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FAIR HOUSING IN BOOM TIMES AND BEYOND

MARGARET MOORE JACKSON*

ABSTRACT

The decade-long boom in oil extraction activities in North Dakota propelled a dramatic turnaround in the state's previously staid economic conditions, but also imposed social challenges. One obvious dilemma was how to provide adequate housing for the drastically expanded population in remote, oil-producing counties that did not have nearly enough places where people could live. Eventually, construction of new housing units grew at explosive rates and with little regulatory attention beyond basic health and safety requirements. Enforcing non-discrimination mandates was not an explicit priority. As the oil boom tapered in 2015, the pressure of high rents, low vacancy rates, and makeshift encampments began to decrease. The slowdown offers a much-needed opportunity to assess the enforcement of non-discrimination in housing. This Article first explains how federal and state fair housing laws apply to oil-boom housing and then how non-compliance with these laws, particularly the requirement that new, multifamily housing be constructed with basic adaptability features, will harm individuals and communities in North Dakota. To avoid negatively impacting the state for years to come, understanding and enforcement of non-discrimination in housing should be enhanced throughout the state, including in the oil-producing counties.

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I. INTRODUCTION

With the resurgence of oil extraction operations in 2006,¹ sparsely-populated areas of western North Dakota² experienced significant increases

1. Oil and gas extraction activities in the state began to pick up in 2006 and then further increased in 2008–2009 due to enhancements in hydraulic fracturing (“fracking”) technology. Deborah Sontag & Robert Gebeloff, *The Downside of the Boom*, N.Y. TIMES (Nov. 23, 2014), <http://www.nytimes.com/interactive/2014/11/23/us/north-dakota-oil-boom-downside.html> (“Since 2006, when advances in hydraulic fracturing — fracking — and horizontal drilling began unlocking a trove of sweet crude oil in the Bakken shale formation, North Dakota has shed its identity as an agricultural state in decline to become an oil powerhouse second only to Texas.”); Monica Davey, *Oil in North Dakota Brings Job Boom and Burdens*, N.Y. TIMES (Jan. 1, 2008), http://www.nytimes.com/2008/01/01/us/01dakota.html?_r=0 (summarizing preludes to the boom); Andrea Stone, *Oil Boom Creates Millionaires and Animosity in North Dakota*, ABC NEWS, <http://abcnews.go.com/Business/story?id=5768171&page=1> (“A record 80 rigs were drilling in North Dakota in August, part of an oil boom that began mid-2006.”).

2. In 2000, North Dakota had one of the lowest total population densities of any state. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, POPULATION, HOUSING UNITS, AREA, AND DENSITY: CENSUS 2000 SUMMARY FILE 1,

in numbers of inhabitants. Among the many resulting challenges to affected communities was a lack of housing for the exploding and increasingly diverse population. This critical need for housing, and the adverse impacts while the need was not being met, contributed to a statewide boom in construction. The new housing that was precipitated by the oil boom included single-family homes, multifamily apartments, and modular buildings with multiple units—sometimes known as “man camps” or “crew camps.” Municipalities had incentive to authorize many types of new housing, so fewer people would live in vehicles or makeshift encampments. Federal and state fair housing laws governing nearly all housing transactions and the construction of new, multifamily housing were far from the forefront. In 2015, extraction and related activities decreased, relieving the urgency for new housing. Now is the time to consider whether the communities that have been built are open to all, in compliance with antidiscrimination law.

This article argues that fair housing mandates apply to oil-boom housing, explores how noncompliance with the law harms individuals and communities, and urges that understanding and enforcement of nondiscrimination in housing should be enhanced throughout the state, including in the oil-producing counties. In particular, this article examines the legal and social impacts of one aspect of the law that supports the availability of housing for persons with disabilities: the requirement that new, multifamily housing be constructed with basic adaptability features. Failure to comply with the imperative of fair housing exposes property developers, owners, and managers to legal risks, while imposing social harms on individuals and communities. As this rural state continues to grapple with oil boom impacts, promoting nondiscrimination in housing will facilitate inclusion and the enhanced development of balanced, integrated communities.

II. IMPACTS OF THE OIL BOOM – CONNECTIONS TO HOUSING

The changes experienced by North Dakota during the last decade diverged somewhat dramatically from its recent past. Conditions in the state before the oil boom depict a staid, but slowly declining, status quo.

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_GCTPH1.US01PR&prodType=table. During the past five years, seventeen western and northwestern North Dakota counties participated in oil and gas production. JOB SERVICE NORTH DAKOTA, LABOR MARKET INFORMATION CENTER, NORTH DAKOTA’S OIL AND GAS ECONOMY 1 (2016).

Traditionally, North Dakota had a very low,³ homogeneous,⁴ and stagnant population,⁵ earning low wages,⁶ in static economic conditions.⁷ Demand for housing was low; the statewide rental vacancy rate between 2000 and 2002 was at a 15-year peak.⁸ While the population increased in the state's largest (but still small) cities, many small towns were in decline,⁹ as were housing values.¹⁰ Few units of new housing were being permitted for

3. North Dakota's 2000 population of 642,200 was the fourth lowest of any state. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, POPULATION, HOUSING UNITS, AREA, AND DENSITY: CENSUS 2000 SUMMARY FILE 1, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_GCTPH1.US01PR&prodType=table.

4. The state's population was 90.2 percent white in 2000. However, the Native American population grew twenty percent during the 1990s, from 25,870 to 31,329 in 2000. Bill Vaughn, *Raising North Dakota*, OUTSIDE ONLINE (July 1, 2003), <http://www.outsideonline.com/1821656/raising-north-dakota>.

5. U.S. CENSUS BUREAU, RESIDENT POPULATION AND APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES, <https://www.census.gov/dmd/www/resapport/states/northdakota.pdf>. The state's resident population grew each decade between 1870 to 1930, but the 1930 total of 680,845 was a population high never again reached during the decennial Census counts performed between 1930 and 2000. *Id.* Ryan Holeywell, *North Dakota's Oil Boom is a Blessing and a Curse*, GOVERNING (Aug. 2011), <http://www.governing.com/topics/energy-env/north-dakotas-oil-boom-blessing-curse.html> ("For the past 100 years, the number of people in North Dakota has remained virtually stagnant.").

6. CTR. FOR SOC. RESEARCH AT N. D. STATE UNIV., 2012 NORTH DAKOTA STATEWIDE HOUSING NEEDS ASSESSMENT: HOUSING FORECAST 17 ("In 2000, North Dakota's per capita income was \$25,592 which was nearly 16 percentage points below the national average of \$30,319, placing North Dakota 38th in the nation."); *see also* U.S. DEP'T OF LABOR, *Table 1. State 1/ average annual pay for 2000 and 2001 and percent change in pay for all covered workers 2/*, <http://www.bls.gov/news.release/annpay.t01.htm>; U.S. DEP'T OF LABOR, *Average Annual Pay by State and Industry, 2001*, <http://www.bls.gov/news.release/annpay.nr0.htm> (reporting that North Dakota was one of five states with the lowest average wages between 1988 and 2001).

7. In 1999, North Dakota was one of four states with the slowest growth in per capita income (2.4 percent) and also with an average per capita income below the U.S. average of \$28,542. U.S. BUREAU OF ECON. ANALYSIS, *1999 State Per Capita Personal Income (Revised)* (Sept. 12, 2000), <https://www.bea.gov/newsreleases/regional/spi/2000/spi0900.htm>.

8. FED. RESERVE ECON. DATA, *Rental Vacancy Rate for North Dakota [NDRVAC]* (Mar. 17, 2016), <https://fred.stlouisfed.org/series/NDRVAC>. The rental vacancy rate was 11.7 percent in 2000 and 11.2 percent in 2002. *Id.* In 2000, seventy percent of the counties in the state had vacancy rates for year-round housing that exceeded ten percent. CTR. FOR SOC. RESEARCH AT N. D. STATE UNIV., *2012 North Dakota Statewide Housing Needs Assessment: Housing Forecast 13* (Sept. 2012), https://www.ndhfa.org/Publications/Reports/NDHFA%20Publications/Statewide%20Housing%20Needs%20Assessment/NDSHNA_HousingForecast_Final.pdf.

9. *See, e.g.*, Deborah Epstein Popper & Frank J. Popper, *The Great Plains: From Dust to Dust: A daring proposal for dealing with an inevitable disaster*, PLANNING MAGAZINE (Dec. 1987) ("The region's farm, ranch, energy, and mineral economies are in deep depression. Many small towns are emptying and aging at an all-time high rate, and some are dying."). Deborah E. Popper & Frank J. Popper, *The Onset of the Buffalo Commons*, 45 JOW 29, 30 (Spring 2006) ("... the most rural areas of North Dakota, like those in other Great Plains states, are depopulating (and aging) fast."). For a beautiful collection of photos of these abandoned towns, see Troy Larson, *17 True Ghost Towns: Population Zero*, GHOSTS OF N. D., (Oct. 30, 2015), <http://www.ghostsofnorthdakota.com/2015/10/30/true-ghost-towns-population-zero/>.

10. Mohammad Hemmasi, *Multivariate Analysis of Quality of Life and Migration in North Dakota*, 5 GREAT PLAINS RESEARCH 283, 284 (1995) <http://digitalcommons.unl.edu/>

construction.¹¹ The draining of the state's population¹² included high rates of younger and more educated persons.¹³ Factors behind the waning population were thought to include the perception of the state as an undesirable place to live,¹⁴ an increasing preference for urban living among younger generations,¹⁵ challenging natural climate and topographic conditions,¹⁶ and the lack of some basic services.¹⁷ Some researchers suggested that the Plains region, including the western part of North Dakota, would be best used if allowed to return to prairie grassland.¹⁸

[cgi/viewcontent.cgi?article=1212&context=greatplainsresearch](http://www.census.gov/construction/bps/txt/t2yu0012.txt) ("During the 1980s, real per capita income fell 8.2%, adjusted housing values dropped 27.0%, and population size shrank 2.1 % In addition, spatial disparities intensified between the state's few larger cities and its many smaller towns and sparsely populated rural areas.")

11. Fewer than 2000 permits for new residential construction were pulled in 2000. U.S. CENSUS BUREAU, *tbl. 2u. New Privately Owned Housing Units Authorized* (Dec. 2000), <http://www.census.gov/construction/bps/txt/t2yu0012.txt>.

12. Patrick Springer, *N.D. Out-migration figures "alarming"*, FARGO FORUM (Apr. 20, 2006), <http://www.inforum.com/content/nd-out-migration-figures-alarming>. ("The state suffered an annual average migration rate of minus 6.3 percent from 2000 to 2004"). A 2008 Pew Research study found that only 40% of adults born in North Dakota still lived there. PEW RESEARCH CTR., *American Mobility: Who Moves? Who Stays Put? Where's Home?*, 10 (Dec. 2008), <http://www.pewsocialtrends.org/files/2010/10/Movers-and-Stayers.pdf>.

13. Hemmasi, *supra* note 10 (stating that a high proportion of those who leave the state's urban areas are "university graduates and financially better off individuals"); *A Plug for the Plains Drain?*, THE ECONOMIST (May 5, 2005), <http://www.economist.com/node/3941213> (describing the state as having a "brain drain" problem, with nearly all counties losing well-educated young people to other states, in part due to lack of available jobs).

