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Justifying Discrimination: How the Ninth Circuit Circumvented the Intent of the Fair Housing Act

Katherine Brinson

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NOTE

JUSTIFYING DISCRIMINATION:

HOW THE NINTH CIRCUIT CIRCUMVENTED THE INTENT OF THE FAIR HOUSING ACT

INTRODUCTION

Imagine a facility that provides shelter and care for people who are homeless, indigent or otherwise down on their luck. The owners and staff of the organization that manages this facility want to ensure that they are providing, as much as is possible, the necessary services for a community's needy population, but doing so has become increasingly difficult. Money is tight, the staff is short-handed, and the demand for these services is ever-increasing. The owners and staff decide that a change is needed because the facility will not survive operating in its current fashion. Accordingly, the facility decides to save substantial funds by closing its doors to men because feeding women and children is less expensive. Or, alternatively, the owners decide to save money by decreasing the number of beds available to disabled persons because employing staff members who are qualified to care for them is doubly expensive. Or, imagine that the facility, by not accepting women, was able to limit its payroll expenses by employing fewer security guards because fewer security guards are needed when the occupants are of a single gender. Now imagine that all the money saved by these adjustments is placed into a fund that will make possible another, better-prepared, and more economical facility to serve those persons who are excluded by these decisions, greatly increasing the facilities available to all persons in need.

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As it stands today, this cannot occur in the Ninth Circuit, the judicial circuit covering the western United States.[1] The hypothetical facility described above likely would not be able to save its money in the manner described because its policies discriminate against protected classes of persons.[2] If the facility's directors told the court that they were changing their policies to save money for another, better facility, it would likely not change the court's ruling.[3] Such a situation arose in Boise, Idaho in 2005. In *Community House, Inc. v. City of Boise* ("Community House"), the plaintiffs, former residents of a homeless shelter, sued the city of Boise, Idaho, claiming that when they were forced to leave the shelter, the city violated the Fair Housing Act.[4] The United States Court of Appeals for the Ninth Circuit has held that safety concerns and actually beneficial discrimination are the only two acceptable justifications for this type of discrimination, and neither of them, when applied as the Ninth Circuit applies them, allows for the long-term planning of the facility as described above.[5]

This Note argues that the test applied by the Ninth Circuit in *Community House* was unreasonably inflexible and inconsistent with the goals of the Fair Housing Act, and that, by allowing for only limited, inflexible exceptions, the court foreclosed an opportunity to expand free or affordable housing for homeless women, men, and families. By contrast, a more flexible approach that weighs the adverse impact on the alleged victim against the benefits of the offered justifications, would better serve the purposes of the Fair Housing Act by allowing each community to maximize the housing opportunities it offers.

Part I of this Note discusses Congress's goals in passing the Fair Housing Act and how the Act applies to homeless shelters. Part II of this Note describes the tests used by the Eighth and Tenth Circuits and the Supreme Court's approach in similar types of cases. Part III analyzes the Ninth Circuit's majority opinion in *Community House, Inc. v. City of Boise*. Part IV argues that the Ninth Circuit's rigid application of the test in *Community House* is inconsistent with the Fair Housing Act. Finally, Part V contends that a more flexible approach to Fair Housing Act claims

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[1] *See* Cmty. House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007). The states and territories within the jurisdiction of the Ninth Circuit include: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, North Marianna Islands, Oregon, and Washington.

[2] *See id.* at 1052.

[3] *Id.* at 1050.

[4] Cmty. House, Inc. v. City of Boise, No. CV-05-283-S-BLW, 2005 WL 2847390, at *1 (D. Idaho Oct. 28, 2005).

[5] *Id.* at 1051.

and the justifications for discriminatory policies presented in Part IV would better serve the purposes of the Fair Housing Act.[6]

I. THE FAIR HOUSING ACT

The Fair Housing Act was created to ensure that housing decisions would be free of discrimination. At its creation, though, it was not a very effective response to housing discrimination, and the scope of the protection it offers developed over a long period. The Act's long gestation was due, in part, to the initial absence of an enforcement mechanisms, but also to ambiguities, such as uncertainty about the applicability of the Act to homeless shelters. While an enforcement mechanism has long been part of the Act, courts continue to struggle, four decades after the Act was created, to define the scope of the protections it provides.

In April of 1968, Congress passed the Fair Housing Act ("FHA") as Title VIII of the Civil Rights Act of 1968.[7] Prior to the passage of the FHA, the Civil Rights Act of 1866 addressed the rampant racial discrimination against former slaves.[8] The 1866 Act could have created a policy of fair housing; however, it lacked any federal enforcement provisions.[9] Then, in 1948, in the landmark case *Shelley v. Kraemer*, the Supreme Court declared that private racially restrictive housing covenants are invalid.[10] Despite the Supreme Court's holding, race-based discrimination continued.[11] The Civil Rights Act of 1964 attempted to address the problem but again included no enforcement provisions.[12] Finally, in the midst of the civil rights movement and in the wake of Dr. Martin Luther King Jr.'s death, President Lyndon Johnson urged Congress to pass the FHA.[13] Congress responded by enacting Title VIII of the Civil Rights Act of 1968, which included meaningful enforcement mechanisms to prevent housing discrimination.[14]

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[6] The scope of this Note is limited to the issue of justifications for policies which are facially discriminatory under the Fair Housing Act and does not discuss disparate impact claims or Establishment Clause issues addressed in the opinion.

[7] 42 U.S.C.A § 3601 et seq. (Westlaw 2008).

[8] *See* H. R. REP. NO. 100-711, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176.

[9] H. R. REP. NO. 100-711, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2175.

[10] Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948).

[11] *See* H. R. REP. NO. 100-711, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2175.

[12] *Id.*

[13] *Id.*

[14] *Id.* Some examples of the Act's enforcement mechanisms include precise identifications of outlawed housing discrimination, authorizing the Department of Housing and Urban Development to take prompt judicial action against a violator, and the usage of Administrative Law Judges to

A. PROVISIONS AND GOALS OF THE FAIR HOUSING ACT

The FHA's purpose is to ensure fair housing for all individuals throughout the United States and to end discrimination against protected classes of persons based on prejudice, stereotypes or ignorance in the provision of housing.[15] Ending housing discrimination is part of Congress's larger commitment to end the exclusion of protected classes from the American mainstream.[16] Protected classes of persons are those who are discriminated against on the basis of race, color, religion, gender, familial status or national origin.[17] The FHA prohibits actions against protected persons including refusing to sell, rent or lease; refusing to negotiate; making a unit unavailable; and imposing policies or procedures because a person is a member of a protected class.[18]

B. THE FAIR HOUSING ACT AS APPLIED TO HOMELESS SHELTERS

In passing the FHA, Congress did not explicitly address homeless shelters or whether the Act would apply to them.[19] The Act simply states that it applies to a dwelling which is defined as "any building, structure, or portion thereof which is occupied as . . . a residence by one or more families."[20] Thus, whether the FHA applies to homeless shelters and other temporary lodging is an issue that courts have struggled with and that has been debated since shortly after the FHA's passage.[21] The Supreme Court has not yet addressed the issue, but several courts have extended the FHA's provisions to homeless shelters.[22] The factors a

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oversee FHA claims.

[15] 42 U.S.C.A. § 3601 (Westlaw 2008); *see* Bangerter v. Orem City Corp., 46 F.3d 1491, 1504 (10th Cir. 1995).

[16] *Bangerter*, 46 F.3d at 1504.

