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Determining the Proper Approach to Discriminatory Statutes within the Scope of the Fair Housing Act

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I. INTRODUCTION

The Fair Housing Act ("FHA"),[1] enacted in 1968 and amended in 1988, is an attempt by Congress to ensure that citizens of the United States have the opportunity to obtain housing on a nondiscriminatory basis.[2] Though the purpose of the FHA is clear, dissension exists among the circuit courts of the United States regarding the extent of protections provided therein. In particular, there has been a significant difference among the circuits as to the appropriate standard by which to evaluate facially discriminatory statutes that fall within the reach of the FHA. The purpose of this comment is to address the proper standard and to illustrate the need for consistency across the circuits. As a means to this end, this comment will discuss the terms and purpose of the FHA, the individual approaches of each circuit addressing the issue, and assess those approaches in an attempt to discern a satisfactory uniform standard.

The issue of what standard ought to apply to facially discriminatory statutes falling within the scope of the FHA is one of modern relevance. Given the numerous groups protected under the FHA, it has proven inevitable that one or more of these groups will be affected by legislation, regulations, or ordinances governing the housing opportunities available to them. For example, a

1. 42 U.S.C. §§ 3601-3631 (2006).
2. *Id.*

recent case decided in the Southern District of New York, *Sierra v. City of New York*,[3] involved a housing code provision that forbade children under the age of sixteen from living in single-room occupancy units that lacked kitchen or sanitary facilities.[4] The provision was facially discriminatory, as it differentiated on the basis of familial status. As the state of the law presently stands, the validity of that provision would depend on what approach the court would choose to adopt regarding facially discriminatory statutes under the FHA.

Because several circuits are split on the issue of what standard ought to apply, individuals similarly situated but residing in different jurisdictions would not likely achieve the same result in a challenge to a law impinging on their fair housing rights. When a member of a group protected by the FHA challenges a facially discriminatory statute, the Eighth Circuit Court of Appeals applies the standard of scrutiny afforded to that particular group under equal protection analysis.[5] Under this approach, individuals of differing groups will receive varying levels of protection under the FHA. For example, if a zoning ordinance differentiated on the basis of race, the strict scrutiny standard would apply, and the ordinance would likely be deemed unlawful.[6] In contrast, a zoning ordinance differentiating on the basis of familial status, such as that challenged in *Sierra*, would merit application of the rational basis standard, and the court would likely give deference to the legislative body.[7] This approach is problematic, as classes of persons protected collectively under the FHA are treated differently on the basis of their particular class.

Comparatively, under the approaches of the Sixth, Ninth, and Tenth Circuit Courts of Appeals, a challenged facially discriminatory statute would be evaluated under a more consistent and individual-centered approach.[8] Under this approach, the primary criteria for validity under the FHA is whether the facially discriminatory statute differentiates on the basis of the unique characteristics and needs of, and concerns regarding the group affected.[9]

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3. 552 F. Supp. 2d 428 (S.D.N.Y. 2008).
4. *Sierra*, 552 F. Supp. 2d at 429.
5. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).
6. *Black Jack*, 508 F.2d 1179.
7. *Sierra*, 552 F. Supp. 2d at 430.
8. *See* Larkin v. State of Mich. Dep't of Soc. Servs., 89 F.3d 285 (6th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995); Cmty. House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).
9. *Bangerter*, 46 F.3d at 1503-04.

This approach is at once more uniform and more flexible than the approach of the Eighth Circuit, as the same standard applies to all groups protected under the FHA, while also allowing regulations or restrictions tailored to the individuals actually affected. This comment will elaborate on the positive aspects of the approach of the Sixth, Ninth, and Tenth Circuits and propose that this approach be adopted uniformly across the circuits so that the FHA is consistently applied throughout the courts of this nation.