14. When more recent focus groups were asked to describe their perceptions of North Dakota, responses included, "boring, flat, cold, oil, snow, crime," the notion that companies struggle with recruitment, that residents have fewer job opportunities, limited opportunities for growth, less time outdoors, and inferior education. Jodi Schwan, *'You can die on Mars. Or you can live in South Dakota.'*, ARGUS LEADER, (Apr. 18, 2015), <http://www.argusleader.com/story/news/business-journal/2015/04/18/schwan-barren-wasteland/25969095/>.

15. Among other factors, younger Americans may increasingly prefer to live in urban settings. TRANSIT CTR., *Who's on Board, 2014 Mobility Attitudes Survey* 32 fig. 18, <http://transitcenter.org/wp-content/uploads/2014/08/WhosOnBoard2014-ForWeb.pdf> (last visited Aug. 2, 2016) (graph showing thirty-two percent of Americans younger than thirty say their ideal neighborhood is in a city, versus sixteen percent of people thirty and older).

16. David A. McGranahan, *Natural Amenities Drive Rural Population Change, Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture. Agricultural Economic Report No. 781*, 16-17 (Sept. 1999), <http://www.ers.usda.gov/media/252390/aer781.pdf> (concluding that climate, topography, and water area are highly related to rural county population changes from 1970-1996; nonmetropolitan counties that score low on the natural amenities index saw an average of only one percent population change).

17. See, e.g., Lois Wright Morton and Troy C. Blanchard, *Starved for Access: Life in Rural America's Food Deserts*, RURAL REALITIES, 2007, at 3, <http://eatbettermovemore.org/SA/enact/neighborhood/documents/RuralRealitiesFoodDeserts1-4.pdf> (identifying some western North Dakota counties as food deserts – places with low access to large food retailers – which tend to also have high poverty rates, lower educational attainment levels, and lower incomes).

18. See, e.g., Deborah E. Popper & Frank J. Popper, *The Buffalo Commons: Metaphor as Method*, 89 *Geographical Review* 491 (Oct. 1999) ("We believe that over the next generation the Plains will, as a result of the largest, longest-running agricultural and environmental miscalculation in American history, become almost totally depopulated. At that point, a new use

A. HOUSING BECAME SCARCE, EXPENSIVE, AND CHAOTIC

Against this backdrop of slumping conditions, what happened next was a jarring departure. The boom in oil and natural gas drilling that accompanied technological advances in fracking caused a population surge that overwhelmed the housing stock of small, rural communities in North Dakota. Workers and their families were drawn to the region, making some areas among the fastest-growing in the country.¹⁹ The oil boom has been consistently linked to an extraordinary need to find housing for many more people than had previously lived in the area.²⁰

New workers flocked to the oil-producing counties to take advantage of the abundance of employment opportunities and the rosy economic conditions overall. According to data published by the U.S. Department of Housing and Urban Development (“HUD”), nonfarm payroll jobs in this traditionally agriculturally dominated region increased by three percent (11,200 jobs) in the year between February 2010 and February 2011.²¹ The year before that, such jobs had *decreased* by 0.1 percent.²² Mining and logging sector jobs went up sixty-two percent (4400 jobs) due to increases in oil exploration and drilling.²³ The education and health services sector increased by 2.6 percent (1400 jobs) because of hospital and school expansions.²⁴ Government employment increased by 2.3 percent (1800 jobs), nearly all of which was at the local level.²⁵ Notably, the boom in

for the region will emerge, one that is in fact so old that it predates the American presence. We are suggesting that the region be returned to its original pre-white state, that it be, in effect, deprivatized.”).

19. Robert H. Freilich & Neil M. Popowitz, *Oil and Gas Fracking: State and Federal Regulation Does Not Preempt Needed Local Government Regulation*, 44 URB. LAW. 533, 533-34 (2012). (“Between April 2010 and June 2011, the Williston, North Dakota area population grew 8.8%, while Dickinson and Minot, North Dakota count among the top eight fastest-growing micropolitan regions in the United States.” (footnote omitted)); see also Justin Fox, *Where America Is Moving*, BLOOMBERGVIEW (Dec. 22, 2015), <http://www.bloomberg.com/view/articles/2015-12-22/new-census-tells-us-where-americans-are-moving> (reporting 2015 population estimates show North Dakota was one of the fastest-growing states by percentage population between 2010 and 2015).

20. Lauren Donovan, *Oil Patch Slides Toward a New Normal*, BISMARCK TRIB., (Dec. 25, 2015), http://bismarcktribune.com/bakken/oil-patch-slides-toward-a-new-normal/article_6d3f0215-46b2-55a3-ad51-ad86fbc76dfa.html (reporting Census Bureau estimate that state population grew seventeen percent between 2004 and 2015).

21. U.S. DEP’T OF HOUS. AND URB. DEV., OFFICE OF POLICY DEV. AND RESEARCH, U.S., HOUSING MARKET CONDITIONS 1ST QUARTER 2011, HOUSING MARKET PROFILE 1 (2011).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

employment included not only oil production-related jobs but also an increase in service sector and other work.²⁶

Many of the increased employment opportunities stimulated by the oil boom involved dangerous conditions and activities with high rates of injury. Oil-field work in the Bakken has been called “the most dangerous job in America.”²⁷ The hazards that often cause injuries to oil and gas workers include:

1. vehicle accidents,
2. injuries involving being struck by or caught in equipment,
3. explosions and fires,
4. falls, and
5. chemical exposures.²⁸

The physical injuries resulting from these hazards commonly include amputations, broken bones, and burns.²⁹ Also, some oil field workers suffer psychological injuries, such as PTSD and anxiety, as a result of oil field accidents.³⁰ It is reasonable to conclude that many injured workers continue working: a 2013 study identified North Dakota as the state with

26. SAM YOUNG, U.S. DEP’T OF HOUS. AND URBAN DEV., HOUSING MARKET PROFILES, MINOT-WILLISTON, NORTH DAKOTA 2 (2013) (reporting payroll growth in the Minot-Williston Housing Market Area (“HMA”) between September 2011 and September 2012 included substantial increases in the percentage of employees in trade, transportation, and utilities (30.7 percent); financial activities (9.7 percent); leisure and hospitality (26.1 percent); along with mining, logging, and construction (53.2 percent) and manufacturing (27.3 percent)).

27. Alexandra Berzon, *Oil Deaths Rise as Bakken Boom Fades: At Least 38 Oil-field Fatalities Occurred Nationally in Five Months; The ‘Most Dangerous’ Job in America*, WALL ST. J. (Mar. 12, 2015), <http://www.wsj.com/articles/oil-deaths-rise-as-bakken-boom-fades-1426187062>.

28. *Oil & Gas Extraction*, OSHA, <https://www.osha.gov/SLTC/oilgaswelldrilling/index.html> (last visited June 14, 2016) (“From 2003 to 2010, 823 oil and gas extraction workers were killed on the job—a fatality rate seven times greater than the rate for all U.S. industries.”).

29. Jennifer Gollan, *In North Dakota’s Bakken Oil Boom, There Will Be Blood*, REVEAL (June 13, 2015), <https://www.revealnews.org/article/in-north-dakotas-bakken-oil-boom-there-will-be-blood/> (“On average, someone dies about every six weeks from an accident in the Bakken – at least 74 since 2006, according to an analysis by Reveal, the first comprehensive accounting of such deaths using data obtained from Canadian and U.S. regulators. The number of deaths is likely higher because federal regulators don’t have a systematic way to record oil- and gas-related deaths, and the U.S. Occupational Safety and Health Administration doesn’t include certain fatalities, such as those of independent contractors”). The *Reveal* reporter quoted Peg Seminario, director of safety and health for the AFL-CIO, as saying, “These workers are paying for cheap gas with their lives and their limbs.” *Id.* Furthermore, he quoted an OSHA official as saying, “Among the most common oil field injuries [in the Bakken oil fields] are amputations, broken bones and burns, which can severely disfigure workers and diminish their career prospects.” *Id.*

30. The *Reveal* reporter interviewed two oil field workers who suffered from PTSD and anxiety as a result of oil field accidents that involved fatalities. *Id.*

the highest rate of employment for persons with disabilities ages 18–64 who live in the community—nearly fifty-three percent.³¹

Despite the dangers, abundant job prospects enticed people to the state, increasing the proportion of racially and ethnically diverse residents.³² Between 2000 and 2010, non-white populations in rural areas increased at double-digit percentages (although still very small in total numbers).³³ But the flourishing population put a strain on existing basic services and infrastructure, which had previously served much smaller numbers of people. Roads, schools, police, fire, and emergency rescue services were “simply inadequate” to serve the swollen population, a deficit that was then compounded by greatly increased traffic and crime rates.³⁴

These impacts were predictable, and they have been documented in other communities experiencing oil boom activity.³⁵ But despite the hardships that were noted relatively early on, North Dakota was wary about taking steps to meet the increased need for services. State and local government entities were “reluctant to invest in permanent infrastructure—especially for housing—given the hardships that followed the oil industry’s boom-bust cycles of the 1950s and 1980s.”³⁶ Eventually, the failure to expand services caused some municipalities to take action to slow population growth. Because of unresolved infrastructure concerns, Williams County issued a moratorium on new temporary housing, such as “man camps,” in late 2012, further limiting housing options for workers in the energy industries.³⁷

31. SUSAN STODDARD, DISABILITY STATISTICS & DEMOGRAPHICS REHAB. RESEARCH & TRAINING CTR., UNIV. OF N.H., 2014 DISABILITY STATISTICS ANNUAL REPORT 13-14, figs. 15 & 16, <http://www.disabilitycompendium.org/docs/default-source/2014-compendium/annual-report.pdf>). This study found that in North Dakota 52.8 percent of working age adults with disabilities are employed. *Id.*

32. The number of African American residents of North Dakota grew fifty-three percent between 2010 and 2013; the percentage increase in Hispanic residents was even higher. *See* N.D. DEP’T OF COMMERCE, N.D. CENSUS OFFICE, BLACK RESIDENTS IN NORTH DAKOTA (Oct. 2014), <https://www.commerce.nd.gov/uploads/8/CensusNewsletterOct2014.pdf>.

33. N.D. DEP’T OF COMMERCE, 2015 STATE OF NORTH DAKOTA ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 25, tbl. II.4, *Population by Race and Ethnicity* (May 11, 2015).

34. Freilich & Popowitz, *supra* note 19, at 534.

35. Erica Levine Powers, *The State of the Play: Zoning Meets Shale Exploration*, ZONING AND PLAN. L. REP., July 2015 (noting “impacts on public safety, public services, water and sewer, and housing”).

36. CARENLEE BARKDULL ET AL., EXTRACTIVE INDUSTRIES AND TEMPORARY HOUSING POLICIES: MAN CAMPS IN NORTH DAKOTA’S OIL PATCH, *in* THE BAKKEN GOES BOOM: OIL AND THE CHANGING GEOGRAPHIES OF WESTERN NORTH DAKOTA 199, 202 (William Caraher & Kyle Conway eds., 2016) (citing Bret. A. Weber et al., *Rural North Dakota’s Oil Boom and Its Impact on Social Services*, 59 SOC. WORK 62 (2014)).