[17] *Id.* As passed in 1968, the Act protected persons from discrimination based on race, color, religion, and national origin. In 1974, Congress amended the Act to include gender as a prohibited basis of discrimination. Pub. L. No. 93-383, § 808(b)(1), 88 Stat. 633, 729 (1974). Additionally, Congress amended the Act in 1988 to prohibit discrimination based on handicap and familial status (e.g., having children in the home). Pub. L. No. 100-430, § 6(b), 102 Stat. 1619, 1622 (1988).

[18] 42 U.S.C.A. § 3604 (Westlaw 2008).

[19] *See* 42 U.S.C.A. § 3602(b) (Westlaw 2008). Section 3602 includes the statute's definition of a "dwelling," in which Congress outlined the places that are subject to the provisions of the Fair Housing Act. This section is devoid of any reference to homeless shelters, transient lodging, or anything of this sort.

[20] 42 U.S.C.A. §3602(b) (Westlaw 2008).

[21] HOUSING DISCRIMINATION LAW AND LITIGATION § 9:2 (West 2007); 1 HOUSING DISCRIMINATION PRACTICE MANUAL § 2:14 (West 2007).

[22] *See* Red Bull Assocs. v. Best Western Int'l, Inc., 686 F. Supp. 447 (S.D.N.Y. 1988) (Fair Housing Act assumed to apply to motel providing long-term lodging to homeless persons), *aff'd*, 862 F.2d 963 (2d Cir. 1988); Woods v. Foster, 884 F. Supp. 1169, 1173-74 (N.D. Ill. 1995) (homeless

court uses to decide whether temporary lodging is a "dwelling," as defined by the FHA, are whether the occupants remain for more than a brief period of time and whether they view their space or room as a place to which they will return.[23] The Ninth Circuit has held that a homeless shelter qualifies as a "dwelling" under the FHA, and it has extended the FHA's protections to inhabitants or would-be inhabitants of homeless shelters, including individuals and families.[24]

II. THE MANY APPROACHES TO FACIALLY DISCRIMINATORY POLICYY JUSTIFICATIONS

While *Community House* was the first time the Ninth Circuit addressed facially discriminatory policies within the realm of the FHA, other circuits had previously addressed the issue. The past few decades have seen multiple tests for determining whether a defendant has sufficient justification for a policy that, on its face, treats certain people differently (a facially discriminatory policy) and the result has been varying degrees of flexibility.

Because the Supreme Court has not addressed what justifies facially discriminatory policies under the FHA, many courts turn to Title VII employment discrimination cases for guidance in the FHA context. Prior to the *Community House* decision, the Ninth Circuit applied a burden-shifting test to all FHA cases, including claims of facial discrimination and discriminatory impact, which it adopted from a United States Supreme Court decision in an employment-discrimination case.[25] This burden-shifting test requires a plaintiff to present a prima facie case of discrimination.[26] A prima facie case under the Fair Housing Act consists of the following: (1) that the plaintiff is a member of one of the Act's protected classes, (2) that the plaintiff applied for and was qualified for housing which is covered by the Act, (3) that the plaintiff's housing application was rejected, and (4) that openings remained after plaintiff was rejected.[27] If a plaintiff successfully presents a prima facie case of

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shelter is a "dwelling" under the Fair Housing Act); Project B.A.S.I.C. v. City of Providence, Civ. A No. 89-248P, 1990 WL 429846, at *4 (D.R.I. Apr. 25, 1990) (homeless shelters covered). *But see* Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991) (questioning whether emergency overnight shelter for homeless can be characterized as a "dwelling" within the meaning of the Fair Housing Act).

[23] HOUSING DISCRIMINATION LAW AND LITIGATION § 9:2 (West 2007) (citing United States v. Hughes Mem'l Home, 396 F.Supp 544 (W.D. Va. 1975)).

[24] Turning Point, Inc. v. City of Caldwell, 74 F.3d 941, 945 (9th Cir. 1996).

[25] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[26] *See McDonnell Douglas*, 411 U.S. at 802.

[27] *Id.*

discrimination, the burden then shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the policy.[28] If a defendant produces a nondiscriminatory reason, the burden finally shifts back to the plaintiff to prove that defendant's given reason is merely a pretext.[29] However, in its *Community House* decision, the Ninth Circuit took a more rigid approach to facially discriminatory policies, eliminating the burden-shifting test and allowing exceptions only for safety concerns and actually beneficial policies.[30]

The Tenth Circuit, on the other hand, has applied a more flexible test.[31] It allows for certain reasonable exceptions, such as policies which further legitimate governmental interests that cannot be achieved in less discriminatory ways.[32]

Since the 1970's, the Eighth Circuit has employed an approach similar to a constitutional equal-protection analysis, first requiring a plaintiff to show a prima facie case of discrimination.[33] It then requires the defendant to demonstrate that its conduct was necessary to promote a "legitimate governmental interest" and that the behavior was "rationally related" to that legitimate governmental interest.[34]

A. THE SUPREME COURT'S APPROACH IN TITLE VII EMPLOYMENT DISCRIMINATION CASES

There are no Supreme Court cases that address justifications for facially discriminatory policies in the context of FHA claims. As a result, many courts, including the Ninth and Tenth Circuits, have turned to Title VII employment-discrimination cases for guidance on how to proceed in the FHA context.

In *UAW v. Johnson Controls, Inc.*, the Supreme Court addressed a defendant's justification for a facially discriminatory policy in an employment context.[35] The Court outlined the approach for situations

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[28] *Id.*

[29] *See* Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997) (applying the *McDonnell Douglas* burden-shifting test to plaintiffs' claim that defendant city discriminated against them in a zoning ordinance that disallowed plaintiffs from constructing a housing complex for physically disabled elderly adults).

[30] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1049-50 (9th Cir. 2007).

[31] Bangerter v. Orem City Corp., 46 F.3d 1491, 1505 (10th Cir. 1995).

[32] *Id.*

[33] Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996); Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991) (citing United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

[34] *Id.*

[35] UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

where an employer's policy is discriminatory on its face, which is different than situations where an employer's policy is neutral on its face but is alleged to have a disparate, discriminatory impact.[36]

In *Johnson Controls*, the employer's policy barred all women, except those whose infertility was medically documented, from jobs involving lead exposure.[37] The Supreme Court concluded that the policy was facially discriminatory because it explicitly discriminated against women based on their gender.[38] The Court held that the appropriate test was whether the policy was justified by Title VII's bona fide occupational qualification exception.[39] The bona fide occupational qualification exception allows an employer to discriminate on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[40] The Court concluded that Johnson Controls' policy did not fit within Title VII's bona fide occupational qualification exception, because the distinction between employee's based on gender was not necessary to the normal operation of the business and therefore violated Title VII.[41]

B. THE SUPREME COURT'S *MCDONNELL DOUGLAS* TEST

The *McDonnell Douglas* burden-shifting test was developed in 1973 in an employment-discrimination action,[42] and it has been continuously applied by the Supreme Court in employment-discrimination cases[43] and by federal courts of appeals in FHA claims.[44]

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[36] *Id.* at 211.

[37] *Id.* at 200.

[38] *Id.* at 197.

[39] *Id.* at 200. The bona fide occupational qualification exception ("BFOQ") is a defense to an employer's sex-based discrimination. A BFOQ is a quality, skill, aptitude, or condition that is necessary for an employee to possess in order to be able to perform the necessary functions of the position. Many courts consider a BFOQ defense or other defenses written into Title VII, as there are no Supreme Court decisions as to justifications or defenses to discriminatory actions within the Fair Housing Act context.

[40] 42 U.S.C.A. § 2000e-2 (West 2007).

