DISPARATE IMPACT DISCRIMINATION IN RESIDENTIAL LENDING
AND MORTGAGE SERVICING BASED ON SEX: INSIDIOUS EVIL

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I. INTRODUCTION

"The [Fifteenth] Amendment nullifies sophisticated as well as
simple-minded modes of discrimination. It renders unconstitutional
onerous procedural requirements which effectively handicap exercise of
the [voting] franchise by the colored race although the abstract right to
vote may remain unrestricted as to race."1 In Lane v. Wilson, the U.S.
Supreme Court found the goal of the Fifteenth Amendment of
"secur[ing] freedom from discrimination on account of race in matters
affecting the [voting] franchise," could not be met if Oklahoma
persisted in applying a facially neutral law that had the practical effect
of permanently disenfranchising black voters.2 In 1969, the United
States Court of Appeals for the Fifth Circuit considered a case with
striking similarities brought under Title VII of the Civil Rights Act of
1964, which prohibits discrimination in employment.3 The court
considered whether an allegedly facially neutral seniority system, based
on pre-Act work credit, constituted present discrimination.4 The
plaintiff workers in Local 189, United Papermakers and Paperworkers
v. United States challenged an employer policy, which they alleged

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Housing Unit. Katherine would like to extend a special recognition to her research
assistant Michele Mathura, a student from Florida Coastal School of Law, for the
extensive and invaluable research she conducted. This Article and the work that
JALA is developing in the area of fair housing discrimination would not be possible
without the excellent statistical research and work performed by Dr. Michael Binder
and his associates with University of North Florida's Public Research Institute.
1 Lane v. Wilson, 307 U.S. 268, 275 (1939); see U.S. CONST. amend. XV.
2 Lane, 307 U.S. at 271, 274-77.
3 Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980,
984-85, 987 (5th Cir. 1969), abrogated by Bernard v. Gulf Oil Corp., 841 F.2d 547
(5th Cir. 1988).
4 Id. at 987.
gave "renewed effect to the old racial distinctions without . . . justification of business necessity." Historically, discriminatory employment policies had shut black employees out of certain jobs available only to white employees and "'lock[ed] in' prior racial classification." The court determined that a resolution could not be reached without actively analyzing whether employer policies brought the vestiges of discrimination into the present day. Reliance on a standard, neutral on its face, is no defense under the Act when the effect of the standard is to lock the victims of racial prejudice into an inferior position. The rigorous analyses required by Lane and United Papermakers make it clear that the practical effects of a policy, regardless of its facial neutrality, must be considered and included in any judicial determination of a claim for discrimination.

Now, decades after the decisions in Lane and United Papermakers, and despite the passage of antidiscrimination laws, the evil scourge of racism still impacts housing, lending, employment, and voting policies in this country. Similarly, the evil products of sexism—including the historic marginalization of women in lending in this country—cannot be denied. Women, predominantly elderly

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5 Id. at 986.
6 Id. at 983, 988.
7 Id. at 987-88.
8 Id. at 988.
9 Lane v. Wilson, 307 U.S. 268, 274-77 (1939); United Papermakers, 416 F.2d at 988; see also Vill. of Arlington Heights v. Metro. House Dev. Corp., 429 U.S. 252, 266 (1977) (explaining that even though the rezoning ordinance was not discriminatory on its face, further analysis could show race was an underlying factor).
12 Economic Problems of Women: Hearings Before the J. Econ. Comm., 93d Cong. 191 (1973) [hereinafter Economic Problems of Women] (statement of Steven Rohde, Member of the Staff, Ctr. for Nat. Policy Review, School of Law, Catholic Univ.); see
women and women of color,\textsuperscript{13} have been and continue to be discriminated against in their ability to access the residential lending credit market.\textsuperscript{14}

This Article addresses the perpetuation of the effects of sex discrimination through current lending and loan-servicing practices, which are undeniably connected and result in illegal foreclosures against women.\textsuperscript{15} Women today face the same kind of problems in the context of residential mortgage lending that the black plaintiffs faced in \textit{Lane}: the application of policies, neutral on their face that have the practical effect of discrimination, which is prohibited by law.\textsuperscript{16} In the world of residential mortgage lending, the practical effect of the implementation of facially neutral business policies disparately impacts women by inhibiting women's access to credit which carries into the present day the vestiges of past sex discrimination which violates the Fair Housing Act ("FHA").\textsuperscript{17} In Part VII, an investigation started by Jacksonville Area Legal Aid, Inc. ("JALA") and conducted by the University of North Florida Public Opinion Research Laboratory ("PORL") is discussed.\textsuperscript{18} The PORL report documents statistical evidence that certain facially neutral lender and servicer practices negatively impact women who are non-note-signing borrowers and have a disparate and discriminatory impact upon women in violation of the FHA.\textsuperscript{19}


\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{See infra} Parts II-IX.

\textsuperscript{16} \textit{See} \textit{Lane v. Wilson}, 307 U.S. 268, 276-77 (1939).


\textsuperscript{18} \textit{See infra} Part VII.

\textsuperscript{19} \textit{See infra} Part VII.
II. OVERVIEW: WOMEN AS BORROWERS

“It is unrealistic to expect that practices that are encrusted with age and surrounded by myth will yield readily and quickly.”

Historically, women have been disenfranchised in residential mortgage lending and in the provision of credit generally. In the United States, women of color, single women, and women whose careers were not considered professional have historically been subject to some of the worst discrimination. Residential lenders and mortgage servicers continue to justify and apply present day sexist residential mortgage lending practices that disparately and detrimentally impact women using as a pretext the obligation of prudent underwriting, with one reviewer describing such sexist practices as “part and parcel of official bank policy.”

