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EFFECT, OR NO EFFECT: A COMPARISON OF PRIMA FACIE STANDARDS APPLIED IN "DISPARATE IMPACT" CASES BROUGHT UNDER THE FAIR HOUSING ACT (TITLE VIII)

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Kristopher E. Ahrend[1]

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"It is the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States."[2]

I. INTRODUCTION

In 1968, the United States Congress enacted Title VIII of the Civil Rights Act, also referred to as the Fair Housing Act (FHA). Adhering to the broad goal cited above, Congress sought to eliminate various types of discrimination in the provision and exchange of housing. To achieve that end, the statute specifically prohibits discrimination in certain contexts, including any residential real estate transactions[3] and the provision of brokerage services.[4] In addition, section 3604(a) states that it shall be unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of race*, color, religion, sex, or national origin."[5] Because of the breadth of this language, courts have interpreted section 3604(a) to encompass discrimination in many types of housing practices.[6] At least

[1] Candidate for *Juris Doctorate*, Washington and Lee School of Law, May 1996. I wish to thank Professor Laura S. Fitzgerald for her encouragement and guidance in the development of this article and Michael J. B. Schaff for his patient editorial assistance and helpful comments.

[2] The Fair Housing Act, 42 U.S.C. § 3601 (1994)

[3] *Id.* at §3605.

[4] *Id.* at §3606.

[5] *Id.* at §3604(a) (*emphasis added*). Other sections of the FHA's substantive provisions contain this or similar language. *See* SCHWEMM, ROBERT G., HOUSING DISCRIMINATION LAW 48 n.20 (1983) (citing the same language in sections 3604(b), 3605, and 3631(a), and similar language in sections 3606 and 3617).

[6] *See* SCHWEMM, *supra* note 4, at 48 (identifying exclusionary zoning, steering, and redlining as a few of the practices that courts have held to be prohibited by the language in section 3604(a)).

one commentator has referred to the section as the most important substantive provision of the FHA.[7]

Despite both its breadth and apparent importance, the language of section 3604(a) is surprisingly ambiguous. The FHA does not define the phrase "because of race."[8] Thus, the statute does not clearly indicate what level of intent a defendant must possess in order to be found guilty of violating the statute.[9] As a result of this ambiguity, the FHA provides little guidance to potential plaintiffs regarding the allegations they must make in order to satisfy their initial or *prima facie* burden of proof under the statute.[10] Litigation of claims under the FHA has helped clarify, to some extent, the levels of proof required of plaintiffs to establish FHA claims, and thus the meaning of section 3604(a). All courts accept the proposition that this language does implicate actions motivated by discriminatory intent.[11] In addition, a majority of federal courts have recited their beliefs that actions *not* motivated by discriminatory intent *may* still fall within the scope of section 3604(a) if they have a disparate impact on a class of people protected by the statute.[12]

However, despite the seemingly uniform acceptance of this principle, the various federal circuits have adopted different formulations of the *prima facie* standard imposed upon plaintiffs.[13] These standards generally resemble one of two models: the "effect-only" standard or the "four-factors" standard.[14] Soon after the adoption of the FHA, some commentators and courts initially considered the difference between the two standards to be minimal.[15] More recent judicial opinions suggest that the difference between the two standards may be more significant.[16]

This paper compares the judicial discussion of the model *prima facie* standards in order to highlight the differences between the two. Through an analysis of more recent cases, it also shows that the choice of standards may reflect differing interpretations of the FHA by various federal courts and that the application of the two standards may lead to different outcomes.[17] Specifically, Section II analyzes and compares the two model *prima facie* formulations as they were first adopted by the federal judiciary. Section III reviews some of the sources of authority that courts have used to justify their adoption of the various *prima facie* formulations. Section IV analyzes several recent judicial opinions which suggest that the choice of *prima facie* standards may reflect differing interpretations of the FHA by reviewing courts, and that application of one standard over the other may change the outcome in a given case. Finally, Section IV concludes that based upon these differences in interpretation and effect, the "effect-only" standard should be adopted as the sole *prima facie* standard utilized in analyzing FHA claims. Through the uniform adoption of this standard, the federal judiciary can insure that the broad scope of the FHA is preserved and that the statute remains a vital piece of modern civil rights legislation.

II. AN ANALYSIS OF THE PRIMA FACIE STANDARDS APPLIED TO DISPARATE IMPACT CLAIMS BROUGHT UNDER THE FAIR HOUSING ACT

A. The Split is Noted Within the Ninth Circuit

Recently, two district courts within the Ninth Circuit decided disparate impact cases brought under the FHA. In *Fair Housing Council of Orange County, Inc. v. Ayres*,[18] the plaintiff, a non-profit corporation promoting equal opportunity in housing, challenged the legal-

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[7] *See id.* at 47 (referring to section 3604(a) as the FHA's "most important provision").

[8] *See id.* at 48-49, 53, 105 (discussing the meaning of the phrase "because of race" in the FHA)..

[9] *See id.* at 52 (asking whether a violation of Title VIII may be sustained where "a defendant's motivation is entirely innocent, but his action produces a discriminatory effect").

[10] This intitial burden is often referred to as the *prima facie* burden. Both case law and commentators have widely accepted the notion that FHA claims should be analyzed using the *prima facie* model. *See, e.g., infra* note 32 and accompanying text.

[11] *See, e.g., id.* at 53 (stating that the phrase "because of race" "would apply when the sole reason for a defendant's action [was] . . . race, color, religion, sex, or national origin. . ."); Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199, 204 (1978); John Stick, Comment, *Justifying A Discriminatory Effect Under The Fair Housing Act: A Search For The Proper Standard*, 27 U.C.L.A. L. REV. 398, 399 (1978). Cases which seek to prove defendant possessed discriminatory intent are often referred to as "disparate *treatment* cases".

[12] *See infra* Section II(B). These cases are often referred to as "disparate impact" cases.

[13] *See infra* Section II(D) (identifying the *prima facie* standards presently utilized by the different federal circuits).

[14] *See infra* Sections II(B) ("effect-only") and II(C) ("four-factors").

[15] *See* Schwemm, *supra* note 10, at 257 (stating "[t]he difference in these two methods of analyzing an effect case under Title VIII may not be particularly significant in terms of producing difference results"); *Resident Advisory Board v. Rizzo*, 564 F.2d 122, 148 n.32 (3d. Cir. 1977) (stating "[w]e read the Seventh Circuit's opinion in *Arlington Heights II* [applying the "four-factors" standard as requiring no more than we do in order for a plaintiff to establish a prima facie case. . ."). The *Rizzo* court adopted an "effect-only" prima facie standard. *Id.*

[16] *See infra* Section IV.

[17] *See infra* Sections IV(A) (discussing ability of courts to narrow scope of FHA through the adoption of one standard over the other), IV(B) (comparing the application of different standards by the majority and dissent in the same case, producing opposite outcomes).

[18] 855 F. Supp. 315 (C.D. Cal 1994).

ity of a two-person per unit occupancy restriction imposed by the defendant landlord.[19] In *United States v. Weiss*,[20] the Government brought suit on behalf of itself and two private persons challenging a similar occupancy restriction.[21] In both cases, the district courts noted the split in the federal circuits regarding the appropriate *prima facie* standard to be applied to disparate impact claims brought under the FHA.[22] Ultimately, the *Fair Housing Council* court adopted an "effect-only" standard while the *Weiss* court, despite extensively discussing the merits of the proper standard, avoided the issue, deciding the case on other grounds.[23]

More important than the analysis of either, both courts concluded that the federal circuits were indeed undecided over the appropriate standard.[24] In addition, the *Fair Housing Council* court specifically identified the split as one between those circuits adopting the "effect-only" standard and those adopting the "four-factors" approach.[25] This recognition by *Fair Housing Council* and *Weiss* provides a useful introduction to the conflict surrounding the question of the proper *prima facie* standard for disparate impact claims brought under the FHA. In order to further explain the *prima facie* concept in FHA cases and to highlight the distinctions between the two primary approaches, the following two subsections examine the seminal opinions which first adopted and applied the two model *prima facie* standards.

B. The "Effect-only" Standard

At least four federal circuits to date have adopted the "effect-only" standard.[26] The Eighth and Third Circuit Courts of Appeals first applied this standard in *United States v. City of Black Jack*[27] and *Resident Advisory Board v. Rizzo*.[28] These opinions are discussed below.