37. YOUNG, *supra* note 26, at 4.

The challenges caused by a rapid population increase were exacerbated by the infusion of money into what had been a slow, low-wage economy. Oil industry workers earned wages that were comparatively high for the region, displacing existing residents who could not afford the skyrocketing rents.³⁸ Local inflation caused a rise in prices for everything from housing to food.³⁹

During the boom, news organizations reported rental rates for apartments in the oil-impacted North Dakota cities were among the highest in the country.⁴⁰ Because housing was in short supply, and there was no protection for renters against predatory landlords,⁴¹ rents were driven up to New York City levels or higher.⁴² About one third of North Dakota households were renters during this time; nearly half of them spent twenty-five percent or more of their income on housing.⁴³ Statewide, over a third of household renters were moderately-to-severely burdened by housing costs, which is defined by paying between thirty percent and fifty percent of their income just to secure a place to live.⁴⁴ Those who could not find

38. See Evelyn Nieves, *The North Dakota Oil Fracking Boom Creates Clash of Money and Devastation, Economic Hardship Reporting Project*, ALTERNET (Sept. 22, 2012), <http://www.alternet.org/environment/north-dakota-oil-fracking-boom-creates-clash-money-and-devastation> (“No one knew that energy companies in search of housing for their workers would buy private property and evict some of the reservation’s poorest residents from their homes.”).

39. Jude Sheerin & Anna Bressanin, *North Dakota Oil Boom: American Dream on Ice*, BBC NEWS (Mar. 12, 2014), <http://www.bbc.com/news/magazine-25983917> (“With no college degree and little experience, it’s possible to land a job with a six-figure salary as a wildcatter, living in a ‘man camp.’ Walmart, for example, is paying shelf stackers \$19.28 (£12) an hour - more than double its average national wage. But wages struggle to keep pace with soaring rents.”); Jessica Holdman, *What Determines Food Prices?*, BISMARCK TRIB. (July 15, 2012), http://bismarcktribune.com/business/local/what-determines-food-prices/article_1348dbe8-cd2f-11e1-b02b-0019bb2963f4.html (recounting increase in food prices as higher than the regional Consumer Price Index in western North Dakota).

40. Abby Kessler, *Following the Work: RV Lots Experience Effects of Oil Slowdown*, DICKINSON PRESS (Apr. 25, 2015, 1:00AM), <http://www.thedickinsonpress.com/news/local/3730792-following-work-rv-lots-experience-effects-oil-slowdown>.

41. Cities and counties were barred by state law from enacting measures to slow the dramatic increase in residential rental rates. N.D. CENT. CODE § 47-16-02.1 (2015) (“Rent controls - Prohibited.”).

42. Associated Press, *Rent in Williston, N.D. tops averages in New York City and Los Angeles*, NEW YORK DAILY NEWS (Feb. 17, 2014, 11:48 AM), <http://www.nydailynews.com/life-style/real-estate/average-rent-williston-n-tops-costs-nyc-article-1.1617187>. As an example, the expected range of monthly rents at Confluence at Harvest Hills, an apartment complex in Williston, N.D., was \$2700 for one-bedroom units, \$3500 for two-bedroom units, and \$4500 for three-bedroom units. YOUNG, *supra* note 26, at 4.

43. U.S. CENSUS BUREAU, *SELECTED HOUSING CHARACTERISTICS: 2008-2012 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: NORTH DAKOTA* (2012), <http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (enter “2012 ACS 5-year estimates” in topic or table name field and enter “North Dakota” in state, county or place field; click “GO”; follow the “SELECTED HOUSING CHARACTERISTICS” hyperlink).

44. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *AMERICA’S RENTAL HOUSING: EXPANDING OPTIONS FOR DIVERSE AND GROWING DEMAND* 42, tbl. A-5 (2015) (citing U.S.

housing they could afford slept in cars and trucks, lived in makeshift conditions, or resided in modular or dormitory style “man-camps.”⁴⁵

Housing problems encompassed more than merely a shortage for newcomers, as existing residents also faced much higher rents, changing (and sometimes deteriorating) neighborhood conditions, and decreasing services.⁴⁶ The population experiencing the impacts of explosive growth included households comprised of single men, but women and families with children also lived in these burgeoning communities.⁴⁷ The effects of the boom on the price of housing and other essential needs most harshly impacted vulnerable populations—both pre-existing residents and those who had newly arrived.⁴⁸

The challenge of securing affordable housing fell most heavily on low-income persons, who are disproportionately made up of racial minorities, families with children, and persons with disabilities. Affordability of housing is directly intertwined with segregation by race and other characteristics, often due to disparities in income and wealth between whites and nonwhites. North Dakota’s poverty rate for American Indians, the state’s largest nonwhite minority,⁴⁹ is second highest in the nation,⁵⁰ at

CENSUS BUREAU, 2014 AMERICAN COMMUNITY SURVEY (2014)). Even broken down by income, substantial percentages of renters are cost-burdened in the eight metro/micro-politan areas in North Dakota. Joint Ctr. for Hous. Studies of Harvard Univ., Interactive Map of Rental Housing Cost Burdens, HARVARD CTR. FOR GEOGRAPHIC ANALYSIS, <http://harvard-cga.maps.arcgis.com/apps/MapSeries/index.html?appid=b05d4c1daa2042489bdd99b3e89a27dd> (last visited June 16, 2016).

45. Freilich & Popowitz, *supra* note 19, at 534; *see also* Monica Davey, *A State with Plenty of Jobs but Few Places to Live*, N.Y. TIMES (Apr. 20, 2010), <http://www.nytimes.com/2010/04/21/us/21ndakota.html>.

46. Nieves, *supra* note 38 (describing negative impacts on roads, traffic, the environment, the housing market, consumer goods, and police services).

47. For a vivid depiction of the diverse residents of oil boom trailer parks, modular housing, and new townhomes, see Andrew Burton, *Oil Booms and Man Camps, Life in North Dakota*, DENVER POST PHOTO BLOG (last updated May 6, 2014), <http://blogs.denverpost.com/captured/2014/05/06/oil-booms-man-camps-life-north-dakota/6935/#>.

48. BARKDULL ET AL., *supra* note 36, at 202 (“Critical housing shortages and intense pressures on social service systems created hardships for both newcomers and long-term residents. Oil industry workers’ pay outpaced the wages of those outside the industry, and the rising costs of living, particularly for housing, disproportionately affected vulnerable populations including low-income residents and those on fixed incomes. The lack of housing also directly affected incoming workers and job-seekers.” (citation omitted)).

49. U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2010-2014 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, <https://www.census.gov/acs/www/data/data-tables-and-tools/american-factfinder/> (follow “2010-2014 ACS 5-year DP” hyperlink; then enter “North Dakota” in state, county or place field; then click “GO”; then follow “ACS DEMOGRAPHIC AND HOUSING ESTIMATES” hyperlink).

50. Suzanne Macartney, et. al., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011 1, 6 (2013), <https://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

over forty-one percent.⁵¹ The state's poverty rate for Asians is also among the highest in the country, at more than twenty-two percent.⁵² The corresponding poverty rate for whites is less than fourteen percent.⁵³ Families with children also experience diminished housing choices when affordability is threatened. Approximately twelve percent of families with children live below the poverty level, and among female-headed households with children, nearly forty percent are below the poverty line.⁵⁴ During a year when North Dakota had the lowest unemployment rate in the country (four percent or lower),⁵⁵ advocates for the homeless saw a nineteen percent rise in the number of people with nowhere to live.⁵⁶

B. A BOOM IN HOUSING CONSTRUCTION FOLLOWED

The extreme need for more housing in the oil-producing region eventually launched a major uptick in housing starts in North Dakota. Permits for units of new residential construction statewide nearly doubled in 2011 (3833 to 6201 units)⁵⁷ and then doubled again by 2014 (to 12,178 units).⁵⁸ In one example, multifamily construction in the Minot-Williston HMA⁵⁹ increased dramatically from 2009 on as builders responded to the

51. *Id.*

52. *Id.* at 8.

53. *Id.* at 5.

54. U.S. CENSUS BUREAU, SELECTED ECONOMIC CHARACTERISTICS: 2010-2014 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. North Dakota's child poverty rate saw the third highest percentage increase (twenty-five percent) of any state in 2014. Jennifer Johnson, *North Dakota Child Poverty Rates See Third-Highest Increase*, BISMARCK TRIB., (Oct. 3, 2015), http://bismarcktribune.com/north-dakota-child-poverty-rates-see-third-highest-increase/article_124ef415-507d-5369-8e7d-c69156691353.html.

55. See OFFICE OF POLICY DEV. AND RESEARCH, *supra* note 21, at 1 ("For the 12 months ending February 2011, the unemployment rate averaged 3.8 percent, down from 4.2 percent a year earlier."). According to the Bureau of Labor Statistics, North Dakota had the lowest state unemployment rate in the country in 2009 (4.3 percent) and was still led the country in 2015 with an even lower rate (2.7 percent). BUREAU OF LABOR STAT., REGIONAL AND STATE UNEMPLOYMENT – 2009 ANNUAL AVERAGES 4 (Mar. 3, 2010); BUREAU OF LAB, STAT., REGIONAL AND STATE UNEMPLOYMENT – 2015 ANNUAL AVERAGES 1 (Feb. 26, 2016).

56. Davey, *supra* note 45 ("North Dakota has the lowest unemployment rate in the country, 4 percent, but advocates for the homeless say the number of people they see with nowhere to live — a relatively rare occurrence here until now — grew to 987 in 2009 from 832 in 2008, an increase of about 19 percent.")

57. Compare U.S. CENSUS BUREAU, BUILDING PERMITS SURVEY (2010), <http://www.census.gov/construction/bps/txt/tb2u2010.txt>, with U.S. CENSUS BUREAU, BUILDING PERMITS SURVEY (2011), <http://www.census.gov/construction/bps/txt/tb2u2011.txt>.

58. U.S. CENSUS BUREAU, BUILDING PERMITS SURVEY (2014), <http://www.census.gov/construction/bps/txt/tb2u2014.txt>.

59. "The Minot-Williston Housing Market Area (HMA), in northwestern North Dakota atop the Bakken Oil Shale Formation, consists of Mountrail, Ward, and Williams Counties." YOUNG, *supra* note 26, at 2.

demand for rental units.⁶⁰ As reported by the HUD Housing Market Profile, approximately 2350 apartment units were permitted in the Minot-Williston HMA in 2012, representing a forty-seven percent increase from 2011.⁶¹ In contrast, “[a]n average of 90 apartment units was permitted annually from 2000 through 2008, before building activity increased sharply to average 560 units annually in 2009 and 2010 in response to strong net in-migration as the Bakken Oil Shale Formation began to be developed.”⁶²

Increased construction of multifamily units occurred throughout the state and not only due to the oil boom. Measured by the number of units permitted, multifamily construction increased by twenty percent in 2010, in response to the tightening rental markets in the state.⁶³ Construction of new apartments comprised ninety percent of this increase.⁶⁴ Between 2006 and 2011, the Fargo-Moorhead area “accounted for approximately one-half of multifamily building activity in the state, largely because of growth in student enrollment at the three area universities.”⁶⁵ Still, rental housing was not able to keep up with the increased demand, as very low vacancy rates and much higher rents persisted even after many new units had been built.⁶⁶

This steep rise in construction also included single-family homes, multifamily apartments, modular worker housing, and dormitory-style buildings.⁶⁷ But even markedly increased availability did not eliminate the shortage of housing, which was especially noticeable in oil-driven communities. Additional living quarters cropped up in trailer parks and RV parks, and as ad hoc vehicle dwellings. In a struggle to meet the need, the state encouraged housing providers to install used temporary work camp

60. *Id.* at 4.