Leading up to the passage of the Equal Credit Opportunity Act, lenders engaged in a number of discriminatory underwriting practices. These practices included totally ignoring the income of a married woman in the credit decision, requiring women to have their husbands cosign for a loan, requiring doctor-issued “baby letters” to verify sterility and birth control practices, and refusing outright to lend to

20 Economic Problems of Women, supra note 12, at 198.
21 Id. at 191.
26 See Economic Problems of Women, supra note 12, at 191.
single women. These past discriminatory practices stemmed from lenders’ perception of women as “poor credit risks” who would act irrationally or fail to return to work after childbirth, even if it meant facing foreclosure. The perception of many lenders in this country for decades was that employment for a married woman was a “temporary aberration” that was abandoned once the woman became pregnant. Although it would be considered unacceptable today, in 1973, a Veteran’s Administration official was quoted as saying it would be “un-American” to consider a woman’s income when qualifying for a loan unless she were to “have a hysterectomy.”

Unfortunately, illegal and insidious business practices persist today in residential mortgage lending that disparately impact women on account of their sex. Lenders are still refusing to count a woman’s pregnancy-related, short-term disability payments as “qualifying income” for a loan. It is not acceptable to blame these present-day discriminatory practices on the housing crisis or to allow lenders to escape responsibility for illegal conduct through restrictive underwriting criteria. The United States Department of Housing and Urban Development (“HUD”) has been involved in a few recent cases involving sex discrimination. In 2011, HUD issued a charge of discrimination against Mortgage Guaranty Insurance Corporation because of its practice of requiring pregnant women to return to work before issuing mortgage insurance, even if the woman had a “guaranteed right to return to work.” That same year, HUD entered

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29 See St. Cyr, supra note 25, at 110.
30 See Economic Problems of Women, supra note 12, at 192.
31 Id.
32 Id.
33 Id.
34 Bernard, supra note 23.
35 Id.
36 Id.
37 See St. Cyr, supra note 25, at 111.
into a conciliation agreement with Cornerstone Mortgage Company ("Cornerstone") based on an investigation that confirmed that Cornerstone had approved a woman borrower for a mortgage loan, and then, upon learning that she was on maternity leave, Cornerstone revoked the approval and refused to approve the loan until the woman returned to work. In doing so, Cornerstone revived a decades-old practice of advising the female borrower to secure a cosigner if she wished to qualify for the loan ahead of her return to work based on an erroneous classification of "maternity leave" as "short-term or temporary disability income." Cornerstone made the decision to rescind the borrower's loan approval without inquiring about her pay while on leave. The borrower, who had accrued sufficient leave time and was receiving her full pay during her absence, had the same income at the time she had initially applied for and was approved for the loan. This fact negated the typical lender argument that reduced income from disability payments restricts the lender from approving a loan. Cornerstone relied—as justification for its discrimination against the female complainant—on the old standard of "prudent loan underwriting," despite the fact that Cornerstone had no objective reason to doubt the prudence of lending to the female borrower, who while out on leave related to the birth of a child, was receiving full pay.

Foreclosure has a particularly damaging effect on older people who are especially susceptible to the financial, physical, and emotional havoc caused by the loss of a home. The significant emotional and physical impact that forced relocation has on the elderly is well

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39 Title VIII Conciliation Agreement, supra note 23, at 1, 2-3.
40 Bernard, supra note 23.
41 Id.
42 Id.
43 Id. at 2-3.
44 Title VIII Conciliation Agreement, supra note 23, at 3.
45 Bernard, supra note 23.
documented, and the harm to the aged is no different when the home shared with a spouse is lost through foreclosure. Consistency of place is important for everyone, but especially for seniors as their health declines and their independence decreases.

The foreclosure problems facing the elderly in this country loom large. The Federal Reserve reports that the "proportion of consumers 75 and older with mortgage debt more than doubled" between 2001 and 2011. By the time a person reaches the age of eighty, they are likely to be living alone, and, because women on average live longer than men, "women make up nearly three-quarters of this group" of single, elderly homeowners. Compounding this problem is the fact that elderly women, who are more likely to be non-note-signing borrowers, are particularly vulnerable to the loss of their home through foreclosure when their note-signing spouse dies. The susceptibility of the elderly to foreclosure is a pressing issue throughout Florida with 19.1% of Florida's population over sixty-five in foreclosure. The national average is 14.5%.

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47 Id.
48 Id. at 4.
49 Id. at 3.
51 Id.
53 Id. at 7-8.
56 Id.
III. THE FAIR HOUSING ACT PROHIBITS SEX DISCRIMINATION IN LENDING

"It is the policy of the United States to provide . . . for fair housing throughout the United States."57

Because fair housing claims are interpreted in accordance with decisions under Title VII employment discrimination cases,58 this Article cites to employment cases to interpret the FHA.59

The FHA makes it unlawful “for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”60 A person or entity is engaged in “residential real estate-related transactions” if its business includes the “making or purchasing of loans or providing other financial assistance (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate.”61 All entities engaged in “residential real estate-related transactions” as part of their business—including lenders and their servicing agents—are prohibited from discriminating in both the lending and customer servicing aspects of these consumer finance transactions based on a person’s membership in a protected class.62 Both the lending and servicing of a residential mortgage loan are essential components of the lending transaction.63 Both activities are encompassed in “making available such a