1. United States v. City of Black Jack

In *United States v. City of Black Jack*,[29] the United States appealed the decision of the district court refusing to enjoin the adoption of a zoning ordinance by the city of Black Jack.[30] Once adopted, the ordinance pre-

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[19] *See* Fair Housing Council Of Orange County, Inc. v. Ayres, 855 F. Supp. 315, 319 (C.D. Cal. 1994) (granting plaintiff's motion for summary judgment and holding that discriminatory effect, alone, would be sufficient to satisfy plaintiff's *prima facie* burden in a FHA case). In *Fair Housing Council*, plaintiff alleged that defendant-landlords' occupancy restriction violated section 3604(b) of the FHA. *Id.* at 316. The district court had determined that the key issue in the case was whether the FHA required that plaintiffs "also demonstrate defendant's intent to discriminate. . . ." *Id.* at 317. On review, the court of appeals first noted that the federal circuits had not yet agreed upon a single *prima facie* standard. *Id.* The court characterized the split as one between those circuits that held proof of discriminatory effect was "always sufficient to establish a violation of the Fair Housing Act", and those circuits which "requir[ed] consideration of four factors, including intent." *Id.* Ultimately, the court accepted the "effect-only" standard. *Id.* at 318. Applying that standard to the case before it, and noting the defendant's lack of rebuttal evidence, the court granted the plaintiff's motion for summary adjudication. *Id.* at 319.

[20] 847 F. Supp. 819 (D.C. Nev. 1994).

[21] *See* United States v. Weiss, 847 F. Supp. 819, 831 (granting defendant's motion for summary judgment because defendant's evidence sufficiently rebutted plaintiffs *prima facie* case, regardless of the *prima facie* standard imposed. In *Weiss*, the plaintiffs alleged defendant's occupancy restriction prevented traditional families with children from renting units in defendant's apartment complex, thereby violating section 3604(a) of the FHA). *Id.* at 822. The court of appeals identified a central issue in the case as "whether [the FHA] require[d] proof of the landlord's intentional discrimination or whether the statute is violated also where no such intention is established but where the conduct can be shown to have a discriminatory effect. *Id.* at 826. In seeking to determine the appropriate standard, the court noted the split in the circuits regarding the appropriate standard. *Id.* However, rather than choosing to apply one *prima facie* standard, the court determined that under either the "effect-only" or the "four-factor" standard, the defendant had sufficiently rebutted plaintiffs *prima facie* evidence. *Id.* at 831. For that reason, the court granted the defendant's motion for summary judgment. *Id.*

[22] *See supra* notes 18 and 20.

[23] *See supra* notes 18 and 20.

[24] *See Weiss* at 826 (stating that "several decisions are inconsistent with each other; others are incomplete in significant respects; and still others so not distinguish between the relevant concepts. . ." and additionally, that "there is a variety of opinion, usually not reconciled in any systemic fashion, [as to] whether a violation may be predicated solely on proof . . . [of] . . . discriminatory effect)"); *Fair Housing Council* at 317 (stating "[o]ther circuits have split on whether intent must be proven. . . to establish a violation of the Fair Housing Act").

[25] *See Fair Housing Council* at 317 (noting the two standards differ in that one requires proof of intent ("the four-factors") while the other does not ("effect-only")).

[26] *See infra* Section II(D) (noting the adoption of the "effect-only" standard by the Second, Fifth, Eighth, and Tenth Circuits); *infra* note 93 (discussing the present uncertainty regarding the choice of standards in the Third Circuit).

[27] 508 F.2d 1179 (8th Cir. 1974).

[28] 564 F.2d 122 (3d. Cir. 1977).

[29] 508 F.2d 1179 (8th Cir. 1974).

[30] *See* United States v. City of Black Jack, 508 F.2d 1179, 1187 (8th Cir. 1974) (holding the city's zoning ordinance violated the FHA because it had a discriminatory effect on blacks living in the St. Louis metropolitan area. In *Black Jack*, the Eighth Circuit Court of Appeals reviewed the district court's holding that the zoning ordinance adopted by the City of Black Jack did not deny persons housing on the basis of race. *Id.* at 1181. On appeal, appellants reasserted their allegations that the zoning ordinance violated the FHA both because it had a discriminatory effect on blacks and because its passage was motivated by discriminatory intent. *See id.* at 1184 (stating a *prima facie* case may be established by showing that the defendant's conduct had a discriminatory effect); *id.* at 1185

vented the completion of a low and middle-income housing project.[31] The government alleged, in part, that the challenged ordinance violated section 3604 (a) of the Fair Housing Act because it "denied persons housing on the basis of race."[32]

In beginning its review, the court of appeals first noted that analysis of FHA cases, and thus the plaintiff's burden of proof, should be governed by the *prima facie* concept.[33] Under such a concept, the plaintiff's *prima facie* burden could be satisfied by either a showing of discriminatory effect or discriminatory intent.[34] The court then argued that permitting the use of an "effect-only" standard was necessary because of both the ability of actors to hide the true intentions of their actions and the significance of the harm that could result from actions not motivated by conscious racial animus, but having a discriminatory effect on a protected class of people, nonetheless.[35] The court reasoned that interpreting the scope of the FHA in such a broad fashion was consistent with the authority of the Thirteenth Amendment under which Congress adopted the statute.[36]

After its extensive review of the appropriate legal analysis to be applied to such FHA claims, the *Black Jack* court reviewed the district court's conclusion that the evidence presented in the case did not justify a finding of discriminatory effect.[37] The district court had appraised the effect of the ordinance simply by assessing the racial makeup of the class of potential residents that might live in the proposed housing development.[38] Because this class would include an equal number of blacks and whites presently living in the metropolitan area, the lower court concluded that the prohibition of the project by the zoning ordinance would not have a disproportionate effect on blacks, and therefore, was not violative of the FHA.[39]

The Eighth Circuit court rejected the analysis of the lower court, offering its own analysis, utilizing a broader definition of discriminatory effect.[40] Under its examination, the court noted that the challenged ordinance would preclude eighty-five percent of the black residents in the area from living in the city of Black Jack, and that without the completion of the housing project, the city's population would remain almost entirely white.[41] Based on its findings, that the ordinance would maintain the racial exclusivity of city of Black Jack and perpetuate a condition of gross segregation within the St. Louis metropolitan area, the *Black Jack* court concluded that the zoning ordinance did produce a discriminatory effect.[42] With this evidence, the plaintiffs had successfully satisfied their *prima facie* burden under the FHA.[43]

Satisfaction of the initial *prima facie* burden, however, did not determine the outcome of the case. Under its model of the *prima facie* concept, the court of appeals noted that once the plaintiff had satisfied its *prima facie* burden, the defendant could rebut this showing by offering a "compelling governmental interest" which might justify the discriminatory effect of the city's actions.[44] While the de-

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n.3 (noting plaintiff's allegation that the zoning ordinance was violative of the FHA because its adoption was motivated by racial purpose and the validity of such an allegation in establishing a FHA violation). Applying an "effect-only" *prima facie* standard, the court of appeals held that the plaintiffs evidence did have such a discriminatory effect and that the defendant had failed to rebut such a showing. *Id.* at 1186-87. For those reasons, the court struck down the ordinance for violating sections 3604(a) and 3617 of the FHA. *Id.* at 1187.

[31] *Id.* at 1181.

[32] *Id.* at 1181 (stating that by preventing the construction of the Park View project through the enactment of a new zoning ordinance, the City had "denied persons housing on the basis of race, in violation of section 3604 (a)" of the federal Fair Housing Act).

[33] *Id.* (citing Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974).

[34] *Id.* at 1184 (noting that "[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect"). *See also id.* at 1185, n.3 (recognizing that while the plaintiff has also alleged that the ordinance was "enacted for the purpose of excluding blacks . . . nevertheless, we do not base our conclusion that [it] violates Title VIII on a finding that there was an improper purpose").

[35] *Id.* at 1185 (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (1969) (en banc)) (explaining that "[e]ffect, and not motivation, is the touchstone, in part because 'whatever our law once was, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme'").

[36] *Id.* at 1184. It was this authority, the court asserted, which permitted it to "[curb] the discretion of local zoning officials. . . where 'the clear *result* of such discretion [was] the segregation of low-income Blacks from all White neighborhoods.'" *Id.*

[37] *Id.* at 1186.

[38] *Id.*

[39] *See id.* (summarizing the district court's finding which based its statistical data on the number of residents with yearly earning within the range that the proposed housing project was intended to appeal to).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1186.

