¹⁵⁹ Crucially, the campaign aimed to correct the racial imbalance that resulted when white flight and a wave of foreclosures “led to abandoned homes and neighborhood blight.”¹⁶⁰ This case suggests that advertisements which might superficially appear to run afoul of § 3604(c) may nonetheless be permissible when they further the broader purposes of the FHA.

3. Human models.

The “human-model cases” of the late 1980s and early 1990s involved black residents who alleged that real estate advertisements featuring exclusively white models violated § 3604(c).¹⁶¹ The *Ragin* case, discussed in Part II.A.3, is one such example.¹⁶² Not all of these suits were successful, however. In *Housing Opportunities Made Equal (HOME) v Cincinnati Enquirer*,¹⁶³ the Sixth Circuit affirmed the district court’s grant of the defendant newspaper’s motion to dismiss despite very similar facts to those in *Ragin*.¹⁶⁴ Like the Second Circuit, the Sixth Circuit surmised that a single advertisement featuring exclusively white models would not likely give rise to liability.¹⁶⁵ It differed, however in its rejection of an aggregate theory of liability based on multiple advertisements, concluding that such a theory stretched the statute too far.¹⁶⁶

¹⁵⁷ Id at 1152.

¹⁵⁸ 935 F2d 868 (7th Cir 1991).

¹⁵⁹ Id at 884–85.

¹⁶⁰ Id at 873.

¹⁶¹ See Schwemm, 29 Fordham Urban L J at 222–26 (cited in note 14).

¹⁶² See generally *Ragin*, 923 F2d 995. See also *Ragin v Harry Maclowe Real Estate Co*, 801 F Supp 1213, 1232 (SDNY 1992) (holding that a corporate leasing agent and owner violated § 3604(c) by publishing advertisements for luxury apartments featuring only white models), *affd* in relevant part and *revd* in part on other grounds, *Ragin v Harry Maclowe Real Estate Co*, 6 F3d 898, 907, 909, 911 (2d Cir 1993).

¹⁶³ 943 F2d 644 (6th Cir 1991).

¹⁶⁴ Id at 645, 654.

¹⁶⁵ Id at 648.

¹⁶⁶ Id at 653.

Arguably, Chinese characters are the functional equivalent of white models in that they project implicit messages about the intended residents of a community. But the allegedly discriminatory message that Chinese-language advertisements send is not nearly as clear as that of the human-model cases. Moreover, while minority-language communities generate network effects by bringing together a critical mass of language speakers and readers, racially discriminatory housing advertisements lack such benefits.¹⁶⁷ This Comment addresses these network effects in more detail in Part III.B.

D. Theoretical Considerations

As I explained in Part I.B and Parts II.A–C, the typical sources of guidance for statutory interpretation—text, legislative history, applicable regulations, and case law—do not conclusively resolve whether and when minority-language housing advertisements violate the FHA.¹⁶⁸ Before proceeding to my proposed solution, it is worth expanding upon the theoretical considerations informing that solution.

First, although language is correlated with national origin, it is not synonymous with national origin. Obvious examples include Spanish and French, which are spoken in many countries besides Spain and France, respectively. Additionally, contrary to popular belief, the United States does not have an official language, at least at the federal level.¹⁶⁹ In recent years, some states have passed laws declaring English the official state language as part of the “English-Only” movement,¹⁷⁰ but neither the FHA nor its accompanying regulations explicitly mandate that housing advertisements appear in English.

In comparison to its more well-known provisions, § 3604(c) has not received much scholarly attention.¹⁷¹ Professor

¹⁶⁷ On network effects, see Lemley and McGowan, 86 Cal L Rev at 489 (cited in note 27).

¹⁶⁸ Because I conclude that the text of § 3604(c) is unclear, consideration of alternative sources is (arguably) appropriate under the plain meaning rule. But see William Baude and Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U Chi L Rev 539, 546–47 (2017) (questioning why the probative value of nontextual information should depend on whether the text is clear).

¹⁶⁹ Harmeet Kaur, *FYI: English Isn't the Official Language of the United States* (CNN, June 15, 2018), archived at <https://perma.cc/F27N-TDY9>.

¹⁷⁰ See Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv CR–CL L Rev 293, 300 & n 55 (1989).