59 See Annmarie Billotti et al., Anatomy of a Fair Housing Case: A Primer on Litigating a Housing Discrimination Claim, 27 CAL. REAL PROP. J., no. 4, 2009, at 30, 32-33, http://www.dfeh.ca.gov/res/docs/CivilRightsYear/Articles/AnatomyofAFairHousingCase.pdf (stating that employment-based discrimination cases are analogous to fair housing claims).
60 42 U.S.C. § 3605(a) (emphasis added).
61 Id. § 3605(b) (emphasis added).
62 Id. § 3605(b)-(c).
63 Id.
transaction" and in the "terms or conditions" of the deal. 64 Residential mortgage contracts necessarily involve the making of consumer loans and the provision of financial assistance that triggers coverage of the FHA. 65 Modern residential mortgage transactions do not exist without loan servicing, 66 and proper servicing—including the provision of loss mitigation—is "other financial assistance" within the coverage of 42 U.S.C. § 3605. 67

Lender and servicer policies that restrict a surviving non-note-signing borrower's access to loss mitigation necessarily have a disparate impact upon women in violation of the FHA. 68 Practically speaking, the application of such a restrictive policy against non-note-signing borrowers will "often prevent a successor in interest from pursuing assumption of the mortgage loan and, if applicable, loss mitigation options—potentially resulting in the avoidable loss of the home." 69

IV. INTENT IS NOT REQUIRED TO MAKE A CASE FOR DISPARATE IMPACT DISCRIMINATION

Intent is not a required element of a disparate impact claim. 70 A prima facie case for disparate impact discrimination requires a showing of the application of an outwardly neutral practice that has a significantly adverse or disproportionate impact on members of a protected class. 71 "Lack of intent" is not a defense to a claim of

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64 Id.
65 Id. § 3605(a)(1).
67 See 42 U.S.C. § 3605; see also 24 C.F.R. § 100.130 (2015).
68 See 24 C.F.R. § 100.130; see infra Part VI.
disparate impact discrimination under the FHA caused by residential mortgage lending or servicing practices that disparately impact women. The implementation of default loan-servicing procedures (like not talking to surviving borrowers who call to access loss mitigation information) where the outcome is discriminatory and disparate against women on account of their sex cannot be allowed.

The only intent on the part of a lender or servicer that is required to be shown is that the lender or the servicer intended to have the policy and to apply it to the non-note-signing borrower. A violation exists where the lender or the servicer intended to have the challenged policies. Malicious intent is not a required element to state a cause of action under the statute. Wrongful and deliberate intent of a lender or servicer can be inferred from the application of a rule or from conduct that results in a denial of equal rights. Further, the requisite intent to discriminate can be inferred from the fact that lenders and servicers persist in the challenged conduct after being put on notice of the discriminatory effects of their acts and omissions. “The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them.”

disparate impact theory a prima facie case is established by demonstrating that application of a facially neutral standard resulted in a significantly discriminatory hiring pattern); see also Inclusive Cmtys., 135 S. Ct. at 2514-15.

See infra Part V.
See 24 C.F.R. § 100.130(b)(3).
See infra Part V.
See Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 997 (5th Cir. 1969).
See Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976) (“Effect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme.”).
United Papermakers, 416 F.2d at 997.
Id.
V. DISPARATE IMPACT GOES TO WASHINGTON: TEXAS DEPARTMENT OF HOUSING & COMMUNITY AFFAIRS V. INCLUSIVE COMMUNITY PROJECT, INC.

"Recognition of disparate-impact liability under the FHA . . . permits plaintiffs to counteract unconscious prejudices and disguised animus . . ." 80

Liability under the FHA for discrimination that is the result of neutral policies was affirmed by the Supreme Court’s ruling in Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc. 81 This decision cemented disparate impact as a cognizable fair housing claim. 82 Prima facie evidence of disparate impact discrimination exists in residential mortgage lending where (1) the lender or servicer has an outwardly or facially neutral policy or practice and (2) that application of the facially neutral policy or practice has a significantly adverse or disproportionate impact upon members of a protected class (in this case women by virtue of their sex). 83 Unlike a disparate treatment case, disparate impact is a theory of liability for which proof of discriminatory intent is not required. 84 The idea that disparate impact claims are cognizable and that such claims can be proved without a showing of intent dates as far back as 1939 with the

81 Id.
decision of the U.S. Supreme Court in Lane v. Wilson.\textsuperscript{85}

A more recent, although still decades old, case involving disparate impact is the U.S. Supreme Court’s landmark decision in Griggs v. Duke Power Co.\textsuperscript{86} Issued in 1971, Griggs targeted employment “practices that [were] fair in form, but discriminatory in operation.”\textsuperscript{87} In the forty-five years since Griggs, appellate courts across the country have accepted and applied the disparate impact test\textsuperscript{88} to claims of discrimination in housing cases involving exclusionary zoning, residency preferences, and insurance matters.\textsuperscript{89} HUD also issued a series of regulations on disparate impact interpreting the FHA as prohibiting disparate impact discrimination.\textsuperscript{90}

In Inclusive Communities, the U.S. Supreme Court held that a disparate impact plaintiff must prove a causal connection between the challenged facially neutral policy and the claimed disparity and ruled that the prima facie burden is not met by simply showing a statistical disparity.\textsuperscript{91} The Court held that once the disparate impact plaintiff makes the requisite showing, the burden shifts to the defendant to show a “valid interest served by [that] polic[y]” similar to the “business necessity standard under Title VII.”\textsuperscript{92}