[41] *Johnson Controls*, 499 U.S. at 211.

[42] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).

[43] *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (applying *McDonnell Douglas* test to a female former employee's employment-discrimination suit against her former employer alleging that she was denied a promotion and was terminated because of her sex).

[44] *See* Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997) (plaintiffs claimed city's zoning ordinance discriminated against low-income housing for disabled elderly population); *see also* Soules v. HUD, 967 F.2d 817, 822 (2d Cir. 1992) (applying the test to plaintiff's claim that

McDonnell Douglas Corp. v. Green "involved "an African-American civil rights activist who was discharged by his employer, McDonnell Douglas.[45] After being laid off, Green engaged in disruptive and illegal activities against his former employer to protest his employer's allegedly racially discriminatory hiring practices.[46] Shortly thereafter, McDonnell Douglas advertised that it was looking for qualified personnel, and Green applied for a position with his former employer but was not hired.[47] Green then sued McDonnell Douglas, claiming it discriminated against him on the basis of race.[48] He argued that this racial discrimination violated Title VII of the Civil Rights Act of 1964, which prohibits the consideration of race in any employment decision and prohibits discrimination against employees who attempt to correct allegedly discriminatory employer practices.[49] The Court developed a burden-shifting test to determine whether impermissible discrimination has occurred.[50]

The *McDonnell Douglas* test is a three-part burden-shifting test.[51] It first requires that a plaintiff present a prima facie case of discrimination.[52] If a plaintiff proves a prima facie case, the burden of production shifts to the defendant to articulate a nondiscriminatory reason for the action at issue.[53] If the defendant offers an acceptable reason, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the reason is merely a pretext for discrimination.[54]

In *Raytheon Co. v. Hernandez* , the Supreme Court applied the *McDonnell Douglas* test to an employment case .[55] It found that the plaintiff met his initial burden of presenting a prima facie case of discrimination by showing that he was not re-hired by his employer because of a perceived drug addiction disability.[56] The Court then turned

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a real estate agent's denial of housing to plaintiff because she had a 12-year-old daughter violated the FHA).

[45] *McDonnell Douglas*, 411 U.S. at 794.

[46] *Id.*

[47] *Id.* at 796.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 802.

[51] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1053 (9th Cir. 2007) (citing *McDonnell Douglas*, 411 U.S. at 802-04).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 50 (2003).

[56] *Raytheon*, 540 U.S. at 50.

to determining whether there was a legitimate, nondiscriminatory reason behind the defendant's policy of not rehiring employees who were terminated because of misconduct.[57] The Court concluded the policy was legitimate and non-discriminatory, and remanded the case for the lower court to perform the remainder of the analysis.[58]

In *Soules v. Dept. of Housing and Urban Development*, the Second Circuit applied the test in an FHA claim, and first found that the plaintiff established a prima facie discrimination case by demonstrating that she was denied housing once she revealed that she had a young daughter.[59] However, the court held that the landlord's explanation that the plaintiff was aggressive and combative was not pretext, as evidenced by witness testimony and the fact that the landlord did offer the apartment to another family with children.[60] Therefore, the court held there was no violation because the landlord's actions were legitimate and nondiscriminatory.[61]

C. THE TENTH CIRCUIT'S TEST

The Tenth Circuit uses a flexible test in which the court makes allowances for discriminatory policies in some situations. It weighs the harm to those affected by the alleged discrimination against the benefit, if any, to those persons and the community as a whole. The test does not foreclose the possibility of justifiable discriminatory policies, including safety exceptions outlined specifically in the FHA and those exceptions that actually create a benefit for the persons affected. '

In *Bangerter v. Orem City Corp.*, the plaintiff was a disabled man who lived at a group home in Orem, Idaho, in an area zoned for single-family residential housing.[62] Within this zone, the City of Orem allowed different types of residences, such as nursing homes, foster-family care homes, convents, and homes for the mentally and physically handicapped.[63] However, only group homes for the disabled were required to obtain conditional-use permits.[64] Mr. Bangerter's group

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[57] *Id.* at 53-54.

[58] *Id.*

[59] Soules v. HUD, 967 F.2d 817, 822 (2d Cir. 1992).

[60] *Id.* at 823.

[61] *Id.* at 825-26.

[62] Bangerter v. Orem City Corp., 46 F.3d 1491, 1494 (10th Cir. 1995).

[63] *Id.*

[64] *Id.* Conditional-use permits, or special-use permits, are granted by a zoning board and authorize special uses of property as exceptions to the relevant zoning ordinance. Unlike a variance which is an authorized violation of a zoning ordinance, a conditional use permit is a recognized exception to established zoning regulations. BLACK'S LAW DICTIONARY 1406 (deluxe 7th ed. 1999) (defining "special use permit").

home was granted a permit that was subject to additional conditions not imposed on other types of group homes within the zoning area, including 24-hour supervision of the residents and the creation of a community advisory committee for the oversight of community concerns and complaints.[65] Mr. Bangerter alleged that the permit violated the Fair Housing Act because it treated disabled persons differently than non-disabled persons and because this differential treatment was detrimental to disabled persons.[66]

The District Court for the District of Utah applied a rational-basis test similar to that used by the Eighth Circuit which requires that a policy be rationally related to a legitimate government interest.[67] The court found that the permit restrictions did not violate the FHA since they were rationally related to the legitimate government interest of integrating disabled persons into the community.[68] Mr. Bangerter appealed the district court's ruling, arguing that it erred in holding that the challenged ordinance did not violate the FHA simply because its "legitimate" purpose was to integrate the disabled into "normal" surroundings.[69]

The Tenth Circuit Court of Appeals held that the district court utilized the wrong legal standard because the traditional burden-shifting test is only appropriate in disparate impact claims.[70] Mr. Bangerter's claim was one of intentional discrimination, because the ordinance, which treated group homes for the disabled differently from other group homes, was discriminatory on its face.[71] The court did not require the plaintiff to present a prima facie case of discrimination because the ordinance was facially discriminatory.[72] The Tenth Circuit looked to the plain language of the FHA to find acceptable justifications for such facially discriminatory statutes,[73] as did the Supreme Court in *Johnson Controls* when it looked to the plain language of Title VII.[74] The Tenth

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[65] *Bangerter*, 46 F.3d at 1495.

[66] *Id.* at 1496.

[67] *Id.*

[68] *Id.* at 1496-97.

[69] *Id.* at 1497.

[70] *Id.* at 1500. The Tenth Circuit remanded the case to the district court for reconsideration of Bangerter's claim of violations of the FHA and for consideration of the City of Orem's justifications for the discriminatory actions. The Tenth Circuit also remanded the case because of the district court's improper use of a rational-basis test in considering the conduct of the City of Orem under the FHA. Upon remand, the case was dismissed by the district court pursuant to an agreement of the parties.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 1503.

