

**Manufactured Home Displacement and its Disparate
Impact on Low-Income Females: A Violation of the Fair
Housing Act in Boise, Idaho?**

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I. Introduction

Boise, Idaho is one of the fastest growing cities in the Northwest United States.¹ Over the last ten years the city has experienced new construction and urban renewal throughout its city limits as a result of its recent growth.² While this growth has provided visible economic stimulus for the city, it has also cast a shadow upon affordable housing opportunities for the city's moderate to low-income residents.³ This rapid growth has created a premium on underdeveloped lands—thus making manufactured home communities⁴ a prime target for developers of commercial and residential properties.⁵ While Boise generally welcomes growth, it has not directly dealt with the negative impacts of this type of redevelopment. Nationally, Boise is not alone in facing this type of dilemma and the federal government has not responded to the needs created by manufactured home displacement.⁶

Legal articles are often written to identify and discuss problems in the law, and are generally written on topics beyond the general public's interest. But, manufactured home displacement is more than just a legal issue—it is a human problem involving socio-cultural issues and community dynamics. Therefore, this article is written for an audience of both legal practitioners and interested persons alike. Violations of law, ineffective laws, or laws with discriminatory effects are all issues that cross the line from purely legal concern to human interest. These issues deserve public recognition. Thus, the underlying goal

¹ Dennis Cauchon, *No End in Sight for Idaho's Growth*, USA TODAY, Sept. 26, 2007, http://www.usatoday.com/news/nation/2007-09-26-Idaho_N.htm.

² Kate Brusse, *Displaced Residents Get Help from Owner*, IDAHO STATESMAN, Mar. 8, 2007.

³ *Id.*

⁴ Factory-built housing has changed much in the last one hundred years. The first factory-built homes made in the 1920s were referred to as trailers. Toward the 1950s as prefabricated homes gained popularity, this housing was more often referred to as mobile homes and mobile home parks. COLL. OF SOC. SCI. & PUB. AFF., BOISE STATE UNIV., MOBILE HOME LIVING IN BOISE: ITS UNCERTAIN FUTURE AND ALARMING DECLINE 13-18 (2007), available at http://www.boisestate.edu/history/cityhistorian/essays_city/essays_pdf/MobileHomes_Boise.pdf [hereinafter MOBILE HOME LIVING IN BOISE]. More recently there has been a push to refer to all prefabricated and modular type housing as manufactured homes, as the term is seen to be more socially conscientious.

⁵ *Id.*

⁶ See *infra* Part IV.

of this article is to challenge and provoke—to raise awareness about involuntary manufactured home displacement, and ultimately to make readers question the legitimacy of “fair housing” laws in their status quo operation.

Current federal and state laws are failing manufactured homeowners who face the hardships of displacement. Title VIII of the Civil Rights Act of 1968, otherwise known as the Fair Housing Act (FHA), was enacted to prohibit discrimination in housing markets.⁷ But, the United States Department of Housing and Urban Development (HUD), which administers the FHA, has failed to administrate fair housing policies as required by the FHA.⁸ In essence, the federal government’s failure to acknowledge manufactured home displacement as a fair housing issue should be viewed as a violation of its own codified policy: to promote fair housing throughout the United States. The FHA, which has been used to successfully contest housing discrimination in other contexts,⁹ should also be used to challenge the discriminatory displacement of minorities through manufactured home displacement.

In order for a discriminatory act involving fair housing to occur, a discriminatory housing practice must negatively affect a protected class of individuals.¹⁰ Under the FHA, sex, race, religion, and familial status have all been identified as protected classes.¹¹ Thus, where a discriminatory housing practice can be identified

⁷ 42 U.S.C. § 3601 (2006).

⁸ NAT’L COMM’N ON FAIR HOUS. AND EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING*: (2008) <http://www.civilrights.org/publications/reports/fairhousing/summary.html> [hereinafter NAT’L COMM’N REPORT].

⁹ Edward Imperatore, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1039-40 (2008).

¹⁰ *See generally* 42 U.S.C. § 3601 (2006). The majority of case law under the FHA involves racial discrimination; however, the same analytic paradigm is applied to any of the FHA’s protected classes. Additionally, as to be discussed further, circuits vary in their approaches to the prima facie claim and the required elements claimants must demonstrate under the FHA. Imperatore, *supra* note 9.

¹¹ 42 U.S.C. §§ 3604-3607.

and linked to a protected class, FHA should respond to remedy violations.¹² But, this administrative function remains unpracticed.¹³

Boise and its surrounding communities have seen the displacement of approximately 1,300 households, and, at least, 2,600 residents.¹⁴ The complexity of this problem arises from the fact that many manufactured homeowners wear two hats: Homeowner and tenant. As homeowners, these individuals own their manufactured homes, but often rent the lots on which their homes sit. Manufactured homeowners, as homeowners should be protected in their right to fair housing. But because many manufactured homeowners are also tenants, they are subject to the will of private landlords who have the right to maintain or sell their property as they desire. It is the manufactured homeowner's tenant status that ultimately gets trampled. The federal government's failure to protect a manufactured homeowner's right as a tenant leaves the manufactured homeowner exposed to unfair and discriminatory practices by private landlords of manufactured home communities. HUD's failure to recognize these issues surrounding manufactured homeowner displacement, and its failure to provide remedies to this population, is a violation of its own policy, codified within the FHA.

Case law over the last forty years has employed the disparate impact prima facie analysis in order to identify discriminatory acts or practices with discriminatory effects. Evidence of a disparate, and therefore discriminatory, effect is a violation of the FHA that HUD should be required to respond to and remedy. Although there is no case law directly attacking HUD for its failure to enforce the FHA in the manufactured housing arena, HUD's inaction and failure to remedy manufactured housing displacement is vulnerable to attack.

¹² Imperatore, *supra* note 9. As to be further discussed, the majority of Circuits generally have held that discriminatory effects can be deemed to be violative of the FHA.

¹³ See NAT'L COMM'N REPORT, *supra* note 8.

¹⁴ MOBILE HOME LIVING IN BOISE, *supra* note 4, at 1 (demonstrating that in order to prove discriminatory effects under a disparate impact analysis requires the use of statistical evidence. This comment employs the statistics provided from Boise State University, as these statistics currently are the only available census for the Boise area population. The validity of the disparate and discriminatory effects claim thus would rely on the validity of Boise State University's statistics.).

In Boise, because the majority of displaced residents are female,¹⁵ and because the FHA provides a class protection for sex, it is plausible to assert that these women could bring a class claim underneath the FHA and against HUD itself. Additionally, disparate impact, a theory used to demonstrate the marginalization of groups including female populations in the workplace, could also be utilized to make the claim.¹⁶ Statistical evidence of female manufactured homeowners in Boise supports a class action claim.¹⁷ Although the focus of this article is primarily on female displacement, it is important to recognize that other protected classes, such as race, could be used to demonstrate the disparate impact occurring both in Boise and across the country.¹⁸

In the alternative, the Boise claimants could also attack HUD, Ada County, and Boise because they are recipients of Community Development Block Grants, and have failed to affirmatively further fair housing. Similar to disparate impact analysis, a discriminatory effects claim against HUD for its failure to affirmatively further fair housing within the manufactured homes

¹⁵ *Id.* at 1.

¹⁶ See Roberta Achtenberg, *Applicability of Disparate Impact Analysis to Fair Housing Cases*, NATIONAL FAIR HOUSING ADVOCATE ONLINE (Dec. 17, 1993), http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_hudguid7 (reporting that the U.S. Department of Housing and Urban Development authorizes the use of disparate impact analysis in Fair Housing Act claims).

¹⁷ See MOBILE HOME LIVING IN BOISE *supra* note 4, at 1.

¹⁸ See *Human Resources Guide to the Internet, EEO: Disparate Impact*, HR-GUIDE.COM (2001) <http://www.hr-guide.com/data/G702.htm> (showing the potential for race as a viable class claim in Boise, but at this point in time because of the limited available statistical data used in this comment, race is the weaker claim. The success of disparate impact claims rest on accurate statistical evidence demonstrating a strong majority of affected persons. Even where a large percentage of the manufactured home park population in Boise and its surrounding communities is Latina, the lack of statistical evidence demonstrating the raw numbers of Latinas affected by manufactured housing displacement would prevent the successful viability of a race-based claim.); see also MOBILE HOME LIVING IN BOISE, *supra* note 4, at 35 (providing statistical data from Boise State University's (BSU's) study. The source of this comment's statistical data, provided: "One of the surveys limitations may be the difficulty of obtaining accurate statistics on ethnicity and race. Eighty-two percent of our respondents checked the box labeled Caucasian. Hispanics, however, were conspicuous by their absence from our survey data." BSU's study also acknowledged that the lack of Latina response to their survey was consistent with recent research on undocumented Mexican workers in southern Idaho, as well as the general historical tendencies of this population to be underreported in census tallies and other official surveys.).

communities has never been made. Regardless, extending the requirement to affirmatively further fair housing in the manufactured housing realm is a plausible and an easy analogy to make.

This claim—manufactured home displacement as a violation of the FHA—is not only important: it is necessary. This type of claim extends beyond a single individual to an entire class of people, and it is also a claim that can change the administration of laws toward a national benefit. The United States Constitution, the Bill of Rights, and other federal law, such as the FHA, provide for the protection of citizens' civil liberties. But the federal government is not infallible, and minorities are those who most often suffer violations of their rights and liberties. With total equality of all citizens remaining a lofty ideal,¹⁹ it is imperative that violations of minorities' civil liberties be brought to the forefront. The more violations that can be remedied, the closer our society moves toward its ultimate ideal. It is imperative that our society recognize that civil liberties violations affect not only individuals, but sprawl to encompass entire classes or populations. As more violations are corrected, inevitably our society will take a step closer to equality.

Finally, this type of claim is imperative because it can force adjustments of both administration of laws, as well as proving the illegitimacy of laws themselves. To remedy this violation, HUD needs to adjust its administration and execution of the policies of the FHA. Also, the State of Idaho must take a closer look at laws directly affecting manufactured home populations, and take a serious step toward the implementation of remedies. Although governmental immunity prevents a fair housing violation from being asserted against the state, the State of Idaho is in violation of the FHA in that its specific laws in operation create a disparate impact and thus, a discriminatory effect on Boise's female manufactured homeowners.

This article begins with a discussion of the recent history behind manufactured home displacement in Boise, demonstrating how recent urban growth has displaced at least 1,300 residences

¹⁹ *C.f.* Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103, 106 (1994).

in the area.²⁰ Next, the article discusses the various legal frameworks under which the manufactured housing displacement claim might be made—considering the Constitutional framework, several other federal frameworks, and the state of Idaho’s current laws that affect the manufactured housing community. The article continues by examining the separate violations of the FHA committed by HUD and the state. Finally, this article discusses various remedies as proposed by the state of Idaho’s legislative community in terms of two unique and creative claims: the first being the disparate impact / discriminatory effects claim, and the second being the violation of the FHA’s affirmatively furthering fair housing requirement.