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\item \textsuperscript{85} See Lane v. Wilson, 307 U.S. 268, 273-74 (1939) (finding that intent is not a required element to find a person liable of depraving citizen’s rights, privileges, or immunities secured by the Constitution); see also Inclusive Cmtys., 135 S. Ct. at 2511 (finding that Title VII’s and the Age Discrimination in Employment Act’s “otherwise adverse affect” language is equivalent in function and purpose as the FHA’s “otherwise make unavailable” language, which serves the purpose of looking to consequences and not intent).
\item \textsuperscript{87} Id. at 431.
\item \textsuperscript{88} Schwemm, \textit{supra} note 82, at 106-108.
\item \textsuperscript{89} See id. at 107-08.
\item \textsuperscript{90} 24 C.F.R. § 100.500(a) (2015) (“A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”).
\item \textsuperscript{91} Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514-15 (2015) (“If a statistical discrepancy is caused by factors other than the defendant’s policy, a plaintiff cannot establish a prima facie case, and there is no liability.”).
\item \textsuperscript{92} Id. at 2522-23.
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such an interest, the burden shifts back to the plaintiff to show that there is a less discriminatory way for the business to achieve the same "substantial, legitimate, nondiscriminatory interests" being served by the application of the challenged policy. Although no showing of intent is required to support a disparate impact claim, proof of willful blindness is relevant and should be imputed to lenders and servicers who are on notice that their policies could have a disparate impact on a protected class of persons in violation of the FHA. Guidance dating back decades has alerted lenders of the need to evaluate whether their policies and practices, while neutral on their face, "might still be [discriminatory] in their effects . . . ."

VI. LENDER AND SERVICER POLICIES WITH A DISPARATE IMPACT

Sorry for your loss. We can't talk to you. You aren't on the note.

Currently, the practice and policy of some lenders and servicers, when dealing with surviving non-note-signing borrowers, is to engage in acts and practices that have a disparate and discriminatory impact upon women. Among the most systemic of discriminatory residential mortgage lending practices involves the servicer refusing to talk to the non-note signing borrower at all, refusing to discuss loss mitigation options or accept payments from them, advising the borrower that she is not qualified to apply to modify the loan because she is not obligated on the note, and demanding that the borrower open an

93 24 C.F.R. § 100.500(c)(3).
94 Inclusive Cmty., 135 S. Ct. at 2515; see also 24 C.F.R. § 100.500(c)(3).
95 See generally Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 997 (5th Cir. 1969) (concluding that intent may be inferred from a defendant's continued actions after the defendant becomes aware of the discriminatory implications or consequences of such actions).
96 Beckey, supra note 13, at 599.
97 See infra Part VIII.
98 The following information is a culmination of the author's individual investigations and interviews with and reports from clients in multiple fair housing foreclosure cases.
99 Amendments to Regulation X and Regulation Z, supra note 54. This statement is based on client reports to the author in fair housing foreclosure cases and information regarding confidential settlements in fair housing foreclosure cases.
100 Id.; see also Sarah B. Mancini & Alys Cohen, Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information After a Death or
estate for their deceased spouse before they can apply for loss mitigation\textsuperscript{101} when such action is not required pursuant to state law and is specifically prohibited by regulations promulgated by the Consumer Financial Protection Bureau.\textsuperscript{102} A study of compliance with Consumer Financial Protection Bureau servicing standards discloses that “63% of the housing counselors surveyed report that servicers rarely or never have policies in place to facilitate communication with successors in interest of deceased borrowers.”\textsuperscript{103} Lenders and mortgage servicers cite “privacy concerns, banking regulations, due-on-sale clauses in the mortgage contract, and alleged restrictions on assumption of a mortgage loan”\textsuperscript{104} as reasons to refuse to speak with or offer loss mitigation information to surviving non-note-signing borrowers.\textsuperscript{105}

The “you aren’t on the note, so you can’t modify” and the “privacy of borrower” arguments make no sense in Florida or other states where the surviving spouse inherits the home by operation of law.\textsuperscript{106} In many of the foreclosure cases defended by JALA attorneys, the surviving spouse signed the mortgage but not the note and, on this basis, the servicer denied them information regarding their mortgage.\textsuperscript{107}

The Gramm-Leach-Bliley Act is a federal statute that provides privacy protections for consumers dealing with financial institutions.\textsuperscript{108} While this statute restricts “nonpublic personal information” from being disclosed to “unaffiliated third parties”,\textsuperscript{109} this statute has no application

\textsuperscript{101} This statement is based on client reports to the author in fair housing foreclosure cases.
\textsuperscript{102} Implementation Guidance for Certain Mortgage Servicing Rules, supra note 69.
\textsuperscript{103} Mancini & Cohen, supra note 100 (manuscript at 8).
\textsuperscript{104} Id. (manuscript at 5).
\textsuperscript{105} But see Lamarque v. Centreville Sav. Bank, 22 A.3d 1136, 1141 (R.I. 2011) (holding that the lender did not violate privacy concerns when disclosing the mortgage amount owed under the mortgage to a prospective buyer).
\textsuperscript{106} But see Lamarque, 22 A.3d at 1141 (holding that the lender was not responsible for invasion of mortgagor’s privacy when they disclosed the mortgage payoff to a third party).
\textsuperscript{107} See infra Parts VII-VIII.
\textsuperscript{109} Id. § 6802(a).
to a surviving non-note-signing borrower who clearly is not an "unaffiliated third party."110 Also, the information requested by surviving non-note signing borrowers (such as "What is the balance on the loan?"; "What do I need to do to get a modification?" and "Where do I send the payment?") does not constitute "nonpublic personal information."111 The nonapplication of the Gramm-Leach-Bliley Act to the surviving spouse is especially true once a foreclosure is filed and the loan balance alleged to be owed and date of default is published in the filed complaint.112 In addition, in order to apply for a loan modification, the surviving borrower will need to give income and other information to the lender.113 And when information requested by a surviving non-note-signing borrower in order to apply for a loan modification is deemed confidential, the obligation to keep that information confidential runs to the surviving borrower who is a party to the mortgage contract securing the debt.114 When the note-signing spouse dies without a will, the non-note-signing spouse inherits the property without any formal action so that the note-signing borrower's consent to the disclosure of his nonpublic personal information is implied by operation of law.115 These restrictive residential mortgage lending policies have a disparate impact on women who, as a class, are being left without the ability to prevent foreclosure through application for loss mitigation after the death of their spouse.116