¹⁷¹ But see, for example, Reginald Leaman Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 Wm & Mary L Rev 69, 155–59 (1995);

Schwemm's *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision* contains an extensive treatment of the section.¹⁷² Schwemm surveys the relevant legislative history and emphasizes that despite its sparsity, § 3604(c) was intended to apply broadly to further Congress's ultimate goal of housing integration.¹⁷³ Yet he does not address the question presented in this Comment regarding the language in which housing advertisements appear.¹⁷⁴

My approach, described in Part III, draws significantly upon antisubordination theory. At its core, antisubordination theory posits that antidiscrimination law should not make disadvantaged groups worse off.¹⁷⁵ The theory intersects with recent debates regarding whether antidiscrimination laws should apply symmetrically or asymmetrically. Symmetrical laws, like Title VII, prohibit discrimination on the basis of a protected trait, such as race.¹⁷⁶ Asymmetrical laws, like the Americans with Disabilities Act of 1990,¹⁷⁷ prohibit discrimination only for a limited class of people, such as the disabled.¹⁷⁸ Some scholars have argued that symmetry may actually further antisubordination goals,¹⁷⁹ while others contend that asymmetrical enforcement of

Debra L. Alligood, Comment, *When the Medium Becomes the Message: A Proposal for Principal Media Liability for the Publication of Racially Exclusionary Real Estate Advertisements*, 40 UCLA L Rev 199, 200 & n 8, 203 (1992).

¹⁷² See generally Schwemm, 29 Fordham Urban L J 187 (cited in note 14).

¹⁷³ Id at 212–13.

¹⁷⁴ The only scholarly work addressing this question is a student Note by R. Ian Forrest. See generally Forrest, Note, 101 Ky L J 839 (cited in note 17). Forrest argues that language is an element of national origin under the FHA, and therefore “foreign language advertising” for housing violates § 3604(c). Id at 853. He also argues that under the “ordinary reader” test, an ordinary reader is necessarily a monolingual English speaker. Id at 856. I find this slippage between native language and national origin troubling. Given the growing linguistic, racial, and cultural diversity of the United States, courts cannot assume that advertisements appearing in languages other than English are per se discriminatory. Moreover, the ordinary reader is not necessarily a monolingual English speaker as Forrest assumes.

¹⁷⁵ See Fiss, 5 Phil & Pub Affairs at 157 (cited in note 25). See also Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 117 (Yale 1979); David A. Strauss, *The Myth of Colorblindness*, 1986 S Ct Rev 99, 130–32; Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 Cal L Rev 935, 960 (1994); Cass R. Sunstein, *The Anticaste Principle*, 92 Mich L Rev 2410, 2429 (1994); Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U Miami L Rev 9, 28 (2003).

¹⁷⁶ Schoenbaum, 2017 Wis L Rev at 76 (cited in note 22).

¹⁷⁷ Pub L No 101-336, 104 Stat 327, codified as amended at 42 USC § 12101 et seq.

¹⁷⁸ Schoenbaum, 2017 Wis L Rev at 76 (cited in note 22).

¹⁷⁹ Id at 86.

antidiscrimination law is justified in some circumstances.¹⁸⁰ Without taking sides in the debate over which regime is more effective or normatively desirable, I argue that courts should interpret the FHA as calling for not only housing integration, but also the breakdown of social hierarchies among races and nationalities.

III. APPLYING ANTISUBORDINATION THEORY TO THE FHA

This Part outlines an approach in which the exclusive use of minority-language housing advertisements does not necessarily violate the FHA. Continuing to use Chicago's Chinatown as a case study, Part III.A proposes a series of nonexhaustive factors that a court should consider when faced with a Chinese- or other minority-language housing advertisement. Even if an advertisement is found to violate § 3604(c), courts should exercise discretion in their damage awards, with an emphasis on the degree of harm caused, so as not to drive Chinese landlords and newspapers out of the market entirely.

In Part III.B, I take a broader view and consider whether courts and policymakers should reassess the FHA's goal of promoting housing integration at the expense of other values. Drawing upon antisubordination theory, I conclude that the § 3604(c) should be construed narrowly to protect minority rights rather than mandating integration at all costs. This approach will preserve the network effects that minority-language communities generate and ensure that the FHA does not further disadvantage historically marginalized communities.