II. EIGHTH CIRCUIT COURT OF APPEALS: MIRRORING EQUAL PROTECTION ANALYSIS

Of the two principal approaches to the treatment of facially discriminatory statutes under the FHA, the Eighth Circuit Court of Appeals approach gives greater deference to the legislature and tends to uphold more challenged statutes. The Eighth Circuit set forth the parameters of its approach to discriminatory statutes under the FHA in *United States v. City of Black Jack*.[10] In that case, the complaint alleged that the City of Black Jack, Missouri violated the FHA by enacting a zoning ordinance that prohibited multiple family dwellings in a particular area of town, preventing the building of integrated housing for low- to moderate-income citizens.[11] The ordinance was alleged to be discriminatory; its purported aim and expected effect was to maintain the racial composition of the City of Black Jack, which was "virtually all white."[12]

The Eighth Circuit looked to the purposes of the FHA: "[t]o provide, within constitutional limitations, for fair housing throughout the United States"[13] and to aid determination of the proper response to discriminatory housing statutes.[14] The court further considered the fact that the FHA was enacted to aid enforcement of the Thirteenth Amendment, eliminating remnants of slavery,[15] and that it was intended to prohibit "all forms of discrimination, sophisticated as well as simple-minded."[16] Likening housing discrimination to employment discrimination, the court

10. *Black Jack*, 508 F.2d 1179.
11. *Id.* at 1182.
12. *Id.* at 1183.
13. 42 U.S.C. § 3601.
14. *Black Jack*, 508 F.2d at 1184.
15. *Id.*
16. *Id.* (quoting Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974)).

declared barriers that function to discriminate on the basis of an impermissible classification must be eradicated.[17]

The Eighth Circuit announced that the burden of proof in cases challenging statutes as facially discriminatory under the FHA is the "prima facie case"[18] set forth in *Williams v. Matthews Co.*[19] The plaintiff must show that "the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect."[20] Once the plaintiff has established discriminatory effect, "the burden then shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling government interest."[21] The court concluded that the zoning ordinance was impermissibly discriminatory, as it disproportionately affected blacks, confining them to living in the inner city of Saint Louis, and that the ordinance did not further any asserted governmental interest.[22]

In *Black Jack*, the Eighth Circuit set forth its approach to racially discriminatory statutes under the FHA: the plaintiff must show a prima facie case of discriminatory effect, and in response, the government must show that its action was necessary to serve a compelling public interest.[23] Worth noting is that *Black Jack* dealt only with a racially discriminatory ordinance—one that, if evaluated on constitutional grounds, would likely be struck down under strict scrutiny analysis.[24] The FHA extends protection to several other groups of persons, including some who do not merit strict scrutiny under a Fourteenth Amendment equal protection

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17. *Black Jack*, 508 F.2d at 1184 (referencing Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)).

18. *Black Jack*, 508 F.2d at 1184.

19. 499 F.2d at 826.

20. *Black Jack*, 508 F.2d at 1185. The court asserted that effect, rather than motivation, was the pertinent characteristic, because motives may be hidden. *Id.* (citing Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967)).

21. *Black Jack*, 508 F.2d at 1185.

22. *Id.* at 1186-87. The asserted governmental interests were: (1) Road and traffic control; (2) Prevention of overcrowding of schools; (3) Prevention of devaluation of adjacent single-family homes. *Id.* at 1186. The court stated that in determining whether an asserted interest was compelling, three factors must be considered:

> [F]irst, whether the ordinance in fact furthers the governmental interest asserted; second, public interest served by the ordinance is constitutionally permissible and is substantial enough to outweight [sic] the private detriment caused by it; and third, whether less drastic means are available whereby the stated government interest may be attained.

Id. at 1186-87. The court found it unnecessary to evaluate beyond the first factor, as it found none of the asserted interests to be furthered by the ordinance. *Id.* at 1187.

23. *Id.* at 1184-85.

24. *Black Jack*, 508 F.2d at 1183-84.

analysis. While adopting an approach to racially discriminatory statutes under the FHA in *Black Jack*, the Eighth Circuit was not altogether clear what would result when a group alleging discrimination did not merit constitutional strict scrutiny.

In *Familystyle of St. Paul, Inc. v. City of St. Paul*,[25] the Eighth Circuit answered the question of what standard ought to apply to statutes under the FHA which are alleged to be discriminatory on other than racial grounds. In *Familystyle*, the Eighth Circuit evaluated the validity of a Minnesota law requiring residential facilities for the mentally ill to be placed at least a quarter of a mile from one another.[26] The stated purpose of that requirement was to provide for deinstitutionalization of the mentally ill.[27] The court distinguished *Black Jack*, stating that once a plaintiff has presented a prima facie case of the discriminatory effect of the challenged law, "the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a governmental interest commensurate with the level of scrutiny afforded the class of people affected by the law under the [E]qual [P]rotection [C]lause."[28] The court concluded that the rational basis test set forth in *City of Cleburne v. Cleburne Living Center*[29] was the appropriate standard to use in evaluating the validity of a law distinguishing the mentally handicapped.[30]

