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2020

## Source-of-Income Discrimination and the Fair Housing Act

Robert G. Schwemm

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Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 Case W. Rsrv. L. Rev. 573 (2020)

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## SOURCE-OF-INCOME DISCRIMINATION AND THE FAIR HOUSING ACT

*Robert G. Schwemm*<sup>†</sup>

### ABSTRACT

Amending the federal Fair Housing Act (“FHA”) to ban “source-of-income” discrimination has been discussed for over twenty years. During this time, a growing number of states and localities (including many of the nation’s largest cities) have taken this step by amending their fair housing laws to prohibit discrimination against Section 8 voucher holders and others based on their source of income. Meanwhile, bills proposing such an amendment to the FHA have regularly been introduced, including four in the current Congress.

Proponents of such an amendment say it would help fulfill the voucher program’s goal of providing low-income families with a wider choice of housing and eliminate a form of discrimination that has frustrated the FHA’s goals of ending racial discrimination and segregation. The refusal of many landlords to rent to people who rely on vouchers or other government assistance programs has undercut the ability of these programs to extend opportunities outside areas of minority concentration. Further, much of today’s racial segregation reflects economic segregation, and a crucial part of FHA litigation has always involved disputes over locating affordable housing projects in affluent white areas.

What if the FHA were amended to ban source-of-income discrimination? The most obvious result, as experience shows in states and localities that have taken this step, would be a substantial rise in litigation against landlords who continue to engage in such discrimination. Another likely area of increased litigation would be challenges to exclusionary zoning and other municipal practices that block affordable housing. A variety of other practices might also be challenged under an amended FHA.

This Article reviews the experience of states and localities that have banned source-of-income discrimination in housing and then contemplates how the FHA, if amended to add this protected class, would work. Part I provides the legal background by describing the FHA, the Section 8 program, and the state and local laws that now ban source-of-income discrimination. Part II explores cases that have challenged source-of-income discrimination, first under these local laws and then under the FHA’s disparate-impact and other theories of liability. After Part III’s review of the arguments for and against a

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source-of-income amendment to the FHA, Part IV examines the various types of claims that might arise if such an amendment were enacted.

The Article concludes that a source-of-income amendment, though not a panacea, would be an important step forward in helping the FHA achieve its core missions of reducing segregation and ending arbitrary limits on housing choice.

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### INTRODUCTION

Over twenty years ago, a law review note that called for an amendment to the Fair Housing Act (“FHA”)<sup>1</sup> described source-of-income discrimination as the “New Frontier” of fair-housing law.<sup>2</sup> At that time, a few states and localities had banned housing discrimination against Section 8 voucher holders<sup>3</sup> and others based on their sources of income.<sup>4</sup> Today, seventeen states and over seventy localities, including many of the nation’s largest cities, have taken this step.<sup>5</sup> Meanwhile, bills proposing such an amendment to the FHA have regularly been introduced,<sup>6</sup> including three that are pending in the current Congress.<sup>7</sup>

Proponents of such an amendment say it would help fulfill the federal voucher program’s goal of providing low-income families with more housing choices and would eliminate a form of discrimination that has frustrated the FHA’s goals of ending both racially segregated housing patterns and discrimination against certain minorities.<sup>8</sup> The

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1. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801–19, 82 Stat. 73, 81–89 (1968). The FHA, as amended, is codified at 42 U.S.C. §§ 3601–19 (2012).
  2. See Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 160 (1996).
  3. For a description of the Section 8 voucher program, see *infra* Part I.B.
  4. See Beck, *supra* note 2, at 168 nn.81–85, 169 n.86 and accompanying text (noting that Connecticut, Massachusetts, Maine, Minnesota, New Jersey, North Dakota, Vermont, Utah, Wisconsin, and the District of Columbia had such laws); see also *infra* app. II (identifying, in addition to the District of Columbia, some of the localities that had such laws at that time, such as Boston, Chicago, Philadelphia, Seattle, and Montgomery County, Maryland).
  5. See *infra* app. I (listing states), app. II (listing major localities).
  6. See *infra* app. III (“Before 2019”).
  7. See *id.* (“2019”). The non-discrimination provisions of these bills focus exclusively on housing. Meanwhile, on May 17, 2019, the House passed a wide-ranging civil rights bill that bans discrimination based on, *inter alia*, sexual orientation, gender identity, and sex-based stereotypes in employment, housing, public accommodations, public facilities, public education, and federally funded activities, by amending various existing statutes including the FHA. See Equality Act of 2019, H.R. 5, 116th Cong. (2019); see also Catie Edmondson, *Civil Rights Bill Advances But Is Unlikely to Get Far*, N.Y. TIMES, May 18, 2019, at A15 (noting that the likely response to this bill from the Republican-controlled Senate and White House is “a resounding no”).
  8. See *infra* note 87 and accompanying text (voucher program), *infra* Part IV.B (FHA).