II. The History of Manufactured Home Displacement in Boise, Idaho

The Little House, a classic children’s storybook written by Virginia Lee Burton, tells the story of a charming, personified farmhouse that faces the effects of industrialization and urban sprawl.²¹ In her story, Burton tells how over time the little house, once far out in the country, is eclipsed by the growth of a city and is eventually abandoned, slowly falling into disrepair.²² Children’s storybooks are designed to tell a story while passing along a message—however, the hard reality behind children’s storybooks is that they are often based upon real hardships. Even more unfortunate, is that the victims in these day-to-day hardships are not personified little country houses; instead, they are real human victims.

In this article the victims of urban redevelopment are manufactured homeowners who, like the little country house, are being forced out by big-box stores and modern housing developments. And unlike the little house, which is ultimately recovered and moved to a new spot in the countryside, most of these manufactured homeowners have no place to go.

²⁰ See MOBILE HOME LIVING IN BOISE, *supra* note 4, at 1.

²¹ See VIRGINIA LEE BURTON, *THE LITTLE HOUSE* (Houghton Mifflin Co. 2002) (1942).

²² *Id.*

In the last ten years, the *Little House* stories of manufactured homeowners have become all too common in Boise, Idaho.²³ During Boise's real estate boom, which peaked from 2002-2006, "vacant land became scarce, and developers looked for property for infill projects. Mobile home parks came under economic development pressure from builders of homes and commercial enterprises."²⁴ In Boise, manufactured home communities' account for some of the largest underdeveloped urban land areas,²⁵ making manufactured home communities prime real estate, to be purchased, bulldozed, and re-developed.

In a report conducted by Boise State University, researchers determined that from 2001 to 2007 an estimated 1,300 manufactured households were evicted from manufactured home communities in Boise and the surrounding communities.²⁶ The most current figures provide that approximately 5,400 individuals live in 2,700 manufactured houses within 50 manufactured home communities.²⁷ And in 2007, local housing advocates estimated that at least 16 manufactured home communities, including at least 500 housing units, were in danger of being sold and redeveloped within the Boise area.²⁸ In addition, Boise officials estimate that it has been at least twenty years since the development of a new manufactured home park within city limits.²⁹ Manufactured home displacement can be reduced to a simple supply and demand calculation—when a manufactured home park closes and no new communities open, there is reduced availability of manufactured home communities and lots on which displaced owners can relocate their homes.

²³ Brusse, *supra* note 2 (reporting from The Idaho Statesman in March of 2007, the growing trend of the conversion of manufactured home communities into subdivisions, big-box stores, and other modern developments).

²⁴ Brusse, *supra* note 2.

²⁵ Kathleen Kreller, *Governor's Commission Eyes Solutions*, IDAHO STATESMAN, Aug. 17, 2007, at Main 1.

²⁶ See MOBILE HOME LIVING IN BOISE, *supra* note 4, at 1; See also Kathleen Kreller, *Mobile Home Park Residents Discuss Their Plight at Meeting*, IDAHO STATESMAN, May 23, 2008, at Local 2.2

²⁷ MOBILE HOME LIVING IN BOISE, *supra* note 4, at 1.

²⁸ Kreller, *supra* note 25; *Mobile Home Park Residents Discuss Their Plight at Meeting*, IDAHO STATESMAN, May 23, 2008, at Local 2.

²⁹ *Id.*

Not only is the overall reduction in available manufactured home communities a limiting factor for displaced residents, the costs associated with the move can be debilitating for manufactured home owners. Of the Boise area's 5,400 manufactured home residents, "[h]alf are seniors with a median annual income of \$20,000. The majority are female. And nearly half have a chronic medical condition."³⁰ Ultimately, manufactured home park displacement is an affordable housing issue because people, once displaced from their manufactured home communities, cannot afford to relocate their manufactured homes, nor can they afford alternative, more traditional, housing.³¹

Since 2000, the *Idaho Statesman* has documented manufactured home displacement and its reporters have spotlighted many owners who have faced the cost of relocation.³² In general, relocation and re-establishment cost to these owners ranged from \$5,000 to \$10,000, depending on the age of the home and distance between locations.³³ As one manufactured home park resident facing displacement put it, "[w]e cannot stay, and we cannot leave because—it's humiliating to say, but—we're just not able to do what we need to do to get out of here."³⁴

Furthermore, The Idaho Mobile Home Rehabilitation Act requires manufactured homes constructed before June 15, 1976 to be tested and repaired before they are relocated.³⁵ Even where a manufactured home owner has found an available lot for

³⁰ MOBILE HOME LIVING IN BOISE, *supra* note 4, at 1.

³¹ Kathleen Kreller, *Boise Growth Pushing Mobile Homes Out*, IDAHO STATESMAN, Mar. 2, 2008, at Local 1 (reporting:

That mobile homes are vital to the city's stock of low-income housing is evident by the income level of survey respondents. Sixty-one percent reported a "fixed income." In a city with a 2007 median household income of \$58,500, the survey respondents' median was \$20,000. Twenty-five percent of respondents indicated an annual income between \$0 and \$10,800. The next 25 percent had annual incomes between \$11,000 and \$20,000. Another quarter of the respondents reported an income between \$20,000 and \$30,000. MOBILE HOME LIVING IN BOISE, *supra* note 4, at 37.

³² Liz Wyatt, *Group Will Advocate for Factory Homes*, IDAHO STATESMAN, Jan. 30, 2000, at Local 1B, 5B.

³³ Kate Brusse, *Residents of Garden City Mobile Home Park Evicted*, IDAHO STATESMAN, Aug. 15, 2006, at Main 1.

³⁴ *Id.*

³⁵ IDAPA 07.03.13.011.

relocation, her home may not meet the standards required by the Act and she will be prevented from moving unless she can afford to pay for inspections and all necessary repairs.³⁶ Moreover, if the manufactured home is moved to a site other than an existing manufactured home community, even more stringent requirements must be met.³⁷ Thus, where an owner cannot afford the cost of inspection or repairs, she will be forced to abandon her home and find an alternative type of housing.³⁸

However, alternative forms of housing may prove too costly for displaced residents, leaving many displaced homeowners homeless because they are unable to find affordable land on which to re-locate their manufactured home.³⁹ Experts calculate the average cost of an apartment in Boise is \$737 per month, whereas renting a space in a manufactured home community averages between \$350 to \$400—potentially fifty percent less per month.⁴⁰ Although this price estimate does not include the cost of purchasing the manufactured home, used manufactured homes can be purchased for a few thousand dollars.⁴¹ More relevant, however, is that the majority (370 of 531) of Boise’s manufactured homeowners own their manufactured homes outright.⁴² Historically, manufactured homeownership has been an affordable housing option for Boise area residents. But as more and more communities are closed for redevelopment and residents are forced to deal with the costs of displacement, manufactured homeownership can no longer be viewed as an affordable housing solution.

³⁶ *See, e.g., id.*

³⁷ *See id.* These restrictions are set forth in § 67-6509A(4)(a)-(f) of the Idaho Code.

³⁸ Brusse, *supra* note 33 (explaining that abandoning a manufactured home is not necessarily cost-free; sometimes manufactured home communities will charge residents who abandon their homes a percentage of the demolition fee; *see also* Kathleen Kreller, LAWMAKERS WANT TO PROTECT MOBILE Home owners from Displacement, IDAHO STATESMAN, Jan. 19, 2009 at Local 1 (providing the estimated total cost for demolition of a manufactured home is around \$1500.); *see also* STEPHANIE LEWIS, ENVIRONMENTAL REVIEW COMMISSION, MOBILE HOME RECYCLING 10 (2006), <http://www.ncleg.net/documentsites/committees/ERC/2006-2007%20ERC%20Documents/1%20Meeting%20Documents/13%20December%202006/Presentations/Stephanie%20Lewis%20-%20Brunswick%20Co%20ACE.pdf>.

³⁹ Kreller, *supra* note 31, at Local 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² MOBILE HOME LIVING IN BOISE, *supra* note 4, at 38.

Although there are federal housing assistance programs, local housing experts estimate that “only around one-quarter of the people who say they need help with housing costs actually get assistance.”⁴³ In order to qualify for housing assistance programs, like the subsidized housing voucher program, Boise residents must not make more than \$9.90 an hour.⁴⁴ But as one housing expert explained, “a person making less than \$13 an hour could hardly afford an average rent for a two-bedroom apartment.”⁴⁵ Thus, a majority of displaced residents are simply left without any federal remedies and are forced to pay costs for housing they can barely afford.

When a manufactured home park closes, a resident has a finite number of options, each of which involve costly expenses: either the owner will be forced to cover the expense of relocation, or if she cannot afford the relocation or cannot find a new park to relocate to, she will be forced to abandon her home. Boise is, in essence, obliterating manufactured homes as an affordable housing option by not having laws protecting against manufactured homeowner displacement while simultaneously contributing to the growth of an economically impoverished class of residents.

III. Potential Legal Frameworks

A. Non-Existence of Constitutional Remedies

Currently under federal law the FHA, which is regulated by HUD, is the only proscribed remedy for individuals suffering from discriminatory housing practices. States do have the ability to provide separate remedies, and many states have begun to do so. But for states such as Idaho, displaced manufactured homeowners remain without remedy. It seems that such a basic need, i.e. protection from involuntary homelessness, would be protected not only by state governments, but also by the federal government. However, even the United States Constitution cannot be interpreted to protect citizens from the discriminatory effects of their own state government’s housing practices.

⁴³ Kreller, *supra* note 31, at Local 1.

⁴⁴ *Id.*

⁴⁵ *Id.*

Under the Fourteenth Amendment substantive rights due process analysis, the federal government can only prevent a state from infringing on its citizens' fundamental rights. Astonishingly, the United States Supreme Court does not consider housing to be a fundamental interest.⁴⁶ In *Lindsey v. Normet*, the Court recognized the importance of "decent, safe, and sanitary housing," but found:

[T]he Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.⁴⁷

Moreover, the Court proved unwilling to extend a strict-scrutiny standard to interests that do not involve a fundamental right under the Equal Protection Clause, or as the Court in *Lindsey* suggested by "constitutional mandate."⁴⁸ Thus, citizens faced with state laws that have discriminatory effects are left to fight against a rational basis standard, where the state government would simply have to prove a legitimate reason or basis for the law.⁴⁹ The rational basis standard of review is very pro-government, usually leaving claimants without remedy.

⁴⁶ CHESTER JAMES ANTINEAU & WILLIAM J. RICH, 2 MODERN CONSTITUTIONAL LAW: THE STATES AND THE FEDERAL GOVERNMENT 6-7 (2d ed. 1997).

⁴⁷ *Lindsey v. Normet*, 405 U.S. 56, 74 (1970).