A. Factors to Guide Judicial Decision-Making

There are many factors that a court might weigh when confronted with a minority-language housing advertisement, but this Section advocates that they focus on the following: (1) the demographics of the relevant community, (2) the identities and language capabilities of the plaintiff(s) and defendant(s), (3) the content of the advertisement itself, and (4) the costs of translation. These factors emerge from HUD's guidance on § 3604(c) in 24 CFR Part 109, the "ordinary reader" standard, and practical considerations in analogous Title VII cases.

¹⁸⁰ Areheart, 58 BC L Rev at 1123–29 (cited in note 22).

1. Demographics of the relevant community.

First, the demographics of the community where an advertisement appears should inform a court's application of the "ordinary reader" standard for § 3604(c) liability. HUD's Part 109 suggests that "the use of English language media alone or *the exclusive use of media catering to the majority population in an area*, when, in such area, there are also available non-English language or other minority media, *may have discriminatory impact.*"¹⁸¹ Assuming that Part 109 is still good guidance, it is unclear how large an "area" should be. An "area" could hypothetically include all of Chicago, all of Chinatown, or just the block where a dwelling is located.¹⁸² And even if a court would decline to rely upon Part 109 as guidance, it is still persuasive authority due to the dearth of alternative sources.

Borrowing from antitrust law, I propose defining the relevant community before engaging in § 3604(c) analysis of minority-language housing advertisements.¹⁸³ In merger challenges under the antitrust laws, courts first define the relevant geographic market to determine if the proposed merger would harm competition in that market.¹⁸⁴ Similarly, courts should determine the scope of a housing area before analyzing how an ordinary reader in that community would perceive an advertisement. Given that housing markets are inherently local and tied to metropolitan areas, a national scale would be far too large. Instead, courts should apply HUD's definition of "geographic area" in its Affirmatively Furthering Fair Housing (AFFH) rule.¹⁸⁵ HUD defines geographic area as "a jurisdiction, region, State, Core-Based Statistical Area (CBSA), or another applicable area (e.g., census tract, neighborhood, Zip code, block group, housing development, or portion thereof)."¹⁸⁶ This definition would provide courts with flexibility to define the relevant community in light of local conditions.

For instance, in Chicago's Chinatown, a court might look to a map of Chicago's seventy-seven community areas as a starting

¹⁸¹ Previously codified at 24 CFR § 109.25 (emphases added). See Part II.B.

¹⁸² See Part II.B.

¹⁸³ See *Brown Shoe Co, Inc v United States*, 370 US 294, 336–37 (1962) ("[A]lthough the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.").

¹⁸⁴ See US Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 4.2 (2010) (explaining how the agencies define a geographic market).

¹⁸⁵ See Part I.B.

¹⁸⁶ 24 CFR § 5.152.

point.¹⁸⁷ Curiously, however, “Chinatown” is not an officially designated community area; rather, it occupies portions of the areas labeled Armour Square and Bridgeport, demonstrating that municipal designations are imperfect representations of neighborhood identity.¹⁸⁸ Alternatively, a court could draw upon the Supreme Court’s reasoning in *Hills v Gautreaux*,¹⁸⁹ which suggests that the relevant community will often extend beyond the city limits to an entire metropolitan area.¹⁹⁰ At minimum, historical research on Chicago’s Chinatown indicates that the relevant community should include the area north of the Stevenson highway, east of the Chicago river, and west of Clark Street, creating a rough triangle on the city’s near southwest side.¹⁹¹

Once a court has defined the relevant area, it should then examine census data regarding the percentage of residents in the relevant community that speak or read languages other than Chinese, and if so, what languages.¹⁹² The Eastern District of Michigan’s decision in *Real Estate One* lends support for this approach. In that case, the court analyzed patterns of racial change in Detroit before ordering a remedy to combat the defendant’s racially discriminatory advertising practices.¹⁹³ Courts could also consider what percentage (if any) of affordable housing is excluded from non-Chinese prospective residents through the exclusive use

¹⁸⁷ See, for example, *Chicago Neighborhoods* (cited in note 31).

¹⁸⁸ See Ling, *Chinese Chicago* at 55 (cited in note 32) (identifying areas 34 and 60 as Armour Square and Bridgeport, respectively). For more detailed maps, see *Armour Square* (City of Chicago, 2015), archived at <https://perma.cc/3MJ2-QYCN>; *Bridgeport* (City of Chicago, 2015), archived at <https://perma.cc/B73H-MBZE>.