[44] *Id.* In a footnote, the *Black Jack* court noted that this "compelling interest" rebuttal standard was also applied in Equal Protection cases. *Id.* at 1186, n.4. At the time of the decision, the Supreme Court had yet to hold that Equal Protection cases required proof of discriminatory intent. *See* Comment, *A Last Stand On Arlington Heights: Title VIII And The Requirement Of Discriminatory Intent*, 53 N.Y.U. L. REV. 150, 161-62 (discussing Title VIII jurisprudence prior to the *Washington v. Davis* opinion, which held that evidence of discriminatory intent was necessary to establish an Equal Protection violation). This may explain the *Black Jack* court's decision to apply the Equal Protection rebuttal standard in analyzing its FHA claim.

fendant did offer such evidence in this case, the court of appeals concluded it was insufficient to rebut the plaintiff's evidence, and, therefore, found that the defendants had violated the FHA.[45]

2. Resident Advisory Board v. Rizzo

In *Resident Advisory Board v. Rizzo*,[46] various individuals and organizations brought a successful class action alleging that the City of Philadelphia and other state and federal agencies had violated the Equal Protection Clause of the Fourteenth Amendment, as well as the FHA, by failing to complete the construction of a proposed low-income housing project.[47] The defendants appealed the district court's decision which found them guilty of both constitutional and statutory violations.[48] In its review of the district cour's holdings, the court of appeals noted that in order to find a violation of the Equal Protection Clause, the plaintiff had to show not only that the defendant's actions had a "disproportionate impact" on them, but that the defendant had also acted with "invidious discriminatory purpose."[49] By contrast, the court of appeals held that proof of discriminatory effect, alone, would suffice to satisfy the *prima facie* burden for FHA claims.[50]

The *Rizzo* court offered three arguments in support of its conclusion regarding the FHA *prima facie* standard. First, the court recognized that in *Metropolitan Housing Corporation v. Village of Arlington Heights*,[51] the Supreme Court had applied a heightened *prima facie* standard requiring proof of discriminatory intent to the Equal Protection claims before it, but did not offer a similar holding regarding the appropriate standard under the FHA.[52] Instead, the Court remanded the plaintiff's FHA claims for determination by the circuit court.[53] Thus, the *Rizzo* court reasoned, since the Supreme Court chose not to apply an intent-based *prima facie* standard to the FHA claims while doing so in its analysis of the Equal Protection claims before it, the *prima facie* standard for FHA claims need not require proof of discriminatory intent.[54] The *Rizzo* court also noted that both the legislative history of Title VIII, like that of Title VII, supported a broad interpretation of the FHA.[55] Finally, the *Rizzo* court found persuasive, the opinions of several other circuit courts, which held that evidence of discriminatory effect was sufficient to satisfy the *prima facie* standard under Title VIII.[56]

Applying its analysis to the facts before it, the *Rizzo* court recognized that as a result of the efforts to prepare the Whitman site for development, the area's black population had been almost completely decimated.[57] The court reasoned that this effect, alone, was sufficient to establish a FHA violation.[58] Further, the court also rec-

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[45] *Id.* at 1188.

[46] 564 F.2d 122 (3d. Cir. 1977).

[47] *See* Resident Advisory Board v. Rizzo, 564 F.2d 122, 149 (3d. Cir. 1977) (holding that plaintiffs had successfully maintained a *prima facie* case of housing discrimination under the FHA by showing defendant's actions produced a discriminatory effect and that defendants failed to rebut such a showing). In *Rizzo*, plaintiffs alleged that while the City had condemned and cleared the property on which the Whitman Park Townhouse housing project was to be located, it had since delay[ed] and frustrat[ed]" the completion of the project. *Id.* The class of people represented by the suit included "all low income minority persons residing in the City of Philadelphia who, by virtue of their race, [were] unable to secure decent, safe and sanitary housing, outside of areas of minority concentration, and who would be eligible to reside in the Whitman project. *Id.* at 139.

After an extensive review of the facts leading up to the case before it, the court held that "a Title VIII claim must rest, in the first instance, upon a showing that the challenged action by [the] defendant had a racially discriminatory effect", *id.* at 148, and that the plaintiffs had made such a showing. *Id.* at 126. As in *Black Jack*, the court did note that the defendant could rebut a *prima facie* showing by offering some evidence justifying the discriminatory effect. *Id.* at 150. However, unlike the Eighth Circuit, the court chose not to adopt a particular standard, instead, deferring the definition of such criteria to the discretion of the district courts, where it would be determined on "a [should] emerge. . . on a case-by-case basis." *Id.* at 149.

[48] *Id.* at 129.

[49] *See id.* at 143 n.23 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)) (recognizing that discriminatory effect, alone, will rarely be sufficient to establish an Equal Protection violation)).

[50] *See id.* at 145 (concluding that the recent Supreme Court opinion, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1976), in which the Court held proof of discriminatory intent was necessary to maintain an Equal Protection violation but remanded analysis of the FHA, suggested that the Fourteenth Amendment and the FHA were not coextensive).

[51] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1976), *remanded* 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1977).

[52] *See Rizzo*, 564 F.2d at 140, 147 (discussing the Supreme Court's holding in *Arlington*).

[53] *Id.* at 147.

[54] *Id.* at 147-48.

[55] *See id.* at 147 (comparing the legislative history of Title VII and Title VIII).

[56] *See id.* at 148 (citing Metropolitan Housing Development Corp. v. Village of Arlington Heights (*Arlington II*), 558 F.2d 1283 (7th Cir. 1977); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974); citing also Kennedy Park Homes Ass'n., Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970)).

[57] *Id.* at 149 (stating that "[w]hereas originally almost 45% of the families living in the Whitman project area were black, by the time urban renewal clearance was completed and the surrounding blocks reconstructed, virtually no black families were to be found in the area"). .

[58] *Id.*

ognized that the impact of the decision to terminate the project would have a disproportionately high impact on blacks as a class since they represented a substantial proportion of the residents eligible to live in the housing project.[59] The court of appeals found these effects sufficient to satisfy the plaintiff's *prima facie* burden under the FHA.[60]

Following the framework utilized in *Black Jack*, the *Rizzo* court then assessed the defendant's rebuttal evidence.[61] Unlike *Black Jack*, however, the *Rizzo* court did not borrow the "compelling interest" rebuttal standard from Equal Protection jurisprudence.[62] The *Rizzo* court also rejected the proposition of adopting a "business necessity" standard similar to that applied by courts in Title VII cases.[63] Instead, the court concluded that rebuttal evidence should be assessed on a case-by-case basis and offered some suggested guidelines to guide such considerations.[64] Concluding that the defendant had offered no justification for the challenged actions, the court held that the plaintiff's had proved an FHA violation.[65]

C. *The "Four-factors" Standard*

At least two federal circuit courts have held that plaintiffs must prove something beyond mere discriminatory effect in order to establish a *prima facie* case under the Fair Housing Act, though how much more remains unclear. In analyzing disparate impact FHA claims, these courts have applied a "four-factors" standard requiring proof of discriminatory effect and considering several other factors including evidence of discriminatory intent, if there is any. The Seventh Circuit Court of Appeals first developed and applied the "four-factors" standard in *Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington II)*.[66]

In *Arlington II*, the court reviewed the plaintiff's allegations that the village's refusal to rezone plaintiff's property violated the FHA.[67] Prior to the court's receipt of the case on remand, the Supreme Court had decided the plaintiff's Equal Protection claims holding that evidence of discriminatory intent was necessary to establish a constitutional violation, and that the plaintiffs had failed to meet such a standard.[68] On remand, the Seventh Circuit divided its review of the plaintiff's FHA claims into two parts. First, the court determined whether a showing of discriminatory effect could ever be sufficient to support finding a violation of the Fair Housing Act.[69] Then, the court described the circumstances under which such evidence would be sufficient to justify finding a statutory violation.[70]

At the outset of these two inquiries, the *Arlington II* court acknowledged that Congress had intended for Title VIII to be interpreted broadly.[71] Thus, the court reasoned, it should construe the statute broadly in order to effectuate Congress' intent.[72] The court also noted that while the Supreme Court

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[59] *Id.* (noting that "the impact of the governmental defendant's termination of the project [would be felt] primarily by blacks, who make up a substantial proportion of those who would be eligible to reside [in the housing project]").

[60] *Id.*

[61] *Id.* at 149-50.

[62] *Id.* at 148. *Rizzo* was decided after *Washington v. Davis*, which held that evidence of discriminatory intent was necessary to establish a violation of the Equal Protection clause. *See id.* at 140-41 (discussing the effects of the *Washington* opinion on Equal Protection and Title VIII jurisprudence). *See generally* Comment, *supra* note 43, at 161-62 (discussing Title VIII jurisprudence before and after *Washington v. Davis*). Because the *prima facie* standard for constitutional claims required evidence of discriminatory intent after *Washington v. Davis*, rather than the lesser proof of discriminatory effect, the *Rizzo* court did not believe the constitutional rebuttal standard should be applied to Title VIII cases. *Rizzo* at 148.

[63] *Id.* at 148-49.

[64] *Id.* at 149. In particular, the *Rizzo* court considered whether the defendant's justifications served a "legitimate" and "bona fide" interest and whether there was any "alternative course of action" which might have been taken, which might have had a lessor discriminatory impact. *Id.*

[65] *Id.* at 150.

[66] 558 F.2d 1283 (7th Cir. 1977).

[67] *See* Metropolitan Housing Development Corp. v. Village of Arlington Heights (*Arlington II*), 558 F.2d 1283, 1290-94 (7th Cir. 1977) (holding that discriminatory effect, alone, would be sufficient to establish a FHA claim under certain circumstances, but remanding case to district court to analyze plaintiffs claims under a "four-factor" standard which included consideration of intent evidence). In *Arlington II*, the Seventh Circuit determined whether the defendant's failure to rezone plaintiff's property, thereby precluding plaintiff from constructing a low-income housing development, violated the FHA. *Id.* at 1285. In its decision above, the Supreme Court held that proof of discriminatory intent was necessary to establish an Equal Protection violation and that plaintiffs had failed to meet such a standard. *Id.* at 1287. On remand, the court of appeals posed two questions: whether proof of discriminatory effect was sufficient to establish a FHA violation, and, if so, was such evidence sufficient in this instance. *Id.* at 1288.