refusal of many landlords to rent to people who rely on vouchers or other government assistance programs has undercut the ability of these programs to extend opportunities outside areas of minority concentration. Further, much of today's racial segregation reflects economic segregation, and a crucial part of FHA litigation has always involved disputes over locating affordable housing projects in affluent white areas.<sup>9</sup>

A note about the difference between "income" and "source-of-income" discrimination: the former deals with "how much," while the latter deals with "where from." Income-based discrimination has consistently been viewed as compatible with the FHA, as confirmed by the statute's legislative history.<sup>10</sup> Thus, landlords and other housing providers in FHA cases have always been perceived as having a legitimate interest in their tenants' ability to pay the rent or to meet other financial obligations (e.g., to secure protection against default, property damage, etc.).<sup>11</sup> Where this income comes from, however, is a different matter (e.g., wages, investments, trusts, government assistance, etc.). In theory, a tenant's source of income should not matter to a landlord, so long as that income is reasonably likely to continue and does not impose on the landlord other risks or hardships.<sup>12</sup>

What if the FHA were amended to ban source-of-income discrimination? The most obvious result, as cases from states and localities that have taken this step show, would be a substantial rise in litigation against private landlords who continue to engage in such discrimination.<sup>13</sup> Another likely area of increased litigation would be

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9. See *infra* Part IV.B. Early cases involving such disputes include *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288–94 (7th Cir. 1977), and *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974). Recent cases include *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581, 617–19 (2d Cir. 2016), and *Avenue 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 496 (9th Cir. 2016).
  10. See, e.g., 114 CONG. REC. 3,421 (1968) (statement of Sen. Mondale (the FHA's chief sponsor)) ("[T]he basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.").
  11. See *infra* notes 224, 381, 386 and accompanying text; see also ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 10:2 n.5 (2019) (gathering cases that note the FHA's lack of a bar against economic discrimination). A separate issue is whether a landlord may require a certain minimum ratio of income to rent (e.g., that a tenant have wages or other income equal to at least three times the rent). See *infra* Part IV.G.2.
  12. See *infra* notes 213, 224.
  13. See *infra* Part IV.A.

challenges to exclusionary zoning and other municipal practices that block affordable housing.<sup>14</sup> Beyond these types of suits, litigation under an amended FHA might include a variety of other scenarios.<sup>15</sup>

This Article reviews the experience of states and localities that have banned source-of-income discrimination in housing. It then contemplates how the FHA would work if it were amended to add this protected class. Part I begins with the legal background, describing the FHA, the Section 8 program, and their goals and experiences, followed by a review of the state and local laws that now include source-of-income among their prohibited bases of discrimination. Part II then explores cases that have alleged source-of-income discrimination, first under these state and local laws, and then under the FHA's "impact" theory of liability. Part III considers the arguments for and against amending the FHA to ban source-of-income discrimination. Finally, Part IV examines the various types of claims that might arise if the FHA were so amended.

## I. LEGAL BACKGROUND

### A. *The Fair Housing Act*

The current FHA prohibits discrimination in most housing and housing-related transactions based on seven factors<sup>16</sup>: race, color, national origin, and religion were included in the original statute in 1968;<sup>17</sup> sex was added in 1974;<sup>18</sup> and handicap (disability) and families with children were added by the 1988 Fair Housing Amendments.<sup>19</sup> The statute also bars conduct that interferes with the FHA's substantive rights, as well as retaliation for asserting those rights.<sup>20</sup> The FHA authorizes three separate methods of enforcement: private suits; administrative complaints to the Department of Housing and Urban Development ("HUD"); and Justice Department actions. It provides for remedies that include uncapped actual and punitive damages, civil penalties, and attorney's fees,<sup>21</sup> making its enforcement scheme among the strongest of all U.S. civil rights laws. In addition, the FHA mandates that HUD and other federal agencies administer their housing

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14. *See infra* Part IV.B.