Chicagoans themselves disagree over the proper boundaries between neighborhoods. See, for example, Tanveer Ali, *This Is Where Chicagoans Say the Borders of Their Neighborhoods Are* (DNAinfo, Sept 28, 2015), archived at <https://perma.cc/FZP2-BBN3> (illustrating how Chicagoans draw the boundaries of various neighborhoods, but not depicting Chinatown).

¹⁸⁹ 425 US 284 (1976).

¹⁹⁰ *Id.* at 299 (concluding, in a case alleging racial discrimination in public housing, that “[t]he relevant geographic area for purposes of the respondents’ housing options is the Chicago housing market, not the Chicago city limits”). *Gautreaux* is arguably distinguishable, however, in that it involved public housing, rather than private landlords or publishers.

¹⁹¹ See, for example, Ling, *Chinese Chicago* at 52 (cited in note 32). See also *id.* at 216–17.

¹⁹² See, for example, Ryan, *Language Use in the United States* *2 (cited in note 10) (noting that US Census data from the American Community Survey “provides reliable estimates for small levels of geography, including counties, cities, and tracts, allowing exploration of the distribution of language use across states and metropolitan areas of the United States”).

¹⁹³ *Real Estate One*, 433 F Supp at 1145–46. See Part II.C.2.

of Chinese-language advertisements, and what percentage of that excluded population consists of racial or ethnic minorities.¹⁹⁴ These statistics will help determine the degree of harm caused by denying non-Chinese residents easy access to listings in Chinatown.

2. The identities and language capabilities of the parties.

In order to determine if a plaintiff actually suffered psychic harm from an allegedly discriminatory advertisement, a court can and should consider the identities of the parties.¹⁹⁵ Specifically, a court should examine the race, national origin, and language abilities of the plaintiff and defendant.

For example, in Chicago's Chinatown, if a Chinese landlord or publisher can speak or write in another language, that may counsel in favor of liability because the landlord or publisher could have easily provided a parallel translation. If a landlord or publisher cannot speak or write in another language, liability is probably not called for, as it would seem inconsistent with the antisubordination goals underlying the FHA to impose a duty on immigrants to advertise in languages they do not know.¹⁹⁶

Next, courts should consider whether the plaintiff can read or speak a language other than Chinese. If the plaintiff can in fact read Chinese and understands the advertisement, the harm from reading it might seem insignificant at first glance. But such a reader could argue that the exclusive use of Chinese-language housing advertisements denied her the ability to live in an integrated community.¹⁹⁷ If the plaintiff cannot understand Chinese, that would tip the scale in favor of liability, assuming that the plaintiff interpreted the advertisement as a signal that he or she is unwelcome in the community. Proponents of a "colorblind" approach to antidiscrimination law might object that the identities

¹⁹⁴ See, for example, *Gautreaux*, 425 US at 288 (citing evidence that "the public housing system [in Chicago] was racially segregated, with four overwhelmingly white projects located in white neighborhoods and with 99½% of the remaining family units located in Negro neighborhoods").

¹⁹⁵ Title VII case law also considers the parties' identities. Under the *McDonnell Douglas* burden-shifting framework, a plaintiff in an employment discrimination suit must first establish "that he belongs to a racial minority." *McDonnell Douglas Corp v Green*, 411 US 792, 802 (1973).

¹⁹⁶ See *EEOC v Consolidated Service Systems*, 989 F2d 233, 237–38 (7th Cir 1993) (suggesting that imposing additional burdens on minority businesses may run counter to Title VII's goal of increasing economic opportunity to minorities).

¹⁹⁷ See *Trafficante*, 409 US at 212 (holding that white residents had standing to sue their landlord for depriving them of the opportunity to live in a racially integrated community).

of the parties should be irrelevant, but this information is crucial for judges to calculate damage awards if liability is ultimately established.¹⁹⁸

3. Content of the advertisement itself.

Having defined the relevant community and considered the language capabilities and identities of the parties, courts should then consider the content of the advertisement or advertisements in question. As discussed in Part II.C.3, § 3604(c) liability is unlikely to arise from a single advertisement, at least in the context of human models.¹⁹⁹ By contrast, a plaintiff may have a stronger claim when an advertisement is viewed alongside a series of advertisements.²⁰⁰ The inquiry then becomes whether a minority-language advertising campaign conveys a discriminatory preference to an ordinary reader.