[74] *See* UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

Circuit noted that the FHA itself allows for reasonable restrictions when based on legitimate safety concerns.[75] The court also looked to Title VII for additional guidance and found provisions allowing some discriminatory policies within an employment context, such as the safety exception applied in *McDonnell Douglas*.[76] It also considered the Supreme Court's interpretations of those Title VII provisions.[77] Taking note of the exceptions allowed in employment-discrimination cases,[78] the court stated that "actually beneficial" restrictions might also be allowed.[79]

The court determined that the first permissible justification for a facially discriminatory restriction is that it may be benign, meaning the policy is actually beneficial (whether already realized or not), rather than burdensome, to those it targets for differential treatment.[80] If the policy's benefit clearly outweighs the burden placed on those differentially treated, the discriminatory restriction may be justified.[81] For example, if a policy expands housing opportunities for protected classes of persons, promotes the FHA's goal of independent living for minorities and the disabled, and is not based on stereotypes or prejudice, the policy can be characterized as actually beneficial and be upheld.[82]

The second justification authorized by the court is a facially discriminatory restriction whose purpose is rooted in legitimate safety concerns.[83] The FHA explicitly states that discrimination is justified when extending housing to a specific individual or family constitutes a direct threat to the health or safety of others.[84] However, the court held that discriminatory restrictions predicated on public health or safety must be narrowly tailored to specific concerns about individual residents and cannot be based on prejudice or generalized stereotypes.[85] The court explained that a discriminatory policy that singles out disabled persons

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[75] *Id.* (citing 42 U.S.C. §3604(f)(9)).

[76] Bangerter v. Orem City Corp., 46 F.3d 1491, 1503-04 (10th Cir. 1995) (For example, "[i]n the employment discrimination context, the Supreme Court has held that Title VII's bar on all discrimination on the basis of race should not be read literally.")

[77] *Id.*; *see also Johnson Controls*, 499 U.S. at 204.

[78] Bangerter v. Orem City Corp., 46 F.3d 1491, 1504 (10th Cir. 1995) (citing 42 U.S.C. § 3604(f)(2)); *see also* Morgan v. HUD, 985 F.2d 1451, 1456 n. 4 (10th Cir. 1993).

[79] *Bangerter*, 46 F.3d at 1504.

[80] Bangerter v. Orem City Corp., 46 F.3d 1491, 1504 (10th Cir. 1995).

[81] *Id.* at 1504-05.

[82] *Id.*

[83] *Id.* at 1503.

[84] *Id.* at 1503 (citing 42 U.S.C. §3604(f)(9)).

[85] *Id.* at 1503 (citing Elliott v. City of Athens, Ga., 960 F.2d 975, 978 (11th Cir. 1992) and H.R. Rep. No. 100-711, 100th Cong., 2d Sess., at 24, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185).

for specific treatment based on concerns for public safety must be "'individualiz[ed] . . . to the needs or abilities of particular kinds of developmental disabilities,' and must have a 'necessary correlation to the actual abilities of the persons upon whom it is imposed.'"[86] In other words, if a community places restrictions on disabled occupants, those restrictions must address the specific nature of the targeted disability and the disabled resident against whom the restriction is placed.

D. THE EIGHTH CIRCUIT'S TEST

In both 1991 and 1996, the Eighth Circuit Court of Appeals addressed which standard should apply to facially discriminatory policies under the FHA.[87] In *Familystyle of St. Paul, Inc. v. City of St. Paul*, the court held that certain state and local zoning ordinances that were applied to facilities for mentally challenged or mentally ill persons did not violate the FHA.[88] Familystyle of St. Paul, an organization providing rehabilitative services to mentally ill persons and operating a group home in St. Paul, Minnesota, applied for a special-use permit to increase the number of occupants in its group home, but was granted only a temporary conditional-use permit.[89] Since Familystyle's facilities at that time were concentrated within a one-and-a-half-block radius, the conditional-use permit required that Familystyle work to disperse its facilities in order to attempt to integrate the disabled residents with other community residents.[90] Familystyle challenged the conditional-use permit as a violation of the FHA, contending that the dispersal requirements were imposed only on facilities for disabled persons.[91] The Eighth Circuit held that despite discrimination against disabled persons and any burden imposed on them by enforcement of zoning ordinances, the city had not violated the FHA.[92] The court applied a test similar to a constitutional equal-protection analysis, requiring only that the challenged actions have a rational relation to a legitimate government

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[86] *Bangerter*, 46 F.3d at 1503-04 (citing Mabrunak, Inc. v. City of Snow, Ohio, 974 F.2d 43, 47 (6th Cir. 1992) and Potomac Group Home v. Montgomery County, Md., 823 F. Supp. 1285, 1300 (D. Md. 1993)).

[87] Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991); Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996).

[88] *Familystyle*, 923 F.2d at 94.

[89] *Id.* at 92.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 94.

interest.[93] Concluding that the regulations at issue in *Familystyle* met those requirements, the court upheld the discriminatory applications of the regulations.[94]

In *Oxford House-C v. City of St. Louis*, the Eighth Circuit Court of Appeals again held that a discriminatory zoning restriction applied to group homes for disabled persons did not violate the FHA.[95] Oxford House, a group home for recovering alcoholics and drug addicts, was located in an area zoned for single-family dwellings, allowing for homes having eight or fewer unrelated residents.[96] After the city cited Oxford House for having ten residents, the group home challenged the city's enforcement of the restriction, alleging an FHA violation.[97] The Eighth Circuit again applied an equal-protection analysis and found that the zoning restrictions were rationally related to a legitimate government interest and therefore did not violate the FHA.[98]

III. THE NINTH CIRCUIT'S MAJORITY OPINION IN *COMMUNITY HOUSE, INC. V. CITY OF BOISE*

The *Community House* plaintiffs sued the City of Boise, Idaho, because they were forced to leave a homeless shelter that closed its doors to women and families but continued to offer services to men.[99] The plaintiffs asserted that this action was discrimination in violation of the FHA.[100] The Idaho District Court refused to grant a preliminary injunction requiring the plaintiffs' return to the facility.[101] The plaintiffs then appealed to the Ninth Circuit, which held that the district court

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[93] *Id.* The Plaintiffs argued that the dispersal requirement violated the FHA because it limited the housing opportunities for the mentally disabled. The government argued that the dispersal requirement was necessary to promote the deinstitutionalization of the disabled. The court found the dispersal requirement furthered the state's legitimate interest in deinstitutionalizing the mentally ill.

[94] *Id.* at 95.

[95] *Oxford House*, 77 F.3d at 253.

[96] *Id.* at 250-51.

[97] *Id.* at 251.

[98] *Id.* at 252. The district court found that Oxford House's financial viability would be in jeopardy if it were limited to only eight residents. The plaintiffs argued that the restrictions were applied to them because of their handicap. The Eighth Circuit found the city's interest in limiting traffic, congestion, and noise was reasonably related to the occupant restriction on Oxford House and other residential homes, and the court upheld the restriction. Contributing to the failure of the plaintiffs' claims was their inability to prove that the city treated Oxford House any differently than other residents in the same zoning area.

[99] Cmty. House, Inc. v. City of Boise, No. CV-05-283-S-BLW, 2005 WL 2847390, at *1-*2 (D. Idaho Oct. 28, 2005).

[100] *Id.* at *3.

[101] *Id.* at *1.

abused its discretion by applying the wrong legal standard and denying the injunction.[102]

In the early 1990s, Community House, Inc., a nonprofit organization, and the City of Boise, Idaho, together operated a homeless shelter and low-income housing for the community's indigent population.[103] Community House provided housing for homeless individuals and families, as well as long-term low-income housing units and long-term single-resident-occupancy units.[104] Community House also provided long-term housing and services for the severely disabled.[105] In 2004, the City of Boise assumed control and management of Community House.[106] The City of Boise then leased the former Community House facility to the Boise Rescue Mission Ministries ("BRMM"), a Christian nonprofit organization.[107]

BRMM's ideology and management style is based in what it claims are Christian principles.[108] The organization has a history of segregating homeless men from women and segregating homeless single individuals from homeless families.[109] Upon the takeover by BRMM, Community House stopped adding names to its waiting list, and everyone residing at Community House was forced to leave.[110] However, since BRMM planned on continuing to operate the former Community House facility as a male-only facility, men were permitted to reapply for housing at the facility through BRMM.[111] Many of the former residents of Community House, mostly women and children, were left living in parks, cars, or at a local reservoir.[112]

In 2005, Community House, Inc., together with several disabled individuals and a family who had previously resided at Community House, sued the City of Boise.[113] They sought a preliminary injunction to enjoin the City of Boise from removing them from Community House.[114] The plaintiffs also wanted the injunction to command that the

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[102] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1046 (9th Cir. 2007).