VII. WOMEN BORROWERS IN DUVAL COUNTY, FLORIDA, ARE BEING DISPARATELY IMPACTED

It comes as no surprise—considering the historical prevalence of

110 Id.
114 See Mancini & Cohen, supra note 100 (manuscript at 11).
115 Id. (manuscript at 14).
116 See infra Part VII.
sexism and discrimination in the provision of credit to women including mortgage underwriting policies—that a statistical review for gender of the persons to whom residential mortgage credit is extended predicts the gender of the signatory of the promissory note. A review of the foreclosure cases that JALA lawyers are defending in court shows that the statistical evidence documented in the PORL report supports the affirmative claims being made against lenders and servicers for disparate impact discrimination that violates the FHA. The statistical data outlined in the PORL report lays an evidentiary foundation for fair housing counterclaims and affirmative defenses to residential mortgage foreclosures.

JALA is a nonprofit law firm of twenty-seven attorneys that provide civil-legal assistance to low-income and special-needs individuals and groups in Northeast Florida. JALA conducts regular intake to address the civil legal needs of this at-risk population. For example, while an applicant for legal assistance may come to JALA for representation in an eviction, the intake may reveal that the applicant is also in need of assistance with a child support or garnishment case. JALA reviews the data that is collected at intake for systemic harms that can be addressed through the provision of legal services that can effectively impact large numbers of indigent persons who are facing the same issues and are in need of civil legal assistance.

Through intake and screening, JALA has identified a pattern of disparate impact in residential mortgage lending and servicing business practices that should come as no surprise to those familiar with the discrimination based on sex that is prevalent in the industry.

117 See supra Part II.
119 See infra Part VIII.
122 Id.
123 Id.
124 See BINDER ET AL., supra note 118, at 12-14.
borrowers are consistently being refused the right to apply for loan modification and they are being denied the right to continue to make mortgage payments because of their non-note-signing status resulting in a disparate impact on account of sex in violation of the Federal FHA.\textsuperscript{125} The data collected in the PORL report confirm that women borrowers, especially elderly non-note signing women borrowers, are at risk of being subjected to illegal discriminatory practices that result in forced foreclosure.\textsuperscript{126} JALA’s intake records make clear that non-note-signing women borrowers are being prohibited from rescuing their loans from foreclosure after the death of their spouse, sometimes while still attempting to make full payments, because they were stonewalled at every turn by lenders and servicers who insisted that they could not talk to the surviving borrower regarding loss mitigation or payment on their mortgage loan because they did not sign the note.

The information collected by JALA, together with the statistical data documented in the PORL report, is prima facie evidence of disparate impact discrimination against women in the terms and conditions of their loans that is illegal under the FHA.\textsuperscript{127} Facialy neutral residential mortgage lending and servicing policies and practices that have significant adverse and disproportionate impacts upon women by virtue of their sex run afoul of the FHA and are not legally protected business decisions.\textsuperscript{128} The statistical evidence in the PORL report is reinforced by JALA’s investigation and provides “robust” evidence of this insidious discrimination against women.\textsuperscript{129}

\textsuperscript{125} Id.

\textsuperscript{126} See id (providing data on the gender breakdown for signatures on a promissory note and the percentages of occasions for each instance of gender presence on the note and mortgage).

\textsuperscript{127} See Tex. Dep’t of Hous. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015) (finding that evidence of “facially neutral” lender or servicing agent policies and evidence of a significantly adverse or disproportionate impact upon women based upon “robust” statistical evidence is needed to establish a prima facie case).

\textsuperscript{128} See Pottenger v. Potlatch Corp., 329 F.3d 740, 749 (9th Cir. 2003); Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 485 (3d Cir. 1999) (finding that under Title VII’s disparate impact theory a prima facie case is established by demonstrating that application of a facially neutral standard resulted in a significantly discriminatory hiring pattern).

\textsuperscript{129} See generally Inclusive Cmtys., 135 S. Ct. at 2523 (discussing the “robust causality requirement” needed for a prima facie case of disparate impact based on statistical
The director of PORL, Dr. Michael Binder, and his team of researchers reviewed the 45,837 residential mortgage foreclosure actions that were filed in Duval County in the seven years from 2008 through August 2014.\(^{130}\) From these 45,837 foreclosure files, the PORL collected a sample size of 5,388 foreclosures.\(^{131}\) The PORL identified the “number of men on the mortgage” and the “number of women on the mortgage” for each case sampled.\(^{132}\) Of the sampled mortgages, 2,825 had at least one male and one female on the mortgage.\(^{133}\) Additionally, there were nearly identical rates of “men only” (1,240) and “women only” mortgages (1,235), “suggest[ing] that both men and women are equally represented on mortgages.”\(^{134}\) From the sample, the PORL found 4,922 cases where the promissory note was available through the public court record.\(^{135}\) The 454 foreclosure cases for which the plaintiff did not file a promissory note were removed from the analysis.\(^{136}\)