61. *Id.*

62. *Id.*

63. OFFICE OF POLICY DEV. AND RESEARCH, *supra* note 21, at 2.

64. *Id.*

65. *Id.* (noting the increased student enrollment at North Dakota State University, Minnesota State University at Moorhead, and Concordia College; the combined enrollment of these three schools for the fall 2010 semester was more than 24,700 students, which is more than a ten percent increase since the fall 2006 semester).

66. YOUNG, *supra* note 26, at 4 (characterizing rental housing market in the Minot-Williston HMA as “very tight, with an estimated overall vacancy rate of less than 1 percent”). Despite 1100 increase in rental housing inventory since 2010, renter households increased by 2025, causing the rental vacancy rate to decline from 3.5 percent in 2010 to less than one percent in 2013. *Id.*

67. See H.R. Con. Res. 3001, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013) (“[T]he number of crew camps and other group housing facilities and locations has grown significantly due to the lack of permanent housing in growth areas of the state.”).

housing with exemptions from building, electrical, and plumbing codes.⁶⁸ Some housing was constructed for oil industry workers outside of local city limits, which then were extended to include the housing.⁶⁹

While the siting and drilling boom slowed in 2014, multifamily housing continued to be permitted and constructed in some oil boom communities where vacancy rates had not improved.⁷⁰ In other areas, the drop in oil extraction reduced demand for multifamily housing and curtailed construction.⁷¹ Employment numbers and wages remained high.⁷²

Meanwhile, tolerance for crew camps decreased, following the downturn in oil activities in late 2015 and early 2016. Some cities sought to close temporary worker housing, noting that the housing supply had increased to a level such that temporary housing was no longer needed.⁷³ Although some of the housing built for workers was designated as temporary, it remains to be seen whether the owners will demolish it, abandon it, or relocate it to be used elsewhere. Some owners of vacated crew camp buildings sought approval to convert them into hotel lodging.⁷⁴ Others made efforts to use oil worker housing to house crews working on roads, in other industries, and on infrastructure.⁷⁵

68. N.D. CENT. CODE 54-21.3-04.3 (2015). “Temporary work camp housing” includes modular residential structures that house workers on a temporary basis for a maximum of five years. N.D. CENT. CODE 54-21.3-02(8) (2015).

69. Black Gold OilField Servs., LLC, v. City of Williston, 2016 ND 30, ¶ 2, 875 N.W.2d 515, 517 (describing February 2013 Williston City Commission decision to annex nearly 5000 acres in unincorporated Williams County, where temporary workforce housing had been constructed).

70. Dustin Monke, *Oil Patch City Leaders Move Forward After Unexpected Crude Price Declines in 2015*, DICKINSON PRESS (Dec. 25, 2015, 8:52 PM), <http://www.thedickinsonpress.com/energy/oil/3911709-oil-patch-city-leaders-move-forward-after-unexpected-crude-price-declines-2015> (reporting that Watford City apartments continue to be permitted and built despite the 2015 slowdown).

71. *Id.* (reporting that eight permitted Williston apartment projects have been halted and prices and demand for apartments were significantly reduced in Williston and Dickinson).

72. Donovan, *supra* note 20 (reporting 33,000 persons are employed in Williams County in 2015, compared with 30,000 the year before, and although there are fewer jobs for unskilled oil and gas workers, McKenzie and Williams County wages still remain the highest in the state).

73. Amy Dalrymple, *Oil Backers Push to Keep Crew Camps as Decision Looms for Williston*, GRAND FORKS HERALD (Nov. 6, 2015, 10:30 PM), <http://www.grandforksherald.com/news/business/3877932-oil-backers-push-keep-crew-camps-decision-looms-williston>. This effort was led by a group funded by the North Dakota Petroleum Council, which describes itself as “the primary voice of the oil and gas industry in North Dakota.” *The Association*, N.D. PETROLEUM COUNCIL, https://www.ndoil.org/about_us/the-association/ (last visited June 17, 2016).

74. Renée Jean, *Market Forces Close One of Williams County’s Largest Man Camps*, DICKINSON PRESS (Nov. 30, 2015, 4:37 PM), <http://www.thedickinsonpress.com/energy/bakken/3893268-market-forces-close-one-williams-countys-largest-man-camps> (describing crew camp with permits for over 2000 beds closing after a county commission’s vote not to change zoning from industrial to commercial).

75. *Id.* (describing effort to move hundreds of beds to the town of Beulah as housing for construction workers building a urea fertilizer plant); Dalrymple, *supra* note 73 (city commissioner

C. LOCAL AND STATE AGENCIES WERE OVERWHELMED

The strain caused by an increased population, including the additional need for utilities and other services, significantly impacted the resources of local governments.⁷⁶ Western North Dakota in particular struggled to navigate the housing shortage and increased construction in part because the small towns tended to have neither building codes nor building inspectors.⁷⁷ Boom time city planning, if conducted at all, may favor the values and interests of local business leaders and outside developers.⁷⁸ Without the guidance of an overarching local plan or formal processes for the approval of new construction, the result was a little-regulated effort to apply minimal fire, life, and safety policies as development surged.⁷⁹ Local governments focused the regulatory efforts they were able to implement on upholding basic health and safety aspects of the explosion in housing development.⁸⁰ Enforcing nondiscrimination requirements was not an explicit priority.

Even during the latter part of the now decade-long oil boom, housing availability continued to be tight and vacancy rates remained low.⁸¹ Both theoretical and anecdotal sources suggest that in these conditions, housing providers may be more likely to use discriminatory criteria in selecting tenants, offering terms, and otherwise participating in housing-related

expressing concerns about housing wastewater treatment plant construction workers if crew camps are closed).

76. H.R. Con. Res. 3001, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013) (“[T]he increase in population and the need for utilities and services have had significant impacts on the resources of local governments.”).

77. BARKDULL, *supra* note 36, at 217.

78. Caroline S. Tauxe, *Marginalizing Public Participation in Local Planning: An Ethnographic Account*, 61 J. AM. PLAN. ASSOC. 471, 474-76 (1995) (concluding that the planning process in Mercer County, North Dakota, during the 1970s/1980s coal and petroleum extraction boom favored civic leaders and developers, while diverting public participation).

79. BARKDULL, *supra* note 36, at 217.

80. See *Black Gold OilField Servs., LLC, v. City of Williston*, 2016 ND 30, ¶ 2, 875 N.W.2d 515, 517 (describing the city of Williston’s 2013 adoption of a resolution requiring temporary workforce housing units to comply with Williston’s zoning, building, and fire codes); H.R. Con. Res. 3001, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013) (supporting a housing study to help state agencies assist localities in “ensuring that the health and safety of the public are protected while appropriate housing facilities are available to meet the needs of employers in the state”).

81. The statewide rental vacancy rate between 2010 and 2014 was estimated at 5.7%. U.S. CENSUS BUREAU, *SELECTED HOUSING CHARACTERISTICS: 2010-2014 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: NORTH DAKOTA* (2014), <https://www.census.gov/acs/www/data/data-tables-and-tools/american-factfinder/> (follow the “2010-2014 ACS 5-year DP” hyperlink; enter “North Dakota” in state, county or place field; click “GO”; follow the “SELECTED HOUSING CHARACTERISTICS” hyperlink).

transactions.⁸² Thus, in addition to the more visible problems caused by the shortage of available housing, people seeking housing encountered illegal discrimination. A recent study of housing practices in the state identified, among other things, the existence of illegal discrimination in housing-related transactions against persons with disabilities, Native Americans, New Americans, and families with children.⁸³ The North Dakota Department of Labor was the only enforcement entity in the state responsible for receiving and investigating administrative complaints of discrimination in the areas of both housing and employment. During this time, the agency was overwhelmed with claims for unpaid wages, which it also is entrusted with investigating.⁸⁴

The convergence of a population expansion, an economic boom, skyrocketing wages, a shortage of housing, inflated rents, and a lack of civil infrastructure impacted the availability of safe, affordable housing. The process of examining and untangling current housing challenges should include attention to awareness and enforcement of nondiscrimination law.

III. ENHANCING COMPLIANCE WITH NONDISCRIMINATION LAW TO PROMOTE HEALTHY COMMUNITIES IN NORTH DAKOTA

Housing is unique among areas of law and policy. Everyone has to live somewhere. With very few exceptions, the places we live and the transactions that affect where we live are covered by broadly applicable antidiscrimination law. Title VIII of the Civil Rights Act of 1968 as amended in 1988 (“Fair Housing Act”) applies to nearly all housing-related transactions, including private sales, rentals, mortgage lending, insurance, and zoning.

82. See James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1054, 1056 (1989) (positing a market theory of discrimination, where “low vacancy rates and a tight housing market may encourage discrimination, while soft markets with high vacancy rates may discourage bias” because, when forced to choose, housing providers choose profitability over discrimination); N.D. DEP’T OF COMMERCE, *supra* note 33, at 145, *tbl. B.4: Are there any specific geographic areas that have fair housing problems?* (compiling 2013 survey responses, many of which point to oil boom communities).

83. N.D. DEP’T OF COMMERCE, 2015 STATE OF NORTH DAKOTA ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE, *supra*, note 33, at 85, 123, 124, 127-131 (identifying barriers to fair housing choice in failures to make reasonable accommodations, discriminatory advertising, lending discrimination against Native American and Hispanic applicants, discrimination based on receipt of public assistance, and overall lack of understanding of fair housing law and policy).

84. See *Perspectives on the Oil Boom from North Dakota’s Labor Commissioner*, N.D. EMP. L. LETTER, Feb. 2013 (noting that the oil boom has been accompanied by a significant increase in the number of wage and hour claims filed with North Dakota Department of Labor and Human Rights).

Housing antidiscrimination laws were enacted in response to a long history of exclusion of people from housing choices they otherwise would have had and the social problems caused by that exclusion. The law was an effort to fix conditions that had already become entrenched and difficult to remedy. A unanimous Supreme Court described the Fair Housing Act's language as "broad and inclusive" and stated that the Act implements a "policy that Congress considered to be of the highest priority," which can be given effect "only by a generous construction" of the Act.⁸⁵ The Supreme Court also has recognized that the ultimate purpose of the Fair Housing Act was to create "truly integrated and balanced living patterns."⁸⁶

Cities have continued to be the focal point of this remedial legislation. In part because the goals of the law were to address a problem that manifested in more extreme and noticeable form in urban areas, a hallmark of federal housing policy has been emphasis on urban communities. According to a 1995 report on government mortgage financing for lower income families in underserved areas, "[c]entral cities have been used since the legislation was enacted as a temporary proxy for *all* underserved areas."⁸⁷ The report goes on to characterize this practice as obviously inadequate, "most notably its complete omission of rural areas."⁸⁸ Housing and other community conditions are different in rural areas, which not only tend to be less diverse in population but also have much fewer people and therefore less developed infrastructures. The smaller scale may make any degree of residential segregation and disparities between neighborhoods, access to jobs, schools, and amenities, appear less dire.

But once neighborhoods are built and inhabited, maintained or not, served by amenities or not, connected well or poorly to transportation, and assigned to particular public schools, revising patterns of exclusion and segregation becomes truly challenging. So when less-developed regions of the country experience a boom, in population, diversity, employment opportunity, housing construction, and other kinds of development, it presents an opportunity to make sure the mistakes of the past are avoided.

85. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 211-12 (1972). For an overview of federal housing-related programs that were racially discriminatory and contributed to segregation, see RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), <http://s3.epi.org/files/2014/making-of-ferguson-final.pdf>.

86. *Trafficante*, *supra*, note 85, at 211 (quoting 114 CONG. REC. 3, 3422 (1968)).

87. HOUS. ASSISTANCE COUNCIL, *ANALYSIS OF UNDERSERVED RURAL AREAS FINAL REPORT TO THE U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT 1* (1995) (emphasis added).

88. *Id.*

Whether the recent decline in oil extraction activity is merely a pause or a conclusion to the boom, it provides a chance to stop and assess the status of housing in this state, particularly the nondiscrimination mandates that may not have been heeded during the rapid and little-regulated development that occurred during its peak. The significantly expanded stock of housing in North Dakota provides opportunities for sustained growth that could calm the pendulum of boom-and-bust economic conditions. Embracing fair housing law maximizes the positive potential for including all people in the state's continued economic progress, regardless of whether it continues to be driven by the oil industry.

A. STATE AND FEDERAL FAIR HOUSING LAWS ARE SUBSTANTIALLY EQUIVALENT AND MANDATE EQUAL HOUSING OPPORTUNITY FOR ALL

Fair housing legislation was famously passed by Congress in response to the findings of the Kerner Commission, which concluded that both government-sponsored discrimination and discrimination by private actors were responsible for residential segregation, concentrated poverty, and civil unrest.⁸⁹ The original Fair Housing Act banned discrimination in private and public housing-related transactions on the basis of race, color, religion, and national origin.⁹⁰ Housing discrimination based on sex was prohibited by amendment to the law in 1974.⁹¹ In 1988, then-President Reagan signed the Fair Housing Amendments Act, which added protections against housing discrimination for families with children and persons with disabilities.⁹²

The dual goals of fair housing law are to clear the way for people to choose to live where they want and to rectify the segregated conditions caused by decades of government interference with the sale, rental, financing, and insurance of housing. In prohibiting illegal discrimination by all private and public housing providers, lenders, and insurers (with few exceptions), this law permits individuals to weigh for themselves the many factors involved in selecting a place to live. While financial resources,

89. Dr. Martin Luther King, Jr. and his support for the “open housing” movement are also credited with fostering this significant aspect of federal civil rights law. Monroe H. Little, Jr., *More Than A Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 IND. L. REV. 523, 534 (2008).

90. Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (2012). Discrimination was prohibited in all transactions relating to housing, including sales, rentals, financing, insuring, and zoning. *See id.* §§ 3604-3606.

91. Housing and Community Development Act of 1974, Pub. L. 93-383 § 808, 88 Stat. 633, 729 (1974).

92. Fair Housing Amendment Act, Pub. L. 100-430, 102 Stat. 1619-39 (1988).

credit-worthiness, and other signs of responsibility for property may be considered in a housing transaction, the race, color, religion, national origin, or sex of the homeseeker is not permitted to play a role.⁹³ Neither is the fact that the homeseeker has children in the household or that the homeseeker or someone connected to them has a disability.⁹⁴

Since 1999, when the North Dakota Housing Discrimination Act became effective, discrimination in housing has also been prohibited by state law.⁹⁵ The Housing Discrimination Act provides the same protections against discrimination as the federal Fair Housing Act, plus three more protected categories.⁹⁶ Its passage allowed the North Dakota Department of Labor⁹⁷ to apply for substantial equivalence certification. This designation can be awarded to an agency that enforces a state law providing rights, procedures, remedies, and availability of judicial review that are substantially equivalent to those afforded by the federal Fair Housing Act and consistent with federal regulations.⁹⁸ In addition, the state law must “[n]ot place excessive burdens on the aggrieved person that might discourage the filing of complaints,”⁹⁹ such as legal provisions that discourage fair housing testing.¹⁰⁰ Because this certification was granted, HUD refers North Dakota-based housing discrimination claims to the Department of Labor and Human Rights for investigation and

93. 42 U.S.C. § 3604 (2012).

94. *Id.*

95. 1999 N.D. Laws 2-14.

96. N.D. CENT. CODE § 14-2.5 (2015). Previously, the North Dakota Human Rights Act was passed in 1983. 1983 N.D. Laws 466-73. The Human Rights Act made it illegal to discriminate in employment, public accommodations, state or local government services, and credit transactions based on race, color, religion, sex, national origin, age, disability, and status with respect to marriage or public assistance. N.D. CENT. CODE § 14-2.4 (2015).

97. The North Dakota Department of Labor underwent a name change in 2013. It now is known as the North Dakota Department of Labor and Human Rights. *Department History*, N.D. DEP’T OF LAB. AND HUM. RTS., <http://www.nd.gov/labor/about/index.html> (last visited June 8, 2016).

98. 42 U.S.C. § 3610(f)(3)(A) (2012). HUD regulations enumerate specific criteria for substantial equivalence, including that the state law or local ordinance provide for civil penalties and punitive damages against violators. 24 C.F.R. § 115.204(b)(1)(v) (2016). Substantial equivalence requires that the state law “[p]rovide the same protections as those afforded by sections 804, 805, 806, and 818 of the Act, consistent with HUD’s implementing regulations found at 24 CFR part 100.” *Id.* § 115.204(a)(5).

99. 24 C.F.R. 115.204(a) (2016).

100. *Id.* at 115.204(a)(3)(ii). Fair housing testing—a method of uncovering discrimination—has repeatedly been found to be indispensable for enforcing fair housing law. “Testers’ are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence” of discriminatory housing practices. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

determination.¹⁰¹ In return, the Department of Labor and Human Rights receives federal funding from HUD.¹⁰²

A substantially equivalent state agency must commit to fair housing enforcement by devoting financial resources that are comparable to amounts devoted to the enforcement of other antidiscrimination laws.¹⁰³ North Dakota's fair housing law protections are reviewed by HUD at least every five years to confirm that they continue to satisfy the requirements of substantial equivalence.¹⁰⁴ Any weakening of state law protections risks the suspension or withdrawal of this certification and the funding that accompanies it.¹⁰⁵ In most cases, HUD will not immediately withdraw certification after learning that a change to the law impacts substantial equivalence but will proceed with a progressive process, during which time complaints may not be referred and payments may not be provided to the agency.¹⁰⁶

101. See 42 U.S.C. § 3610(f) (2012).

102. HUD is required to refer housing discrimination complaints to state and local agencies that administer fair housing laws certified as substantially equivalent to the federal Fair Housing Act. *Id.* Such agencies then receive reimbursement from HUD for services rendered in assisting HUD's enforcement of the Act. *Id.* § 3616. This federally-funded program is called the Fair Housing Assistance Program, or "FHAP." 24 C.F.R. §§ 115.100(c), 115.300 (2016). As of June 2015, North Dakota was one of thirty-seven states receiving FHAP support. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION, app. C (2015).

103. 24 C.F.R. § 115.307(a)(5). When a substantially equivalent agency also enforces laws in areas other than fair housing, the agency must spend at least twenty percent of its total annual budget on fair housing activities. *Id.* § 115.307(a)(5) (2016).

104. See 42 U.S.C. § 3610(f)(5) (2012).

105. See *id.* § 3610(f)(2); see also 24 C.F.R. §§ 115.210-211 (2016) (noting HUD may suspend all types of funding under the FHAP during a period of suspension and withdrawal). During the oil boom years, North Dakota enacted a new statute that impacts fair housing by authorizing landlords to require "reliable supporting documentation," only from "a physician or medical professional" to "confirm the tenant's disability and the relationship between the tenant's disability and the need for the requested accommodation" when a tenant with a disability seeks approval for an assistance animal in a no-pets building. N.D. CENT. CODE § 47-16-07.5 (2015). This change may be interpreted as conflicting with federal interpretations, which authorize verification not only by "[a] doctor or other medical professional," but also from "a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability" and state that "[i]n most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry." U.S. DEP'T OF HOUS. AND URB. DEV. AND DEP'T OF JUST., JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT (2014), <https://www.justice.gov/crt/us-department-housing-and-urban-development>. Under 24 C.F.R. 115.211(a)(1), "If a state or local fair housing law that HUD has previously deemed substantially equivalent to the Act is amended; or rules or procedures concerning the fair housing law are adopted; or judicial or other authoritative interpretations of the fair housing law are issued, the interim-certified or certified agency must inform the Assistant Secretary of such amendment, adoption, or interpretation within 60 days of its discovery."

106. See 24 C.F.R. § 115.211(b) (2016).

Because the North Dakota Housing Discrimination Act has been certified as substantially equivalent to the Fair Housing Act, federal case law assists in interpreting the North Dakota statute.¹⁰⁷ In accordance with United States Supreme Court precedent, these laws apply broadly and inclusively,¹⁰⁸ providing a right of action to anyone who is “genuinely injured by conduct that violates” the rights owed to someone under the Fair Housing Act.¹⁰⁹ Plaintiffs can choose to file lawsuits for violation of their fair housing rights directly with state or federal courts, or they can file administrative claims with either HUD or the Department of Labor and Human Rights.¹¹⁰ By providing plaintiffs with the right to recover a wide range of compensatory damages, including awards for emotional distress, attorneys’ fees, and punitive damages, the statutory framework offers incentives for housing providers to comply with the law and for attorneys to represent plaintiffs whose rights have been violated.¹¹¹

The duty of housing providers to follow fair housing law is nondelegable,¹¹² which means that both property owners and management companies are liable for the discriminatory conduct of their agents.¹¹³ Potential liability for discrimination is broadly available against both individual and entity defendants, including employees who are acting within the course and scope of their employment; regardless, they still can be individually liable for their own unlawful conduct under the Fair Housing Act.¹¹⁴ However, the protections of absolute immunity for

107. *State ex. rel. N.D. Dep’t of Labor v. Matrix Props. Corp.*, 2009 ND 137, ¶¶ 7-9, 770 N.W.2d 290, 293-94. The North Dakota Housing Discrimination Act prohibits discrimination based on race, color, religion, sex, disability, age, familial status, national origin, or status with respect to marriage or public assistance in the sale or rental of a dwelling and in access to or membership in a multiple-listing service or real estate brokers’ organization. N.D. CENT. CODE § 14-02.5-02, -08 (2015).

108. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (upholding standing of white tenants in a building that discriminated against nonwhites); *see also United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994).

109. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 103 n.9 (1979) (holding residents of a neighborhood had standing to sue for discriminatory practices in the area); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (holding that fair housing organization and testers who were given false information about housing availability had standing to sue).

110. 42 U.S.C. § 3613 (2012) (authorizing private litigation enforcement).

111. *See Alexander v. Riga*, 208 F.3d 419, 429-30, 432 (3d Cir. 2000) (holding that failure to find plaintiffs were prevailing parties entitled to reasonable attorneys’ fees and costs under 42 U.S.C. § 3613(c)(2) was abuse of discretion and that refusal to deal with African-American potential tenants was sufficient evidence of “reckless or callous indifference” to federally protected rights to support award of punitive damages).

112. *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992).

113. *Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1098 (7th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Meyer v. Holley*, 537 U.S. 280, 282 (2003).