Ultimately, the court held that mere proof of discriminatory effect could suffice to establish a statutory claim under *certain circumstances*, *id.* at 1290, but remanded such assessment in this case for determination by the district court. *Id.* at 1294. However, the court of appeals offered four factors to be considered by the district court in making such a determination. *Id.* at 1290. This paper refers to these factors as the "four-factors" *prima facie* standard.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1289. The *Arlington II* court recognized that other courts had inferred from congressional statement of policy in Title VIII that the statute should be interpreted broadly as well. *Id.*

[72] *Id.* The *Arlington II* court declined "to take a narrow view" of the statute "[i]n light of the declaration of congres-

had required proof of discriminatory intent to establish a constitutional violation in *Washington v. Davis*, the *Davis* court had reaffirmed the application of a lesser standard in cases brought under Title VII, the federal civil rights statute dealing with employment discrimination.[73] Noting the similarities in both the language and the purposes of Titles VII and VIII, and mindful of Congress' intent that both statutes be interpreted broadly, the court of appeals concluded that evidence of discriminatory effect, alone, *could* establish a violation of the FHA under certain circumstances.[74]

In order to determine when such circumstances were present, the court compiled a "four-factor" inquiry to guide its analysis.[75] The court claimed to have gleaned the factors from prior disparate impact FHA cases.[76] The court summarized the four factors as follows:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[77]

Despite its extensive discussion of the proper method for analyzing the case before it, the court of appeals concluded that it lacked sufficient evidence to make a final determination.[78] For this reason, the court remanded the case to the district court to apply its "four-factors" analysis and determine the outcome of the case.[79]

After *Arlington II*, several issues regarding the application of the "four-factors" standard remained unclear. The *Arlington II* court offered little guidance concerning how to assess or weigh evidence of the individual factors in order to determine whether the FHA was violated.[80] Also, subsequent cases have not clearly indicated how or whether the *Arlington II* "factors" should be incorporated into the typical *prima facie* analysis, such as that applied in *Rizzo*.[81] Finally, some commentators and courts have suggested that the "four-factors" standard was not intended to be applied as a *prima facie* test at all, but rather, was intended to guide the assessment of the *merits* in FHA cases.[82]

At the very least, a superficial analysis of the standards suggests that because evidence of discriminatory effect is only one factor to be considered under the "four-factors" analysis, not every plaintiff producing such evidence, without more, will succeed in maintaining a FHA claim under the *Arlington II* standard.[83] By contrast, under the "effect-only" standard, comparable evidence will be sufficient both to satisfy the plaintiff's *prima facie*

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sional intent provided by section 3601[of the FHA,] and the need to construe the Act expansively in order to implement that goal." *Id.*

[73] *See id.* at 1288 (noting the Supreme Court's affirmation of Griggs v. Duke Power Co., 401 U.S. 424 (1971) in Washington v. Davis, 426, U.S. 229 (1976)).

[74] *Id.* at 1290. The *Arlington II* court concluded that "at least under some circumstances a violation of section 3604(a) [could] be established by a showing of discriminatory effect without a showing of discriminatory intent."

[75] *Id.*

[76] *Id.* at 1290.

[77] *Id.* The court offered some explanation of the four factors. The court recognized two types of discriminatory effect: either a "greater adverse effect" on a particular group as compared to others or the general effect of the action on the surrounding community as a whole, such as the perpetuation of segregation. *Id.* The court also noted that evidence of discriminatory intent could bolster a plaintiffs claims of discriminatory effect, though such evidence was not necessary, and thus, this factor was the least important to the overall inquiry. *Id.* at 1292. As to the interest of the defendant, the court noted that more deference should be given to governmental bodies acting within their authority than to those acting beyond their authority or private parties acting to further private goals. *Id.* at 1293. Finally, the court counseled reluctance towards granting relief where such would force defendants to take affirmative steps towards remedying discrimination as opposed to relief which would merely prevent a defendant from interfering with a plaintiff's efforts to construct such housing. *Id.*

[78] *Id.* at 1294.

[79] *Id.*

[80] *See* Comment, *supra* note 43, at 170 (discussing the "[i]nadequacies of the *Arlington Heights* [four-factor] standard).

[81] The *Rizzo* court did comment on the *Arlington II* factors, but did not suggest that they should be incorporated into its "effect-only" analysis. *See Rizzo*, 564 F.2d at 148 n.32 (discussing the *Arlington II* opinion). However, at least one commentator has interpreted teh *Rizzo* courts discussion of *Arlington II* to mean that *Rizzo* did intend for the "four-factors" analysis to be incorporated into its "effect-only" formula. *See* Terri A. Bjorn, *Recent Decisions*, 46 GEO. WASH. L. REV. 615, 626 (summarizing the FHA analysis proscribed by the court in *Rizzo*).

[82] *See* Schwemm, *supra* note 11, at 257 (citing the *Rizzo* court's belief that the Seventh Circuit's approach [in *Arlington II*] simply set forth 'a standard upon which ultimate Title VIII relief may be predicated, rather than indicating the point at which the evidentiary burden of justifying a discriminatory effect will shift to the defendant'"). Thus, the *Arlington II* factors may not have been intended to establish a *prima facie* standard at all. Nonetheless, recent opinions suggest that the *Arlington II* standard has been interpreted to be a *prima facie* standard. *See infra* Sections II(A), II(D). *See also* Stick, *supra* note 10, at 408 (comparing the *prima facie* standards from *Rizzo*, *Black Jack*, and *Arlington II*).

[83] *See Arlington II*, 558 F.2d at 1290 (The court's statement that a FHA violation may be supported by evidence of discriminatory effect "under some circumstances" implies that under other circumstances, such evidence will not be sufficient.)

burden, and, in some instances, to successfully establish an FHA violation.[84]

D. Summary of Present Approaches

Judge Harold Greene of the District Court for the District of Columbia offered one of the most accurate assessments of the jurisprudence addressing the appropriate *prima facie* standard for FHA claims when he stated:

> [w]hile, to be sure, proof of discriminatory intent by the landlord seems everywhere to be regarded as establishing a violation of the [Fair Housing Act], . . . , there is a variety of opinion, usually not reconciled in any systemic fashion, whether a violation may also be predicated solely on proof that the landlords actions had a discriminatory effect . . . .[85]

Interestingly, Judge Green has offered one of the most restrictive interpretations of the FHA to date. In *Brown v. Artery Organization,*[86] Judge Greene suggested that there should be no uniform *prima facie* standard under the Fair Housing Act.[87] Rather, courts should sustain claims brought against governmental defendants where only evidence of discriminatory effect is produced, but require *some proof* of discriminatory intent in cases involving private defendants.[88] While unique in his approach to the question of the appropriate *prima facie* standard, Judge Greene's opinion fails to cite any statutory or judicial authority for his distinction between classes of defendants.

Every other circuit, with the exception of the Eleventh, has adopted one of the two *prima facie* standards discussed in the preceding sections, or some similar version. The Second, Fifth, and Eighth Circuits have all adopted an "effect-only" standard similar to those adopted in *Black Jack* and *Rizzo*.[89] In addition, the First Circuit has adopted a standard which resembles the "effect only" standard.[90] By contrast, the Fourth and Seventh Circuits have retained the "four-factors" standard first applied in *Arlington II* and *Clarkton*.[91] The Sixth and Tenth Circuits have adopted a "three-factor" standard which expressly omits any consideration of discriminatory intent.[92] The Ninth Circuit has yet to determine, conclusively, which standard will apply.[93] Finally, despite its initial decision in *Rizzo*, recent opinions suggest that the Third Cir-

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[84] *See* Black Jack, 508 F.2d at 1184 (stating "[t]o establish a prima facie case of racial discrimination [in a Title VIII case], the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect); *Rizzo*, 564 F.2d at 148 (determining "that discriminatory effect alone will, if proved, establish a Title VIII prima facie case. . . ; [ultimately], if the Title VIII prima facie case is not rebutted, a violation is proved").

Nonetheless, both courts also noted that satisfaction of the *prima facie* standard merely shifted the burden of production to the defendant, to offer some evidence that might rebut the plaintiff's claims. *See* Black Jack, 508 F.2d at 1185 (noting upon plaintiff's satisfaction of the *prima facie* standard, burden shifts to the defendant to justify the challenged conduct); Rizzo, 546 F.2d at 149 (noting that merely satisfying the *prima facie* burden does not guarantee success on the merits but merely triggers defendant's burden to offer a justify the actions in question).

[85] Brown v. Artery Organization, 654 F. Supp. 1106, 1114 (D.C. Dist. Col. 1987).