In contrast to the uniformity found when looking at the genders of the borrowers signing the mortgages involved in the sample of foreclosure actions, PORL found that men were more likely to appear on the note at issue in the foreclosure as the only signer relative to women, where both the man and woman had signed the related mortgage.\(^{137}\) Of the 2,634 foreclosures studied by PORL that had both a man and a woman signing the mortgage as borrowers (“two-borrower mortgages”), only 57.3% of those cases involved promissory notes signed by both genders.\(^{138}\) Within the two-borrower mortgage group, if only one borrower signed the promissory note, that borrower was a man 69.9% of the time while a woman was the sole-signer of the promissory note 30.1% of the time.\(^{139}\) Thus, men were twice as likely to appear on

\(^{130}\) Binder \textit{et al.}, supra note 118, at 2.
\(^{131}\) \textit{Id.} at 2, 4.
\(^{132}\) \textit{Id.} at 4.
\(^{133}\) \textit{Id.} at 10.
\(^{134}\) \textit{Id.} at 11.
\(^{135}\) \textit{Id.}
\(^{136}\) \textit{Id.}
\(^{137}\) \textit{Id.} at 16.
\(^{138}\) \textit{Id.} at 15-16.
\(^{139}\) \textit{Id.} at 17.
the note as the sole-signer when both parties (man and woman) had signed the mortgage.\textsuperscript{140} The PORL determined that “there is a large and statistically significant difference in the likelihood of men appearing on a promissory note relative to women when they are both on the mortgage.”\textsuperscript{141}

The PORL also reviewed data from the U.S. Census Bureau, World Bank, and the World Health Organization and found that American women have a greater life expectancy than men—on average living five years longer.\textsuperscript{142} Viewing the statistical information in its entirety establishes that women are more likely to be non-note-signing borrowers and are more likely to outlive their partners than are men\textsuperscript{143} and that women in Duval County are more likely than men to be surviving borrowers and are more likely to have not signed the note in a residential mortgage transaction.\textsuperscript{144} The PORL statistics confirm that residential mortgage lending policies and practices that disadvantage non-note-signing borrowers will disproportionately impact women by virtue of their sex.

The author anticipates that similar statistics exist in other counties throughout the country. These practices that determine who signs a note and who does not and the impacts of sexism are not unique to Duval County.\textsuperscript{145}

\section*{VIII. \textsc{Fair Housing in Defense of Foreclosure in Duval County, Florida}}

“[A]rtificial, arbitrary, and unnecessary barriers . . . .”\textsuperscript{146}

JALA has filed disparate impact FHA counterclaims against foreclosing plaintiffs seeking compensation and other forms of relief for women who have suffered discrimination as a result of the application

\textsuperscript{140} Id.
\textsuperscript{141} Id. at 19.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 20.
\textsuperscript{145} See Economic Problems of Women, supra note 12, at 191-92.
of the facially neutral residential mortgage lending and servicing policies and practices discussed in this Article. In opposing these FHA claims, the foreclosing plaintiffs, through counsel, argue that the FHA counterclaims should be dismissed. The FHA counterclaims are often discounted as not being legitimate and foreclosing attorneys claim ignorance of the disparate impact standard and the FHA generally. Indeed, one foreclosing plaintiff went so far as to argue that the non-note-signing female borrower could not show that she is a member of a protected class because not signing a note does not make her a member of a protected class.

Willful blindness to disparate impact discrimination by residential mortgage lenders and servicers continues despite guidance dating back decades\textsuperscript{147} issued by federal regulators. By way of example, in 1973, the Federal Home Loan Bank Board\textsuperscript{148} reviewed and revised its residential mortgage lending regulations with the goal of discouraging discriminatory lending practices (at this time sex was not included as a protected class).\textsuperscript{149} These amendments were promulgated in order to provide “guidance to member institutions in developing and implementing nondiscriminatory lending policies” and to “point out that activities of lenders which may not be intended to be discriminatory might still be so in their effects . . . .”\textsuperscript{150} The amendments declared that “[t]he use of lending standards which have no economic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate.”\textsuperscript{151} Disparate impact caused by facially neutral lender policies is not a new or novel thing, and the risk of such discrimination, even when unintended, is knowledge imputed to lenders and servicers of residential mortgage loans in this country.

Lenders also work to defeat FHA counterclaims by conflating

\textsuperscript{147} See, e.g., BECKEY, supra note 13, at 600.
\textsuperscript{148} Id.
\textsuperscript{149} Id. (“The Civil Rights Act of 1968 does not specifically prohibit discrimination in lending on the basis of age, sex or marital status . . . . However, such discrimination is contrary to the principle of, and may in fact violate, Constitutional provisions which guarantee equal protection of the law for all persons.”).
\textsuperscript{150} Id.
\textsuperscript{151} Id.
direct credit discrimination and disparate impact discrimination. They argue that non-note-signing borrowers have to state a claim for direct discrimination, to wit, that the borrower is a member of a protected class who sought a loan, that they qualified for the loan, that the bank denied the application, and that other similarly situated applicants who were not in the protected class received loans or were treated more favorably. The elements of a direct discrimination claim are not the same as the elements that need to be proved in a disparate impact discrimination case where the plaintiff has to show that an outwardly neutral act or business practice was imposed causing a significantly adverse or disproportionate impact on the person as a member of a protected class.