In *Cleburne*, the Supreme Court declared that those afflicted by mental retardation do not constitute a suspect class for equal protection purposes.[31] Because the mentally retarded are not a suspect class, the validity of the law hinges on whether the distinction between the mentally impaired and others is "rationally related to a legitimate governmental purpose."[32] The Eighth Circuit concluded that deinstitutionalization of the mentally handicapped was a legitimate government purpose and that the law was valid under the FHA.[33]

Familystyle set forth the Eighth Circuit's approach to facially discriminatory statutes under the FHA. Following Equal Protection Clause jurisprudence, the court determined that whatever

25. 923 F.2d 91 (8th Cir. 1991).
26. *Familystyle*, 923 F.2d at 92-93.
27. *Id.* at 93.
28. *Id.* at 94 (citing *Black Jack*, 508 F.2d at 1185 n.4).
29. 473 U.S. 432 (1985).
30. *Familystyle*, 923 F.2d at 94.
31. *Cleburne*, 473 U.S. at 433.
32. *Id.*
33. *Familystyle*, 923 F.2d at 94-95.

standard of scrutiny applies to an affected group under equal protection jurisprudence will be used in FHA evaluations of facially discriminatory laws affecting that group.[34] The Eighth Circuit utilized this approach again in *Oxford House-C v. City of St. Louis*.[35] Oxford House, which ran group homes for recovering alcoholics and drug addicts, challenged a Missouri zoning ordinance that limited the number of unrelated residents in group homes for the handicapped.[36] Oxford House alleged that the ordinance discriminated against the residents, obstructing their fair housing rights.[37] The Eighth Circuit declared that, even if the ordinance caused some financial hardship on the homes—and thereby their handicapped residents—, the ordinance was lawful so long as an underlying rational basis existed.[38] The court found that the government had a legitimate interest in reducing traffic, congestion, and noise in residential areas and that the ordinance was reasonably related to that purpose.[39]

III. SIXTH, NINTH, AND TENTH CIRCUIT COURTS OF APPEALS: A MORE PARTICULARIZED STANDARD

In contrast to the Eighth Circuit's approach to discriminatory statutes under the FHA, which mirrors equal protection jurisprudence in its application of the standard of scrutiny to be accorded to a particular affected group, the Sixth, Ninth, and Tenth Circuits each take an approach that is more protective of a plaintiff's fair housing rights. The more protective approach rejects the notion of applying an equal protection analysis to challenged statutes under the FHA. Instead, the courts apply a consistent standard to discriminatory statutes under the FHA: the statutes must be tailored to the actual situations of the particular groups affected.[40]

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34. *Id.* at 94.
35. 77 F.3d 249 (8th Cir. 1996).
36. *Oxford House*, 77 F.3d at 250-51.
37. *Id.*
38. *Id.* at 252.
39. *Id.*
40. *See Larkin*, 89 F.3d at 290 (Any discriminatory statute enacted under the FHA must be "warranted by the unique and specific needs and abilities of those handicapped persons affected."); *Bangerter*, 46 F.3d at 1503 (Any discrimination against handicapped, made under the FHA, in the name of public safety "must be tailored to particularized concerns about individual residents."); *Cmty. House*, 490 F.3d at 1050 (discriminatory treatment under the FHA must be predicated on the actual situations of the affected persons).

In *Bangerter v. Orem City Corporation*,[41] the Tenth Circuit rejected the use of an equal protection analysis to assess FHA claims.[42] The case involved a challenge to a zoning ordinance requiring group homes for the mentally handicapped located in "single family" residential areas to obtain a conditional use permit.[43] The court, making an analogy to employment discrimination cases, looked to the Supreme Court's decision in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls*[44] to establish that the ordinance could be deemed discriminatory based on its terms alone, without regard to the underlying government intent or interest.[45] Rejecting the application of an equal protection analysis, the Tenth Circuit stated that the plaintiff's ability to assert a right under the Fourteenth Amendment is irrelevant in an FHA claim because the mentally handicapped are a protected class under the FHA, even if they are not protected for Fourteenth Amendment purposes.[46]