⁴⁸ *Id.* at 74 (holding that under the strict scrutiny standard, a law would be presumed invalid unless the state could prove that infringement of a citizen's right was necessary in order to further a legitimate government objective. See ANTINEAU & RICH, *supra* note 46 at 7.

⁴⁹ *Lindsey v. Normet*, 405 U.S. 56, 74 (1970).

B. Other Federal Frameworks

1. The Fair Housing Act

Forty-one years ago, Congress passed Title VIII of the Civil Rights Act of 1968, more commonly known as The Fair Housing Act.⁵⁰ Today, as amended, this statute prohibits discrimination in public and private housing markets based on race, color, national origin, religion, sex, disability, or familial status.⁵¹ In its declaration of policy, the Act states, “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁵²

After the passage of the FHA, its administration and enforcement was left up to HUD.⁵³ Originally, HUD was created in response to the U.S. Housing Act of 1937, but in 1968, HUD was given the administrative responsibility of enforcing of the FHA.⁵⁴ Today, the Office of Fair Housing and Equal Opportunity (FHEO) oversees the administrative enforcement of the Fair Housing Act and other civil rights legislation.⁵⁵ In addition, the FHEO oversees the Fair Housing Administrative Program (FHAP) to administer the award of Fair Housing Initiative Program grants, and works with private industry, fair housing, and community advocates to promote voluntary fair housing compliance.⁵⁶

It is the FHA which informs the enforcement and administration of the both FHEO and FHAP.⁵⁷ Typically, the federal administrative and enforcement process begins when an individual files a complaint with the FHEO or with a state or local governmental branch of FHAP.⁵⁸ Complainants are referred by private, nonprofit fair housing organizations that work to push

⁵⁰ 42 U.S.C. § 3601 (2006); *see also* HOMES AND COMMUNITIES, U.S. Dept. of Housing and Urban Dev., Fair Housing Laws and Presidential Executive Orders, <http://www.hud.gov/offices/fheo/FHLaws/index.cfm> (last visited Nov. 15, 2010).

⁵¹ 42 U.S.C. § 3601, 3604-3606 (2006); *see also* NAT’L COMM’N REPORT, *supra* note 8.

⁵² 42 U.S.C. § 3601 (2006).

⁵³ HUD.Gov, HUD History, *available at*

<http://portal.hud.gov/portal/page/portal/HUD/about/hudhistory>.

⁵⁴ *Id.*

⁵⁵ HOMES AND COMMUNITIES, U.S. Dept. of Housing and Urban Dev., About FHEO, <http://www.hud.gov/offices/fheo/aboutfheo/aboutfheo.cfm> (last visited Nov. 19, 2009).

⁵⁶ *Id.*

⁵⁷ *See* 42 U.S.C. § 3601 *et. seq.* (2006).

⁵⁸ NAT’L COMM’N REPORT, *supra* note 8.

claims towards the FHAP, and ultimately to HUD. Not only can claims be brought individually to a HUD agency, but the FHA also authorizes HUD's Administrative Secretary to actively promote fair housing.⁵⁹ The FHA "requires communities and the federal government to proactively further fair housing, residential integration, and equal opportunity goals,"⁶⁰ and has in place a system to handle the receipt of such claims in the United States. The federal government and HUD in particular, has failed to implement the FHA. Fair housing for every citizen across the board continues to remain an unfulfilled federal objective.⁶¹

If a claimant is lucky enough to get HUD to recognize their claim, in order to prevail under the FHA, a claimant must show "unequal treatment" on the basis of one of the protected classes: race, color, national origin, religion, sex, disability, or familial status.⁶² "Unequal treatment" can be established by showing intentional discrimination or discriminatory effect.⁶³ Some of the strongest FHA claims are the intentional discrimination cases where, "the plaintiff has the burden of showing that the defendant acted intentionally, or was improperly motivated in its decision to discriminate against persons protected by the FHA."⁶⁴ These cases are typically the strongest because intentional discrimination claims are usually brought where there is clear evidence of purposeful discrimination.

However, the majority of the appellate circuits hold that a violation of the FHA can be established with evidence of a discriminatory effect alone.⁶⁵ The majority view supports prima facie disparate impact claims, evidencing a disparate impact upon

⁵⁹ HOMES AND COMMUNITIES, *U.S. Dept. of Housing and Urban Dev., Promoting Fair Housing*, (Jan. 28, 2008) <http://www.hud.gov/offices/fheo/promotingfh.cfm>.

⁶⁰ NAT'L COMM'N REPORT, *supra* note 8.

⁶¹ NAT'L COMM'N REPORT, *supra* note 8. *See also infra* Part IV: The Violations.

⁶² *See e.g.*, *Reese v. Dade Cnty*, 2009 WL 3762994, at *10 (S.D. Fla. Nov. 10, 2009) (utilizing the disparate impact prima facie framework in order to identify discriminatory practices. Although *Reese* is a district court opinion, it employs the majority of appellate courts' rational.).

⁶³ The majority of claims brought under the FHA are brought on the basis of race, however the analysis for any claim brought by one of the protected classes would remain the same: *See, e.g.*, *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182 (9th Cir. 2006); *Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005).

⁶⁴ *Reese*, 2009 WL 3762994 at *10 (discussing *Bonasera v. City of Norcross*, 2009 WL 2569097 (11th Cir. 2009)).

⁶⁵ *Imperatore*, *supra* note 9 at 1043-45.

a protected class compared to the relevant population as a whole.⁶⁶ “A plaintiff can show discriminatory effect in one of two ways: by showing that the decision has a desegregating effect; or that the decision makes housing options significantly more restricted for members of a protected group than for persons outside that group.”⁶⁷ Even though the majority view allows for a finding of FHA violations without proving discriminatory intent, proving disparate impact claims requires statistical evidence, which can be challenging to collect.⁶⁸

It should also be noted that since the enactment of the FHA, appellate courts have created varying interpretations from jurisdiction to jurisdiction.⁶⁹ As described above, the majority of courts have adopted the “effect-only” standard for establishing a disparate prima facie case, where the plaintiff must demonstrate that the defendant’s actions have a discriminatory effect on minorities.⁷⁰ However, under the “effect-only” standard, courts vary in their application of the burden shifting.

For example, the Third Circuit requires that after the plaintiff has proven the prima facie case for discriminatory effect, the burden shifts to the defendant to show that “no alternative course of action” could be adopted in order to avoid discrimination.⁷¹ The Fourth and Tenth Circuits require the defendant to demonstrate a “business necessity” for the particular discriminatory practice.⁷² The Ninth Circuit has yet to adopt a uniform approach, as the Court of Appeals has not addressed the issue, however, the best

⁶⁶ *See, e.g. id.*

⁶⁷ *Bonasera v. City of Norcross*, 2009 WL 2569097 (11th Cir. 2009) citing *Housing Investors, Inc. v. City of Clanton*, 68 F.Supp.2d 1287, 1298 (M.D. Ala. 1999).

⁶⁸ *See Reese*, 2009 WL 3762994 at *10 (holding that the disparate impact claim in this case ultimately fails because even though the plaintiffs presented compelling statistical evidence, they could not meet their burden of proof in providing an available alternative which would have a less discriminatory impact.).

⁶⁹ *See Imperatore, supra* note 9, at 1040-44.

⁷⁰ *Id.* at 1042.

⁷¹ *Id.* at 1043, (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 127 (3d Cir. 1977)).

⁷² *Id.* (citing *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1254 (10th Cir. 1995) (holding that the defendant must demonstrate a “genuine business need.”); *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 988 (4th Cir. 1984) (utilizing the Title VII employment discrimination disparate-impact case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that the defendant must demonstrate a business necessity for the discriminatory effects against the suspect class).

approach would likely be an “effects-only” approach.⁷³ Regardless of the slight differences between the circuit courts’ various requirements, the ultimate result is the same: where the plaintiff can show a discriminatory effect, even without proof of an invidious purpose, this showing is sufficient for courts to find a FHA violation.⁷⁴

2. Disparate Impact Theory

The disparate impact theory was first seen in employment law and Title VII cases from the 1970s. The Supreme Court first utilized the theory in *Griggs v. Duke Power Co.* where it held that the objective of Title VII was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”⁷⁵ Furthermore, the Court found that even without the finding of discriminatory intent, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”⁷⁶ Stated simply, disparate impact provides that even where an employer has no discriminatory intent, Title VII prohibits discrimination occurring through the application of a facially neutral provision that creates an adverse impact upon members of a protected class.⁷⁷

Over the next twenty years the disparate impact analysis gained greater nation-wide court approval, ultimately leading to the Civil Rights Act of 1991,⁷⁸ which codified the disparate impact analysis and providing a specific framework for establishing the burden of proof in Title VII employment cases.⁷⁹ The first requirement under the codified disparate framework is a showing

⁷³ *Id.* at n.92.

⁷⁴ *Id.* at 1043.

⁷⁵ *Griggs*, 401 U.S.424, 429-30 (1971).

⁷⁶ *Id.* at 430.

⁷⁷ See HR GUIDE TO THE INTERNET: EEO: Disparate Impact (2001), <http://www.hr-guide.com/data/G702.htm>.

⁷⁸ See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

⁷⁹ See, HR GUIDE TO THE INTERNET, *supra* note 77.

that “a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”⁸⁰

In order to prove disparate impact, courts have required plaintiffs to furnish statistical evidence in order to meet the initial requirements within the disparate prima facie framework.⁸¹ For many claimants, this requirement of statistical evidence can be burdensome, if not impossible, to produce thus preventing them from bringing viable claims. But, where the plaintiff has enough evidence to establish disparate impact, the respondent must then “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”⁸² Where the respondent is unable to demonstrate business necessity for the practice, a disparate impact claim will be upheld.⁸³ However, even in cases where the respondent claims a valid business necessity, the complaining party may still prevail by providing proof that “the employer has refused to adopt an alternative employment practice which would satisfy the employer’s legitimate interest without having a disparate impact on a protected class.”⁸⁴ Thus, codification of the disparate impact analysis lent the theory a level of credibility, which ultimately set the stage for use of the theory in the Title VIII Fair Housing realm.

Two years after FHA’s codification of disparate impact,⁸⁵ HUD’s Assistant Secretary for FHEO released a memorandum to its regional directors, which provided that cases brought under the FHA “should now be analyzed using a disparate impact analysis.”⁸⁶ This memorandum came after disparate impact claims had already been utilized for at least twenty years in various

⁸⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

⁸¹ See HR GUIDE TO THE INTERNET, EEO: Disparate Impact (2001), <http://www.hr-guide.com/data/G702.htm>.

⁸² 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

⁸³ See *Id.*

⁸⁴ HR GUIDE TO THE INTERNET *supra* note 77. See also 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

⁸⁵ 42 U.S.C. § 2000e-2(k) (2006).