15. *See infra* Part IV.C–F.

16. *See* 42 U.S.C. §§ 3603–07, 3617 (2012).

17. *See* Pub. L. No. 90-284, 82 Stat. 73 (1968).

18. *See* Pub. L. No. 93-383 § 808(b), 88 Stat. 633, 729 (1974).

19. *See* 42 U.S.C. §§ 3604–06 (2012).

20. *See id.* § 3617; 24 C.F.R. § 100.400(c)(5) (2018); SCHWEMM, *supra* note 11, § 20.

21. *See* 42 U.S.C. §§ 3610–14 (2012).

programs in a manner that actively furthers fair housing,<sup>22</sup> although this provision does not provide for private enforcement.<sup>23</sup>

The FHA has also fostered the development of many state and local fair-housing laws and agencies, in part through its requirement that complaints to HUD be referred to these agencies.<sup>24</sup> Over fifty localities and thirty-five states now have laws that are substantially equivalent to the FHA.<sup>25</sup> And many go farther in that they have narrower exemptions or additional protected classes,<sup>26</sup> both of which are specifically authorized by the FHA.<sup>27</sup>

The original FHA sought to eliminate private and public practices that had for decades confined African-Americans to segregated, ghetto-like neighborhoods. The FHA was passed in the wake of racial violence in many urban areas,<sup>28</sup> which led the Kerner Commission to conclude that America was “moving toward two societies, one black, one white—separate and unequal,” and to call for a national open-housing law.<sup>29</sup> The Senate responded in early 1968 by passing a fair-housing bill that was intended, according to its principal sponsor Senator Mondale, to replace “the ghetto . . . [with] truly integrated and balanced living patterns.”<sup>30</sup> Shortly after the assassination of Dr. Martin Luther King,

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22. *See id.* § 3608; SCHWEMM, *supra* note 11, § 21:1 & nn.2–3; *see also infra* note 308 and accompanying text.
  23. *See* SCHWEMM, *supra* note 11, § 21:7 & n.6.
  24. *See* 42 U.S.C. § 3610(f) (2012).
  25. For a list of these states and localities, *see* SCHWEMM, *supra* note 11, at app. C.
  26. For examples of those that go beyond the FHA, *see* SCHWEMM, *supra* note 11, §§ 30:2 & nn.1–2, 30:3.
  27. *See* 42 U.S.C. § 3615 (2012) (“Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter”); *see also* 24 C.F.R. § 115.204(h) (2018) (providing, in HUD regulations, that a state or local law’s protection of additional prohibited bases does not mean that that law is not substantially equivalent to the FHA for the purposes of justifying referrals of FHA-agency complaints).
  28. *See* Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2516 (2015) (noting that the FHA was passed in response to Martin Luther King’s assassination and the “new urgency” “the Nation faced . . . to resolve the social unrest in the inner cities”).
  29. *See id.* at 2525–26 (quoting NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968)).
  30. 114 CONG. REC. 3,422 (1968) (statement of Sen. Mondale); *see also id.* (“[T]he best way for this Congress to start on the true road to integration is by enacting fair housing legislation.”).

Jr., the House agreed to this bill, and President Johnson signed it into law on April 11, 1968.<sup>31</sup>

Courts have interpreted the FHA broadly in accordance with its remedial purposes. In its first review of the statute in 1972 in the *Trafficante* case,<sup>32</sup> the Supreme Court noted the FHA's pro-integration goal and concluded that FHA violations hurt not only their minority targets, but also a broader community that, in this case, included residents of a large apartment complex whose landlord's anti-black discrimination allegedly blocked the complex's integration.<sup>33</sup> *Trafficante* was quickly followed by two other decisions that recognized FHA standing for other types of plaintiffs (e.g., municipalities and fair-housing organizations).<sup>34</sup> In 2017, the Court re-affirmed these decisions in *Bank of America Corp. v. City of Miami*.<sup>35</sup> Two years earlier, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,<sup>36</sup> the Court recognized that the FHA includes a disparate-impact standard of liability.<sup>37</sup> The Court again underscored the FHA's mission of fostering integration<sup>38</sup> and the Act's important "role in moving the Nation toward a more integrated society."<sup>39</sup> Also, to the extent that lower courts had interpreted the FHA broadly by the time of the 1988 Fair Housing Amendments Act,

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31. See 114 CONG. REC. 9,620–21 (1968) (House passage); see also LYNDON B. JOHNSON, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 509–10 (1970) (remarking upon signing the Act).

32. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

33. *Id.* at 211 (noting that the FHA was designed to "replace the ghettos" with integrated housing patterns and that the Act aimed to protect not only direct victims of housing discrimination but "the whole community") (quoting 114 CONG. REC. 3,422 (statement of Sen. Mondale) (1968)); *id.* at 2,706 (statement of Sen. Javits).

34. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109–11 (1979). Also, in the 1970s and 1980s, lower courts regularly upheld housing developers' standing to allege FHA violations by municipalities that blocked the developers' proposals for affordable housing projects. See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 391, 393–95 (2d Cir. 1982); see also SCHWEMM, *supra* note 11, § 12A:3 n.6 (gathering cases).

35. See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017).

36. 135 S. Ct. 2507 (2015).

37. *Id.* at 2525.

38. See *id.* at 2521–22, 2525–26.

39. *Id.* at 2526.



the Court in both *City of Miami* and *Inclusive Communities* held that the 1988 Congress intended to endorse these broad interpretations.<sup>40</sup>

Still, fifty years after the enactment of the FHA, severe racial segregation continues to characterize much of America's housing. Using the 100-point dissimilarity index as a measure (with 100 indicating total segregation and 0 indicating a randomly distributed population by race), census figures show that the black-white segregation score for all of the nation's metropolitan areas in 1970 was 79; 73 in 1980; 67 in 1990; 64 in 2000; and 59 in 2010.<sup>41</sup> Thus, while some progress has been made over the FHA's fifty years, the pace of change has been extremely slow.<sup>42</sup> The pace has also varied greatly across the country: in 2010, New York, Chicago, Philadelphia, Cleveland, St. Louis, and Miami all remained in the 70-80 range, and Los Angeles, Washington, D.C., and Baltimore scored around 65,<sup>43</sup> while some western metropolitan areas had scores of under 40.<sup>44</sup> Also, the rise in "minority suburbanization"

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40. See *City of Miami*, 137 S. Ct. at 1303-04; *Inclusive Cmty.*, 135 S. Ct. at 2519-20.

41. See JOHN R. LOGAN & BRIAN J. STULTS, *THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS* 4 (2011). For Latinos and Asians, comparable figures in the 1970-2010 period were about 50 and 41, respectively. *Id.* at 10, 17. Dissimilarity values "of at least 60 are considered high and those of at least 70 are considered extreme." WILLIAM H. FREY, *THE NEW METRO MINORITY MAP: REGIONAL SHIFTS IN HISPANICS, ASIANS, AND BLACKS FROM CENSUS 2010*, at 3 (2011).

42. See Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 629 (2010) ("[D]ecades after the passage of the Fair Housing Act, residential segregation remains a key feature of America's urban landscape. . . . In areas with large African American communities—places such as New York, Chicago, Detroit, Atlanta, Houston, and Washington—the declines have been minimal or nonexistent") (citation omitted).

43. See LOGAN & STULTS, *supra* note 41, at 6; see also Paul A. Jargowsky, *The Persistence of Segregation in the 21st Century*, 36 L. & INEQ. J. 207, 214 (2018) (providing 2010 indices of black-white dissimilarity for the twenty largest metropolitan areas). Based on 2013-17 data, the five most racially segregated cities—all with numbers well above 70—were, in order: Milwaukee, New York, Chicago, Detroit, and Cleveland. See William H. Frey, *Black-White Segregation Edges Downward since 2000, Census Shows*, BROOKINGS (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue> [<https://perma.cc/CSG9-YAXZ>]. As for Latino-white segregation, many major cities had dissimilarity indices in the 57-64 range, including New York, Los Angeles, Chicago, and Philadelphia. See LOGAN & STULTS, *supra* note 41, at 12.