The Tenth Circuit looked first to the actual language of the FHA.[47] The court referenced Section 3604(f)(9) of the Act, which specifies that the Act does not require housing to be made available to an individual when that person's tenancy would pose a risk to public safety.[48] While the Act does allow for discriminatory housing statutes in the interest of public safety, there are limitations.[49] The court asserted that any discrimination against the handicapped in the name of public safety "must be tailored to particularized concerns about individual residents"[50] and cannot be based on generalizations or stereotypes about the handicapped.[51] Furthermore, while the FHA does not preclude housing restrictions that benefit, rather than discriminate against, the dis-

41. *Bangerter*, 46 F.3d 1491.
42. *Id.* at 1500, 1503.
43. *Id.* at 1496.
44. 499 U.S. 187 (1991).
45. *Bangerter*, 46 F.3d at 1500-01.
46. *Id.* at 1503.
47. *Id.* at 1503-04.
48. *Id.* at 1503. Section 3604(f)(9) of the FHA states "[n]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(f)(9) (2006).
49. *Bangerter*, 46 F.3d at 1503.
50. *Id.*
51. *Id.*

abled,[52] the court was wary of accepting such a justification for a discriminatory statute.[53] The court concluded by declaring, "restrictions that are narrowly tailored to the particular individuals affected could be acceptable under the [FHA] if the benefit to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them."[54]

The Sixth Circuit adopted a very similar approach in *Larkin v. Michigan Department of Social Services*.[55] *Larkin* involved a challenge to the spacing and notice requirements of the Michigan Adult Foster Care Facility Licensing Act.[56] The Sixth Circuit stated that, because the statute was facially discriminatory, the burden shifted to the defendant to establish its legitimacy.[57] In determining the magnitude of the burden on the defendant, the Sixth Circuit referenced both the Eighth Circuit's approach in *Familystyle* and *Oxford House* and the Tenth Circuit's decision in *Bangerter*.[58] Looking to a prior decision that safety restrictions on homes for the handicapped "must be tailored to the particular needs" of those individuals affected,[59] the Sixth Circuit required facially discriminatory statutes under the FHA to be "warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply,"[60] a standard similar to that adopted by the Tenth Circuit.

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52. *Id.* at 1504. The Tenth Circuit looks to Supreme Court jurisprudence surrounding the Title VII bar on racial discrimination, in which the Court considered the legislative and historical background of Title VII and determined that affirmative action benefitting minorities is permissible. *Id.* (citing United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979)).

53. *Id.*

54. *Bangerter*, 46 F.3d at 1504. To support this position, the court looks to decisions of other circuits in the intentional racial discrimination setting in which the courts upheld housing policies that made traditionally black housing more available to whites, thus reducing the availability of such housing to blacks. *Id.* at 1505 (citing South-Suburban Hous. Ctr, v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991) and Otero v. New York City Hous. Auth., 484 F.2d 1122 (2nd Cir. 1973)). The court emphasized the importance of allowing for limited restrictions on minority housing to achieve the greater policies of the FHA, including integration. *Bangerter*, 46 F.3d at 1505.

55. *Larkin*, 89 F.3d 285.

56. *Id.* at 287. The Act sought to prevent an "excessive concentration" of such facilities in a municipality. *Id.* It prohibited the grant of a license to a proposed adult foster care facility if another such facility was located within a 1500 foot radius. *Id.* It further required notice to a designated agency of the proposed location of an adult foster care facility so that residents in the surrounding area could be notified. *Id.* The Michigan Adult Foster Care Facility Licensing Act is codified at MICH. COMP. LAWS §§400.701 *et seq.*

57. *Larkin*, 89 F.3d at 290.

58. *Id.*.

59. *Id.* (citing *Marburnak*, 974 F.2d at 47).

60. *Larkin*, 89 F.3d at 290.

In 2007, in *Community House, Inc. v. City of Boise*,[61] the Ninth Circuit followed the lead of the Sixth and Tenth Circuits and adopted an approach to facially discriminatory statutes under the FHA that required the statute to either benefit the protected class or to respond to legitimate safety concerns based on the individuals involved, rather than being based on stereotypes.[62] The court relied heavily on the Supreme Court's decision in *Johnson Controls*,[63] an employment discrimination case in which the Court declared that an employment policy discriminating on the basis of religion, sex, or national origin could only pass muster if such a quality was a "bona fide occupational qualification."[64] Applying the *Johnson Controls* approach, the Ninth Circuit concluded that, while statutes could treat FHA-protected classes differently, such treatment must be predicated on the actual situation of those affected.[65]

In their decisions regarding discriminatory statutes under the FHA, the Sixth, Ninth, and Tenth circuits each analogize the challenged statutes to employment discrimination actions brought under Title VII of the Civil Rights Act of 1964,[66] each looking to the Supreme Court's decision in *Johnson Controls*.[67] In *Johnson Controls*, the Supreme Court determined that the issue of whether an employment practice is discriminatory depends not on the underlying intent, but on the actual and explicit terms of the policy.[68] The Court stated, "...the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."[69] By adopting the Supreme Court's approach to employment discrimination cases in the context of discriminatory statutes under the FHA, the Sixth, Ninth, and Tenth

61. 490 F.3d 1041 (9th Cir. 2007).