⁸⁶ *Applicability of Disparate Impact Analysis to Fair Housing Cases*, NATIONAL FAIR HOUSING ADVOCATE ONLINE available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_hudguid7 (Dec. 17, 1993 Memorandum for all Regional Directors, Office of Fair Housing and Equal Opportunity from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity).

contexts—from housing, to education and environmental claims—
—as the disparate impact framework is so easily identified and
applied.⁸⁷ The memorandum described the Secretarial decision,
Secretary v. Mountain Side Manufactured Estates, dated July 19,
1993, which was the first FHEO case where the Secretary
recognized the validity of a prima facie case of disparate impact
established by statistical evidence.⁸⁸

The memorandum required that prima facie disparate impact
evidence should be “buttressed by an analysis of the evidence
supporting the belief that a particular policy, practice, standard or
procedure disadvantages a group or a portion of a group protected
against discrimination.”⁸⁹ The memorandum also provided
examples of legitimate evidence, including: analysis of waiting
lists, applicant flow or occupancy data, and a more general
“analysis of the effect of a policy on potential applicants or the
population at a community in a particular income bracket.”⁹⁰
Additionally, the Secretary “confirmed that a respondent might
rebut a prima facie case by evidence that the policy is justified by a
business necessity which is sufficiently compelling to overcome
the discriminatory effect.”⁹¹ The memorandum concluded by
charging directors to conduct thorough investigations
surrounding “genuine business reasons” for the presented policy.
These “investigation[s] should consider whether there are any less
discriminatory ways in which the respondent’s business
justifications may be addressed.”⁹² The memorandum
acknowledged the importance of addressing less discriminatory
alternatives; however, as last year’s FHEO Commission revealed,
HUD has failed to heed its own advice by attempting to deny
review of any claims based upon disparate impact.

Notwithstanding HUD’s failure to review disparate impact
claims, claimants continue to employ the disparate impact theory
to claim FHA violations, as evidenced by recent case law.⁹³ The

⁸⁷ *Disparate Impact*, CENTER FOR EQUAL OPPORTUNITY (July 16, 2007),
<http://www.ceousa.org/content/view/505/138/>.

⁸⁸ *Applicability of Disparate Impact Analysis to Fair Housing Cases*, *supra* note 86.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See, e.g.*, *Reese v. Miami-Dade County*, No. 01-3766-CIV, 2009 WL 3762994 (S.D.
Fla. Nov. 10, 2009) (presenting statistical evidence for plaintiffs pertaining to the

viability of a disparate impact claim lies in the ability of the claimant to put forth statistics that demonstrate a disparate impact, and having done so, being able to rebut any legitimate policy objectives the defendants may claim by showing the existence of an available alternative that would have a less discriminatory impact.⁹⁴

For example, in the 2009 case *Reese v. Miami-Dade County*, claimants employed the disparate impact theory in an attempt to prevent the demolition of a public housing unit.⁹⁵ Claimants were able to demonstrate that 99% of the public housing unit's residents were African American, and that demolition of the unit would force the residents to relocate.⁹⁶ However, even though claimants were able to clearly present the discriminatory impact upon a protected class—i.e. race— the claimants ultimately lost their claim because they could not rebut Miami-Dade County's claim that the demolition of the unit was necessary to reduce low-income density in order to meet overarching federal statutory goals of poverty de-concentration and development of sustainable mixed income communities.⁹⁷ Additionally, the claimants in *Reese* ultimately were unable to provide an available alternative that would have a less discriminatory impact.⁹⁸

Thus, *Reese* ultimately demonstrates that the disparate impact framework is alive and well, but warns claimant that a simple showing of FHA protected class displacement is not sufficient to make a valid FHA claim. If there is displacement, there must be no legitimate governmental objective behind it, or there must be a less discriminatory means to reach the governmental objective.⁹⁹ In order to bring a valid disparate impact claim, it is not only important to gather the relevant statistics, but also demonstrate alternatives to the current discriminatory actions. This task is

population displaced by the demolition of a housing project, in order to demonstrate a disparate impact on the basis of race); *Charleston Hous. Auth. v. U.S. Dept. of Agric.*, 419 F.3d 729 (8th Cir. 2005) (illustrating an example of the prima facie disparate impact case, where undisputed statistical evidence showed demolition of low income housing complex would have a racially disproportionate impact because the majority of tenants within the housing project were African American).

⁹⁴ See, e.g., *Reese*, 2009 WL 3762994.

⁹⁵ *Id.* at 1.

⁹⁶ *Id.* at 10.

⁹⁷ *Id.* at 11.

⁹⁸ *Id.* at 12.

⁹⁹ *Id.* at 10-12.

formidable, but the burden is on legal minds to attack discriminatory behavior and put forward creative and unique solutions.

C. Problematic Idaho Law

Although the State of Idaho is keenly aware of the failure of its laws, no remedy has been implemented at the present time. Since 1999, manufactured home displacement has received a great deal of attention in Boise's local news. At the peak of the real-estate boom, the Boise community was sensitive to the growing number of manufactured home park closures, so much so that that the crisis caught the attention of then Idaho State Governor Jim Risch. In 2006, Governor Risch signed Executive Order No. 2006-39, which created the Governor's Manufactured Home Park Advisory Committee (MHPA Committee).¹⁰⁰ In the executive order the Governor stated that "[t]he Committee is tasked with working with appropriate State agencies in Idaho ... to make recommendations to the Governor about the State's role in a collaborative effort aimed at helping individuals who live in manufactured homes and are forced to relocate but lack the means to do so."¹⁰¹

In October 2007, the twenty-four-person Committee submitted a report to the Governor providing its recommendations.¹⁰² As the MHPA Committee correctly identified, the primary source of legislative injustice for displaced manufactured owners and park tenants is Idaho's current Mobile Home Park Landlord-Tenant Act, which the Committee identified as "obsolete in terminology and impact."¹⁰³ What the MHPA Committee meant was that the act fails to provide any sort of protection for current manufactured homeowners who are tenants, and it provides absolutely no remedies for owners once they have been displaced.¹⁰⁴ The MHPA Committee stated in its own review of the act: "residents who own a home and rent the

¹⁰⁰ Exec. Order No. 2006-39 (2006), available at http://gov.idaho.gov/mediacenter/execorders/eo06/eo_2006-39.html.

¹⁰¹ *Id.*

¹⁰² GOVERNOR'S MANUFACTURED HOME PARK ADVISORY COMM., REPORT OF THE GOVERNOR'S MANUFACTURED HOME PARK ADVISORY COMM. 7 (2007), *hereinafter* GOVERNOR'S MANUFACTURED HOME PARK ADVISORY COMM. REPORT.

¹⁰³ *Id.* at 9.

¹⁰⁴ See IDAHO CODE ANN. §§ 55-2001 to 2019 (2007).

land are uniquely vulnerable to the closing of a [manufactured] home park.”¹⁰⁵ The only protection, if it even can be deemed such, was afforded to park tenants in 2004 when the law was amended to increase the required notice period for required park closure from 120 days to 180 days.¹⁰⁶ However, this sixty-day increase effectively did nothing but delay the inevitable for most displaced manufactured home owners.

Another state law that the Committee failed to identify or discuss that purportedly should afford dual manufactured home owner and park tenants’ protection is the Idaho Local Land Use Planning Act (LLUPA). The LLUPA’s purpose is “[t]o protect property rights while making accommodations for other necessary types of development such as low-cost housing and mobile home parks.”¹⁰⁷ Furthermore, in the LLUPA’s planning duties for housing, the law requires “plans for the provision of safe, sanitary, and adequate housing, including...the siting of manufactured housing and mobile homes in subdivisions and individual lots.”¹⁰⁸ But with no state remedies in place, or even on the horizon, it is glaringly obvious that the State is ignoring the failures of its laws as manufactured home displacement continues to occur.

IV. Violations

A. HUD’s Own Violation of the Fair Housing Act

In the 40th anniversary year of the Fair Housing Act, the Leadership Conference on Civil Rights Education Fund, the National Fair Housing Alliance, the NAACP Legal Defense and Education Fund, and the Lawyers’ Committee for Civil Rights formed the National Commission on Fair Housing and Equal Opportunity (FHEO Commission) in order to investigate the state of fair housing and to produce a comprehensive report.¹⁰⁹ Over the course of six months, the seven-member commission held hearings in Chicago, Houston, Los Angeles, Boston, and Atlanta, and concluded that

¹⁰⁵ GOVERNOR’S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102, at 7.

¹⁰⁶ 2004 Idaho Sess. Laws Ch. 276 (H.B. 773).

¹⁰⁷ IDAHO CODE ANN. § 67-6502(a) (2006).

¹⁰⁸ *Id.* at 1.

¹⁰⁹ NAT’L COMM’N REPORT, *supra* note 8.

despite strong legislation, past and ongoing discriminatory practices in the nation's housing and lending markets continue to produce levels of residential segregation that result in significant disparities between minority and non-minority households, in access to good jobs, quality education, homeownership attainment and asset accumulation...[M]any...questions whether the federal government is doing all it can to combat housing discrimination. Worse, some fear that rather than combating segregation, HUD and other federal agencies are promoting it through the administration of their housing, lending, and tax programs.¹¹⁰

The Commission reported that even though over four million cases of housing discrimination occur yearly, less than thirty thousand complaints are filed per year and even fewer are actually federally reviewed.¹¹¹ For example, “[i]n 2007, the 10 HUD offices processed 2,440 complaints, the 105 FHAP agencies processed 7,700 inquiries and the 81 private fair housing agencies processed 18,000 complaints.”¹¹² By looking at the number of reported inquires and complaints, it is easy to see that HUD's problem is not the lack of access to agencies where individuals may file claims.¹¹³ Rather, the problem is HUD's minimalist approach to issuing charges of discrimination after its investigations.

¹¹⁰ NAT'L COMM'N REPORT, *supra* note 8. The most common association with the word “segregation” is the black and white binary—the separation between the Caucasian and African races. However, segregation is something that occurs not just on the basis of race, but also on the basis of sex, religion, familial status, disability, and many other classifications not even addressed in protection provisions like the Fair Housing Act. Segregation is maintained and sometimes even amplified through governmental practices and the discriminatory administration of oftentimes facially neutral laws. NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY, *Forty Years After the Passage of the Fair Housing Act, Housing Discrimination and Segregation Continue*, THE FUTURE OF FAIR HOUSING (2008) available at <http://www.civilrights.org/publications/reports/fairhousing/forty-years.html>. It is an unfortunate truth that housing segregation continues today, even where the Fair Housing Act charges the federal government not only with avoiding discrimination, but also with taking proactive steps to advance fair housing.

¹¹¹ NAT'L COMM'N REPORT, *supra* note 8.

¹¹² *Id.*

¹¹³ *Id.* Discrimination claims may be filed either with HUD's Office of Fair Housing and Equal Opportunity (FHEO) or a state or local governmental fair housing enforcement agency (FHAP agency).