[103] *Id.* at 1045.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Cmty. House, Inc. v. City of Boise, No. CV-05-283-S-BLW, 2005 WL 2847390, at *2 (D. Idaho Oct. 28, 2005).

[109] *Id.* at *2.

[110] *Id.*

[111] *Id.*

[112] Appellants' Opening Appellate Brief, 2006 WL 2952501 (C.A.9) at pg. 10.

[113] *Cmty. House*, 2005 WL 2847390 at *3.

[114] *Id.*

former residents be reinstated.[115] To obtain an injunction, an applicant must show a likelihood of success on the merits" of the case and "a possibility of irreparable injury," or the moving party must show "the existence of serious questions [as to] the merits and the balance of hardships tipping in the moving party's favor," a likelihood of success on the merits" of the case and "a possibility of irreparable injury," or the moving party must show "the existence of serious questions [as to] the merits and the balance of hardships tipping in the moving party's favor."[116] The plaintiffs's appeal to the Ninth Circuit revolved around what was required to show a serious question as to success on the merits. They argued that in determining whether a serious question existed, the district court applied the wrong legal standard.[117] The plaintiffs offered

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[115] *Id.*

[116] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1047 (9th Cir. 2007). The plaintiffs sought a preliminary injunction, which is distinct from a permanent injunction. To obtain a preliminary injunction, "the moving party must show a likelihood of success on the merits" of the case and "a possibility of irreparable injury," or the moving party must show "the existence of serious questions [as to] the merits and the balance of hardships tipping in the moving party's favor." *Compare* A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1154 (S.D. Fla. 1998). A permanent injunction requires (1) success on the merits, (2) a showing that the permanent injunction is necessary to prevent irreparable harm, (3) a showing that the potential injury outweighs the potential harm of the injunction, and (4) a showing that the permanent injunction serves the public interest. *Id.* at 1154. "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987). Therefore, the standard of proof in order to obtain a preliminary injunction is lower than the standard for a permanent injunction. Here, the district court denied the preliminary injunction because it concluded that the plaintiffs had not raised a serious question of discrimination. Cmty. House, Inc. v. City of Boise, No. CV-05-283-S-BLW, 2005 WL 2847390, at *5 (D. Idaho Oct. 28, 2005). The plaintiffs then appealed, arguing that the district court did not find that the plaintiffs had raised a serious issue of discrimination because the district court applied the wrong legal standard and therefore abused its discretion. *Cmty. House*, 490 F.3d at 1049. The Ninth Circuit then held that the district court had in fact used the wrong legal standard, and the Ninth Circuit changed the law that the district court must apply to a request for a preliminary injunction when a policy is facially discriminatory under the FHA. *Id.* It then found that the plaintiffs had raised a serious issue of discrimination because the policy was discriminatory on its face. *Id.* The Ninth Circuit reversed the district court's denial of the preliminary injunction. *Id.* Following the Ninth Circuit decision, the parties settled their dispute and the issue of whether the city's actions were permissibly justified was not actually litigated. Additionally, the Ninth Circuit did not indicate whether the new legal standard applied in *Community House* applies to requests for permanent injunctions. *Id.* For the purposes of this article, it is assumed that the same legal standard is applied to both preliminary and permanent injunctions when a policy or action is facially discriminatory under the FHA.

[117] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). An action based on a violation of the FHA (as opposed to in an employment-discrimination context) requires the following: (1) that the plaintiff is a member of a protected class, (2) that the plaintiff applied for and was qualified for the housing covered under the FHA, (3) that the plaintiff's housing application was rejected, and (4) that openings remained after plaintiff was rejected. *Id.*

evidence showing that men were permitted to reapply to Community House (now then run by BRMM), whereas women and families were not, a facially discriminatory policy that favored men.[118] In response, the defendants argued that the policy was necessitated by safety concerns because more violent incidents occurred when the occupants were co-mingled.[119] Additionally, and more significantly, the defendants argued that the policy was necessary in order for them to transfer the men from another facility, Boise Rescue Mission, to the former Community House facility in order to renovate Boise Rescue Mission into more housing for women and children, thereby doubling the facilities available to the homeless and low-income population of the city.[120]

The United States District Court for the District of Idaho denied the plaintiffs' motion for an injunction to require the return of the former residents to the shelter based on its application of the *McDonnell Douglas* test.[121] In applying the *McDonnell Douglas* test, the trial court was persuaded by the justifications offered by the defendants and found that "the plaintiffs [had] not raised serious questions as to whether [the city's] justifications satisf[ied] the standards for permissible discrimination under the Fair Housing Act."[122] The plaintiffs appealed the district court's ruling, asserting that the court abused its discretion in denying their motion for a preliminary injunction.[123] The plaintiffs asserted that BRMM's men-only policy violated the FHA.[124] The Ninth Circuit, after purportedly applying the Tenth Circuit's test, held that the district court abused its discretion in denying the plaintiffs' motion for a preliminary injunction requiring BRMM to reinstate the former residents of Community House.[125]

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[118] *Cmty. House*, 2005 WL 2847390 at *5.

[119] *Id.*

[120] *Id.* The Idaho court specifically noted that in reopening *Community House* only to men, the city made a policy decision to trade short-term hardship for long-term gain. The court also noted that the men-only policy looks less like discrimination and more like a necessary condition in order to increase shelter space for women and families.

[121] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1045 (9th Cir. 2007).

[122] *Id.* at 1051.

[123] Cmty. House, Inc. v. City of Boise, 468 F.3d 1118 (9th Cir. 2006).

[124] *Cmty. House*, 490 F.3d at 1045.

[125] *Id.* at 1052. A panel of three appellate judges decided this case. Judge David R. Thompson wrote the majority opinion.

A. THE *MCDONNELL DOUGLAS* TEST DOES NOT APPLY WHEN A POLICY IS FACIALLY DISCRIMINATORY

The Ninth Circuit in *Community House* concluded that the *McDonnell Douglas* burden-shifting test[126] does not apply when analyzing facially discriminatory policies because there is no need to probe for a discriminatory motive when the statute or policy is discriminatory on its face.[127] The court instead applied the test used by the Tenth Circuit, which allowed some justifications for facially discriminatory policies.[128] The Ninth Circuit reasoned that in light of the Supreme Court's recognition of justifications for facially discriminatory acts in analogous Title VII employment-discrimination cases, as outlined in *Johnson Controls*, an approach that allows justifications under the FHA is appropriate.[129] It also held that the Tenth Circuit's test applied to the *Johnson Controls* approach.[130] *Johnson Controls* stated that in cases where there is direct evidence of a facially discriminatory policy, the discrimination is presumed and the defendant bears the burden of proof that the policy is exempted in some way.[131]

B. INTENTIONAL DIFFERENTIAL TREATMENT CAN BE JUSTIFIED BY LEGITIMATE SAFETY CONCERNS OR BY ACTUALLY BENEFICIAL DISCRIMINATORY EFFECTS

In addition to holding that *McDonnell Douglas* did not apply to the plaintiff's claim, the Ninth Circuit Court of Appeals in *Community House* stated that a plaintiff challenging a facially discriminatory policy must show that a protected group has been subjected to clearly differential and discriminatory treatment to establish a prima facie case.[132] However, a defendant may justify intentionally discriminatory treatment under the FHA if it can show that the policy is based on an exception.[133]

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[126] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[127] *Cmty. House*, 490 F.3d at 1049.