62. *Id.* at 1050.

63. 499 U.S. 187.

64. *Id.* at 200. A bona fide occupational qualification was defined as one "reasonably necessary to the normal operation of that particular business or enterprise." *Id.*

65. *Cmty. House*, 490 F.3d at 1050.

66. 42 U.S.C. §§ 1980-2000 (2006).

67. *Johnson Controls*, 499 U.S. 187. *See Bangerter*, 46 F.3d at 1503 (citing Supreme Court's assertion that, in the employment discrimination context, whether a practice is discriminatory centers on the actual terms of the practice, not the intent of the employer); *Johnson Controls*, 499 U.S. at 199; *Larkin*, 89 F.3d at 289 (referencing the Tenth Circuit's adoption of the Supreme Court's *Johnson Controls* approach to discriminatory practices); *Cmty. House*, 490 F.3d at 1049-50 (citing the position of the Supreme Court in *Johnson Controls* that the legitimacy of discriminatory treatment in the employment context will be determined by the explicit terms of the discrimination, not the employer's intent).

68. *Johnson Controls*, 499 U.S. at 199.

69. *Id.*

Circuits refuse to consider the motive or purpose of a law, thus precluding application of standards promulgated under equal protection analysis.[70] The sole factor in determining whether a statute is discriminatory is the terms of the statute itself.[71]

IV. THE SOUTHERN DISTRICT COURT OF NEW YORK ADOPTED THE APPROACH OF THE SIXTH, NINTH, AND TENTH CIRCUIT COURTS OF APPEALS

As previously mentioned, the Southern District of New York recently considered a case challenging a housing code provision as facially discriminatory under the FHA. In *Sierra v. New York*,[72] the plaintiff was evicted from her single-room occupancy unit (a unit lacking a kitchen, restroom) on the basis of a housing code provision prohibiting children under the age of sixteen from living in such units.[73] The court assessed the approaches of the various circuits.[74] Rejecting the Eighth Circuit's approach, the court claimed that application of rational basis scrutiny[75] is typically reserved for situations in which state law is alleged to violate more general provisions of the Constitution, like the Fourteenth Amendment.[76] Where Congress has formulated a specific provision to protect a particular class, however, the court asserted that a heightened standard is necessary to ensure the class receives the protection Congress intended.[77] The appropriate standard to be applied, the court claimed, was the standard set forth by the Second Circuit in *Huntington Branch, NAACP v. Town of Huntington*,[78] which requires the defendant to show a genuine government interest that cannot be served by a less discriminatory means.[79] The Southern District of New York believed that standard to be a broader statement of the standard set forth by the

70. *Bangerter*, 46 F.3d at 1500-01; *Larkin*, 89 F.3d at 290; *Cmty. House*, 490 F.3d at 1049-50.

71. *Bangerter*, 46 F.3d at 1500-01.

72. . *Sierra*, 552 F. Supp. 2d 428.

73. *Id.* at 429.

74. *Id.* at 430-31.

75. *Id* at 430. The Southern District of New York discusses the approach of the Eighth Circuit solely in terms of the rational basis standard. *Id.* Each of the cases cited by the Southern District of New York with regard to the Eighth Circuit is one in which the Eighth Circuit applied the rational basis test. *Id.* It should be reiterated, however, that the Eighth Circuit's approach is most accurately stated as set forth in *Black Jack*.

76. *Id.*

77. *Sierra*, 552 F. Supp. 2d at 430-31.

78. 844 F.2d 926 (2d Cir. 1988). *Huntington* was a case addressing the independent issue of disparate impact under the Fair Housing Act. *Id.*

79. *Sierra*, 552 F. Supp. 2d at 431 (citing *Huntington*, 844 F.2d at 936).