Charges of discrimination are only made where HUD “determin[es] that there is reasonable cause to believe that discrimination has occurred.”¹¹⁴ Where thousands of instances of discrimination occur annually, HUD minimizes this by validating only handfuls of cases.¹¹⁵ “In FY [fiscal year] 1995, for example, 125 cases were charged. The number has spiraled downward in recent years, with charges issued in only 69 cases in 2002 and 31 cases in 2007.”¹¹⁶ The administrative enforcement process is intended to provide an impartial investigation within one hundred days and assistance in remedying or resolving the basis for the complaint. However, in order for these efforts to be made, HUD must identify a charge—thus without a HUD identified charge, these cases of discrimination go unnoticed.

During the FHEO Commission’s hearings, commission members found extensive and incontrovertible evidence suggesting problems with HUD’s process and methodologies for FHA enforcement.¹¹⁷ The FHEO Commission identified HUD’s high standard of review as a possible explanation for the low number of claims investigated by HUD.¹¹⁸ Normally, the administrative standard of proof that is required to claim a discriminatory practice under the FHA is “reasonable cause.”¹¹⁹ Reasonable cause “exists when one can conclude based on all relevant evidence, viewed not as an advocate for either complainant or respondent but rather objectively in light of the Act’s prohibitory language and case law that [a] violation may have occurred.”¹²⁰ As the FHEO Commission noted, the purpose of the reasonable cause standard is to “screen out cases that lack

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See NAT’L COMM’N REPORT, *supra* note 8.

¹¹⁸ *Id.*

¹¹⁹ 42 U.S.C. § 3610 (g)(2)(A) (2006).

¹²⁰ HUD Guidance Memo, Reasonable Cause Determinations Under the Fair Housing Act, NATIONAL FAIR HOUSING ADVOCATE ONLINE (June 15, 1999), http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_reasonable_cause_memo.].

evidence of discrimination.”¹²¹ However, the HUD offices and FHAP agencies are requiring proof much weightier than reasonable cause in order to determine that a violation has occurred.

In its report, the FHEO Commission argued that HUD’s standard is even higher than the “preponderance of evidence” standard normally required to establish defendant liability. A preponderance of evidence finding “is the responsibility of the ultimate fact-finder, e.g., the court or administrative law judge, and is subject to the higher standard of review applicable to that forum.”¹²² HUD’s evidentiary threshold to begin investigation of claims should not be set as high as the threshold requirement to prove a violation of FHA.¹²³ “[R]easonable cause in a fair housing case must be established by a lesser degree of evidence than that showing a violation by a preponderance of the evidence.”¹²⁴ HUD, by raising the requirements for the pursuit of investigation is, in essence, turning away cases that should otherwise be investigated.

Not only has HUD taken the “economical and efficient” requirements of the administration of the FHA to an extreme, HUD has failed to take the initiative, as expressly granted by the FHA, to help prevent discriminatory housing practices. The FHA provides that where “any group of persons has been denied any of the rights granted . . . and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.”¹²⁵ Thus, HUD has clear authority to initiate large-scale investigations of discriminatory practices. The FHEO Commission recommended systemic investigations in which HUD could make large scale examinations of agencies and industries for “widespread entrenched discriminatory practices” because systemic

¹²¹ NAT’L COMM’N REPORT, *supra* note 8.

¹²² HUD Guidance Memo, *supra* note 120.

¹²³ HUD Guidance Memo, *supra* note 120; *see also* EEOC v. Chesapeake & Ohio Ry. Co., 577 F.2d 229, 232 (4th Cir. 1978) (noting that reasonable cause determinations are not designed to adjudicate violations of Title VII).

¹²⁴ Reasonable Cause Determinations under the Fair Housing Act, *supra* note 120.

¹²⁵ 42 U.S.C. § 3614(a) (2006).

investigations are useful to uncover “the kinds of discrimination that are not identified by the victims, or where the victims may be unaware of their rights or reluctant to file complaints.”¹²⁶

To supplement systemic investigations, HUD could conduct disparate impact evaluations, and thus establish fair and equal housing not just for individual claimants, but for communities who may not even realize that they are being treated in a matter violative of the law. In 1994, an interagency commission that included HUD, the Offices of Federal Housing Enterprise Oversight (OFHEO), and the Department of Justice (DOJ) issued a policy statement on fair mortgage lending practices, which stated that violations of fair lending laws could now be proved by application of a disparate impact analysis.¹²⁷ Specifically, the policy statement provided for the appropriate usage and framework for analysis under disparate impact theory.

Initially, this multi-agency announcement provided for federal acceptance of the disparate impact theory, however, in 2001 this step was nullified “when a DOJ official announced that the Department would not litigate fair housing cases involving policies or practices that relied on a disparate impact analysis to prove a violation of the Fair Housing Act.”¹²⁸ Not only was the DOJ’s announcement willfully ignorant of the 1994 interagency policy statement, it was made without consideration of the judicial branch’s growing acceptance of disparate impact evidence to prove violations of the FHA. Ultimately, the DOJ’s rejection of claims established on the basis of disparate impact discourages HUD and its investigative entities from processing claims made on the premise of disparate impact. This rejection demonstrates the federal government’s willful ignorance, and violation, of its express duty to enforce the FHA.¹²⁹ The demand must be made of HUD to follow the FHA, and execute and administer the FHA as it is designed to, while embracing other widely accepted theories such as disparate impact.

Even though HUD has the authority to launch systemic investigations, it has only resolved three Secretary-initiated

¹²⁶ NAT’L COMM’N REPORT, *supra* note 8.

¹²⁷ NAT’L COMM’N REPORT, *supra* note 8.

¹²⁸ NAT’L COMM’N REPORT, *supra* note 8.

¹²⁹ *See* 42 U.S.C. §§ 3602, 3610, 3614(a) (2006).

complaints since 2002.¹³⁰ Furthermore, all recent complaints initiated by the FHEO Secretary have been complaints relating to individual cases of discrimination, rather than systemic or group discrimination.¹³¹ In essence, HUD is failing in its mandated role of promoting fair housing.

As the FHEO Commission stated, “HUD has the authority to initiate its own investigations of discriminatory practices, providing a potent tool for large-scale investigation that can lead to sweeping changes.... However there is a consistent pattern of missed opportunities for systemic investigations in HUD enforcement.”¹³² The purpose of HUD’s administrative enforcement process is to provide an impartial investigation process.¹³³ The FHA requires that HUD’s administrative secretary make an investigation of the complaint within one hundred days of receipt of the complaint, unless it is impracticable to do so, in which case the secretary is required to at least notify the complainant of the reasons of its inability to respond within that time frame.¹³⁴

Regardless of the administrative secretary’s opinion regarding the validity of the complaint, the FHA requires that during all investigatory periods, the administrative secretary should attempt to resolve the complaint through conciliation agreements.¹³⁵ But where the secretary finds discriminatory acts, either through establishing reasonable cause or in simply recognizing that prompt judicial action is required, the complainant may elect either a civil action—in which the Attorney General shall commence and maintain an action on behalf of the aggrieved person—or they may elect to an administrative hearing.¹³⁶ The FHA’s express provisions requiring the administrative secretary’s proactive efforts toward the resolution of discriminatory actions makes HUD’s recent omissions suspect. The FHA seems to avoid such requirements, such as conciliation agreements, by simply avoiding the claim through its use of a very strict standard of

¹³⁰ *Id.*; see also NAT’L COMM’N REPORT, *supra* note 8.

¹³¹ *See id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*; See 42 U.S.C. § 3610 (2006).

¹³⁵ NAT’L COMM’N REPORT, *supra* note 8. The conciliation agreement may be informal or done through arbitration. See 42 U.S.C. § 3610 (2006).

¹³⁶ See 42 U.S.C. §§ 3610(e), 3614(a)-(o) (2006).

proof. Ultimately, this standard seems to be a clever ploy to avoid otherwise valid claims of discrimination. HUD should be called upon to revise its practices so that valid claims can be adequately addressed and remedied, as currently required under the FHA.

NAACP v. Secretary of Housing and Urban Development is a landmark case in which the First Circuit Court of Appeals held that HUD's failure to affirmatively further basic policies of the Title VIII Fair Housing Act was subject to judicial review by federal courts.¹³⁷ The circuit held that judicial review of HUD's administrative actions was subject to review under the Administrative Procedure Act (APA) and that where Congress did not expressly intend to prevent judicial interference with HUD's efforts, judicial review is appropriate.¹³⁸

The *NAACP* court found four reasons to support judicial review of HUD's practices. First the action should be subject to judicial review when the right to HUD's assistance to further fair housing is imperative and there is strong reason to believe a plaintiff has been wrongly deprived of HUD's assistance.¹³⁹ Second, where the court can find "adequate standards against which to judge the lawfulness of HUD's conduct," i.e. where the court can find that "HUD's pattern of activity reveals a failure to live up to its obligation" (which is defined statutorily within the FHA) judicial review is appropriate.¹⁴⁰ Third, where judicial review does not threaten "HUD's ability to carry out its basic statutory missions," i.e. that a review of an "abuse of discretion" in most instances will not threaten HUD's effectiveness, those "abuses of discretion" should be subject to review.¹⁴¹ Finally, where alternative remedies are available, HUD's actions should be open to judicial review.¹⁴² The *NAACP* rationale has thus illuminated ways in which claimants can bring an attack against HUD policy. This rationale will be used below to demonstrate the

¹³⁷ *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987).

¹³⁸ *Id.* at 157-159.

¹³⁹ *Id.* at 157-158.

¹⁴⁰ *Id.* at 158.

¹⁴¹ *Id.* at 159.

¹⁴² *Id.*

validity of claims against HUD, and the legality of judicial review of HUD's inaction to promote fair housing in the manufactured housing arena.¹⁴³

B. *The State of Idaho's Violation of the Fair Housing Act*

The State of Idaho's inaction towards remedying the issue of manufactured home displacement is in direct opposition to the policies underlying the FHA. First, the State ignores its own LLUPA laws that provide for the accommodation of manufactured home communities. Second, the State supports its mobile home landlord-tenant laws that provide no protection for manufactured homeowners and park tenants against displacement. Even though these state laws stand in opposition to the federal government's fair housing requirements, Idaho manufactured homeowners are powerless to remedy their situation.

As a rule, a state's control of fair housing practices is separate from federal practices and requirements.¹⁴⁴ "The federal statutes were not intended to preempt local fair housing ordinances, and Title VIII specifically preserves 'any law of a State or political subdivision of a State . . . that grants, guarantees, or protects the same rights as are granted by this title.'"¹⁴⁵ The one benefit to the separation of claims is that a claimant can file under both systems, and likewise does not have to choose between federal or state remedies.¹⁴⁶ However, this benefit is unavailable in Idaho because the laws do not support the promotion of manufactured housing communities' rights, nor do they address manufactured housing communities as a population that should be included in the administration of "fair housing." Furthermore, claimants appearing before the Ninth Circuit Court of Appeals are precluded from leveraging the federal requirements against the state, and

¹⁴³ NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149 (1st Cir. 1987) will also be discussed later to establish the validity of a claim via HUD's inaction to "affirmatively further fair housing" in the manufactured home communities. It is noted that *NAACP* is a First Circuit case; see *infra* Part V.B.1 for a discussion surrounding the Ninth Circuit's possible non-acceptance of the First Circuit's approval of the claimants use of the Administrative Procedure Act to create standing to sue the local government.