Courts should not rush to the conclusion that an ordinary reader is a monolingual English speaker.²⁰¹ Rather, an ordinary reader is a person who lives *in the relevant community*.²⁰² Such a reader might only read Chinese, but she might also read Spanish, English, or some other language, depending on how the community is defined. Complicating matters further, there is significant variation within the broader Chinese community. Mandarin Chinese speakers are more likely to read simplified Chinese, while Taiwanese and Cantonese speakers are more likely to read traditional Chinese characters.²⁰³

Admittedly, it is cold comfort that non-Chinese readers do not know what they are missing if they encounter a Chinese housing advertisement and cannot understand it. Facebook recently found itself in hot water when ProPublica revealed that the social networking site allows housing advertisers to target their ads by

¹⁹⁸ Notable advocates of colorblindness in antidiscrimination law include Alexander M. Bickel, *The Morality of Consent* 133 (Yale 1975) (condemning the use of racial quotas “in a society desperately striving for an equality that will make race irrelevant”) and William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 Yale L J 995, 1000, 1003–05 (1984) (arguing against the use of racial preferences to correct imbalances).

¹⁹⁹ See, for example, *Housing Opportunities Made Equal*, 943 F2d at 648 (concluding that a single ad featuring a white model, standing alone, would not violate § 3604(c) as a matter of law).

²⁰⁰ See *Ragin*, 923 F2d at 1002.

²⁰¹ My approach contrasts with Forrest, Note, 101 Ky L J at 856 (cited in note 17).

²⁰² On the “ordinary reader” standard, see Part II.A.3.

²⁰³ See Forrest, Note, 101 Ky L J at 856 n 91 (cited in note 17).

race.²⁰⁴ Similarly, the cumulative effect of an absence of advertisements in languages other than Chinese could still convey a message that non-Chinese residents are not welcome. Yet again, the key question for § 3604(c) analysis is whether an *ordinary reader in the relevant community* would interpret the advertising campaign as indicating a discriminatory preference on the basis of race or national origin.

4. Translation costs.

With the rise of Google Translate and other translation software, the costs associated with translating an advertisement are decreasing. Nonetheless, on balance, landlords should bear the costs of translation. Landlords presumably have greater access to economic and social capital than recent immigrants, and thus can more readily provide translations upon request. At the same time, courts should be wary of imposing too high a burden (in terms of liability or increased costs) on minority-language newspapers, such as *The Chicago Chinese Times*.²⁰⁵ The *Ragin* court recognized this danger:

[T]he [New York] Times is fearful that such claims from a multitude of plaintiffs might lead to a large number of staggering, perhaps crushing, damage awards that might over time impair the press's role in society. . . . The potential for large numbers of truly baseless claims for emotional injury [] exists, and there appears to be no ready device, other than wholly speculative judgments as to credibility, to separate the genuine from the baseless.²⁰⁶

The court was careful to note, however, that publishers should not be immunized from liability merely because they might go out of business. Instead, the court emphasized the importance of “assert[ing] judicial control over the size of damage awards for emotional injury in individual cases.”²⁰⁷

²⁰⁴ Julia Angwin and Terry Parris Jr, *Facebook Lets Advertisers Exclude Users by Race* (ProPublica, Oct 28, 2016), archived at <https://perma.cc/7F9H-LWDG>; Julia Angwin, Ariana Tobin, and Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race* (ProPublica, Nov 21, 2017), archived at <https://perma.cc/SPQ5-BANE>.

²⁰⁵ See generally 芝加哥時報 (The Chicago Chinese Times), online at <https://chicagochinesetimes.com> (visited Aug 19, 2019). As of this writing, Google Chrome can translate the text of the webpage, but not the surrounding advertisements.

²⁰⁶ *Ragin*, 923 F2d at 1004–05.