[128] *Id.* at 1050.

[129] *Id.*

[130] *Id.*

[131] UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) ("For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law").

[132] *Cmty. House*, 490 F.3d at 1050.

[133] *Id.* at 1050 ("This is not to say that a government can never justify any intentional differential treatment of the handicapped [under the FHA]. Some differential treatment may be objectively legitimate. . . . Even though the language of the Ordinance singles out individuals for

The Ninth Circuit considered other circuits' approaches in determining what standard to apply to a defendant's justification for a facially discriminatory policy under the FHA and found in favor of the test used by the Tenth Circuit.[134] The Ninth Circuit reasoned that the Eighth Circuit's application of an equal protection test was improper because certain classes of persons, such as families and the handicapped, are specifically protected by the FHA, where they are not under equal protection jurisprudence.[135] The *Community House* court held that in order for it to allow a facially discriminatory policy to proceed, a defendant must show either that the restriction is in fact beneficial as against the protected class, or that the restriction responds to legitimate safety concerns, which are not based on stereotypes.[136] The *Community House* court concluded that the Tenth Circuit's approach was more in line with the Supreme Court's approach in *Johnson Controls*.[137]

To justify their discrimination, the defendants' in *Community House* asserted that the former Community House facility would be converted into a shelter for women and children in the future.[138] The defendants also contended that they were concerned about the safety of the residents, as the cohabitation of genders had caused problems for them in the past.[139] In light of the test adopted from the Tenth Circuit, the *Community House* court rejected the City's justifications because they did not promote legitimate safety concerns or presently actually beneficial effects.[140] The court found that the city did not produce enough evidence to support its claim that the discriminatory policies at Community House protected the safety of the other residents or the

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discriminatory treatment based on their familial status and handicap, a proper justification can legitimize the different treatment and validate the Ordinance." (quoting Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 n.17 (10th Cir. 1995) and Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1497 (W.D. Wash. 1997))).

[134] *Id.* at 1050.

[135] *Cmty. House*, 490 F.3d at 1050; *see Bangerter*, 46 F.3d at 1503 ("The use of an Equal Protection analysis is misplaced here because this case involves a federal statute and not the Fourteenth Amendment. . . . [A] plaintiff's 'inability to properly assert a right under the Fourteenth Amendment is not of concern when examining [the plaintiff's] claims brought pursuant to the Fair Housing Act.' Moreover, the FHAA specifically makes the handicapped a protected class for purposes of a statutory claim—they are the direct object of the statutory protection—even if they are not a protected class for constitutional purposes." (citation omitted)).

[136] *Cmty. House*, 490 F.3d at 1050 (citing Larkin v. Michigan Dep't of Soc. Servs., 89 F.3d 285, 290 (6th Cir. 1996) and *Bangerter*, 46 F.3d at 1503).

[137] *Id.*

[138] Cmty. House, Inc. v. City of Boise, No. CV-05-283-S-BLW, 2005 WL 2847390, at *5 (D. Idaho Oct. 28, 2005).

[139] *Id.*

[140] *Cmty. House*, 490 F.3d at 1052.

community.[141] The court also found that even if the city planned to build another facility, the city had not presented a definitive time period as to the displacement or the return of the plaintiffs.[142] Therefore, the court found the city's justifications insufficient.[143]

IV. THE TENTH CIRCUIT'S APPLICATION OF THE TEST TO JUSTIFICATIONS FOR A FACIALLY DISCRIMINATORY POLICY IS MORE CONSISTENT WITH THE FAIR HOUSING ACT THAN THE NINTH CIRCUIT'S APPLICATION

The approach adopted by the Ninth Circuit envisions only two acceptable justifications for a defendant's facially discriminatory acts: exceptions rooted in legitimate safety concerns and those where the discrimination is currently actually beneficial to the plaintiff. While the decision did not establish how broadly the exceptions may be construed, the court's treatment of the uncertainty of the alleged benefits to the Community House plaintiffs suggests that the exceptions will not be broadly applied (at this time). While the Ninth Circuit never reached the issue of whether the Community House defendants violated the FHA, the court recognized only narrow exceptions that would allow facial discrimination to be permissible. Not all circuits, however, agree with the Ninth Circuit approach and have adopted more flexible tests for determining when facial discrimination violates the FHA. Such an approach gives courts greater ability to uphold technically discriminatory acts that have the effect of promoting the goals of the FHA.

The Tenth Circuit recognized that one of Congress's objectives in enacting the FHA was to extend equal housing opportunities to protected classes of persons.[144] In its analysis of potential justifications for facially discriminatory housing policies, the Tenth Circuit allowed for housing changes which were actually beneficial, even if only beneficial in the future.[145] Although the Ninth Circuit expressly adopted the Tenth Circuit's test, its application of the test differs from that of the Tenth Circuit. The *Community House* decision effectively barred an opportunity to put the goals of Community House—and in turn, the FHA—into effect by denying the defendants an opportunity to develop a

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[141] *Id.* at 1051.

[142] *Id.* at 1052.

[143] *Id.*

[144] *Id.* at 1504.

[145] Bangerter v. Orem City Corp., 46 F.3d 1491, 1505 (10th Cir. 1995).

facility in the future.[146] The Tenth Circuit's flexible application of the test, allowing justifications for discriminatory policies based on a case-by-case basis rather than a blanket rule, more accurately reflects the goals of the FHA. The Ninth Circuit's application of the test, by contrast, disregards the nuances of the test and considers only two exceptions because the FHA's paramount purpose is to extend and encourage expansion of housing to its protected classes of persons, rather than to foreclose such opportunities for communities. As the Second Circuit has observed, a test that weighs the adverse impact on the persons discriminated against as opposed to the proposed justifications for the discrimination is more likely to serve the purposes of the FHA.[147]

A. THE TENTH CIRCUIT'S TEST REFLECTS THE GOALS OF THE FAIR HOUSING ACT

The Tenth Circuit's flexible application of the test more accurately reflects the purpose of the FHA because flexibility creates the possibility for finding more solutions in addressing housing discrimination.[148] Congress's intent to provide for fair housing through the FHA, as interpreted by the Tenth Circuit, is not without limitation.[149] First, the FHA expressly allows for discrimination justified by legitimate safety concerns.[150] The FHA specifically recognizes that a protected person who constitutes a direct threat to the health and safety of others does not warrant the FHA's protections, and therefore the Act does not require the offering of housing to an individual who poses a true threat to the safety of the people in the community.[151]

Second, the Tenth Circuit requires that restrictions based on safety concerns be narrowly tailored and not based on stereotypes.[152] The FHA's legislative history reveals that Congress intended to eliminate the

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[146] *Cmty. House*, 490 F.3d at 1060.

[147] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam).

[148] *Bangerter*, 46 F.3d at 1505.

[149] *See* 42 U.S.C.A. § 3601 (Westlaw 2008) (noting that fair housing under the Act is limited by constitutional provisions); *see also* 42 U.S.C.A. § 3604(f)(9) (Westlaw 2008) ("Nothing 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").

[150] 42 U.S.C.A. § 3604(f)(9) (Westlaw 2008).