Lenders also try to avoid liability for disparate impact discrimination in the servicing of residential mortgages by claiming that only the origination of the mortgage loan is a “residential real estate-related transaction.” There is no legitimate basis to remove loan servicing from the definition of “residential real estate-related transaction[s]”. Loan servicing necessarily involves giving access to loss mitigation because servicing involves the provision of “other financial assistance” that is secured by an interest in residential real estate. Loan servicing and access to loss mitigation is a “term and condition[]” of the residential lending transaction. Lenders and servicers are prohibited from discriminating in the provision of loss

153 Pottenger v. Potlatch Corp., 329 F.3d 740, 749 (9th Cir. 2003) (determining that the Age Discrimination in Employment Act permits disparate impact claims when a victim asserts a facially neutral business practice that adversely affects a protected class); Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 485 (3d Cir. 1999) (finding that under Title VII’s disparate impact theory a prima facie case is established by demonstrating that the application of a facially neutral standard resulted in a significantly discriminatory hiring pattern).
156 See id.; 24 C.F.R. § 100.130 (2015).
mitigation services. The prohibition against discrimination found in the FHA is not confined to the origination of the loan. Nothing in the statute supports such a view. Lenders and servicers cannot discriminate against persons in the servicing or administration of the loan. Fair housing rights do not stop at origination. Servicing is an essential part of the modern home loan system and, in that context, servicing is a "term and condition[]" of the residential lending transaction, the provision of loss mitigation is "other financial assistance."

Reliance on objective default loan servicing standards and protocols that are neutral on their face is not a defense to an FHA violation where application of the standards puts women into an inferior and disadvantaged position in the administration of the loan on the basis of their sex. The right to fair housing requires that women borrowers not on the note be given equal access to loss mitigation and other special servicing designed to avoid foreclosure and damage to credit. Any benefits secured by the facially neutral but discriminatory practices in residential default loan servicing, must give way to the mandates of the FHA. Lenders and servicers violate the Act when their policies

157 24 C.F.R. § 100.130.
158 See David H. Harris, Using the Law to Break Discriminatory Barriers to Fair Lending for Home Ownership, 22 N.C. CENT. L.J. 101, 113-14 (1996) (listing other instances besides loan origination where discrimination is also prohibited).
159 See 42 U.S.C. § 3605(a)-(c); 24 C.F.R. § 100.130; see also Harris, supra note 158.
160 See 42 U.S.C. § 3605(a)-(c); 24 C.F.R. § 100.130; see also Harris, supra note 158, at 127-28.
161 See 42 U.S.C. § 3605(a)-(c); 24 C.F.R. § 100.130; see also Harris, supra note 158, at 127-28.
162 See 42 U.S.C. § 3605(a)-(c); 24 C.F.R. § 100.130. See generally Adam J. Levitin & Tara Twomey, Mortgage Servicing, 28 YALE J. ON REG. 1, 3-5, 11 (2011) (illustrating the importance of servicing loans in the current home loan system).
163 See Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 485 (3d Cir. 1999) (finding that a court can establish a prima facie case under the disparate impact theory when the application of a facially neutral standard results in a discriminatory hiring pattern); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 995-97.
164 See Lanning, 181 F.3d at 494; United Papermakers, 416 F.2d 980, 986-87, 995-97 (5th Cir. 1969) (finding that wrongful and deliberate intention can be inferred from the effect of the rule or conduct itself).
165 See Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976) (finding that
and practices continue to effectively exclude women from the class of persons able to access special servicing designed to avoid foreclosure and mitigate loss of housing.\textsuperscript{166}

\section*{IX. What Really Causes Disparate Impact Discrimination Based on Sex in Residential Mortgage Lending}

Facially neutral policies of residential mortgage lenders that are implemented directly or through servicing agents are illegal when these policies have a disparate and discriminatory impact on women due to their sex.\textsuperscript{167}

Even when lenders implement such disparately discriminatory policies in an effort to avoid problems stemming from failing to conform to underwriting and investor contractual obligations for lending money to borrowers, such practices are illegal.\textsuperscript{168} Despite the significance of the impact of these policies on women and their families, the important subject has received scant attention.\textsuperscript{169} Refer to the writings of David J. Reiss, Adam Levitin, and Anna Gelpern (among others) for a survey of the scholarly work on the topic.\textsuperscript{170}

Because securitization of residential mortgages is and has been “central to U.S. housing finance,” the vast majority of mortgages originated in recent years have been securitized.\textsuperscript{171} Access to modification of securitized mortgage loans is limited and controlled by

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the effect, regardless of the intent, of the housing practice can result in a cause of action).

\textsuperscript{166} Id.

\textsuperscript{167} See \textit{generally} Tex. Dep’t of Hous. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (finding that when a facially neutral policy is in place yet has a disproportionate impact on members of a particular class, there is a disparate and discriminatory impact on that protected class).

\textsuperscript{168} See \textit{supra} Part II.


\textsuperscript{171} Gelpem & Levitin, \textit{supra} note 169, at 1081. Most residential mortgage-backed securities are structured to qualify REMICs under the Internal Revenue Code in order to avoid double-taxation. \textit{Id.} at 1096-97 n.85.
IRS Real Estate Investment Conduit ("REMIC") rules that are directly incorporated into the pooling and servicing agreements that govern the trusts that are the investment vehicles for residential mortgage-backed securities. The trust income to REMIC investors that is derived from the mortgage payments of millions of borrowers around the country and earned from these securities is given special passive tax shelter treatment. The IRS REMIC regulations that, among other things, directly limit and control the modification of securitized residential home loans, comprise an entire article in the pooling and servicing agreements, bind lenders and servicers administering loans for the trusts and impact the provision and process of special default loan servicing and access to loss mitigation. The establishment and implementation of lending policies and practices that include the refusal to offer access to loss mitigation options is rooted in the way lenders and servicers determine the meaning of the "modification-proof contracts" based on provisions contained in the pooling and servicing agreements that manage these securitized trusts. These REMIC securities agreements are designed to be "hyper-rigid" contracts that manage the risks of securitization to the investors who have to report to the IRS. The rigidity of these contracts is supposedly intended to ensure compliance with the IRS regulations that set the terms that control lender and servicer discretion to modify the residential mortgages that are the trust assets. But the IRS has never brought a single challenge to the tax sheltered income reported for these securities as a result of a loan modification or other loss-mitigation contracts. Besides private REMICs, the other major vehicle for secondary financing of residential mortgage loans is through Fannie Mae and Freddie Mac trust agreements, which incorporate specific loan-modification controls including an outright ban on principal reduction. These Fannie Mae