114. *See Reyes v. Fairfield Props.*, 661 F. Supp. 2d 249, 278-80 (E.D.N.Y. 2009) (noting that liability under the Fair Housing Act covers individual and nonindividual landlords, owners,

legislative acts by elected officials and qualified immunity for government employees remain available.¹¹⁵

More than 10,500 fair housing complaints were filed in 2008 nationwide, demonstrating “that housing discrimination still exists in communities across America.”¹¹⁶ “Not only do renters face discrimination, but those pursuing homeownership are often limited by discriminatory practices as they search for a home, apply for a mortgage, or purchase homeowners insurance.”¹¹⁷ About thirteen percent of administratively filed housing discrimination complaints arise in rural areas, such as North Dakota.¹¹⁸ According to a 2011 study of discrimination in rural housing:

Evidence suggests that discrimination and limited fair housing knowledge are creating unequal housing opportunities in rural communities. A survey of fair housing issues in Montana found that many individuals, especially in rural communities, lacked basic knowledge about fair housing laws and were unaware of the procedures for filing a complaint. This lack of information also has an impact on housing providers, some of whom may engage in illegal housing discrimination and not know it.¹¹⁹

It is reasonable to believe that housing discrimination likewise continues to exist in North Dakota, particularly in light of the shortage of available housing. It has been theorized that discriminatory treatment increases when housing markets are tight and vacancy rates are low.¹²⁰

and property managers); *Hous. Opportunities Project for Excellence, Inc. v. Key Colony No. 4 Condo. Ass'n*, 510 F. Supp. 2d 1003, 1014 (S.D. Fla. 2007) (stating that employee acting in the course and scope of employment is still individually liable for own unlawful conduct under the Fair Housing Act).

115. *Cmty. House, Inc. v. City of Boise*, 623 F.3d 945, 973 (9th Cir. 2010) (holding local officials entitled to absolute immunity for legislative acts and city employees entitled to qualified immunity from fair housing liability).

116. HOUS. ASSISTANCE COUNCIL, RURAL FAIR HOUSING COMPLAINTS AND ENFORCEMENT 3 (2011) (citing NAT'L FAIR HOUS. ALL., FAIR HOUSING ENFORCEMENT: TIME FOR A CHANGE, 2009 FAIR HOUSING TRENDS REPORT, <http://www.nationalfairhousing.org/Portals/33/2009%20Trends/2009%20Fair%20Housing%20Trends%20Report.pdf>).

117. *Id.* at 10 (citing NAT'L FAIR HOUS. ALL., *supra* note 116).

118. *Id.*

119. *Id.* at 5 (citation omitted) (citing W. ECON. SERVS., STATE OF MONTANA ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING AND FAIR HOUSING CHOICE (2004)).

120. Kushner, *supra* note 82, at 1054, 1056.

B. OIL BOOM HOUSING IS SUBJECT TO NONDISCRIMINATION LAW REQUIREMENTS

The explosion in housing construction throughout the state carries with it a responsibility for complying with nondiscrimination laws.¹²¹ The Fair Housing Act covers nearly all types¹²² of “dwellings,” which are broadly defined to include any building occupied or intended to be occupied as a residence.¹²³ The law also covers vacant land that is offered for sale or rent for the construction or location of a dwelling.¹²⁴ Houses, apartments, condominiums, mobile home parks, and trailer courts are dwellings covered by the Fair Housing Act.¹²⁵ Included within the regulations defining a dwelling are sleeping rooms in a facility where occupants share kitchens and bathrooms.¹²⁶ Housing that is intended to be a place to return to, even if only temporarily, falls within fair housing mandates.¹²⁷ Thus, college

121. Among other reasons, all state and local government agencies that receive HUD funds are required to engage in documented efforts to affirmatively further fair housing. 24 C.F.R. §§ 91.225(a)(1) (localities), 91.325(a)(1) (states), 903.7(o)(1) (2015) (Public Housing Authorities). “Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” 24 C.F.R. § 5.152 (2015).

122. There are exceptions for single-family homes sold or rented without an agent by a private owner not in the real estate business and for owner-occupied multifamily buildings of four units or less. 42 U.S.C. § 3603(b)(1), (2) (2016).

123. 42 U.S.C. § 3602(b) (2012). While the terms of the statute refer to residence by families, residence is not defined and “family” includes a single individual. *Id.* § 3602(c). Under the state fair housing law, “‘Dwelling’ means any structure or part of a structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families or vacant land that is offered for sale or lease for the construction or location of a structure or part of a structure as previously described.” N.D. CENT. CODE § 14-02.5-01(8) (2015).

124. 42 U.S.C. § 3602(b) (2012).

125. 24 C.F.R. § 100.201 (2016) (“*Dwelling unit* means a single unit of residence for a family or one or more persons.”); *see also* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3238 (Jan. 23, 1989) (noting that the statute’s definition of “dwelling” is “clearly broad enough to cover” “mobile home parks, trailer courts, condominiums, cooperatives, and time-sharing properties”). The statute does not cover hotels, motels, or detention facilities. *Patel v. Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (hotel); *Garcia v. Condarco*, 114 F. Supp. 2d 1158, 1163 (D.N.M. 2000) (detention facility).

126. 24 C.F.R. § 100.201 (2016) (including within the definition rooms where “sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling”). Examples of these other types of dwelling units “include dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.” *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 n.2 (9th Cir. 2007) (emphasis omitted) (quoting 24 C.F.R. § 100.201 (2016)).

127. *Hunter ex rel. A.H. v. District of Columbia.*, 64 F. Supp. 3d 158, 174-75 (D.D.C. 2014) (following the majority precedent as set forth in *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975) that a residence is “a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit”).

dorms fall under the purview of fair housing law.¹²⁸ Also, temporary housing for seasonal workers fits within the statute's coverage, even if the workers maintain homes in another state.¹²⁹

Based on these well-established precedents, oil workforce housing and man-camps, even if temporary, are covered by fair housing law. Individuals, private companies, and public entities that develop, own, or manage oil field dwellings are responsible for complying with these laws in all housing-related transactions. This means not only that covered housing must be equally available to persons regardless of their race, color, religion, or national origin but that housing must also be open to women, families with children, and persons with disabilities.¹³⁰ Likewise, advertisements for oil field housing cannot explicitly or implicitly signal limitations or preferences against accepting women.¹³¹ Only in roommate situations, where a person seeks a shared living arrangement, is discrimination based on protected status potentially lawful.¹³²

Fair housing policy requires nondiscrimination during boom times and busts, so that solving the challenge of where to live does not involve additional barriers for certain populations. The potential impacts, depending on whether these laws are enforced, are dramatic in situations such as the North Dakota oil boom. When a sparsely inhabited and racially homogenous region experiences dramatic increases in economic development and population, the availability of housing plays a major role in determining who will enjoy expanded prospects. Chances to benefit from the boom, whether by accepting temporary jobs or by settling permanently, should not be limited by discrimination. Ensuring that women have an equal opportunity to secure housing allows them to participate in the high wage economy by performing work related to the oil industry. Enforcing fair housing law also helps equalize opportunities for

128. *United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974, 983 (D. Neb. 2013) (holding that college student housing is covered by the Fair Housing Act's definition of "dwelling").

129. *Lauer Farms, Inc. v. Waushara Cty. Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997) (holding migrant camp structures proposed on vacant land to be covered dwellings); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1327-28 (D. Or. 1996); *Hernandez v. Ever Fresh Co.*, 923 F. Supp. 1305, 1308 (D. Or. 1996).

130. *See, e.g., United States v. Reece*, 457 F. Supp. 43, 48 (D. Mont. 1978) (holding that refusal to rent apartments to single women without cars, but not to single men without cars, violated Fair Housing Act as a matter of law).

131. ROBERTA ACHTENBERG, U.S. DEP'T OF HOUS. AND URB. DEV., GUIDANCE REGARDING ADVERTISEMENTS UNDER §804(C) OF THE FAIR HOUSING ACT 2-4 (1995), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11870.pdf.

132. *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1222 (9th Cir. 2012) (holding that discriminatory roommate ads do not violate Fair Housing Act because "shared living" situations do not constitute "dwellings").

the many racial and ethnic minorities who have contributed to the population boom. Nonwhites who join the overwhelmingly white population should be guaranteed equal access to the housing of their choice, at the same terms as white homeseekers. The state's many residents with disabilities,¹³³ including elderly persons with impairments to mobility and veterans with physical or psychological impairments, also are entitled to fair housing opportunity. All people have the right to decide where to live based on their preferences and qualifications, without discriminatory barriers.

Rural communities that experience a sudden influx of people from diverse backgrounds have the unique advantage of being able to avoid creating residential segregation, rather than struggling to alleviate it after it develops. The racially segregated living patterns that exist throughout the country did not occur naturally but resulted from decades of discriminatory public policies, intentional government action, and private discrimination. Once established, residential segregation is a notoriously difficult social problem to solve. Despite differences in history, economics, and demographics, rural areas are believed to develop residential segregation in ways that are very similar to patterns in metropolitan areas.¹³⁴ To avoid the pitfalls of this path, North Dakota's housing providers should understand their fair housing obligations, including the prohibition on "steering"—the practice of segregating home-seekers based on protected categories—¹³⁵so that developing neighborhoods and apartments are integrated from the start. Assistance with options and potential locations during a housing search should be provided equally to homeseekers without regard to race, sex, color, national origin, religion, disability, or whether they have children. The community benefits of promoting diverse neighborhoods are believed

133. In North Dakota, approximately 10.6% of the state's population reports having a disability. 2014 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, PERCENT OF PEOPLE WITH A DISABILITY, UNITED STATES CENSUS BUREAU (2013), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_GCT1810.ST04&prodType=table; see also STODDARD, *supra* note 31, at 4 fig. 1 (showing that between 9.5% and 11.2% of the population in North Dakota has a disability).

134. Daniel T. Lichter, Domenico Parisi, Steven Michael Grice, & Michael C. Taquino, *National Estimates of Racial Segregation in Rural and Small-Town America*, 44 *Demography* 563, 577-78 (2007) (concluding that segregation tends to increase with growing minority percentages and is typically lower in places with new development).

135. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 94 (1979). Steering occurs in the state, and landlords may not understand its illegality. At a training session that was mandated under the terms of a conciliated settlement of a housing discrimination claim, property managers openly admitted directing disabled tenants into one particular building. Interview with Michelle Rydz, Executive Director, High Plains Fair Hous. Ctr. (April 15, 2015).

to include improving racial tolerance and enhancing the likelihood of success for children who grow up in those neighborhoods.¹³⁶

The national mandate for residential integration and inclusion also extends to persons with disabilities. Disability became a protected class under housing discrimination law when the federal law was amended in 1988. The integration of persons with disabilities lies at the heart of this provision of the Fair Housing Amendments Act of 1988, which was intended as: “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American Mainstream. [The Act] repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals.”¹³⁷

Over the past several decades, disability-based housing discrimination complaints have increased in number, tripling between 1998 and 2008 nationwide.¹³⁸ Starting in 2000, disability exceeded race as the primary basis of complaints of housing discrimination in rural areas.¹³⁹ In 2008, disability was the basis of complaints in over forty percent of the filed rural cases.¹⁴⁰ This increase in disability-based complaints in rural areas matched national trends.¹⁴¹ Between 2007 and 2010, the nationwide percentage of administrative complaints for housing discrimination that were based on disability rose from forty-nine percent to fifty-three percent.¹⁴² The most common type of housing discrimination claim asserted in North Dakota also is based on disability.¹⁴³ As cities across the state build much-needed housing and infrastructure, attention must be paid to the requirement that federal funding be used in ways that affirmatively further fair housing.