[86] 654 F.Supp. 1106 (D.C. Dist. Col. 1987).

[87] *See* Brown v. Artery Org., Inc., 654 F. Supp. 1106, 1118 (D.C. Dist. Col. 1987) (holding plaintiffs were entitled to a preliminary injunction preventing their eviction because they had presented circumstantial evidence sufficient to suggest that defendants were acting with discriminatory *purpose*; such proof of intent was required where defendant was a private organization and not a governmental body). In *Brown*, plaintiffs challenged defendant's attempts to evict overwhelmingly minority tenants of a low-rent apartment complex in order to raise rents on the units. *Id.* at 1108. The court note that the *prima facie* standard for plaintiffs bringing claims under the FHA should vary depending upon the status of the defendant. *Id.* at 1116-17. In the case before it, against a private defendant, the court noted that the plaintiffs had provided both extensive proof of discriminatory effect as well as circumstantial evidence suggesting defendant acted with discriminatory purpose. *Id.* at 1118. Based on this evidence of both effect and intent, the court granted plaintiff's request for preliminary injunction. *Id.* at 1119.

[88] *Id.* at 1115-16. The "four-factors" standard also makes such a distinction between private and governmental defendants, but does not explicitly require proof of discriminatory intent in either situation. *See supra* Section II(C) (discussing the *Arlington II* factors).

[89] *See, e.g.*, Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179, 1182 (E.D.N.Y. 1993) (2d. Circuit); United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Oxford House-C v. City of St. Louis, 843 F.Supp. 1556, 1577 (E.D. Mo. 1994)(8th Cir.); Familystyle of St. Paul v. City of St. Paul, 728 F.Supp. 1396, 1303-04 (D. Minn. 1990), aff'd 923 F.2d 91 (8th Cir. 1991).

[90] *See Casa Marie*, 988 F.2d 252, 269 n.20 (1st Cir. 1983) (outlining the four considerations to be considered when analyzing a Fair Housing claim, the first being that the plaintiff bears the burden of showing that the defendant's actions caused a disparate impact on the members of a class protected by Title VIII). *See also* United States v. Grisham, 818 F.Supp. 21, 23 (D. Me. 1993).

[91] *See* Potomac Group Home Corp. v. Montgomery County, Maryland, 823 F.Supp. 1285, 1295-96 (D. Md. 1993) (4th Cir.); Burrell v. City of Kankakee, 815 F.2d 1127, 1131 (7th Cir. 1987).

[92] *See* Arthur v. Toledo, 782 F.2d 565, 575 (6th Cir. 1986) (excluding proof of intent as a factor); Mountainside Mobile Estates v. Secretary of HUD, 56 F.3d 1243 (10th Cir. 1995).

[93] *See supra* Section II(A).

cuit may be wavering in its acceptance of the "effect-only" standard.[94]

III. AUTHORITY RELEVANT TO THE DETERMINATION OF THE APPROPRIATE PRIMA FACIE STANDARD

In determining the appropriate *prima facie* standard to be applied to disparate impact claims brought under the FHA, courts have cited a variety of sources to support their conclusions. The following sections summarize these sources of authority.

A. Interpretation of the Phrase "Because of Race"

Section 3604 (a) of the Fair Housing Act states that "it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person *because of race*, color religion, sex, familial status, or national origin."[95] Despite the apparent importance of the phrase "because of race" in interpreting the scope of the statute's application, the FHA does not explicitly define this phrase or the appropriate standard of proof necessary to sustain a statutory violation.[96] Therefore, courts and commentators have intepreted this language using other sources of authority in order to determine the appropriate standard of proof. In particular, most court and commentators have identified the phrase "because of race" as the key phrase for discerning the appropriate level of proof required to find a FHA violation.[97]

As the *Arlington II* court explained, reading this language narrowly would require a standard of actual intent while reading the language broadly would permit a standard of effect *or* intent.[98] *Arlington II* held that the language should be interpreted broadly in order to permit the finding of a statutory violation based on proof of discriminatory effect in certain circumstances.[99] Similarly, the courts in *Black Jack* and *Rizzo* concluded that a violation of the Fair Housing Act could be shown by proof of discriminatory effect.[100] Finally, commentators and courts alike have cited the Supreme Court's broad interpretation of identical language found in Title VII as support for the adoption of a similar interpretation in Title VIII cases.[101] In summary, the phrase "because of race" has been interpreted to implicate more than actions taken with discriminatory intent in other contexts, and nothing in the language of the FHA suggests that the interpretation of this phrase should be any different under Title VIII.

B. Legislative History of the Fair Housing Act

Many federal courts have held that the FHA should be interpreted broadly.[102] Supporting this belief, these courts frequently cite the FHA's statement of purpose, which declares that Congress intended the FHA "to provide, within constitutional limitations, for fair housing throughout the United States."[103] Unfortunately, the legislative history of the FHA provides little authority to support further conclusions regarding the proper scope of the statute. The court in *Resident Advisory Board v. Rizzo*, along with at least one commentator, have noted, however, the discussion surrounding an amendment, proposed during the intitial Senate debates over the FHA, which would have required plaintiffs to offer proof of discriminatory intent in order to establish violations

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[94] *Compare* Resident Advisory Board v. Rizzo, 564 F.2d 122, 148 n.32 (3d. Cir. 1977) (rejecting application of the "four factors" inquiry) *with* Congdon v. Strine, 854 F.Supp. 355, 360 (E.D. Pa. 1994) (3d. Cir.) *and* Horizon House v. Township of Upper Southampton, 804 F.Supp. 683, 697 (E.D. Pa. 1992) (3d. Cir.), *aff'd* 995 F.2d 217 (1993) (*without published opinion*) (accepting and applying the "four factors" analysis as applied in *Arlington Heights II*). Despite recognizing that the *Rizzo* framework was still controlling within the Third Circuit, *see* Congdon, 854 F. Supp. at 361 n.2, the district court in *Congdon* chose to utilize the "four-factors" standard to guide its analysis of the FHA claims before it. *Id.* at 361 The author is not certain what impact the *Congdon* court's analysis or the court of appeals' unpublished affirmation of *Horizon House* have had on the validity of the *Rizzo* opinion within the Third Circuit.

[95] 42 U.S.C. §3604 (a) (1994) *(emphasis added)*. *See supra* note 4 (identifying the other sections of the FHA containing the identical or similar language).

[96] *See supra* note 7.

[97] *See* SCHWEMM, *supra* note 4, at 58 (discussing the significance of the "because of race" language).

[98] *Arlington II*, 558 F.2d at 1288.

[99] *See id.* at 1289 (declining to interpret the "because of race" language narrowly). *See also* Bjorn, *supra* note 80, at 622-23 (discussing the treatment of the "because of race" language by the *Arlington II* and *Rizzo* courts; Schwemm, *supra* note 10, at 202-07; Stick, *supra* note 10, at 400-07.

[100] *See supra* Sections II(B)(1) & (2).

[101] Griggs v. Duke Power Co., 401 U.S. 424 (1971). The *Griggs* court interpreted such language to prohibit employment practices that had discriminatory effects on individuals. *Id.* at 435-36. *See also* SCHWEMM, *supra* note 4, at 58-59.

[102] *See* Rizzo, 564 F.2d at 147 (citing with approval both Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII) and Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (Title VIII) standing for the proposition that both Title VII and Title VIII should be construed broadly so as to end discrimination; *Arlington II*, 558 F.2d at 1289 (citing the conclusion by several courts that the Fair Housing Act should be interpreted broadly in order to effectuate the intent of Congress).

[103] 42 U.S.C. §3601 (1994). *See, e.g.*, Arlington II, 558 F.2d at 1289; Black Jack, 508 F.2d at 1183.

of the FHA.[104] However, the amendment was defeated after a heated debate on the Senate floor.[105]

With that exception, much of the FHA's legislative history suggests that Congress was not as keen on adopting the legislation as the statute's rather broad purpose statement would suggest. Earlier attempts by the Senate to adopt fair housing legislation failed in both 1966 and 1967.[106] Only through constant political pressure from President Johnson was the eventual FHA legislation even introduced in Congress in 1968.[107] Although the Senate did adopt the President's FHA legislation in 1968,[108] the corresponding legislation in the House progressed slowly, and seemed headed for eventual demise in the House Rules Committee in the Spring of 1968.[109] Sadly, several commentators have suggested that it was only because of the sudden assassination of Dr. Martin Luther King on April 8th, 1968 that rising conservative fervor in opposition to the legislation was quelled long enough for the legislation to be adopted by the House.[110] Two days following Dr. King's death, the House passed the FHA bill.[111] The following day, the President signed the Civil Rights Act of 1968 into law.[112] The often contentious and eventual emotionally-charged birth of the FHA probably provides comparable evidence to support both a broad and a narrow interpretation of the FHA. By comparison, recent Congressional Amendments to the FHA have reflected the more unequivocal support of Congress for a broad, more far-reaching FHA. Since its initial adoption in 1968, Congress has enacted several amendments expanding the substantive provisions of the FHA.[113] The adoption of these amendments seemingly reflects Congress' interest in expanding, rather than limiting, the scope of the FHA.