¹⁴⁴ ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 30:1 (Thomson Reuters/West 2009) (2001).

¹⁴⁵ *Id.*, citing *Hunter v. Erickson*, 393 U.S. 385, 388 (1969); 42 U.S.C. § 3615 (2006).

¹⁴⁶ *Id.*

the state may invoke governmental immunity against claimed violations of federal law.¹⁴⁷ Governmental immunity thus provides an impenetrable shield of liability, even where the state is clearly in the wrong and its legislature knows of the discrepancy.¹⁴⁸

However, governmental immunity does not change the fact that Idaho law effectively blocks manufactured homeowners and park tenants from a protection the federal government guarantees: fair housing. This argument still needs to be made in order to reinvigorate Idaho's citizens to remedy continuous violations. As it stands, a disparate impact/discriminatory effects claim would be effectively blocked by state immunity. However, as will be discussed in the preceding section, a new door for attack of state practices may have been opened by the recent case *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v Westchester County*. In essence, the First Circuit held that Westchester county, as a recipient of HUD funds, is open to liability where the county fails to use the funds in a manner that aligns with the "affirmatively furthers fair housing" requirement under the FHA. It is important to note that the *Westchester* court and the First Circuit's interpretation of a claimant's standing to sue local state governments is not an interpretation that would be accepted nation-wide. Thus, for example, in the Ninth Circuit, a claimant's standing to sue is likely much narrower.

V. Proposed Remedies

A. *What Idaho Wants to Do About It: Proposed State Remedies*

The Governor of Idaho, through the Manufactured Housing Advisory Committee, made recommendations that fall into three general categories: (1) education and information; (2) public policy and legislation; and (3) funding.¹⁴⁹ Although there has been grave criticism of the Committee's effectiveness because its

¹⁴⁷ See *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182 (9th Cir. 2006) (providing an example of the Ninth Circuit's continued preservation of local government and state immunity against local policies and laws that violate the Fair Housing Act).

¹⁴⁸ See *Id.*

¹⁴⁹ GOVERNOR'S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102.

recommendations have remained unimplemented,¹⁵⁰ the Committee report has not completely lost significance as a copy of the report has been forwarded to Idaho's current governor, Butch Otter.¹⁵¹ Furthermore, Committee recommendations are usually the first place to start when initiating a legislative remedy.

As to the first recommendation, education and information, the MHPA Committee found the manufactured homeowners' general lack of knowledge and information regarding park closure and manufactured home relocation to be the greater problem.¹⁵² "When told their park is closing, residents aren't sure where to begin and owners are not sure how to help their residents. Manufactured homeowners who are tenants in manufactured home communities generally are uneducated as to what their legal rights are, how to access community supportive services, legal assistance, or financial assistance for relocation expenses."¹⁵³ The Committee's recommendation suggested providing one-on-one case management as well as making readily available free access to information about displacement.¹⁵⁴

As to the second recommendation, public policy and legislation, the committee identified two important reasons to modify state policy to encourage maintenance, preservation, and support of manufactured homeowners. First, manufactured homeowners are homeowners and their investment in this form of affordable housing should be protected for the sake of preserving homeownership in the state of Idaho, and secondly, that displaced homeowners increases their reliance on public service programs.¹⁵⁵ The identified remedy for this recommendation lies squarely in the update and revision of the current Mobile Home Park Landlord-Tenant Act.¹⁵⁶ Suggested modifications include:

¹⁵⁰ See Email from Idaho State Representative Phylis King, to Allison Blackman, Associate Editor, Idaho L. Rev. (Sept. 4, 2009, 4:50 PST) (on file with author); see generally MOBILE HOME LIVING IN BOISE, *supra* note 4.

¹⁵¹ A copy of the report was obtained from Governor Butch's Otter's team of assistants; a special thank you to Brian Whitlock, Government Affairs representative, at the Idaho Office of the Governor.

¹⁵² GOVERNOR'S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102, at 8.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ GOVERNOR'S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102, at 14.

requiring park owners to give notice to all residents taking actions to sell the park; allowing the park tenant or any other non-profit organization ninety days to make a matching offer to purchase the property; prohibiting landowners from charging residents for costs for demolishing homes that the owners cannot afford to update or move; and finally the MHPA committee suggested amendment of “the State’s Land Use Planning Act to encourage municipalities and local governments to promote and preserve the developments of [manufactured home communities]”—which is amusing considering that the state’s LLUPA is already written in such a way as to encourage promotion and preservation of manufactured home communities.¹⁵⁷

The final recommendation made by the MHPA committee was funding. As the committee recognized, a “significant portion” of the local manufactured homes are older, pre-1976, and thus the costs associated with removal and relocation are significant.¹⁵⁸ The cost of unit relocation may be prohibitive for reasons that include costs of required rehabilitation, moving expenses, replacement housing, and the financial impact of unit abandonment and disposal. Parks willing to take older units (which are few and far between) often place increased restrictions which create even higher relocation costs. . . . When communities are sold, vital affordable housing resource are lost to the community and fixed income residents are forced into financial hardship, which in turn places a burden on public resources.¹⁵⁹

As a solution, the MHPA committee recommended that communities as a whole should share the burden of relocation and other displacement costs. The Committee sees cost sharing as a method to preserve manufactured homes as an affordable housing option, which is in turn “critical to Idaho’s ongoing economic development.”¹⁶⁰ Furthermore, the MHPA Committee recognized that the closure of manufactured home communities also presents

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 9.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

health and safety issues, especially for the communities containing pre-1976 homes where the costs of rehabilitation can be significant.¹⁶¹ “When owner[s] [or] tenants choose abandonment, remnant structure can become health and safety risks as well as aesthetic impediments to improving the community or park.”¹⁶² Thus, the committee pointed out that where the community has an interest, either through health risks or aesthetic desires, it should help to carry the financial burden of the rehabilitation costs where the homeowner is displaced and risks losing her home if she cannot afford rehabilitation costs.¹⁶³

Finally, under the funding recommendations, the MHPA Committee suggested the restructuring of the Idaho housing trust fund and re-energizing the funds either through surcharges or excise taxes in realty transactions in order to help cover the costs of manufactured home displacement.¹⁶⁴ In addition, the Committee discussed shifting some of the financial burden of displacement back to park owners.¹⁶⁵ In 2006, local officials in Garden City – a small city in the greater Boise metro area which contains many manufactured home parks – provided \$90,000 in federal grants to assist residents displaced from the Coffey manufactured home park, and, in 2007, Boise officials came up with \$100,000 in emergency funds to assist displaced residents from the Thunderbird manufactured home park.¹⁶⁶ Boise local governments are acutely aware of the problems surrounding displacement and have not completely disregarded the issue. However, Boise’s reluctance to move forward with long-term solutions leaves the government with only reactionary measures, and usually the effort is only surmised in the face of disaster coupled with public outcry.

¹⁶¹ *Id.* at 19.

¹⁶² *Id.*

¹⁶³ *See id.* at 15.

¹⁶⁴ *Id.* at 16. “The governor’s commission is looking at a number of long-term solutions, including legislative actions and funding for the Idaho Housing Trust Fund. The trust fund was created in 1992 but has never received state funding. The task force is looking for sources to pay in.” Kreller, *supra* note 31.

¹⁶⁵ GOVERNOR’S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102, at 17.

¹⁶⁶ Kreller, *supra* note 31.

In the 2009 Legislative Session, Representative Phylis King, a democrat from Boise, introduced legislation to revise the Mobile Home Landlord-Tenant Act.¹⁶⁷ However, the bill, which purported to include protection for “park residents from frivolous evictions and unreasonable rent increases and would extend timelines for notifications and eviction,”¹⁶⁸ as King herself put it, “went down in flames!”¹⁶⁹ This early veto has not stopped King, who is currently working on several draft bills for next year’s session, and hopes that presenting bills one issue at a time will at least allow some immediate beneficial changes to be made.¹⁷⁰

B. Creative Class Action Suits

1. Making the Disparate Impact Claim in Boise

As mentioned previously the most difficult part of first asserting a disparate impact claim is compiling relevant statistics. The population of Boise’s female manufactured homeowners is at a disadvantage in making this particular claim, simply because there is no single national, credible source that accurately reflects the relevant statistics for this population. Both the Boise State Research team and the MHPA committee have taken statistical samples; however, no other sources have duplicated this work. Boise State’s statistical sample, like any other statistical data, has the potential for inaccurate findings. Although Boise State’s data and the MHPA Committee’s data provide a report that yields favorably for a finding of discriminatory impact, if this population attempted to make a legal claim it would be in their best interest to obtain more supportive data. In the Boise area, as the issue of manufactured home displacement persists, there needs to be a push for legal practitioners along with sociological experts to collect more information regarding this population’s problem of

¹⁶⁷ See Statesman Staff, *Bill that Would Protect Park Residents Sent to Attorney General for Opinion*, IDAHO STATESMAN, Feb. 20, 2009 at Local 1; see also Email from Idaho State Representative Phylis King to Allison Blackman, Associate Editor, Idaho L. Rev. (Sept. 4, 2009, 4:50 PST), (on file with author).

¹⁶⁸ Statesman Staff, *Bill that Would Protect Park Residents Sent to Attorney General for Opinion*, IDAHO STATESMAN, Feb. 20, 2009 at Local 1.

¹⁶⁹ Email from Idaho State Representative Phylis King to Allison Blackman, Associate Editor, Idaho L. Rev. (Sept. 3, 2009, 10:57 PST), (on file with author).

¹⁷⁰ *Id.*

displacement in order to promote viability of this type of claim. For now the available data, if accurate, suggests there is a disparate and discriminatory effect, which at a minimum provides an incentive for additional research.

Keeping the limits of the current statistical data in mind, a disparate impact and therefore a discriminatory effect assertion claimed by a Boise female manufactured homeowner is supported by the data collected by the Boise State Research team, as well as statewide and local Boise statistics provided by the MHPA Committee.¹⁷¹ The MHPA Committee concluded in its final report that statewide, 45,000 of the 75,000 manufactured homes are “located on leased land and therefore at risk of displacement.” Thus, statewide, sixty-four percent of all manufactured homeowners face some level of risk for displacement.¹⁷² The Governor’s Committee, in an earlier draft of its report estimated that in Boise “[e]ighty-five percent of the manufactured home communities in Boise are threatened by redevelopment.”¹⁷³ Boise State’s subsequent investigation found that “18 out of 50 manufactured home communities with a total of 693 manufacture houses [] were currently in the immediate path of construction and listed for sale.”¹⁷⁴ Thus an additional thirty-six percent of manufactured home communities are currently being threatened— 693 more households in addition to the over 1,300 households that have already been evicted.¹⁷⁵

Based on these statistics, there is no doubt that the entire Boise manufactured home park population is potentially at risk for displacement. Specifically, female manufactured homeowners, as the majority of Boise’s manufactured home park population,¹⁷⁶ face the discriminatory effects of HUD’s faulty administration of the FHA. Sex, as a recognized class under the FHA, allows females

¹⁷¹ See MOBILE HOME LIVING IN BOISE, *supra* note 4 (explaining that BSU’s research team was organized to study the current state of manufactured home living in Boise, Idaho); see also GOVERNOR’S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102, at 7.