Ninth Circuit in *Community House*.[80] The district court held that the *Huntington* standard was appropriate for the same reasons asserted by the Ninth Circuit.[81]

V. ANALYSIS

There are two general approaches to the standard to be applied to facially discriminatory statutes falling within the scope of the FHA. The Eighth Circuit approach mirrors Equal Protection Clause analysis as to the level of scrutiny that should be applied.[82] The Sixth, Ninth, and Tenth Circuits each share a different approach, which provides a more consistent standard to the several classes protected by the FHA and allows for more flexibility in housing laws, restrictions, and benefits tailored to the actual situations of those affected. As the following discussion indicates, the approach of the Sixth, Ninth, and Tenth Circuits is the more appropriate standard to be applied to discriminatory statutes falling within the scope of the FHA.

The core problem of the Eighth Circuit's approach stems from the use of standards promulgated under Equal Protection Clause jurisprudence, applying the level of scrutiny accorded to an affected class under equal protection analysis. This approach tends to prejudice parties challenging a housing law or regulation as facially discriminatory in violation of the FHA. As applied by the Eighth Circuit,[83] a plaintiff challenging a housing law that is facially discriminatory on the basis of race is more likely to prevail than a plaintiff challenging a law that discriminates on the basis of handicap.

This result is illustrated by a comparison of the decisions rendered by the Eighth Circuit in *Black Jack* and *Familystyle*. In *Black Jack*, the plaintiffs challenged an ordinance that arguably discriminated on the basis of race.[84] Once the plaintiffs had established a prima facie case of discrimination, the Eighth Circuit required the municipal defendant to show that the discriminatory ordinance was necessary to serve a compelling public interest.[85] That standard placed a considerable burden on the defendant, making it more likely that the plaintiff might prevail. Compara-

80. *Id.*
81. *Id.*
82. *Black Jack*, 408 F.2d at 1185.
83. *Id.*
84. *Id.* at 1181.
85. *Id.* at 1184-85.

tively, the Eighth Circuit applied a rational basis level of scrutiny in *Familystyle*, requiring only that the ordinance be rationally related to a legitimate government purpose when plaintiffs challenged an ordinance discriminating on the basis of handicap.[86] The rational basis standard is easier to meet than the strict scrutiny standard. A law discriminating on the basis of handicap is thus more likely to stand where a law discriminating on the basis of race will be struck down.

This result is undesirable under the FHA for a variety of reasons. One problem is that the levels of scrutiny promulgated under the Equal Protection Clause are typically reserved for claims of violations of the broad rights guaranteed by the Constitution.[87] The rights to which citizens are entitled under the FHA are not such "broad, general guarantees,"[88] but are specific protections granted by Congress to a particular group of citizens. Thus, the FHA is an inappropriate context in which to apply the levels of scrutiny used to protect broad constitutional guarantees.

Additionally, the Eighth Circuit's approach conflicts with Congress's intent in enacting the FHA as evidenced by the plain language of the statute. Congress included all of the protected classes together in one statute.[89] This action indicates its intent that each protected class receives the same protection under the Act, without significant differentiation between the protection given to individual classes of protected persons. The handicapped are not a traditionally "suspect class" under the Equal Protection Clause and are not typically accorded any type of heightened scrutiny in the equal protection context.[90] If Congress had intended to condition the degree of protection granted under the FHA on the class of the injured party, it would have drafted the Act in such a manner. Because it did not, the Eighth Circuit's choice to apply varying levels of scrutiny—thereby according varying levels of protection—is contrary to the intent of Congress.

A final problem with the Eighth Circuit's approach is the possibility that, in many cases, it allows for a legislature or other rulemaking authority to avoid the stated purpose of the FHA. This danger exists particularly for those classes not deemed "suspect classes" under equal protection analysis, to whom the rational ba-

86. *Familystyle*, 923 F.2d at 92-93.
87. *Sierra*, 552 F. Supp. 2d at 430.
88. *Id.*
89. 42 U.S.C. § 3604 (2006).
90. *City of Cleburne*, 473 U.S. at 446.

sis standard would apply. The rational basis standard, by its nature, tends to give more deference to the legislature or rulemaking authority, so long as a legitimate government purpose underlies the legislation. A "legitimate government purpose" can be attached to any law restricting the availability of housing to a group protected under the FHA, and—so long as that restriction bears a rational relation to that purported purpose—the restriction will stand. As a result, the door is open for a lawmaking body to discriminatorily restrict access to housing with relatively little judicial inquiry into its effect.