C. *The Prima Facie Showing Under Title VII of the Civil Rights Act*

In seeking to interpret the Fair Housing Act, courts and commentators have relied on the judicial interpretation of Title VII of the Civil Rights Act of 1964, a civil rights statute similar, in form, to Title VIII, which addresses discrimination in employment.[114] Such comparisons are appropriate for several reasons. Foremost, both pieces of legislation also share a common purpose in that they were enacted to eliminate the effects of invidious discrimination.[115] In addition, Title VII also contains the "because of race" language.[116] While the Supreme Court has yet to interpret such language in the Title VIII context, it has interpreted such language, at least implicitly, under Title VII.

In *Griggs v. Duke Power Co.*,[117] the Supreme Court analyzed the scope of Title VII, implicitly addressing the

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[104] *See* Rizzo, 564 F.2d 126, 147 (citing 114 Cong. Rec. 228, 3421 (1968) (discussing the significance of an amendment proposed by Senator Baker, which would have required proof of discriminatory intent in order to establish a violation of the FHA); Elliot M. Mincberg, Comment, *Applying the Title VII Prima Facie Case To Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 144 (1976) (discussing the legislative history of the FHA).

[105] *See Rizzo* at 147 (citing 114 Cong. Rec. 5221-22 (1968)).

[106] *See* Lamb, Charles M., *Congress, The Courts And Civil Rights: The Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115, 1124 (1981-82) (describing Senate's attempts to adopt fair housing legislation). *See generally* Dubofsky, Jean Eberhart, *Fair Housing: A Legislative History And A Perspective*, 8 WASHBURN L. J. 149 (1969) (detailing the legislative history of the Civil Rights Act of 1968 (FHA)).

[107] *See* Lamb, *supra* note 105, at 1120, 1121 (highlighting the leadership and persistance of President Johnson in his efforts to pressure Congress into adopting fair housing legislation).

[108] *See id.* at 1125 (discussing the eventual passage of the Civil Rights Act of 1968 by the Senate).

[109] *See* Dubofsky, *supra* note 105, at 160 (1969) (describing the activity in the House regarding the FHA legislation).

[110] Lamb, *supra* note 105, at 1126. *See also* Dubofsky, *supra* note 105, at 160 (crediting the tragic assassination of Dr. King with having provided the necessary momentum in the House to adopt the FHA legislation).

[111] *See* Dubofsky, *supra* note 105, at 160; Lamb, *supra* note 105, at 1126.

[112] *See* Dubofsky, *supra* note 105, at 160; Lamb, *supra* note 105, at 1126.

[113] *See* National Housing and Community Development Act of 1974, Pub. L. No. 93-383, §808(b)(1), 88 Stat 633, 729 (adding "sex" to the list of protected characteristics under the FHA); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §13(a), 102 Stat. 1619, 1636 (adding "familial status" to the list of protected characteristics under the FHA).

[114] *See, e.g.*, Black Jack, 508 F.2d at 1184; Arlington II, 558 F.2d at 1289; Rizzo, 564 F.2d at 147; METCALF, GEORGE R., FAIR HOUSING COMES OF AGE 124 (1988); SCHWEMM, *supra* note 4, at 58; Mincberg, *supra* note 103, at 158-160.

[115] *See, e.g.*, Griggs, 401 U.S. at 429-30 (stating objective of Congress in enacting 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"); Schwemm, *supra* note 10, at 215 (discussing the purposes of Titles VII and VIII); Mincberg, *supra* note 103, at 158-60 (discussing the reasons for interpreting Titles VII and VIII similarly).

[116] Section 2000e-2(a) of the Civil Rights Act of 1964 states:

> [i]t shall be an unlawful employment practice for an employer -
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1994) (*emphasis added*).

[117] 401 U.S. 424 (1971).

interpretation of the phrase "because of race."[118] To determine the statute's scope, the Court considered the underlying purpose of Title VII as stated by Congress.[119] From this purpose, the Court determined that Congress intended for the statute to combat the "*consequences* of [discriminatory] employment practices, [and] not simply the motivation [of employers]."[120] Additionally, the Court noted the opinion of the Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, which supported interpreting the statute broadly.[121] For those reasons, the Court concluded that the language of Title VII should be interpreted liberally, in order to permit plaintiffs to prove a statutory violation without proving intentional discrimination.[122]

D. Comparison of the Prima Facie Standard Under the Equal Protection Clause

In *Washington v. Davis*, the Supreme Court held that a plaintiff must make a showing of intentional discrimination in order to prove a violation of the Equal Protection Clause.[123] In other words, the *prima facie* showing in an equal protection case required proof of discriminatory intent. This holding was reaffirmed by the Supreme Court in *Metropolitan Housing Development Corp. v. Village of Arlington Heights.*[124] Significantly, while the *Arlington* case also involved a FHA claim, the Supreme Court did not address the question of whether discriminatory effect would be sufficient to establish a FHA violation.[125] Rather, the Court remanded the question for further consideration by the Seventh Circuit Court of Appeals.[126]

Courts and commentators have noted that the Supreme Court's decision not to determine the appropriate *prima facie* standard under the FHA while deciding the appropriate standard under the Equal Protection Clause suggests that the Court intended for the two standards to differ.[127] Moreover, commentators comparing the proper analysis of claims under the Equal Protection Clause and the FHA have noted that both the legislative history of the FHA and subsequent judicial interpretation suggest that Title VIII was meant to be more expansive than the Equal Protection Clause.[128] To the extent that these views are accurate, they support the assertion that the appropriate standard of proof under the FHA should be more liberal than the corollary equal protection standard.

IV. DOES THE STANDARD REALLY MATTER?

As Section II(D) reveals, there is a split among the federal circuits regarding the appropriate *prima facie* formulation to be applied to FHA claims. Not as clear, is whether this split really matters. After all, the divergence in approaches first appeared some twenty years ago and has yet to be resolved in any conclusive fashion. Further, as early as the Third Circuit's opinion in *Resident Advisory Board v. Rizzo*, courts have suggested that the "four-factors" and the "effect-only" standards are not that different.[129] In addition, while adopting different lan-

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[118] *See* Griggs v.Duke Power Co., 401 U.S. 424, 433, 435-36 (1971) (discussing the appropriate interpretation of Title VII). In *Griggs*, the Supreme Court granted certiorari to determine whether the defendant's requirement that employees possess a high school diploma and pass an intelligence test were permissible under Title VII of the Civil Rights Act of 1964. *Id.* at 425-26. Defendants claimed the requirements were permissible because they were not intended to discriminate on the basis of race. *Id.* at 433. The Court responded that Title VII addressed both the motivations and the consequences of employment practices. *Id.* at 432. Based on this conclusion, the Court held that the use of discriminatory employment practices would be upheld only where the practices were shown to be "job related." *Id.* at 436.

[119] *Id.* at 431. The Court noted that Title VII's was enacted to "remove... artificial, arbitrary, and unnecessary barriers to employment when the barriers operate[d] invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*

[120] *Id.* at 432.

[121] *See id.* (taking into account the guidelines of the Equal Employment Opportunity Commission which permitted only the use of job-related tests).

[122] *Id.* at 436.

[123] *See* Washington v. Davis, 426 U.S. 229, 239-45 (1976) (holding evidence of discriminatory intent was required to establish a violation of the Equal Protection Clause of the Fourteenth Amendment).

[124] Village of Arlington Heights v. Metropolitan Housing Development Corporation (*Arlington I*), 429 U.S. 252 (1977) (stating "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

[125] *Id.* at 271.

[126] *Id.* (instructing that the question of whether a violation of the Fair Housing Act can be predicated solely on a showing of discriminatory effect be considered on remand).

[127] *See*, Rizzo, 564 F.2d 126, 146 (concluding that the Supreme Court's remand of the FHA in *Arlington I* suggests the Court intended for the constitutional and statutory *prima facie* standards to be different); Bjorn, *supra* note 80, at 625 (discussing the *Rizzo* opinion's analysis of *Arlington I*).

[128] *See*, Mincberg, *supra* note 103, at 145 (comparing the scope of Title VIII with that of the Equal Protection Clause).

[129] *See* Rizzo, 564 F.2d at 148 (suggesting that the "four-factors" standard, as applied by the Seventh Circuit in *Arlington II*, "required no more than we do in order for a plaintiff to establish a *prima facie* case, i.e., . . . a showing of discriminatory effect without a showing of discriminatory intent"). The court went on to state that while the two standards appeared different, it did not believe that the Seventh Circuit was altering the "effect only" *prima facie* standard. *Id.* at 148. Rather, *Arlington II* was simply "setting forth a standard upon which ultimate Title VIII relief may be predicated. . . ." *Id.*

guage to express their standards, the courts in *Rizzo, United States v. City of Black Jack,* and *Arlington II* all claimed to embrace the same foundational proposition: that evidence of discriminatory effect could be sufficient to establish a FHA claim.[130] Finally, at least one prominent FHA scholar has suggested that while the standards appear to propose different methods of analysis, the results produced by the application of the two might not be terribly different.[131] All of this evidence suggests that the difference in standards does not matter.