¹⁷² GOVERNOR’S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102, at 7.

¹⁷³ The Governor’s Manufacture Home Park Advisory Committee report cites to its own earlier draft.

¹⁷⁴ GOVERNOR’S MANUFACTURED HOME PARK ADVISORY COMM. REPORT, *supra* note 102, at 5.

¹⁷⁵ MOBILE HOME LIVING IN BOISE, *supra* note 4, at 1, 5.

¹⁷⁶ *Id.* at 1.

to bring this claim where a disparate impact to that population can be identified. As previously discussed, females as a class are not the only individuals suffering from discrimination and disparate treatment; undoubtedly, the local Latina population also suffers from similar treatment.¹⁷⁷ However, the female sex as a class has the best statistics, if accurate, to prove the claim; whereas Latinas as a class have not been specifically identified within the manufactured home population statistics in the Boise area.¹⁷⁸ But, invoking the female sex as a class provides a broad, sweeping class covering all races, colors, national origins, religions, familial statuses and disabilities, which would hopefully account for multiple protected classes in one fell swoop.¹⁷⁹

The next step in making a disparate impact/discriminatory effects claim is for the respondent, HUD, to demonstrate that the challenged practice is necessary. Here HUD may claim that its FHA administrative practices are sufficient, and that it is a business necessity for them to operate limitedly, without extending administrative practices to include systemic investigations or resolution of group discrimination or disparate impact cases. However, this excuse is weak, especially in light of the statutory provisions that proscribe HUD the power to utilize systemic investigations and proactively prevent discrimination in all areas of housing. Furthermore, claimants could bring a multitude of alternative practices that HUD could adopt in light of its current discriminatory practices.

Additionally, in *NAACP v. Secretary of Housing and Urban Development* the court held that any of HUD's legitimate agency practices might be reviewed and scrutinized.¹⁸⁰ The court also held that a court may make the decision to "set aside" the agency's

¹⁷⁷ *Id.* at 35.

¹⁷⁸ *Id.* Some may argue that even withstanding the available statistics, race as a class would make for a stronger case, as the majority of case law is based upon race-based discrimination. *See supra* note 18 and accompanying text.

¹⁷⁹ MOBILE HOME LIVING IN BOISE, *supra* note 4, at 35-36 (The Boise State University study indicated that "[o]ne of the survey's most noteworthy finding was the number of manufactured home residents who reported physical disabilities." Of the survey respondents forty-eight percent reported at least one physical disability: half of the respondents with disabilities reported more than one disability, and chronic conditions were the most frequently cited. Persons with disabilities would provide another class that would be able to make a compelling case of disparate impact.).

¹⁸⁰ *N.A.A.C.P. v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987).

practice where “HUD’s practice over time, its *pattern* of behavior, reveals a failure ‘affirmatively...to further’ Title VIII’s fair housing policy.”¹⁸¹ The setting aside of an agency practice would plausibly include HUD’s inaction to promote fair housing in the manufactured housing arena.

The First Circuit has taken a broad approach to granting judicial review of agency action but their approach has not been adopted across the board; instead, most courts require judicial review only when the agency action is deemed to be “arbitrary and capricious.”¹⁸² The majority of circuit courts have found that even without a private right of action under the FHA,¹⁸³ courts may review FHA claims pursuant to the Administrative Procedures Act (APA). The APA gives courts the ability to set aside federal agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”¹⁸⁴ unless a statute precludes review or the agency action is “committed to agency discretion by law.”¹⁸⁵ The Ninth Circuit has not made a decision adopting the broad standard utilized in *NAACP*, namely, looking for a pattern of illegitimate activity. Although the Ninth Circuit has previously reviewed other agency action by applying the “arbitrary and capricious” standard, it has not made a decision involving HUD agency action.¹⁸⁶ Thus, although it is most likely the Ninth Circuit

¹⁸¹ *NAACP*, 817 F.2d at 158. (emphasis in original).

¹⁸² See, e.g., ROBERT SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 21-3 (Thomson Reuters/West 2009) (2001). See also *American Disabled for Attendant Programs Today v. U.S. Dept. of Hous. & Urban Dev.*, 170 F.3d 381, 387-390 (3d Cir. 1999) (holding that HUD action or inaction and subsequent failure to conduct a prompt investigation or take enforcement action upon discovery of noncompliance is not reviewable under the APA because HUD did not have final control over the actions taken; instead the court suggested the plaintiff assert a housing discrimination claim directly against the federal funding recipients) (similar to the claim asserted within *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 2009 WL 4555269 (S.D.N.Y. Feb. 24, 2009) *infra* note 201.).

¹⁸³ 42 U.S.C. § 3608 (2006).

¹⁸⁴ 5 U.S.C. § 706(2)(A) (2006).

¹⁸⁵ 5 U.S.C. § 701(a)(2) (2006).

¹⁸⁶ See, e.g., *Nw. Motorcycle Ass’n v. U.S. Dept. of Agric.*, 18 F.3d 1468 (9th Cir. 1994) (holding that under the arbitrary and capricious standard, the court must consider whether the agency action has a rational connection between facts found and agency decisions made); see also *Sierra Club v. Penfold*, 857 F.2d 1305 (holding to delay a Bureau of Land Management amendment to allow for additional environmental assessments). The Idaho Supreme Court has also followed the APA’s “arbitrary and capricious” standard. See *Haw v. Idaho State Bd. of Med.*, 137 P.3d 438 (Idaho 2006) (holding that Idaho courts must determine whether the agency in question acted within

would employ an “arbitrary and capricious” standard when looking at the legitimacy of HUD’s conduct surrounding manufactured housing displacement. Although, there is still the possibility that the Circuit would accept the First Circuit’s rationale, and look to HUD’s pattern of inactivity in regard to the manufactured housing communities.

Notwithstanding the possibility that the Ninth Circuit may refuse to utilize the rationale of *NAACP*, Boise’s female manufactured homeowners could assert the federal government’s failure to protect this class against displacement, or at least assist them in dealing with the after-effect of displacement, as a pattern of inactivity constituting a violation of the HUD’s duty to promote fair housing. In the alternative, Boise claimants could assert that HUD’s inactivity is “arbitrary and capricious.” Generally, HUD’s failure to recognize manufactured housing as an affordable housing solution, and its failure to provide support and protection to this particular population, is an agency practice that reflects an abuse of HUD’s discretion, which is arbitrary and capricious. Even though naysayers may worry about the effects of judicially reviewing an administrative agency, this particular judicial review would not interfere with HUD’s ability to carry out its basic statutory mission. In fact, this is exactly the type of judicial interference that can spark recognition of the issue, promoting change within the administration.

It is imperative that HUD recognize its failure to address manufactured housing issues like displacement, especially because displacement adds to the growing housing shortage. Finally, remedies for displacement are not impossible. Many states have already begun to apply appropriate remedies.¹⁸⁷ Although “the court faces the difficult task of avoiding both remedies that may be too intrusive ... and those that may prove to be ineffective ... [t]his difficulty is not ... unsolvable.”¹⁸⁸ HUD can directly impact the issue of manufactured housing displacement, as HUD provides funding to states. It may be possible for HUD to base its funding decisions on a state’s recognition and handling of displacement issues. A court could require HUD to develop state

the outer limits of its discretion, consistently with relevant legal standards, and exercised reason).

¹⁸⁷ See *infra* Part V.A. for Idaho’s proposed remedies, based on other state’s successful manufactured housing remedies.

¹⁸⁸ *NAACP*, 817 F.2d at 159.

incentives to better support the manufactured housing communities either through the reinstatement of sold manufactured home communities, or by providing displaced manufactured home residents with the financial support to be able to relocate their home, or find affordable new housing. Truly, this “burden” of administration and recognition of manufactured housing issues is not outside the scope of codified policy the FHA requires of HUD.

a. A Critical Legal Studies Twist: Asking the “Woman Question” and Using Feminist Practical Reasoning

So, what do feminism and manufactured homes have to do with one another? Well, for starters, in Boise, Idaho, manufactured home displacement is a feminist issue because the majority of individuals displaced are women.¹⁸⁹ “[A]t the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied, and that the satisfaction of these needs would require a radical change ... in the social, economic, and political order.”¹⁹⁰ Feminism is therefore a tool that can be used to fight against sex-based discrimination and ultimately remedy the inequality between men and women in all areas of law and society.¹⁹¹

As feminist scholar Katherine Bartlett admonishes, being a feminist requires taking responsibility to push for the transformation of politics to recognize and safeguard different-sexed identities.¹⁹² Feminist scholars, lawyers, and advocates construct arguments for social change the same way other non-feminist scholars, lawyers, and advocates construct arguments—“they identify the essential feature of those facts, they determine what legal principles should guide the resolution of the dispute,

¹⁸⁹ MOBILE HOME LIVING IN BOISE, *supra* note 4 at 32.

¹⁹⁰ Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 833, n.8 (1990).

¹⁹¹ *Id.* at 833.

¹⁹² *Id.*

and they apply those principles to the facts.”¹⁹³ However, feminist based arguments employ forms of reasoning that help to reveal women’s needs,¹⁹⁴ including asking “the woman question” and feminist practical reasoning.

In order to push for laws that consider women’s needs, it becomes important to ask “the woman question”—which is designed “to identify the sex implication of rules and practices which might otherwise appear to be neutral or objective.”¹⁹⁵ Here, the policies surrounding the FHA, and Idaho’s law affecting manufactured homeowners, may appear neutral and objective, especially considering sex. However, asking “the woman question” reveals that, in fact, policies and practices of both federal and Idaho state law affect Boise’s females in a disparate manner. “In the law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of woman than of men, for whatever reason, or how existing legal standards and concept might disadvantage women.”¹⁹⁶ Most importantly asking the woman question can lead to the exposure of negative implications of laws in operation, and suggest how to correct any adverse impacts.¹⁹⁷

This article asks the woman question in the realm of manufactured home displacement in Boise, Idaho. It also posits that a feminist practical reasoning be utilized in considering this area of the law. “Feminist practical reasoning builds upon the traditional mode of practical reasoning by bringing to it the critical concerns and values reflecting in other feminist methods, including the woman question ... [and it] challenges the legitimacy of the norms of those who claim to speak, through rules, for the community.”¹⁹⁸ In essence, feminist practical reasoning requires that real-life implications of legal regimes considered being the “norm” be challenged in order to remove ill impacts. Feminist practical reasoning pierces the male, white-privileged veil. Thus, it allows legal issues to be viewed in a way that reveals exactly how females suffer legal sex based discrimination.