²⁰⁷ *Id.*

Similarly, in *EEOC v Consolidated Service Systems*,²⁰⁸ the Seventh Circuit held that a small business's use of word-of-mouth hiring, which resulted in an overwhelmingly Korean workforce, did not violate Title VII of the Civil Rights Act.²⁰⁹ The company's owner purchased three newspaper advertisements, two in a general circulation newspaper and one in a Korean-language newspaper, but those advertisements resulted in no hires, and the word-of-mouth system was much cheaper.²¹⁰ Judge Richard Posner observed that "[i]t would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring."²¹¹ Moreover, "[t]he fact that [job applicants] are ethnically or racially uniform does not impose upon [a hiring manager] a duty to spend money advertising in the help-wanted columns of the *Chicago Tribune*."²¹² Thus, the foregoing analysis should not impose a duty upon landlords and publishers to create advertisements in every conceivable language.

Instead, courts should interpret § 3604(c) such that publishing an advertisement exclusively in Chinese would not weigh in favor of liability *unless* the landlord or publisher refused to provide a translation upon request *and* had the ability to do so. Recall that there is no Mrs. Murphy exception to § 3604(c),²¹³ so courts should consider a landlord's sophistication or lack thereof before assigning responsibility for translation costs. If a landlord or publisher has the ability to translate an advertisement but is reluctant to accept applications from tenants lacking Chinese-language skills, that would weigh in favor of finding that Chinese-only advertisements violate § 3604(c). This approach balances the FHA's goal of expanding access to housing while permitting landlords and publishers to signal that Chinatown is a Chinese-language community.

B. Network Effects and Language Communities

Although my proposed solution stipulates that Chinese-language advertisements do not necessarily violate the FHA, many such advertisements may nonetheless be subject to

²⁰⁸ 989 F2d 233 (7th Cir 1993).

²⁰⁹ *Id.* at 236.

²¹⁰ *Id.* at 235.

²¹¹ *Id.* at 238.

²¹² *Consolidated Service Systems*, 989 F2d at 237.

²¹³ See 42 USC § 3603(b)(1)–(2). See also note 107 and accompanying text.

§ 3604(c) liability. From an antisubordination perspective, this result seems troubling, in that it exacerbates rather than combats the subordinate position of a disadvantaged group—in this case, Chinese immigrants. Thus, it may be time to rethink courts' tendency to interpret the FHA as privileging housing integration at the expense of competing values.

Ethnic enclaves generate network effects by attracting a critical mass of minority-language speakers and readers to a community. Yet overzealous “colorblind” enforcement of § 3604(c) against minority-language advertisements would negate these effects and run counter to the antisubordination promise of the FHA. To the extent that the text of the FHA conflicts with this interpretation, I urge policymakers to consider amending § 3604(c) to make clear that minority-language housing advertisements do not violate the FHA absent evidence of discriminatory intent. In other words, the creators of such advertisements should not be liable unless extrinsic evidence suggests that they intended to discriminate against prospective residents who cannot understand their language. Even without amending the FHA, this interpretation is consistent with § 3604(c)'s prohibition on making, printing, or publishing advertisements with “an intention to make [a discriminatory] preference, limitation, or discrimination.”²¹⁴

1. The benefits of residential homogeneity.

Proponents of critical legal studies and critical race theory have cast doubt on the notion that integration always redounds to the benefit of marginalized communities. A significant body of work criticizes the *Brown v Board of Education*²¹⁵ decision for failing to improve the educational outcomes of black students,²¹⁶ and for causing negative externalities, such as lost job opportunities for black teachers.²¹⁷ Admittedly, these concerns were not at the forefront of Congress's discussions when it passed the FHA.²¹⁸ But given what we know today about the costs and limitations of

²¹⁴ 42 USC § 3604(c).

²¹⁵ 347 US 483 (1954).

²¹⁶ See, for example, Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 180–81, 196–98 (Oxford 2004); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 40 (Chicago 2d ed 2008).

²¹⁷ See Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 *J Am Hist* 43, 46–47 (2004).

²¹⁸ See Part I.B.1.

integration to achieve racial justice, courts should avoid rigid applications of the FHA against the very communities it was intended to protect in the first place.²¹⁹

Some forms of residential homogeneity are designed to exclude marginalized groups. Professor Lior Strahilevitz has argued that many residential communities use “exclusionary amenities,” such as golf courses, to achieve racial homogeneity in spite of the FHA.²²⁰ Because playing golf is a close proxy for whiteness, charging a premium to live near a golf course tends to exclude black residents from a community.²²¹ “Exclusionary vibes,” ranging from architectural styles to condominium names, also act as signaling devices for who is welcome in the community.²²² Strahilevitz is careful to note, however, that exclusionary amenities are not inherently bad: “Where a religious, linguistic, or other minority community genuinely requires some measure of critical mass to thrive, it may be appropriate for the state to subsidize the creation of exclusionary amenities or, failing that, at least to remain neutral.”²²³ For example, the deaf community in Laurent, South Dakota, may even generate positive externalities:

There are strong welfarist arguments for such a residential arrangement, given the network effects and economies of scale associated with bringing speakers of [sign] language together in one place. There are sound political representation arguments as well, and Laurent organizers are particularly enticed by the prospect of electing representatives who will be forceful advocates for their interests.²²⁴

Courts and policymakers should consider the benefits of bringing together a community of Chinese-language speakers, not only for network effects and political representation, but also for the inherent benefits of preserving an inclusive space for recent immigrants and Chinese Americans.²²⁵

²¹⁹ But see Elizabeth Anderson, *The Imperative of Integration* 112–17 (Princeton 2010) (arguing in favor of racial integration to rectify injustice and inequality).

²²⁰ See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 Va L Rev 437, 447, 464 (2006).

²²¹ See *id.* at 464–68.

²²² On “exclusionary vibes” in real estate advertising, see Strahilevitz, 104 Mich L Rev at 1850–55 (cited in note 6).

²²³ Strahilevitz, 92 Va L Rev at 498 (cited in note 220).

²²⁴ *Id.* at 497.

²²⁵ See, for example, Ling, *Chinese Chicago* at 218–20 (cited in note 32) (describing Chinatown’s numerous community organizations, businesses, and cultural centers for Chinese immigrants and current residents).

At first blush, an interpretation of the FHA that acknowledges residential homogeneity as desirable in some communities might seem counterintuitive.²²⁶ I am *not* aligning myself with those who say that segregation is entirely voluntary and therefore integration is not a policy priority or a social good.²²⁷ My approach is not intended to give “white ethnic” communities a playbook to discriminate against black or Hispanic communities. Rather, the goal is to challenge judges and policymakers to think beyond the black/white racial dichotomy that framed the debate when the FHA was enacted.²²⁸

2. The perils of “colorblind” enforcement.

An antisubordinationist interpretation of the FHA would also prevent the paradoxical enforcement of § 3604(c) in ways that mandate assimilation (and hasten gentrification) by assuming that native English speakers are the default ordinary reader.²²⁹ If an ordinary reader only reads English, non-English advertisements would be at greater risk of liability, even though such advertisements themselves expand access to housing for non-English speakers. Historically, American jurisprudence has “encode[d] or protect[ed] a default ‘white’ normative perspective, making whites’ interests seem invisible or natural.”²³⁰ Yet Chinese landlords may not be able to speak or write languages other than Chinese. In this sense, housing is distinct from the employment context, in which some jobs reasonably require that an employee can speak English.²³¹ The harms suffered from exclusionary advertisements will almost certainly be greater for

²²⁶ Strahilevitz, 92 Va L Rev at 497–98 (cited in note 220).

²²⁷ See, for example, Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 41–42 (1992).

²²⁸ See note 49 and accompanying text.

²²⁹ For a similar critique of colorblind constitutionalism, see Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 Stan L Rev 1, 56 (1991) (“In [a colorblind] society race would cease to be a matter of substantive interest. The assimilationist ideal holds that sometime in the future the physical features associated with race—skin color, hair texture, facial features—would be socially insignificant.”) (citations omitted).

²³⁰ Camille Gear Rich, *Marginal Whiteness*, 98 Cal L Rev 1497, 1511 (2010).

²³¹ See James Leonard, *Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification*, 72 Mo L Rev 745, 756–58 (2007) (arguing that language, unlike race or gender, is relevant to job performance in most industries). See also *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency* *5 (HUD, Sept 15, 2016), archived at <https://perma.cc/VS3K-RHCE> (“[M]any of the interests asserted by employers that some courts have recognized as non-pretextual under Title VII will be inapplicable with regards to housing.”).

historically disadvantaged groups than for whites, and it seems unjust to impose a de facto duty that landlords who are immigrants themselves must speak and write in English.