172 Id.
173 Id.
174 Id.
175 Id. at 1075-76.
176 Id. Pooling and service agreements govern the management of securitized pools of mortgage loans. Id.
177 Id.
178 See id. at 1096-97 n.85.
179 See id.
180 Id. at 1080-82.
and Freddie Mac trust agreements also require conformity with the servicing guidelines that are published by both corporations on their websites.\textsuperscript{181}

Another reason that lenders and servicers are not willing to expand loss-mitigation servicing so as to avoid disparately impacting women is because loan modification interferes with the way that investors in these residential mortgage-backed securities are paid and reduces the income earned.\textsuperscript{182} Because the investors rely on a stream of income from these investments, the distribution of which is determined based on risk that is assumed by the various levels (tranches) of investors, any modification of a loan necessarily disrupts and changes the waterfall stream of payment to all the investors at every risk and tranche level.\textsuperscript{183} There are other inherent conflicts of interest that cause servicers to perpetuate discriminatory loan-modification practices that disparately impact women.\textsuperscript{184} Servicers are often required to invest in the trust so that the servicer’s income from its investment position in the trust decreases each time a loan modification is granted.\textsuperscript{185} The disruption and change in income into the trust caused by loan modifications interrupt the return on the servicer’s investment in the trust. The loan modification reduces the servicer income because the loan is no longer in default status.\textsuperscript{186} In some cases, a servicer is contractually required by the pooling and servicing agreement to purchase modified loans from the pool, which obligation effectively transfers the cost of modification to the servicer—putting them in conflict with the interests of the borrower and making it unlikely that the servicing agent will modify.\textsuperscript{187}

As a result of rigid contracts and short-sighted lender interpretation of IRS regulations, lenders and servicers have not spent any time engaged in business conduct geared toward avoiding business

\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} at 1089-91.
\textsuperscript{183} \textit{Id.} at 1091-93.
\textsuperscript{184} See infra notes 183-85 and accompanying text.
\textsuperscript{185} \textit{Id.} at 1091-93.
\textsuperscript{186} \textit{Id.} at 1098-1110. Servicing agents make more money to service loans in default. \textit{Id.} at 1104.
\textsuperscript{187} \textit{Id.} at 1105-07.
practices and policies that push women (mostly elderly) into foreclosure. A shift toward active foreclosure prevention through access to loan modification processes and away from disparately impactful and discriminatory policies will not happen as long as the lenders and servicers do not provide best practice loss-mitigation policies that conform to trust and IRS rule limitations.

X. CONCLUSION

Modern lender practices that bring the vestiges of past discrimination into the present day and reinforce them, directly conflict with and violate the laws of this country intent on eradicating such loathed discrimination. Historical sex discrimination results in underrepresentation of women as signatories on promissory notes in the present day with elderly women most likely to be left in the lurch when their note-signing spouse dies. Lender policies limiting non-note signers’ ability to participate in the loss mitigation process thwarts the effort to save elderly widows from losing their homes in foreclosure.

Lender policies that disparately impact women to their detriment persist despite published best practice guidance that clearly directs lenders to be cognizant of disparate impact discrimination and affirmatively work to facilitate communication with surviving borrowers. Data collected by PORL exposes the problem with the lender policies discussed in this Article that do, in fact, have a disparate and negative impact upon women on account of their sex. Armed with this data, JALA champions disparate impact FHA claims in the defense of home foreclosures and challenges lenders who discriminate

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188 Id. at 1075.
189 Id.
191 Id.
192 Mancini & Cohen, supra note 100 (manuscript at 10).
194 See BINDER, supra note 118, at 2-5.
against women through the application of facially neutral business policies and practices that cause women to be denied access to loan servicing when they are non-note-signing borrowers.\textsuperscript{195} Now that the U.S. Supreme Court has reinforced the strength and scope of the protections afforded under the FHA against practices that "are fair in form but discriminatory in operation,"\textsuperscript{196} disparate impact FHA claims will continue to be an essential part of the work of lawyers defending residential foreclosures where such discrimination is an integral part of residential mortgage lending. Reforming lender and servicer policies will remain a huge challenge as long as lenders are allowed to establish and implement policies that discriminate while using IRS regulations or other contractual limitations on loan modifications as an excuse.\textsuperscript{197}

Compliance with the FHA is mandatory. Surviving non-note-signing borrowers must be given an opportunity to assume the debt obligation and sign the note and must be offered each and every service that would otherwise be offered to a borrower who signed the note—including but not limited to access to loss mitigation.\textsuperscript{198} Reform of the complex and often misunderstood regulatory scheme behind residential mortgage backed securities is also essential, and transparency and communication is key, but the ability to achieve this is unknown.\textsuperscript{199}

\textsuperscript{195} Id.
\textsuperscript{197} Gelpern & Levitin, supra note 171, at 1077-1152.
\textsuperscript{198} Mancini & Cohen, supra note 100 (manuscript at 10).
\textsuperscript{199} Gelpern & Levitin, supra note 171, at 1149-52.