44. See LOGAN & STULTS, *supra* note 41, at 7; FREY, *supra* note 41, at 14; see also Richard Sander, *The Opportunity and the Danger of the New Urban Migration*, 53 U. RICH. L. REV. 871, 884-87 (2019) (identifying

over the life of the FHA—minorities now constitute about one-third of the suburban population in the nation’s largest metropolitan areas—may just mean that minorities have mainly been “re-segregated in separate communities within the suburbs.”<sup>45</sup> Thus, as Senator Mondale recently noted: “The evil of residential segregation has waned at some times and in some places, but in others . . . , segregation has only grown.”<sup>46</sup>

What’s more, today’s racially impacted neighborhoods are in some ways even worse than those that existed in 1968. For one thing, predominantly black areas now tend also to be predominantly poor;<sup>47</sup> many of the upper- and middle-class black families who were confined to racial ghettos by blatant forms of discrimination before 1968 have moved elsewhere, leaving the current residents without professional services, role-models, and other advantages of a mixed-income neighborhood. As a result, today’s heavily black and poor areas are beset by

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factors that led to greater black–white integration in western cities as compared to northern cities).

45. WILLIAM H. FREY, *CTR. ON URBAN & METRO. POL’Y, MELTING POT SUBURBS: A CENSUS 2000 STUDY OF SUBURBAN DIVERSITY* 13 (2001); see also Myron Orfield & William Stancil, *The Summit for Civil Rights: Mission, Structure, and Initial Outcomes*, 36 L. & INEQ. J. 191, 195 (2018) (describing the suburbanization of people of color as revealed by the 2010 census).
46. Walter F. Mondale, *The Civil Rights Law We Ignored*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/opinion/walter-mondale-fair-housing-act.html> [<https://perma.cc/4LLY-CAH9>].
47. See Kendra Bischoff & Sean F. Reardon, *Residential Segregation by Income, 1970–2009*, in DIVERSITY AND DISPARITIES 208, 215, 225 (John R. Logan ed., 2013) (finding that “segregation of families by socioeconomic status has grown significantly in the last forty years” and that income-segregation trends “among black and Hispanic families are much more striking than those among white families,” with income segregation among black families in 2009 being “65 percent greater than among white families”).

myriad problems, including poor air and water quality,<sup>48</sup> lower-quality food and health services,<sup>49</sup> shorter life expectancies,<sup>50</sup> limited access to credit,<sup>51</sup>

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48. See, e.g., Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018) (finding in an EPA study that, in forty-six states, communities of color are exposed to dangerous pollution at higher levels than white communities); Peter Christensen & Christopher Timmins, *Sorting or Steering: Experimental Evidence on the Economic Effects of Housing Discrimination* (Nat'l Bureau of Econ. Res., Working Paper No. 24826, 2018) (noting correlations between minority neighborhoods and pollution, particularly at Superfund sites).
49. See, e.g., Mariana C. Arcaya & Alina Schnake-Mahl, *Health in the Segregated City*, in THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY IN THE TWENTY-FIRST CENTURY 165 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019) (concluding that “poor, predominantly minority neighborhoods experience . . . worse outcomes on a range of health measures”); Dayna Bowen Matthew, *Health and Housing: Altruistic Medicalization of America’s Affordability Crisis*, 81 L. & CONTEMP. PROBS. 161, 167–70 (2018) (reviewing research establishing links between residential segregation and adverse health outcomes); Kelly M. Bower et al., *The Intersection of Neighborhood Racial Segregation, Poverty, and Urbanicity and its Impact on Food Store Availability in the United States*, 58 PREV. MED. 33 (2014) (finding that “living in an impoverished and a segregated black neighborhood presents a double disadvantage in access to high quality foods [such as] . . . fresh fruit, vegetables, low-fat milk, and high-fiber foods”); see also John Eligon et al., *Black Americans Bear the Brunt As Virus Spreads*, N.Y. TIMES, April 8, 2020, at A2 (reporting that the coronavirus “is infecting and killing black people in the United States at disproportionately high rates . . . , highlighting what public health officials say are entrenched inequalities in resources, health and access to care”).
50. See, e.g., Imogene Francis, *Life Expectancy Gaps in US Cities Linked to Racial Segregation: Study*, GLOBE POST NEWSLETTER (June 13, 2019), <https://theglobepost.com/2019/06/13/life-expectancy-racial-segregation/> [<https://perma.cc/9NA7-V6S9>] (reporting on a New York University School of Medicine study that showed the gap between white and black life expectancies can differ between ten and thirty years in the nation’s largest cities, with the gap being “widest in cities with extreme segregation”); Arcaya & Schnake-Mahl, *supra* note 49 (concluding that “poor, predominantly minority neighborhoods experience disproportionately high mortality rates”); N. CAMBRIA ET AL., SEGREGATION IN ST. LOUIS: DISMANTLING THE DIVIDE 5 (2018) (noting the eighteen-year life-expectancy gap at birth between two zip codes in the St. Louis area less than ten miles apart—one heavily black, one heavily white).
51. See, e.g., Rugh & Massey, *supra* note 42, at 632–33; see also Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1300–02 (2017).