Critics may object that my approach will lead to underenforcement of the FHA against Chinese landlords. If Chinese landlords or newspapers are not liable for the exclusive use of Chinese in housing advertisements, the argument would go, it will be harder for individuals and enforcement authorities to detect advertisements that substantively discriminate in violation of § 3604(c). This fear is not unwarranted. For example, some Chinese-language advertisements in San Francisco's Chinatown have indicated prohibited preferences on the basis of sex, marital status, and familial status, including blatantly discriminatory warnings, such as, "if you have children don't bother asking."²³²

Underenforcement of the FHA is unlikely if, as suggested above, plaintiffs can state a claim under § 3604(c) when a landlord refuses to provide a translation but has the means to do so. In that case, the prospect of § 3604(c) liability should deter landlords from putting discriminatory messages in Chinese-language advertisements in the first place. Extrinsic evidence of discriminatory intent to exclude non-Chinese minorities could also bolster a claim that an advertisement indicates a discriminatory preference on the basis of race or national origin.²³³ This difficult balancing act underscores the need for fact-specific, thoughtful application of § 3604(c).

Enforcement agencies also have an important role to play. Simply put, HUD and DOJ should not make civil actions against Chinese landlords and publishers a top priority. Absent evidence of a widespread "pattern or practice" of discrimination against non-Chinese prospective residents,²³⁴ federal, state, and local agencies should concentrate their efforts on blatantly discriminatory notices, statements, and advertisements, particularly those that seek to maintain all-white neighborhoods. HUD has limited resources for secretary-initiated complaints and should focus its efforts accordingly.²³⁵ State and local housing authorities should

²³² Forrest, Note, 101 Ky L J at 861 n 113 (cited in note 17).

²³³ See, for example, *Jancik v Department of Housing and Urban Development*, 44 F3d 553, 556 (7th Cir 1995); *Spann*, 662 F Supp at 546.

²³⁴ See 42 USC § 3614(a).

²³⁵ See 42 USC §§ 3610, 3612. For example, there were only eleven secretary-initiated complaints in 2017, of which just two dealt with race or national origin discrimination. Abedin, et al, *Making Every Neighborhood a Place of Opportunity* at *56 (cited in note 81).

adopt a similar approach.²³⁶ However, because the FHA depends heavily on private attorneys general,²³⁷ the recommendations in this Part have focused on how courts should interpret the law, not which cases the government should bring.

CONCLUSION

This Comment has proposed a novel solution to the uncertain legality of minority-language housing advertisements. Using Chicago's Chinatown as a case study, I argue that such advertisements do not violate the FHA unless a series of factors suggests that they indicate a discriminatory preference. Specifically, courts should consider the demographics of the relevant community, the identities and language abilities of the parties, the content of the advertisement itself, and the cost of translation. Evidence of discriminatory intent should weigh heavily in favor of finding that an advertisement or series of advertisements violates § 3604(c), but courts should otherwise hesitate before imposing liability. This solution flows from an appreciation of the antisubordination goals underlying the FHA, as well as the substantial network effects that minority-language communities generate. My ultimate goal is to balance the benefits of pro-Chinese inclusion against the potential for non-Chinese exclusion from Chinatown. Section 3604(c) is an important tool in the fight against housing discrimination, but courts and enforcement agencies should recognize the limitations of this provision to force integration.

Although this Comment has focused on Chicago's Chinatown, the analysis has obvious applications to other ethnic enclaves. For example, my approach could extend to Chicago's predominantly Hispanic Little Village neighborhood or to Little Saigon in Orange County, California. Further research into the pervasiveness of non-English housing advertisements in these and other neighborhoods is necessary.

This Comment also has implications for antidiscrimination law more broadly. It raises difficult questions surrounding the role of ethnic enclaves in the wake of the FHA and the extent to which advertisements may signal preferences for target audiences. My solution is informed by antisubordination theory, but I

²³⁶ See notes 81–83 and accompanying text.

²³⁷ See note 72.

recognize the value of symmetrical enforcement of antidiscrimination law to further antistatutory goals.²³⁸ This Comment also urges courts to consider the substantial network effects that minority-language communities like Chinatown generate. Going forward, policymakers should consider how best to ensure that ethnic enclaves are not only welfare-enhancing, but also compatible with a pluralist society.²³⁹

²³⁸ See generally Schoenbaum, 2017 Wis L Rev 69 (cited in note 22).

²³⁹ See Cao, 44 Wm & Mary L Rev at 1534 (cited in note 21).