[151] *Bangerter*, 46 F.3d at 1503; *see also* 42 U.S.C.A. § 3604(f)(9) (Westlaw 2008).

[152] *Bangerter*, 46 F.3d at 1504; *see* Elliott v. City of Athens, Ga., 960 F.2d 975, 978 (11th Cir. 1992) (holding that an exemption may apply, but noting that any exemptions to the protections of the FHA are to be construed narrowly).

use of ignorance or stereotypes in housing policies in favor of treating protected persons fairly.[153] In *Bangerter*, the Tenth Circuit found that there was no evidence to support a conclusion that the plaintiffs possessed tendencies that were a direct threat to the community and remanded to the district court the task of discerning whether the discriminatory policies were narrowly tailored.[154] The basic objective of the FHA is to extend housing to protected classes of persons and to end discrimination based on prejudice and ignorance,[155] a goal the Tenth Circuit furthered when it ordered that the district court determine if the policies were tailored to the specific abilities of the protected persons.

Third, the Tenth Circuit recognizes that discriminatory policies that are actually beneficial to the protected persons can be justified.[156] For example, the court analogized beneficial housing policies to those of race-conscious affirmative-action programs that expand, rather than reduce, opportunities for a protected class of persons.[157] Additionally, the court compared facially discriminatory policies to those that are facially neutral, potentially allowing for the possibility that discriminatory policies can be justified if there are legitimate interests furthered by those policies, and no other, less discriminatory ways to achieve those interests exist.[158] The court stressed the importance of

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[153] *See* H.R. Rep. No. 100-711, 100th Cong., 2d Sess., at 18, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 ("Prohibiting discrimination against individuals [protected under the FHA] is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice. The Fair Housing Act . . . is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons [protected under the FHA] from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons [protected under the FHA] be considered as individuals. Generalized perceptions . . . and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.").

[154] *Bangerter*, 46 F.3d at 1504.

[155] *See* H.R. Rep. No. 100-711, 100th Cong., 2d Sess., at 13, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174 (Congress specifically identified stereotypes and ignorance as creating a situation in which protected persons are not given the same opportunities as others, and demanded that prejudice not be a basis for exclusion in a housing context.)

[156] *Bangerter*, 46 F.3d at 1504.

[157] *Id.*

[158] *Id.* at 1504-05; *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988) (In the context of facially neutral government actions that have a discriminatory impact on the handicapped or other groups protected by the Fair Housing Act, courts have uniformly held that a defendant can justify its conduct despite the discriminatory impact if it can prove "that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."), *aff'd*, 488 U.S. 15 (1988) (per curiam).

flexibility in finding solutions to address discrimination in housing and specifically to realize Congress's goals as established in the FHA.[159]

B. THE NINTH CIRCUIT'S APPLICATION OF THE TEST IS INCONSISTENT WITH THE GOALS OF THE FAIR HOUSING ACT

In *Community House*, BRMM closed its doors to women and families, and offered services only to men. The Ninth Circuit concluded that only two justifications for such a facially discriminatory policy are acceptable.[160] In so doing, the Ninth Circuit eschewed the flexible approach utilized by the Tenth Circuit, flexibility that was applied by that court in order to further the legislative intent of the FHA.[161] Additionally, the *Community House* court disregarded the nuances of the previously established exceptions.

1. The Ninth Circuit Considered Only Two Exceptions

Under the *Community House* approach, in order to justify a facially discriminatory policy or procedure, a defendant must show either: (1) the restriction is in fact not harmful to the protected class, or (2) the restriction responds to legitimate safety concerns that are not based on stereotypes.[162] These two exceptions are the only justifications the Ninth Circuit considered in *Community House*.[163] The Ninth Circuit did not allow for additional justifications based on the specific situation of the parties in *Community House*, such as the proposed future facility for women and children.[164] The Ninth Circuit analyzed the City of Boise's given justifications and dismissed them as illegitimate upon finding they did not comport with either of the established exceptions, namely that the facility was not currently actually beneficial.[165] The Ninth Circuit noted that it might be possible for the City of Boise to establish a legitimate justification at a later stage in the litigation, but only if it was supported by evidence of a legitimate safety concern.[166]

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[159] *Bangerter*, 46 F.3d at 1505.

[160] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1051 (9th Cir. 2007).

[161] *Id.* at 1051-52.

[162] *Cmty. House*, 490 F.3d at 1050 (citing Larkin v. Michigan Dep't of Soc. Servs., 89 F.3d 285, 290 (6th Cir. 1996) and *Bangerter*, 46 F.3d at 1503).

[163] *Cmty. House*, 490 F.3d at 1050 .

[164] *Id.* at 1052.

[165] *Id.* at 1051-52.

[166] *Id.*

The Tenth Circuit's test, however, did not preclude the possibility of additional legitimate justifications.[167] Indeed, in its inquiry into potential justifications, the Tenth Circuit noted that the inquiries made should be based on discrimination against disabled persons—the protected class in *Bangerter*—and on other considerations relevant to that specific case.[168] For example, Mr. Bangerter alleged that the City of Orem's requirement that there be an advisory committee was discriminatory, but the court entertained the theory that the committee might fall within an exception allowing for discrimination in order to protect the safety of the community.[169] The Tenth Circuit did not hold that the exceptions applied by it were exclusive.[170]

The Tenth Circuit began its analysis by first evaluating interpretations of Title VII of the Civil Rights Act of 1968, which it found analogous to provisions within the FHA.[171] In *Bangerter*, the parties affected by the facially discriminatory policies were disabled persons.[172] Therefore, in order to determine the allowable justifications, the *Bangerter* court considered Title VII provisions pertaining to the safety of and actually beneficial discrimination against protected individuals, including the bona fide occupational qualification exception, allowing for discrimination if a person's sex, religion or national origin are "reasonably necessary" to the normal operation of a business.[173] The Tenth Circuit's approach was pointedly in response to the specific facts of the case before it in *Bangerter,* in that the court's inquiry was directed at the plaintiffs' unique situation and did not pass on all potential justifications for any facially discriminatory policy.[174]

The Tenth Circuit identified a specific need for flexibility in creating solutions to the problems addressed by the FHA.[175] The *Bangerter* court acknowledged a trend in which courts in the Second and Seventh Circuits suggested that, despite a discriminatory impact on protected persons, a defendant can justify its policies if it can prove that those policies further a legitimate government interest and that no alternative would serve that purpose with a less discriminatory impact.[176]

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[167] *Bangerter*, 46 F.3d at 1503 n.19.

[168] *Id.* at 1504.

[169] *Id.* at 1504.

[170] *Id.* at 1503 n.19.

[171] *Id.* at 1503.

[172] *Id.* at 1494.

[173] *Bangerter*, 46 F.3d at 1503.

[174] *Id.* at 1503 n.19.

[175] *Id.* at 1505.

[176] *Id.* at 1505 (citing Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936

The Tenth Circuit specifically highlighted those decisions that "have left some room for other policies that restrict minorities in limited ways in order to foster . . . the overarching policies of the FHA."[177] It was with this flexibility in mind that the Tenth Circuit evaluated what is needed to realize the goals of the FHA.[178] The Ninth Circuit did not apply the Tenth Circuit's test with the flexibility it employed and encouraged.[179]

2. *The Ninth Circuit Disregarded the Nuances of the Established Exceptions*

The Tenth Circuit's test allows a justification predicated upon legitimate safety concerns, so long as those concerns were not based on stereotypes and so long as they are narrowly tailored to particularized concerns about individual residents.[180] The *Bangerter* court said, "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 outweighs whatever burden may result to them."[181]

The Ninth Circuit, by contrast, was not interested in whether the City of Boise's proffered justifications were narrowly tailored.[182] This approach fails to allow for flexibility in realizing the objectives of the FHA. The City of Boise claimed that the BRMM project would not be able to convert its site into a more beneficial facility without being able to transfer the men at that facility to the former Community House site.[183] BRMM's discriminatory policy—to offer housing services only to men—created a temporary dislocation of some women and families in order to complete the new facility and fully serve the homeless and low-

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(2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam)); *see* S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991); *see also* Otero v. N.Y. City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973).