¹⁹³ Bartlett, *supra* note 190, at 836.

¹⁹⁴ *Id.* at 836.

¹⁹⁵ *Id.* at 837.

¹⁹⁶ *Id.*

¹⁹⁷ *See generally id.*

¹⁹⁸ *Id.* at 854-55.

The objective of presenting a feminist perspective is to allow the readers of this article to employ both “the woman question” and feminist practical reasoning when considering the displacement as it effects Boise area females. When a reader, and hopefully the Boise community, can see real-life implications of current law as it affects local women; then, hopefully that reader could ask the woman question and employ feminist practical reasoning to fight for laws that, in application, would provide equal treatment.

2. The Affirmatively Furthers Fair Housing Requirement

An alternative to a disparate impact and discriminatory effects claimed violation of the FHA would allow Boise claimants to make a claim under the requirement that HUD “affirmatively further fair housing.” Section 3608 of the Fair Housing Act requires HUD to administer housing programs in a manner which affirmatively furthers the policies behind the FHA in order to provide fair housing throughout the United States.¹⁹⁹ FHA’s early legislative history has been interpreted by many appellate courts to hold HUD, its Secretary, and administrative bodies to “affirmatively further fair housing [AFFH requirement].²⁰⁰ In *NAACP v. Secretary of Housing and Urban Development*, the First Circuit delineated the meaning to be HUD’s obligation to “affirmatively further fair housing:”

[A] statute that instructs HUD to administer its grant programs so as ‘affirmatively to further’ the Act’s fair housing policy requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others.... This broader goal suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.²⁰¹

¹⁹⁹ 42 U.S.C. 3608(e)(5) (2006).

²⁰⁰ See JOHN RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL 2:13 (2009).

²⁰¹ 817 F.2d 149, 154-155 (1st Cir. 1987).

Since *NAACP*, many courts have obligated recipients of HUD funds to adhere to the AFFH requirement.²⁰² A major aspect of HUD's role in supporting national fair housing is HUD's control and distribution of government funds to local governments to help promote housing opportunities. One such program is the Community Development Block Grant (CDBG) given to states and communities who apply for funding.²⁰³

Any local government that accepts funding from HUD, such as CDBG, is required to certify that it will meet certain requirements so that the funding can be effectively utilized. These requirements have been codified in the Federal Regulations.²⁰⁴ Just as HUD is required to take measures under the AFFH requirement, recipients of federal funds must also follow the AFFH requirement. In order to affirmatively further fair housing, parties receiving funds must "conduct an analysis to identify impediments to fair housing choice within the area, take appropriate actions to overcome the effects of any impediment identified through that analysis, and maintain records reflecting the analysis and actions in this regard."²⁰⁵

The recent decision in *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County* sent a strong signal to the nation and HUD that the AFFH requirement will not be tolerated as a hollow standard: "This [o]pinion holds that a local government entity that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction."²⁰⁶ In this case, plaintiff, the Anti-Discrimination Center of Metro New York, Inc., claimed that Westchester County falsely certified that it was in compliance with its obligation to affirmatively further fair housing, as required to receive CDBG

²⁰² RELMAN, *supra* note 200; *see e.g.*, IVAN BODENSTEINER AND ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY (STLOCCIVIL) § 4:10 (2009).

²⁰³ <http://www.hud.gov/offices/cpd/communitydevelopment/programs>.

²⁰⁴ 24 CFR § 570.601(a)(2) (2009).

²⁰⁵ 24 CFR § 91.425(a)(1)(i) (2009).

²⁰⁶ 495 F.Supp.2d 375, 376 (S.D.N.Y. Jul 13, 2007); *see also* U.S. ex rel. Anti-Discrimination Center of Metro New York, 668 F.Supp.2d 548 (S.D.N.Y. 2009).

funds.²⁰⁷ The court held undisputedly that CDBG recipients must certify to HUD that grant monies are “administered in conformity” with both the Civil Rights Act of 1964 and the FHA. And that “the projected use of funds has been developed so as to give maximum feasible priority to activities which will benefit low and moderate income families or aid in the prevention or elimination of slums or blight.”²⁰⁸ In essence, the court found that there is no excuse for HUD or HUD’s grantees not to align local housing practices with the requirement of the FHA and the underlying social policies of the Civil Rights Act of 1964.

Furthermore, the decision has sent a message across the nation that HUD or HUD’s grantees’ failures to eliminate intentional discrimination or practices yielding a discriminatory effect will be identified and reprimanded. *Westchester*, although a district court decision within the First Circuit, has sent reverberations throughout the United States. Recipients of CDBG funding across the nation will be forced to re-evaluate their spending of CDBG funding for fear of attack and reprimand by private interest groups. Possibly, the AFFH avenue of attack may be short-lived as HUD and HUD grantees move to remedy the discriminatory practices in connection with CDBG funding.

However, the more likely stop-block to the AFFH attack is the issue of standing when private organizations attempt to bring claims against HUD and, primarily, their local community governments. In *Westchester*, the Anti-Discrimination Center of Metro New York brought a claim under the False Claims Act (FCA),²⁰⁹ where liability is predicated on a false representation of compliance with a federal statute or regulation.²¹⁰ To make a FCA claim against HUD or a HUD grantee, the claimant must be absolutely certain of the local government’s false certification and reporting, a formidable task. Another way to establish standing is via the APA. This method is discussed in connection with *NAACP v. Secretary of Housing and Urban Development*, through a finding of HUD’s illegitimate patterned activity.²¹¹ To reiterate, the First Circuit has taken a broad approach to granting judicial

²⁰⁷ U.S. ex rel. Anti-Discrimination Center of Metro New York, 2009 WL 4555269 (S.D.N.Y. Feb. 24, 2009).

²⁰⁸ 42 U.S.C. § 5304(b)(2)-(3) (2006).

²⁰⁹ 31 U.S.C. § 3729 (2006).

²¹⁰ *Id.*

²¹¹ See discussion *supra* Part IV.A.

review of agency action where there is a pattern of possible illegitimate agency activity. This broad interpretation has not been employed across the board. Instead, the majority of courts apply the APA's "arbitrary and capricious" standard, another difficult standard to meet.²¹²

Ada County and the city of Boise, as recipients of CDBG funds,²¹³ are thus held to the AFFH requirement. Therefore it is plausible for a Boise claimant to assert that both HUD and Ada County have failed to affirmatively further fair housing. HUD is failing the AFFH requirement through its inaction surrounding manufactured home displacement, and for providing funding to a county that is failing to affirmatively further fair housing. Ada County is failing the AFFH requirement by accepting CDBG funds. Ada County certifies that the uses are affirmatively furthering fair housing within the county, yet does not apportion any of the CDBG funds towards remedying the issues surrounding displacement. The difficult part of attempting to bring this claim will be either establishing the required evidence to assert standing under the FCA, or in the alternative, convincing the federal district court or the Ninth Circuit Court of Appeals to denounce HUD's inaction as arbitrary or capricious under the APA.

VI. Conclusion

It has been at least 20 years since southwest Idaho first recognized the issue of manufactured housing displacement. For at least 20 years the federal government and the state of Idaho have determined that the manufactured housing population is ineligible to receive the rights and remedies provided protected classes under the FHA. Further, Boise's female manufactured homeowners cannot look to the Constitution for protection, nor can they find protection under Idaho state law. Other federal frameworks exist, such as the disparate impact theory and the

²¹² See, e.g., ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 21:7 (Thomson Reuters/West 2009) (2001).

²¹³ See CityofBoise.org, 2006 City of Boise, Fair Housing Plan (2006) <http://www.cityofboise.org/Departments/PDS-HCD/FairHousing/FairHousingPlan/2006FairHousingPlan.pdf>.

FHA framework, but oftentimes the judiciary is only eager to acknowledge these frameworks and employ remedial measures after a demonstration of outrageous, and usually intentional, discriminatory behavior.

The federal government, through actor's such as HUD, the DOJ and the Attorney General, are in violation of the Fair Housing Act for the following reasons: (1) HUD's failure to execute and administer the Fair Housing Act in total fulfillment of its codified policy, (i.e. to promote fair housing throughout the United States); (2) HUD's continuing pattern of reducing the number of "viable" discriminatory claims from year to year; (3) HUD's failure to execute systemic investigations surrounding plausible group discrimination; (4) HUD's, the DOJ's, and the Attorney General's failure to employ a disparate impact theory in order to substantiate valid claims; and finally, 5) the federal government's general failure to provide any recognition or remedies for manufactured home displacement, a nationwide issue.

The state of Idaho fails Boise's female manufactured homeowner population because: (1) The State ignores its own LLUPA laws that provide for the development of manufactured home communities; and (2) The State supports its Mobile Home Landlord Tenant laws that provide no protection for manufactured homeowners and tenants against displacement.

In order to provide a federal remedy for the disparate impact on Boise's female manufactured homeowners, as well as other involuntary displaced manufactured homeowners nationally, HUD must diligently follow the administrative policies outlined in the FHA. The national FHEO Commission must garner greater support under the Obama administration in order to push for better administration and execution of the FHA. In order to provide a statewide remedy, Idaho must continue the initial efforts made under former governor Jim Risch. Governor Risch created the MHPA committee to identify ways in which the state can better support individuals who are forced into involuntary displacement. Although no specific efforts were made according the MHPA final report, the committee has presented Governor Butch Otter with a copy of the report. Other state representatives, including Phylis King, are making efforts to present legislation in hopes of re-working Idaho's current manufactured home legislation.

Nevertheless, valiant efforts will not suffice to eliminate the disparate impact on Boise's female manufactured homeowners. Only substantial change in Idaho state laws and a reinvigoration of the true spirit behind the FHA into HUD's administrative practices can make a difference to eliminate the discriminatory effects and disparate impact that involuntarily displaced manufactured homeowners face. As feminist scholars have suggested, the most effective changes are made when perspectives are changed and communities begin to see the true impact of laws from the negatively impacted population's perspective. Tools, such as asking "the woman question" and using the feminist legal perspective, can help to clarify women's issues and disparate impact on woman, in the face of seemingly neutral legislation.

This article has identified a problem in both federal and Idaho state specific laws. It has also highlighted involuntary manufactured home displacement in Boise as a socio-cultural and community issue. What is not easily recognized is the direct impact that legal regimes have on social issues. Thus, it is the duty of legal practitioners to transform action into change so that we can change the status quo of what constitutes socially acceptable "fair housing." Practitioners can promote awareness by proactively accepting cases, making claims, and utilizing theories in order to right legal discrimination and promote greater equality. Boise's legal community and local government have the power to affect change and provide Boise's involuntarily displaced manufactured home residents a second chance. Children's stories such as the *Little House* may present an idealized vision of giving displaced and forgotten individuals a place to go—but the ideal, fair housing for every citizen, is a utopia worth fighting for.