However, several more recent cases support the opposite conclusion. At least one court, applying the "four-factors" standard in order to assess the merits of a FHA claim, was able to use the standard to limit the scope of the correlative *prima facie* standard. A comparison of the majority and dissenting opinions in another case supports the conclusion that the two standards can produce different outcomes when applied to the same facts. Finally, a third opinion provides a compelling explanation of how to use the "four-factors" standard in assessing the merits of a FHA claim while preserving the broad standard created by the "effect-only" *prima facie* approach. These three propositions, and the cases that support them, are discussed in the following sections.

A. *Narrowing the Scope of the Prima Facie Case: Arthur v. Toledo*

Some courts and commentators have suggested that the court in *Arlington II* intended for the "four-factors" standard to be used in assessing the merits, rather than the *prima facie* evidence, in FHA claims.[132] However, even where the "four-factors" standard is applied in such a manner, its application has still provided courts with a means of narrowing the scope of the *prima facie* standard. In *Arthur v. Toledo,*[133] the plaintiffs brought a class action suit alleging that Toledo city officials were guilty of various constitutional and statutory violations, including violation of the FHA.[134] The defendants had been negotiating with the United States Department of Housing and Urban Development (HUD) to build two new housing projects outside of Toledo's inner-city area.[135] City officials determined that in order to proceed with construction of the housing project, a sewer extension would have to be built connecting both sites with existing lines.[136] The City Council held two votes on the sewer ordinance, defeating the ordinance on the first vote and passing it on the second.[137]

Following the second vote, those council members opposed to the adoption of the ordinance petitioned the council to hold a public referendum to challenge the council's vote.[138] The City Council approved their request and held such a referendum.[139] As a result, the voters repealed the ordinances by an overwhelming margin, effectively preventing the completion of the housing projects.[140] The plaintiffs then brought suit alleging that the decision by the council members to petition for a referendum was motivated by discriminatory intent, and that the outcome of the referendum had a discriminatory effect on those minority applicants seeking homes in the housing projects.[141]

In its review of the plaintiffs FHA claims, the court of appeals accepted the proposition that evidence of discriminatory effect, without proof of intent, *could* suffice to establish a FHA violation.[142] However, the court qualified this statement by adding that not every action producing such an effect would be found violative of the statute.[143] With this in mind, the court adopted the multi-factored approach of *Arlington II,* but chose to consider only three of the four *Arlington II* factors.[144] The court refused to consider evidence of discriminatory intent in its analysis of the plaintiff's disparate impact claims, arguing that if such evidence was not sufficient

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[130] *See* Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (comparing the opinions in *Rizzo, Black Jack,* and *Arlington II*).

[131] *See* Schwemm, *supra* note 10, at 257 (concluding "[t]he difference in these two methods of analyzing an effect case under Title VIII may not be particularly significant in terms of producing difference results). *But see* Stick, *supra* note 10, at 398, 407-08 (examining the differences between *Arlington II's* "four-factor" standard and the "effect-only" standards adopted by *Black Jack* and *Rizzo*).

[132] *See, e.g.,* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d. Cir. 1988); Stick, *supra* note 10, at 410 (describing *Arlington II* factors as a standard for determing the outcome of a Title VIII case).

[133] 782 F.2d 565 (6th Cir. 1986).

[134] *See* Arthur v. Toledo, 782 F.2d 565, 577 (6th Cir. 1986) (holding defendants, in submitting a key ordinance for approval by referendum, did not violate the FHA, despite plaintiffs claims that the decision to hold a referendum was motivated by racial bias). In *Arthur,* the Sixth Circuit reviewed the district court's decision below, which held for the defendants on all counts. *Id.* at 568. Plaintiffs alleged defendant's acts violated the Fifth and Fourteenth amendments, and the Contract Clause of the United States Constitution, The Fair Housing Act, and 42 U.S.C. §§ 1981, 1982, & 1983. *Id.* at 566. The court of appeals determined that a "three-factor" standard based on the *Arlington II* standard should be utilized to analyze the plaintiffs' FHA claim. *Id.* at 574. The court omitted consideration of any evidence of discriminatory intent. *Id.* Applying this standard, the court affirmed the district court's holding that no FHA violation had occurred. *Id.* at 575.

[135] *Id.* at 567.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 568.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 574.

[143] *See id.* at 575 (citing *Arlington II,* 558 F.2d at 1290).

[144] *Id.*

to maintain a claim based on disparate treatment, then the plaintiff should not be permitted to receive "partial credit" for its use elsewhere.[145] Applying these "three factors", the court concluded that the district court was correct in holding that the defendants did not violate the FHA.[146]

While the opinion of the court of appeals focused on review of the district court's assessment of the merits, its analysis also impacted the scope of the *prima facie* standard in future disparate impact cases challenging the use of referenda. In determining that there was no FHA violation, the court of appeals based its decision entirely on its analysis of the third *Arlington II* factor, which required consideration of the defendant's interest in taking the challenged action.[147] In its earlier discussion of referenda, the court had determined that it should only inquire into the motivation of the electorate during public referenda in rare circumstances.[148] In the absence of such circumstances, courts should not make such an inquiry.[149] Therefore, except in rare cases, the court concluded that because of this limitation, "the discriminatory effect of a referendum [could not] establish a violation of the FHA."[150]

This holding by the court effectively eliminated the availability of the "effect-only" *prima facie* standard to plaintiffs challenging the results of public referenda since such evidence, under the court's holding, would not suffice to establish a FHA violation. Therefore, through its use of the "four-factors" standard to review the merits of a FHA claim, the *Arthur* court was able to narrow the scope of the "effect-only" *prima facie* standard.

B. The Standards Compared: Mountainside Mobile Estates v. Secretary of Housing and Urban Development

In *Mountainside Mobile Estates v. Secretary of Housing and Urban Development*,[151] the plaintiff challenged a restriction imposed by the owners of a mobile home park which limited the occupancy of all mobile homes within the park to three persons.[152] The case provided the Tenth Circuit with its first opportunity to consider the appropriate standard to be applied to disparate impact claims brought under the FHA. In an earlier case, the court had held that evidence of a *significant* discriminatory effect could be sufficient to establish a disparate impact claim under Title VII.[153]

Accepting that premise for the Title VIII claim before it, the majority in *Mountainside assumed* that the government had established a *prima facie* case with its statistical evidence.[154] The court also noted that under the "effect-only" formulation, once a *prima facie* case was established, the defendant bore the burden of justifying the challenged actions.[155] However, instead of considering the such rebuttal evidence, the court first applied the "three-factors" variation of the *Arlington II* standard to assess the weight of the plaintiff's discriminatory effect evidence.[156] Under this "three-factors" analysis, the court concluded that the plaintiff's evidence of discriminatory effect was particularly weak.[157] Having diminished the plaintiff's *prima facie* arguments through its application of the "three-factors", the court then considered the defendant's evidence in rebuttal.[158] While spending some time determining the appropriate rebuttal standard,[159]

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[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *See id.* at 573 (discussing the ramifications of examining "the factors motivating the electorate in a public referendum)

[149] *Id.*

[150] *Id.*

[151] 56 F.3d 1243 (10th Cir. 1995).

[152] *See* Mountainside Mobile Estates v. Secretary of Hous. & Urban Dev. (HUD), 56 F.3d. 1243, 1252 (holding that defendant's occupancy restriction did not violate the FHA because defendant was able to rebut plaintiffs *prima facie* evidence with a legitimate justification). In *Mountainside*, defendant appealed the ruling of an Administrative Law Judge, as affirmed by the Secretary of HUD, which enjoined the defendant's use of a three-person occupancy restriction. *Id.* at 1246-47. In particular, the defendants challenged the ALJ's conclusion that a violation of the FHA could be supported merely by evidence of discriminatory effect. *Id.* at 1247. Applying a "three-factors" test, the Tenth Circuit reversed, holding that despite the plaintiff's *prima facie* evidence, defendant successfully rebutted plaintiffs claim. *Id.* at 1257.

[153] *See id.* at 1257 (citing Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1242 (10th Cir. 1991).

[154] *Id.* at 1252 (stating "[f]or purposes of this opinion, we shall assume... that a Title VIII plaintiff may establish a prima facie case of discriminatory impact by proof of national statistics relative to U.S. households as presented here). The court cited *Rizzo* for the proposition that "a Title VIII prima facie case, once established, as here, could alone suffice to prove a Title VIII violation unless the defendants justify the discriminatory effect which has resulted from their challenged actions". *Id.*

[155] *Id.* at 1252.