136. See Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* 2, 4, 79 (Harvard Univ., Working Paper, May 2015), http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf (finding that neighborhood quality affects children’s long-term outcomes in terms of intergenerational mobility, college attendance, teenage employment, teenage birth, and marriage); D. Garth Taylor, *Housing, Neighborhoods, and Race Relations: Recent Survey Evidence*, 441 ANNALS AM. ACAD. POL. SOC. SCI. 26, 35 (1979) (effects of interracial housing and neighborhood integration may include lessening of white prejudice); see also Scott E. Carrell, et al., *The Impact of Intergroup Contact on Racial Attitudes and Revealed Preferences* (Nat’l Bureau of Econ. Research, Working Paper No. 20940, 2015) (exposure to racially diverse peer groups increases likelihood of selecting racially diverse roommate).

137. H.R. REP. NO. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

138. HOUSING ASSISTANCE COUNCIL, RURAL FAIR HOUSING COMPLAINTS AND ENFORCEMENT, 1, 13 (2011), <http://www.ruralhome.org/storage/documents/fairhousing2011.pdf>.

139. *Id.* at 12-13.

140. *Id.* at 13.

141. *Id.* at 8.

142. U.S. DEP’T OF HOUS. AND URBAN DEV., THE STATE OF FAIR HOUSING: ANNUAL REPORT ON FAIR HOUSING FY2009 22 (2010).

143. N.D. DEP’T OF LABOR AND HUM. RIGHTS, 2013-2015 BIENNIAL REPORT 1, 11-13 (2015), <http://www.nd.gov/labor/publications/docs/13-15biennial.pdf>.

C. LAWS GOVERNING THE DESIGN AND CONSTRUCTION OF
MULTIFAMILY HOUSING MUST BE ENFORCED TO ENSURE HOUSING
OPPORTUNITY TO PERSONS WITH DISABILITIES

Unfair treatment in connection with a housing transaction is a relatively well-known example of prohibited discrimination. Refusing to deal, offering worse terms, or dissuading a home seeker from options that are open to others, based on protected class status, are emblematic of well-known types of prohibited conduct. Harassment or intimidation of a person who seeks to exercise their fair housing rights is another example that most people recognize. But one less familiar type of discrimination, pertaining to the design and construction of new multifamily housing, should be placed at the forefront of enforcement and education efforts in North Dakota.

In addition to forbidding discrimination because of protected class status, fair housing requires considering the needs of persons with disabilities, both when new housing is constructed and when an individual encounters a specific barrier due to the effects of their disability.¹⁴⁴ To reduce the frequency with which the built environment prevents access to housing because of physical disabilities, Congress amended the Fair Housing Act in 1988.¹⁴⁵ In passing these enhanced protections, Congress understood that integrating people with mobility impairments into mainstream society depends on changing the physical environment and eliminating other discriminatory activities: “A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying ‘No Handicapped People Allowed.’”¹⁴⁶

As a result, newly constructed multifamily buildings must be built to adapt to the needs of persons with disabilities.¹⁴⁷ Covered housing with

144. The duty to reasonably accommodate the disabilities of home seekers, including tenants, and the duty to allow tenants with disabilities to make reasonable modifications are not addressed in this Article.

145. Fair Housing Amendment Act, Pub. L. 100-430, 102 Stat. 1619-39 (1988).

146. H.R. REP. NO. 100-711, at 25 (1988), 1988 U.S.C.C.A.N. 2173, 2186.

147. Multifamily dwellings designed or constructed for first occupancy after March 31, 1991, must meet design and construction requirements to make them accessible to handicapped persons. 42 U.S.C. § 3604(f)(3)(c); *see also* N.D. CENT. CODE § 14-02.5-06 (2015). Under 42 U.S.C. § 3604(f)(3)(C)(i)-(iii), discrimination includes a failure to design and construct covered multifamily dwellings in such a manner that

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

four or more units is required to provide the minimum adaptability features.¹⁴⁸ Detached single family houses, duplexes, triplexes are not covered by the Fair Housing Act's design and construction requirements but may be required to follow other accessibility laws if government-funded.¹⁴⁹ In covered, multifamily buildings, all ground floor units must be built to include public and common use areas; doors wide enough for wheelchairs; an accessible route into and through the dwelling; accessible light switches, electrical outlets, and environmental controls; reinforced bathroom walls; and kitchens and bathrooms that allow a person in a wheelchair to maneuver.¹⁵⁰

Adaptable construction requirements help communities ensure that as additional multifamily housing is developed, people with disabilities will not be precluded from living in it. Adaptable buildings facilitate independent living, even when people are injured, develop illnesses, or become less mobile with age. These minimal requirements do not mandate full accessibility, but they do make housing available to people who have a limited ability to turn or grip door hardware; people who use crutches, canes, or walkers; people who have limited reach ranges; and people who have vision or hearing disabilities. The requirements can be met with little or no additional cost if done at the time of construction.¹⁵¹

However, despite the fact that these design and construction requirements have been in effect for more than a quarter century, a substantial percentage of the nation's multifamily housing stock fails to

(iii) all premises within such dwellings contain the following features of adaptive design:

- (I) an accessible route into and through the dwelling;
- (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
- (III) reinforcements in bathroom walls to allow later installation of grab bars; and
- (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

148. 42 U.S.C. § 3604(f)(7)(A)-(B); 24 C.F.R. § 100.201 (defining "covered multifamily dwellings" as "buildings consisting of 4 or more dwelling units if such buildings have one or more elevators" and "ground floor dwelling units in other buildings consisting of 4 or more dwelling units").

149. U.S. DEP'T OF HOUS. AND URB. DEV. AND DEP'T OF JUST., JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: ACCESSIBILITY (DESIGN AND CONSTRUCTION) REQUIREMENTS FOR COVERED MULTIFAMILY DWELLINGS UNDER THE FAIR HOUSING ACT 23-24 (2013), https://www.ada.gov/doj_hud_statement.pdf. These other accessibility laws—particularly Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Architectural Barriers Act—have requirements for accessibility that exceed those contained in the Fair Housing Act.

150. See 42 U.S.C. § 3604(f)(3)(C); *accord* N.D. CENT. CODE § 14-02.5-06(3)(c) (2015).

151. See OFFICE OF HOUSING, U.S. DEP'T OF HOUS. AND URB. DEV., FAIR HOUSING ACT DESIGN MANUAL 1 (rev. 1998) [hereinafter DESIGN MANUAL].

comply. Based on Census data tabulated by the Harvard Joint Center for Housing Studies in conjunction with its 2015 report on rental housing, only about half of the multifamily units in buildings of 5 or more units built between 2003 and the present have the basic accessibility feature of a no-step entryway.¹⁵² Despite the legal requirements and regardless of the predicted need, less than one percent of rental units include the “five basic universal design features: no-step entry, single-floor living, lever-style door handles, accessible electrical controls, and extra-wide doors and hallways.”¹⁵³

The persistence of this violation of law impacts many people; nationwide, more than seven million renter households include persons with disabilities related to mobility, hearing, vision, cognition, self-care, or independent living.¹⁵⁴ Not surprisingly, “The incidence of disabilities increases sharply with age: among those aged 80 and over, fully 65 percent of renter households have at least one disability.”¹⁵⁵ As the baby boomer generation continues to age, the number of renters with disabilities is expected to rise sharply.¹⁵⁶

More than 72,000 North Dakotans are considered to be persons with a disability.¹⁵⁷ According to information gathered by a state agency and a local nonprofit fair housing organization, the basic design and construction mandates of the Fair Housing Act are not well understood in North Dakota and requests for reasonable accommodations are frequently resisted.¹⁵⁸ The requirement that newly built apartments be designed and constructed to accommodate persons with disabilities is among the specific compliance and enforcement problems that have been identified. This has been documented both in North Dakota in particular as well as in the rest of the country.

152. *Table W-8, Rental Units with Accessibility Features by Structure Type and Year Built: 2011*, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., (citing U.S. CENSUS BUREAU, 2011 AMERICAN COMMUNITY SURVEY (2011)), <http://jchs.harvard.edu/americas-rental-housing>, Appendix Tables and Additional Web-Only Tables.

153. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 44, at 18.

154. *Id.* (“Some 4.3 million of these renter households have someone at home who has serious difficulty walking or climbing stairs.”).

155. *Id.*

156. *Id.*

157. U.S. CENSUS BUREAU, SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES: 2010-2014 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: NORTH DAKOTA (2014), <https://www.census.gov/acs/www/data/data-tables-and-tools/american-factfinder/> (follow “2010-2014 ACS 5-year DP” hyperlink; then enter “North Dakota” in state, county or place field; then click “GO”; then follow “SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES” hyperlink).

158. N.D. DEP’T OF COMMERCE, *supra* note 33, at 110-11, 127.

In March 2016, the U.S. Justice Department announced that the owners and developers of seventy-one multifamily housing complexes in four states with more than 2500 ground-floor units had agreed to pay \$350,000 and to substantially retrofit their apartment buildings under the terms of a judicial consent decree.¹⁵⁹ The action asserted that the defendants had violated the Fair Housing Act and the Americans with Disabilities Act by building apartment complexes that were inaccessible to persons with disabilities.¹⁶⁰ The agreement required developers and related companies to take extensive actions, such as replacing excessively sloped sidewalks, installing properly sloped curb walkways, replacing cabinets to provide sufficient space for wheelchair users, and removing accessibility barriers in public and common use areas.¹⁶¹ The settlement funds included \$300,000 to compensate persons with disabilities who were impacted by the violations and \$50,000 as a civil penalty.¹⁶²

During the oil boom years, many new multifamily housing units were built in North Dakota.¹⁶³ Research conducted thus far has not studied whether newly constructed housing complies with existing nondiscrimination laws, but anecdotal evidence confirms the presence of at least one easily identifiable violation: one or more steps to building or unit entrances.¹⁶⁴

How can a community with explosive development of much-needed multifamily housing make sure that its residents with disabilities will be able to find housing? Neither of the two federal agencies charged with enforcing the Fair Housing Act (HUD and the Department of Justice) reviews state and local building codes or building plans to determine

159. U.S. DEP'T OF JUST., OFFICE OF PUB. AFF., *Justice Department Settles Disability-Based Housing Discrimination Lawsuit with Owners and Developers of 71 Apartment Complexes in Alabama, Georgia, North Carolina, and Tennessee* (Mar. 8, 2016), <https://www.justice.gov/opa/pr/justice-department-settles-disability-based-housing-discrimination-lawsuit-owners-and>; Consent Order, *U.S.A. v. Rappuhn, et al.*, (N.D.Ala. 2016), <https://www.justice.gov/opa/file/831341/download>.

160. U.S. DEP'T OF JUST., OFFICE OF PUB. AFF., *supra* note 159.

161. *Id.*

162. *Id.*

163. OFFICE OF POLICY DEV. AND RESEARCH, *supra* note 21, at 2 (“According to preliminary data, during the 12 months ending February 2011, the number of multifamily units permitted increased by 20 percent, to 1,420 units, of which apartments accounted for 90 percent. By comparison, an average of 1,100 multifamily units a year were permitted from 2006 through 2008; during this period, apartments accounted for 60 percent of the units permitted.”).