inferior schools,<sup>52</sup> poor transportation and other public services,<sup>53</sup> and fewer opportunities associated with a good life.<sup>54</sup>

Why has the FHA failed to reduce America's racially segregated housing patterns? Part of the reason is that residential segregation has causes other than discrimination—such as economic differences<sup>55</sup>—and thus ending racial discrimination does not automatically result in integration.<sup>56</sup> But it is also true that the types of discrimination that

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52. See, e.g., ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* 4 (2019); John R. Logan & Julia Burdick-Will, *School Segregation and Disparities in Urban, Suburban, and Rural Areas*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 185 (2017); Sean F. Reardon, *School Segregation and Racial Academic Achievement Gaps*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 34 (2016).
53. See, e.g., PARTNERSHIP FOR SOUTHERN EQUITY, OPPORTUNITY DEFERRED: RACE, TRANSPORTATION, AND THE FUTURE OF METROPOLITAN ATLANTA (2016); Brian S. McKenzie, *Neighborhood Access to Transit by Race, Ethnicity, and Poverty in Portland, OR*, 12 CITY & COMMUNITY 134, 135 (2013); Jeffrey A. Fagan, *Policing and Segregation, in THE DREAM REVISITED*, *supra* note 49, at 153, 154–55.
54. See generally RICHARD H. SANDER ET AL., MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 407–08 (2018) (noting that research shows housing integration is a powerful engine for reducing various forms of racial inequality). As Senator Mondale recently wrote, the approach of trying “to fix segregated neighborhoods without integrating them . . . has always failed . . . . We know even more clearly than in 1968 that integration is the clearest path for non-white families to acquire a foothold in the American education and economic system.” Walter F. Mondale, *Afterword to THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FAIR HOUSING ACT* 295 (Gregory D. Squires ed., 2018).
55. See, e.g., WILLIAM H. FREY & DOWELL MYERS, U. OF MICH. POPULATION STUD. CTR., RACIAL SEGREGATION IN U.S. METROPOLITAN AREAS AND CITIES, 1990–2000: PATTERNS, TRENDS, AND EXPLANATIONS 22 (2005) (concluding that the black–white dissimilarity levels reflected in the 2000 census are “significantly affected, most, by the relative household incomes of Blacks versus Whites”).
56. See LOGAN & STULTS, *supra* note 41, at 21 (identifying reasons beyond economic differences for the persistence of black–white segregation and concluding that “[p]art of the answer is that systematic discrimination in the housing market has not ended”). That economic differences account for only part of the answer is demonstrated by the fact that “minorities at every income level live in poorer neighborhoods than do whites with comparable incomes.” JOHN R. LOGAN, US2010 PROJECT, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS, AND ASIANS IN METROPOLITAN AMERICA 1 (2011) (finding that the “disparity between black and white neighborhood poverty in a metropolitan area is hardly related to blacks’ average income levels [and] racial segregation is a very strong predictor of unequal neighborhoods”).

the FHA condemns continue at discouragingly high levels. Although those levels have diminished since 1968,<sup>57</sup> more needs to be done.

*B. The Housing Choice Voucher Program (“Section 8”)*

The Housing Choice Voucher (“HCV”) program is the federal government’s largest housing subsidy program, serving over 2.2 million low-income households comprising some 5.3 million individuals.<sup>58</sup> Created by the 1974 Housing and Community Development Act,<sup>59</sup> the program is sometimes called “Section 8” after the provision in that statute authorizing it.<sup>60</sup>

Actually, Section 8 has two components: “tenant-based” assistance, which provides vouchers to low-income renters, and “project-based” assistance, which provides subsidies to owners of low-income apartments.<sup>61</sup> Under both the tenant- and project-based programs,

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57. See, e.g., MARGERY AUSTIN TURNER ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at 5 (2013) (finding that, in the most recent of HUD’s four national-tester-based studies, minority home-seekers are still often “told about and shown fewer homes and apartment than [comparable] whites”). For a description of the levels of rental and sales discrimination found in these four HUD studies, see SCHWEMM, *supra* note 11, § 2:4.