[156] *Id.* As stated in the text, the majority assumed that plaintiff's evidence of discriminatory effect did establish a *prima facie* case of discrimination under the FHA. *Id.* However, claiming to assess the merits of the plaintiff's claims, the court then applied the "three-factors" standard adopted earlier by the Sixth Circuit in *Arthur* to determine whether the "plaintiff's prima facie case of disparate impact [made] out a violation of Title VIII. *Id.* This analysis was taken prior to, and separate from the consideration of the defendant's rebuttal evidence. *See id.* at 1254 (considering defendant's rebuttal evidence).

[157] *Id.* at 1253.

[158] *Id.* at 1254.

[159] *Id.* The court decided to apply a "manifest relationship" rebuttal standard, gleaned from the Title VII "business necessity" rebuttal standard, rather than the more difficult "compelling need or necessity" standard that the Secretary had applied below. *Id.*

the court ultimately held that the defendant's had sufficiently rebutted the plaintiff's claims.[160] For this reason, the court of appeals reversed the earlier decision by the HUD Secretary and found no FHA violation.[161]

By contrast, the dissent in *Mountainside* did not apply the multi-factored standard in its analysis of the plaintiff's FHA claim.[162] The dissent emphasized that evidence of discriminatory effect alone should suffice to satisfy the plaintiff's *prima facie* burden. Once that burden has been met, the defendant must rebut such evidence.[163] Unlike the majority, however, the dissent did not utilize the *Arlington II* factors to assess the plaintiff's *prima facie* evidence. Rather, the dissent appears to have weighed the evidence presented from both sides, concluding that the plaintiffs did offer sufficient evidence of a FHA violation and that the defendant failed to sufficiently rebut that evidence.[164] Therefore, the dissent determined that the Secretary's finding of a FHA violation should be affirmed.[165]

This divergence in the results produced by the majority and the dissent, supports the proposition that the use the "effect-only" and "four-factors" standards can produce different results when applied to the same case. The majority in *Mountainside* used the *Arlington II* factors to diminish the *prima facie* evidence provided by the plaintiff. Under the "effect-only" approach applied by the dissent, the weight of the plaintiff's evidence was preserved. Further, by applying the *Arlington II* factors prior to assessing the defendants rebuttal evidence, the majority reduced the distinction between using the standard as a *prima facie* standard or as a "merits" standard to one of semantics. Under either label, the plaintiff's case was lost at the *prima facie* stage, *before* the defendant's evidence in rebuttal was considered. Thus, the majority was able to use the multi-factors analysis to narrow the scope of the *prima facie* standard, and in turn the FHA.

C. *The Proper Role of the "Four-factors" Standard: Huntington Branch NAACP v. Town of Huntington*

In *Huntington Branch NAACP v. Town of Huntington*,[166] the plaintiffs challenged the refusal of the defendants to repeal a municipal ordinance which restricted the development of multi-family housing projects in a largely white area.[167] The district court below dismissed the plaintiffs claims on three alternative grounds, the second, and most relevant to this paper, being that under the *Arlington II* "four-factors" standard, the plaintiffs failed to establish a *prima facie* case of housing discrimination.[168] Reviewing these holdings, the court of appeals focused on the proper methods for analyzing both the *prima facie* burden and the merits of a FHA claim.[169] Correcting the district court's analysis of both the facts and applicable law, the court of appeals held that discriminatory effect, alone, was sufficient to satisfy the *prima facie* standard for claims housing discrimination. Finding that the plaintiff's had satisfied this *prima facie* burden, the court reversed the district court on the merits and found the defendants guilty of violating the FHA.[170]

Though the court quickly resolved the issue of the appropriate *prima facie* standard for disparate impact claims, the courts subsequent discussion of the merits provided additional insight into the *prima facie* concept and the proper use of the *Arlington II* factors. The court recognized that the *Arlington II* factors were useful in analyzing FHA claims, though not as a *prima facie* standard.[171] Rather, these factors, *among others*, should be considered when assessing the *defendant's justification* for their challenged actions.[172] In particular, the court found the *Arlington II* factors useful in characterizing and separating the various types of disparate impact claims before the court.[173] However, ultimately, the court still weighed the strength of the plaintiff's *prima facie* evi-

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[160] *Id.* at 1257.

[161] *Id.*

[162] *Id.* The dissent emphasized that evidence of discriminatory effect, without more, was sufficient to establish a *prima facie* case of housing discrimination. *Id.* (citing Betsey v. Turtle Creek, 736 F.2d 983 (4th Cir. 1986).

[163] *See id.* at 1257, 1258 (implicitly accepting the rebuttal concept by contesting only the majority's analysis of the rebuttal evidence and not the use of the rebuttal standard itself).

[164] *See id.* at 1257 (noting that the evidence did support finding that defendant's policy had a discriminatory effect and that the defendant's rebuttal evidence was not sufficient to overcome such a finding).

[165] *Id.*

[166] 844 F.2d 926 (2d. Cir. 1988).

[167] *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d. Cir. 1988) (holding defendants in violation of the FHA because they failed to justify those actions which plaintiffs proved created a discriminatory effect). In *Huntington*, the Second Circuit reviewed the district court's holding denying plaintiff relief under the FHA. *Id.* at 928. Plaintiffs alleged that the town's zoning ordinance effectively limited private multi-family housing projects to "a largely minority urban renewal area" while preventing the construction of such projects in particular white neighborhoods. *Id.* at 928. The district court based its decision on three alternative grounds, one of which was that the plaintiff failed to satisfy its *prima facie* under the "four-factors" standard. *Id.* at 932. The court of appeals reversed, holding that the plaintiff had established a prima facie case under the *Rizzo* "effect-only" standard, the appropriate *prima facie* standard. *Id.* at 934.

[168] *Id.* at 933.

[169] *Id.*

[170] *Id.* at 941.

[171] *See id.* at 935-36 (warning that "treating the [*Arlington II* factors] as steps necessary to make out a prima facie case places too onerous a burden on appellants").

[172] *See id.* (accepting the relevance of the *Rizzo* and *Arlington II* approaches but concluding "[i]n this case, we are obliged to refine the standard for assessing a Title VIII defendant's justification somewhat beyond what was said in either [case]").

[173] *See id.* at 937 (recognizing, in accordance with the first factor of the *Arlington II* standard, that "discriminatory effect.

dence against the defendant's evidence in rebuttal.[174] Based on that balancing of the evidence, the court concluded that the defendant had violated Title VIII.[175] Thus, the *Huntington* opinion offers persuasive insight into a more appropriate role for the *Arlington II* "four factors" standard in analyzing disparate impact claims under the FHA.

V. CONCLUSION

For the past twenty years, the federal judiciary has failed to adopt and consistently apply a uniform *prima facie* standard to analyze disparate impact claims brought under the FHA. As this paper has shown, the application of different *prima facie* standards can be determinative in the outcome of a FHA case. Further, the application of the "four-factors" standard, both as a *prima facie* standard and as a guide for the analysis of the merits of FHA claims can provide courts with a means for narrowing the scope of both the plaintiffs *prima facie* burden under the FHA and the scope of the statute itself. Finally, while the "four-factors" analysis has its place in the proper of analysis of FHA claims, applying it as a *prima facie* standard does not necessarily reflect the intent of the court in *Arlington II* or of Congress' intent in enacting the FHA.

As this paper's analysis of relevant authorities suggests, Congress intended for the FHA to be interpreted broadly. This purpose can be gleaned from analysis of the key language in the FHA, the statute's recent legislative history, the interpretation of similar statutory language in Title VII, and judicial opinions discussing both the Equal Protection Clause and the FHA. The decisions in *Arthur, Mountainside Mobile Estates*, and *Huntington Branch, NAACP* suggest that the "effects-only" *prima facie* standard best furthers such a broad interpretation.

For these reasons, the "effect-only" standard should be adopted by all of the courts within the federal judiciary. By doing so, the judiciary will permit more plaintiffs to successfully establish, and potentially remedy, their claims of discriminatory effect under the FHA, in turn, increasing the ability of the FHA to diminish housing discrimination in the United States. Such a goal is as worthwhile today as it was some twenty five years ago, when President Lyndon Johnson stressed, in a speech to Congress, that:

> Segregation in housing compounds the Nation's social and economic problems. When those who have the means to move out of the central city are denied the chance to do so, the result is a compression of population in the center. In that crowded ghetto, human tragedies - and crime - increase and multiply. Unemployment and educational problems are compounded - because isolation in the central city prevents minority groups from reaching schools and available jobs in other areas. . . .

A fair housing law is not a cure-all for the Nation's urban problems. But ending discrimination in the sale or rental of housing is essential for social justice and social progress.[176]

. . arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation").

[174] *See id.* at 940 (stating that "[i]n balancing the showing of discriminatory effect against the import of the Town's justifications, . . . we conclude that the strong showing of discriminatory effect . . . far outweigh the Town's weak justifications").

[175] *Id.* at 941.

[176] *See* LAMB, *supra* note 106, at 1124 (citing 1969-1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 116, at 61 (1965).