164. Interview with Bret Weber, (Dec. 15, 2015); *see also*, photograph of Capital Lodge, Sarah Jane Keller, *Despite Low Oil Prices, North Dakota Remains an Expensive Place to Live*, VICE NEWS, (June 15, 2015), <https://news.vice.com/article/despite-low-oil-prices-north-dakota-remains-an-expensive-place-to-live>.

whether they comply with the Act's accessibility requirements.¹⁶⁵ Rather, "The burden of compliance rests with those who design or construct covered multifamily dwellings."¹⁶⁶ Thus, litigation is a primary enforcement mechanism, and anyone responsible for the design or construction of multifamily housing can be sued, including architects, developers, and contractors.¹⁶⁷ Violators can be ordered to retrofit the buildings with adaptable features,¹⁶⁸ as the defendants in the settlement described above agreed to do.

Enforcing design and construction violations through private party complaints and actions initiated by the Department of Justice will not effectively alleviate the problem of inaccessible new housing. Among other reasons, actions to require those responsible for constructing new multifamily housing without following the design and construction requirements must be brought quickly.¹⁶⁹ Some courts have held that the statute of limitations on a design-and-construct violation is triggered on the date the last certificate of occupancy is issued.¹⁷⁰ In a 3-2 decision, the North Dakota Supreme Court followed the Ninth Circuit appellate decision on this issue, holding that a complaint filed within two years after a disabled person encountered noncompliant housing, but more than two years after the unit received a certificate of occupancy, was barred by the statute of limitations.¹⁷¹ Based on this interpretation, once housing is built

165. U.S. DEP'T OF HOUS. AND URB. DEV. AND DEP'T OF JUST., JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: ACCESSIBILITY (DESIGN AND CONSTRUCTION) REQUIREMENTS FOR COVERED MULTIFAMILY DWELLINGS UNDER THE FAIR HOUSING ACT 23 (2013) (citing 42 U.S.C. § 3604(f)(5)(D) (2012)).

166. *Id.* (citing DESIGN MANUAL, *supra* note 151, at 2). Primary enforcement of the Fair Housing Act is through individual complainants, who act "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. at 211.

167. *Balt. Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664-65 (D. Md. 1998).

168. *See* Sec'y, U.S. Dep't of Hous. and Urban Dev. *ex rel.* Will-Grundy Ctr. for Indep. Living v. Perland Corp., HUDALJ 05-96-1517-8, 1998 WL 142159, at *13 (Mar. 30, 1998) FH/FL ¶25, 136 (HUD ALJ 3/30/98).

169. The Fair Housing Act provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach." 42 U.S.C. § 3613(a)(1)(A) (2012).

170. *Garcia v. Brockway*, 526 F.3d 456, 461 (9th Cir. 2008) (holding that the "failure to design and construct" is "a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase.").

171. *State ex rel. N.D. Dep't of Labor v. Matrix Props. Corp.*, 2009 ND 137, ¶17, 770 N.W.2d 290, 297-98. The dissent articulates several bases for a contrary holding, among them, that the majority erroneously relied on the *Garcia* opinion, despite the congressional repudiation of a similarly-narrow construction of the statute of limitations in employment discrimination cases. *See id.* at ¶¶ 20-38, 770 N.W.2d at 298-304, 303-04 (Kapsner, J., dissenting).

and occupied, a very narrow window of time exists in which to force compliance with adaptability requirements. After the statute of limitations runs, a community and its inhabitants may be saddled with additional housing stock that many persons with disabilities cannot inhabit.

In conflict with those judicial determinations, HUD and the Department of Justice interpret the limitations period for design-and-construct claims as beginning to run only when an aggrieved person is injured by a violation of this provision. Under that interpretation, a violation “may cause an injury to a person at any time until the violation is corrected. A person may be injured before, during or after a sale, rental or occupancy of a dwelling. . . . [C]omplaints can be filed at any time that the building continues to be in noncompliance.”¹⁷²

With the state courts in North Dakota bound to follow the precedent set in *Matrix*, a remaining avenue for litigation enforcement beyond two years after issuance of a certificate of occupancy would be to file an action in federal court and assert that the HUD/DOJ interpretation governs. Also, claims can be filed with the Department of Labor and Human Rights within a one-year statute of limitations, and complainants may pursue this administrative avenue with or without a lawyer.¹⁷³

The private bar can play an important role in achieving compliance with fair housing law, including design and construction standards. Enhanced awareness of potential causes of action for housing discrimination violations and the availability of attorneys’ fees for prevailing plaintiffs could entice more attorneys to consider representing persons with such potential cases. In addition, state rules of attorney conduct permit lawyers to advise housing discrimination clients in a limited capacity.¹⁷⁴ Attorneys can help clients file complaints with the Department of Labor and Human Rights and then provide limited assistance during the agency’s investigation, without long-term commitment to the case. Attorneys who represent property developers can have a positive impact as well, by advising their clients about design and construct standards, as well as pointing them to resources intended to aid in compliance.¹⁷⁵

But pursuing enforcement after apartment complexes are completed and inhabited is flawed because (1) the Eighth Circuit’s view on the statute

172. U.S. DEP’T OF HOUS. AND URB. DEV. AND DEP’T OF JUST., *supra* note 165, at 28.

173. N.D. CENT. CODE § 14-02.5-18(1) (2015).

174. See N.D. RULES OF PROF. CONDUCT, r. 1.2(b) (2016).

175. See, e.g., U.S. DEP’T OF HOUS. AND URB. DEV. AND DEP’T OF JUST., *supra* note 149, at 2. Another excellent resource is the Fair Housing Accessibility FIRST website, a HUD initiative to promote compliance with design and construction law, FAIR HOUS. ACCESSIBILITY FIRST, <http://www.fairhousingfirst.org/index.asp> (last visited Aug. 8, 2016).

of limitations is uncertain, (2) a small number of lawyers practice in North Dakota, and (3) even a favorable outcome involves inefficient and costly retrofitting of noncompliant multifamily buildings.

North Dakota and its municipalities could take two steps to clarify design and construction requirements for developers while ensuring that persons with disabilities who encounter non-compliant housing can pursue enforcement: (1) enact building codes that explicitly repeat or refer to the design and construction requirements, and (2) amend the Housing Discrimination Act to overturn *Matrix* and make clear that the right to litigate a design and construction violation exists as long as the violation continues to impede access to housing.¹⁷⁶

Either local governments or the state could enact measures to facilitate compliance with design and construction requirements before certificates of occupancy are issued. The state building code is intended, among other goals, to protect the welfare of people, but it does not incorporate Fair Housing Act adaptability standards or requirements.¹⁷⁷ As specifically authorized in federal law, “A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.”¹⁷⁸

The state building code currently refers to the Americans with Disabilities Act (“ADA”) in its accessibility standards¹⁷⁹ but not to Fair Housing Act adaptability requirements. ADA accessibility requirements apply only to public areas of multifamily housing, not to the individual dwellings themselves.¹⁸⁰ Architects, builders, and development companies may believe that in abiding by the ADA they have met their obligations. While the state has adopted the 2012 International Building Code, with amendments, HUD has not yet recognized this version of the IBC as one of

176. Even without a statutory amendment, the dissenting Justices in the *Matrix* opinion asserted several viable theories for holding that the statute of limitations is properly interpreted as being triggered only after a person with a disability encounters the noncompliant housing. *Matrix*, 99 N.D. 20-38, 770 N.W.2d at 298-304 (Kapsner, J., dissenting).

177. N.D. CENT. CODE § 54-21.3-01(3) (2015) (noting the purpose of the code is to “[e]nsure adequate construction of buildings throughout the state and to adequately protect the health, safety, and welfare of the people of this state”). The lack of fair housing standards in North Dakota’s building code is not unusual. See, Robert G. Schwemm, Barriers to Accessible Housing: Enforcement Issues in “Design and Construction” Cases Under the Fair Housing Act, 40 U. RICH. L. REV. 753, 773-74 (2006) (describing how “tens of thousands of building codes throughout the country” lack FHA accessibility requirements and some builders want those requirements reflected in local building codes).

178. 42 U.S.C. § 3604(5)(B) (2012).

179. N.D. CENT. CODE § 54-21.3-04.1(3) (2015).

180. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 355.

the ten safe harbors for those seeking to ensure compliance with design and construct requirements.¹⁸¹ The state building code should be amended to point developers directly to the design and construction mandates of the Housing Discrimination Act¹⁸² and the Fair Housing Act.

IV. CONCLUSION

Where people live, and what they pay to live there, directly affects other significant aspects of their lives. Housing impacts both everyday realities and long-term opportunities—affecting not just how long it takes to get to work each day or where someone can buy groceries, but whether they will be safe in their neighborhood, whether they will have adequate monetary resources after housing costs are paid, whether or not they will remain healthy, who their government representatives will be, what kind of education their children will receive, and whether they will accumulate wealth that can be passed down to their children.

It has long been the explicit policy of this state to ban discrimination.¹⁸³ Housing is a fundamental social justice issue and should be considered with the human impacts.¹⁸⁴ Even temporary housing should meet the needs of people and communities, providing a foundation for inclusive communities as the state continues to become more racially and ethnically diverse. Rapid growth and increased employment opportunities have developed in many

181. The ten safe harbors are listed at the Fair Housing Accessibility FIRST website. *Frequently Asked Questions (FAQ)*, FAIR HOUS. ACCESSIBILITY FIRST, <http://www.fairhousingfirst.org/faq/safeharbors.html> (last visited Aug. 8, 2016).

182. Section 14-02.5-06(4) of the state's Housing Discrimination Act helpfully references ANSI A 117.1 (1986), compliance with which provides a safe harbor, but it may be that builders are not looking to the Housing Discrimination Act in efforts to meet their legal obligations. N.D. CENT. CODE § 14-02.5-06(4) (2015).

183. N.D. CENT. CODE § 14-2.4-01 (“It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer; to prevent and eliminate discrimination in employment relations, public accommodations, housing, state and local government services, and credit transactions; and to deter those who aid, abet, or induce discrimination or coerce others to discriminate.”). In 1983, the North Dakota Human Rights Act made it illegal to discriminate in employment, public accommodations, state and local government services, and credit transactions. 1983 N.D. Laws 466-73. Nondiscrimination in housing initially was a policy goal but became state law in 1999. 1999 N.D. Laws 2-14.

184. BARKDULL ET AL., *supra* note 36, at 220 (“Somewhere between the pleas of man camp residents to simply build more housing and the concerns of local taxpayers about getting stuck paying for municipal bonds lie opportunities to implement a more optimal balance of permanent long-term development with a suitable amount of temporary labor housing. A social justice framework requires that judgments regarding economic activity and housing be pursued to benefit human beings, and compels us to remember that neither temporary laborers nor long-term residents deserve to be treated like inventories of widgets, with no more consideration than corporate ledgers.”).

sectors of the state's economy during the oil boom years.¹⁸⁵ People with disabilities can and should participate in the growth and opportunities resulting from the oil boom. Many can perform newly available jobs, with or without a reasonable accommodation, and contribute to continued economic vitality. In this small state, adding a substantial number of new housing units that lack adaptable design features means foreclosing options to persons with disabilities for years to come. Fair housing laws, including those requiring adaptable design and construction of new, multifamily buildings, should be enforced, providing equal opportunity and housing choice to all.

185. OFFICE OF POLICY DEV. AND RESEARCH, *supra* note 21, at 1.