58. See U.S. DEP’T OF HOUS. & URBAN DEV., *New Picture of Subsidized Housing Fact Sheet* (June 8, 2018), [http://www.huduser.gov/portal/elist/2018-june\\_08.html](http://www.huduser.gov/portal/elist/2018-june_08.html) [<https://perma.cc/XU7K-NQ2B>] [hereinafter *New Picture*] (reporting that in 2016, the HCV program had funding for 2,474,400 units, 93% of which were occupied by 5,350,188 individuals).

The HCV program assists more families than the other two major federal rental-assistance programs combined: public housing has about one million units serving over two million residents; project-based rental assistance has about 1.3 million units serving some two million residents. See U.S. DEP’T OF HOUS. & URBAN DEV., 2017 OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS 66 (2018) [hereinafter 2017 HUD REPORT] (reporting that, in the eighteen-month period ending September 30, 2017, there were 2,215,224 households assisted by tenant-based vouchers and 982,752 assisted by public housing); *infra* note 61 (providing comparable figures for the project-based rental program).

59. Pub. L. No. 93-383, § 8(a), 88 Stat. 633, 662 (1974) (codified at 42 U.S.C. § 1437f (2012)); see also 24 C.F.R. § 982.1 (2018) (providing an overview of the HCV program).

60. See 42 U.S.C. § 1437f(d)(1)(D) (2012). Although the name was eventually changed to the Housing Choice Voucher program, see *infra* note 80, courts often still refer to it as the “Section 8” program. See, e.g., *Hayes v. Harvey*, 903 F.3d 32, 40 (3d Cir. 2018) (en banc).

61. See *Hayes*, 903 F.3d at 36 (citing 42 U.S.C. § 1437f(f)(6)–(7) (2012); 24 C.F.R. § 982.1(b)(1) (2018)) (describing both the tenant- and project-based programs). A project-based owner enters into a long-term contract with the local public housing agency (“PHA”), under which the owner agrees to rent its property to eligible low-income families and the PHA

assisted families contribute a prescribed amount toward their rental payments<sup>62</sup> with the government paying the balance up to a statutorily capped amount.<sup>63</sup>

The basic features of the tenant-based voucher program have remained the same over the years.<sup>64</sup> HUD funds the program and administers it through roughly 2100 local public housing agencies (“PHAs”) with which HUD contracts.<sup>65</sup> Based on local-market data and statutory caps, HUD sets basic rent levels (“payment standards”) for

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agrees to provide HUD-funded rental-assistance payments to the owner on the assisted tenants’ behalf. *See* 42 U.S.C. § 1437f(b) (2012); 24 C.F.R. §§ 983.202, .205 (2018). The owner then enters into written leases with particular families for individual units. *See* 24 C.F.R. § 983.256 (2018); 24 C.F.R. § 982.308(b) (1998). In 2019, there were 17,335 project-based Section 8 properties comprising about 1.3 million units and 2 million people. *See* U.S. DEP’T OF HOUSING & URBAN DEV., CONTRACT RENEWAL INFORMATION—ALL CONTRACTS (2019), *available at* <https://www.hud.gov/sites/dfiles/Housing/documents/contractrenewaalcontracts.zip> [<https://perma.cc/8VTJ-2JRM>]; *see also supra* note 58.

The project-based program and the housing units it subsidizes are subject to the FHA’s nondiscrimination commands and other applicable civil rights laws. *See* 24 C.F.R. § 982.53 (2018); *see, e.g.*, *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1422 (11th Cir. 1984) (holding that a Section 8 project-based landlord violated the FHA by failing to comply with certain HUD subsidized-housing regulations). Project-based developments have been involved in a good deal of FHA litigation, including a number of challenges to local governments’ efforts to block such developments. *See, e.g.*, *Atkins v. Robinson*, 545 F. Supp. 852, 857–65 (E.D. Va. 1982); *United States v. City of Birmingham*, 538 F. Supp. 819, 822 (E.D. Mich. 1982); *see also infra* Part IV.B (discussing FHA exclusionary-land-use cases).

62. 42 U.S.C. § 1437f(o)(2) (2012); *see also id.* § 1437a(a)(1).

63. *See id.* § 1437f(c), (o)(1)–(2); *Hayes*, 903 F.3d at 36–37.