This hazard is illustrated in the Eighth Circuit's opinion in *Oxford House*.[91] The court upheld a zoning ordinance that limited group rehabilitative housing opportunities for recovering addicts.[92] The court expressed indifference to the fact that these group homes would suffer extreme financial hardship as a result of the restrictions of the zoning ordinance, stating that the ordinance was not a violation of the FHA as long as the city had a rational basis for enacting it.[93]

This cavalier attitude toward the effect of the ordinance conflicts with the protective goal of the FHA. Under the approach taken by the Eighth Circuit, a legislature has the ability to systematically discriminate against a protected class of persons and limit the housing opportunities available to them, provided that a rational basis for the restriction can be concocted. In a situation like that in *Oxford House*, for example, a city could enact zoning ordinances that make it so financially difficult for a group rehabilitative home to operate that no such homes could exist in the community. The potential for such discrimination indicates that the approach of the Eighth Circuit does not satisfactorily uphold the protections of the FHA.

While the approach of the Eighth Circuit does not adequately achieve the stated goal of the FHA, the "more searching scrutiny"[94] approach of the Sixth, Ninth, and Tenth Circuits does. It is well-suited to furthering the goal of providing "for fair housing throughout the United States."[95] This approach requires that a discriminatory housing restriction (1) either benefit the class affected or be tailored to the actual needs of or concerns regarding

91. *Oxford House*, 77 F.3d 249.
91. *Id.* at 253.
93. *Id.*
94. *Sierra*, 552 F. Supp. 2d at 431.
95. 42 U.S.C. § 3601 (2006).

the individuals affected and (2) not be based on stereotypes of that class.[96] At once both consistent and flexible, this approach most accurately manifests Congress's intent underlying the FHA.

In contrast to the approach of the Eighth Circuit, the approach of the Sixth, Ninth, and Tenth Circuits provides a more consistent standard of protection to all classes given protection under the FHA. There is no distinction as to what level of protection will be given based on the particular class of the challenging party. At the same time, the approach is flexible enough that the outcome in a particular case will be determined by the actual needs, concerns, and characteristics of the individuals affected by the challenged law. While all classes included in the FHA receive equal rights and protection, those restrictions that are genuinely necessary in a particular situation are likely to be upheld.

The flexibility of the standard combined with the prohibition on restrictions based on stereotypes is another positive attribute of the approach of the Sixth, Ninth, and Tenth Circuits. By seeking to avoid the use of stereotypes, this approach makes a court more likely to detect a false justification. As a result, only those restrictions that are merited by a particular class of persons in a particular situation will be upheld. The interests of those protected by the FHA, as well as the members of the community at large are furthered by this approach. People protected under the Act are assured that their housing opportunities will not be unfairly limited on the basis of race, gender, handicap, familial status, etc., while the community at large may receive the benefit of restrictions that are necessary for the public good.

Of particular importance is that this approach permits facially discriminatory statutes that benefit a protected class. While it is necessary to be wary of any restriction seeking to be justified on the ground that it benefits, rather than harms, the affected people, it is equally important that those restrictions actually benefitting a protected class be upheld. As previously noted, several courts have made comparisons to employment discrimination cases in discussing the FHA. In the employment discrimination context, the Supreme Court has stated that Title VII's bar to racial discrimination should not be read literally, but instead should be read against the history of its enactment and interpreted to allow affirmative action.[97] By analogy, the FHA should therefore be

96. *Cmty. House*, 490 F.3d 1041.
97. United Steelworkers of Am. AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

read as prohibiting discrimination intended to harm a protected class, while at the same time permitting restrictions that are intended to and actually do benefit them.

VI. CONCLUSION

The Sixth, Ninth, and Tenth Circuit approach allows for beneficial restrictions to stand, yet ferrets out those restrictions claiming to be beneficial but actually based on broad generalizations and stereotypes. Furthermore, it offers a consistent standard, applied uniformly to all protected groups, yet provides for flexibility in the evaluation of challenged laws. The aggregate effect of these factors is that the preferred standard provides substantial protection to those groups protected under the FHA, while allowing legislative bodies to create housing laws that meet the present needs and concerns of their communities. For these reasons, the approach of the Sixth, Ninth, and Tenth Circuits should be the standard applied by all courts addressing facially discriminatory statutes within the scope of the FHA.

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