[177] *Bangerter*, 46 F.3d at 1505; *see* United States v. Starrett City Assocs. 840 F.2d 1096 (2d Cir. 1988) (stating that race-conscious policies allowed under Title VII are similar to those allowed under Title VIII's Fair Housing Act, and holding that "although any racial classification is presumptively discriminatory, a race-conscious affirmative action plan does not necessarily violate federal constitutional or statutory provisions").

[178] *Bangerter*, 46 F.3d at 1505.

[179] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1052 (9th Cir. 2007).

[180] *Bangerter*, 46 F.3d at 1503-04 (citing Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43, 47 (6th Cir. 1992).

[181] *Id.* at 1504.

[182] *Cmty. House*, 490 F.3d at 1051 (remanding to the district court the decision as to the legitimacy of the City's proffered safety justification).v

[183] *Id.* at 1052.

income community.[184] Another short-term disadvantage in order to support a long-term benefit was contemplated by the Tenth Circuit in developing its test, namely that an advisory board to oversee the operations of the facility could aid the acceptance of the disabled occupants by the community at large.[185] But this approach is absent from the Ninth Circuit's decision.[186]

The Ninth Circuit's stringent application of the test foreclosed an opportunity for the court to ascertain beneficial housing changes for the community of Boise, Idaho. BRMM intended to create a separate facility for those persons displaced from the former Community House facility, pending the outcome of the litigation.[187] The Ninth Circuit's rejection of the City of Boise's justifications for the men-only policy at the former Community House facility made it impossible for an additional facility to be developed. The Congressional goal of expanding fair housing for protected classes of people, as stated in the FHA, was not reflected in the Ninth Circuit's *Community House* decision.

C. A MORE FLEXIBLE TEST WOULD BETTER REFLECT THE GOALS OF THE FAIR HOUSING ACT

Rather than apply the Tenth Circuit's test with rigidity, the Ninth Circuit should have opted for a more flexible approach, as is employed by other courts of appeals.[188] Two circuits have held that a flexible approach to and broad interpretation of Title VIII cases is the manner in which Congress meant for the FHA to be applied.[189] These decisions have recognized the need for a flexible approach to FHA actions. As the Second Circuit stated in *Huntington Branch NAACP v. Town of Huntington*, if a defendant can prove that "its actions furthered, in theory

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[184] *Id.*

[185] *Bangerter*, 46 F.3d at 1505.

[186] *Cmty. House*, 490 F.3d at 1052.

[187] *Id.* at 1052.

[188] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988) ("in the end there must be a weighing of the adverse impact against the defendant's justification"), *aff'd*, 488 U.S. 15 (1988) (per curiam); *see* Resident Advisory Bd., v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (holding that a legitimate bona fide governmental interest that cannot be accomplished in a less discriminatory way might be justified in light of the purposes of the FHA); *see also* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (declining to take a narrow view of the FHA in light of the declared congressional goals behind the Act's section 3601 and the need to construe the FHA broadly in order to implement those goals).

[189] *See Huntington*, 844 F.2d at 936 ("Congress intended that broad application of the anti-discrimination provisions would ultimately result in residential integration"); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (stating that the courts give "vitality" to the Fair Housing Act only by a "generous construction").

and in practice, a legitimate, bona fide governmental interest," that justification should weigh heavily in the defendant's favor.[190] Moreover, two courts have held that a case-by-case inquiry into each facially discriminatory FHA case will over time create a set of criteria to be used in determining the validity of a defendant's justification,[191] a very useful tool for the courts in adhering to the purposes of the FHA.

In the case of BRMM, its desire to build a new facility and the need to segregate women and families from men in order to do so was a long term goal similar to those found acceptable by some Courts. In *South-Suburban Housing Center v. Greater Southern Suburban Board of Realtors*, the Seventh Circuit permitted a race-based policy set in place to further an FHA goal of integrating public housing.[192] The Second Circuit stated in *Huntington* that the use of a balancing test, weighing short-term inconvenience against long-term benefit, was necessary to properly determine whether a defendant can avoid liability for a discriminatory policy.[193] Furthermore, the Second Circuit has recognized that in FHA cases, some discriminatory policies can be justified in certain instances even if that means that members of a protected class will be prevented from receiving public housing, in order to benefit the community as a whole rather than only a few of its members.[194] Based on the trend in which courts accept long-term justifications for discriminatory policies, the Ninth Circuit had the ability to take the defendants' long term goals into account. However, it did not do so.[195] The Ninth Circuit foreclosed an approach that would allow for the expansion of housing opportunities for protected persons and did not uphold the FHA's goal to do so.[196]

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[190] *Huntington*, 844 F.2d at 936.

[191] *See Rizzo*, 564 F.2d at 148 (stating that some Title VIII cases are distinct from Title VII cases and deserving of specialized review because justifications accepted in a Title VIII context, such as the business necessity exception, are simply not applicable to Fair Housing Act claims); *see also, Arlington Heights*, 558 F.2d at 1283 (outlining four individual factors to be considered and in turn weighing all party's interests under the headings of each of those the four factors).

[192] S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 882 (7th Cir. 1991). In an attempt to integrate the historically Black neighborhood, the policy at issue reached out to white home buyers, encouraging them to purchase homes in the Black neighborhood. *Id.*

[193] *Huntington*, 844 F.2d at 936.

[194] Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

[195] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).

[196] *See* United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir. 1988); *see also* United States v. Charlottesville Redevelopment & Hous. Auth., 718 F. Supp. 461 (W.D.Va. 1989).

V. CONCLUSION

This decision failed to comport with the goals of the Fair Housing Act as outlined by Congress.[197] The FHA is intended to promote nondiscriminatory housing for protected classes of persons.[198] By employing a more flexible approach, balancing a defendant's justifications against the potential harm to the community and the plaintiff, the Ninth Circuit could have adhered to the FHA's goals and created a more permissive precedent, allowing for more housing to be built for the homeless population of the Boise community in the future. The Ninth Circuit's decision in *Community House, Inc. v. City of Boise*, avoided the legal trend that called for the application of an individualized, flexible assessment of each FHA claim, in the hopes that a more thorough decision can be made for each individual community.

KATHERINE BRINSON*

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[197] *See supra* notes 146-199 and accompanying text.

[198] 42 U.S.C.A. § 3601 (West 2007); *see* Bangerter v. Orem City Corp., 46 F.3d 1491, 1504 (10th Cir. 1995) (stating that the underlying objective of the Fair Housing Act is to extend the principle of equal housing opportunity to handicapped persons and other protected persons).

* J.D. Candidate, 2009, Golden Gate University School of Law, San Francisco, CA: B.A., History, 2003, University of California, Berkeley, Berkeley, CA. Thank you to the current Board, especially Anna Benevenue, Kira Murray, and Rob Connallon without whom I would not have been able to find my voice in this article. Thanks to my friends and family who braved my legal ramblings throughout the entire process. Lastly, my utmost thanks to my mom, Gloria, my first ever editor, my sounding board, my most patient friend and loyal supporter.