64. *See, e.g.*, Stacy Seicshnaydre et al., *Missing Opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 L. & CONTEMP. PROBS. 173, 174–84 (2016) (describing the HCV program’s structure and purposes).

65. 24 C.F.R. § 982.151(a)(1) (2018). Local PHAs administer the program in accordance with a formal administrative plan that must both conform to HUD regulations and rely on HUD-established rent levels. *See infra* note 66 and accompanying text.

each area (known as “Fair Market Rents” or “FMRs”),<sup>66</sup> and voucher holders rent units that fall within these FMRs.<sup>67</sup>

Low-income families apply for a voucher from their local PHA, which screens them for income and other eligibility requirements.<sup>68</sup> For those who qualify, the PHA issues a voucher,<sup>69</sup> or, more likely, puts them on a waiting list.<sup>70</sup> Once a family is selected, the PHA provides them with program information that includes “a list of landlords [or other parties] known to the PHA who may be willing to lease a unit to

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66. See 24 C.F.R. § 982.503(a)(1) (2018). The local PHA adopts a schedule that sets voucher-payment-standard amounts per unit size for each FMR area in its jurisdiction. The payment standards are designed to cover the prevailing rent levels for all but the top end of the rental market and are between 90% and 110% of the relevant FMR. The amount of rent that a voucher family must pay is generally no more than 30% of the family’s adjusted income. See *id.* §§ 982.503, .505, .515.

Until recently, HUD calculated FMRs using rent levels for entire metropolitan areas or other large jurisdictions. This meant that an area’s FMR might not accurately reflect rents in the area’s higher-cost submarkets, which often resulted in payment standards being too low for “voucher holders to afford rents in high-rent, high-opportunity neighborhoods, consigning them to low-opportunity areas of concentrated poverty.” See *Open Cmty. Alliance v. Carson*, 286 F. Supp. 3d 148, 154 (D.D.C. 2017); see also Seicshnaydre et al., *supra* note 64, at 175 (noting that HUD’s “creation of a single-voucher payment standard for an entire region . . . steered voucher families to the lowest-cost neighborhoods”). “HUD recognized the shortcomings of FMR schedules . . . as early as 1977.” *Open Cmty. Alliance*, 286 F. Supp. 3d at 155 n.2. Thus, it began to address the problem in 2010 by considering the use of smaller-area FMRs (“SAFMRs”), and it eventually adopted a rule in 2016 that required PHAs in twenty-four major metropolitan areas to use SAFMRs. See *id.* at 152–59. The Trump Administration tried to suspend this rule in 2017, but that effort was enjoined for violating the Administrative Procedure Act, see *id.* at 161–79, and thus HUD’s new SAFMR rule went into effect as scheduled in 2018.

67. See U.S. DEP’T OF HOUSING & URBAN DEV., *Housing Choice Vouchers Fact Sheet*, [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) [<https://perma.cc/JBA5-QNZZ>] (last visited Mar. 9, 2020). A family may lease an apartment for more than this standard, but PHA assistance cannot exceed the standard; if rent exceeds the standard, the family must pay the difference.

68. The selection criteria are set forth in HUD regulations and in the PHA’s administrative plan. See 24 C.F.R. § 982.151(a)(1) (2018). Eligibility for the HCV program depends primarily on household income. HUD’s income limits are set based on the number of persons in the applicant household. See generally U.S. DEP’T OF HOUSING & URBAN DEV., *supra* note 67.

69. See U.S. DEP’T OF HOUSING & URBAN DEV., *supra* note 67; 24 C.F.R. §§ 982.202, .302 (2018).

70. See *New Picture*, *supra* note 58 (noting that the average family receiving a voucher spent thirty months on a waiting list).

the family or . . . assist the family in locating a unit.”<sup>71</sup> A family with a voucher then seeks housing on its own, generally paying no more than 30% of its income for rent, with the PHA paying the remainder to the landlord with HUD funds.<sup>72</sup> Vouchers are good for at least sixty days (and may be renewed),<sup>73</sup> and they are “portable,” which means they may be used anywhere in the country, so long as the rental unit chosen is in the jurisdiction of a PHA that administers a HCV program.<sup>74</sup>

In the voucher program, as in the non-subsidized market, landlords are responsible for screening prospective tenants,<sup>75</sup> and they may use their regular selection criteria.<sup>76</sup> Once an assisted family finds an appropriate unit and a landlord willing to rent to them, the local PHA must approve the tenancy. To approve it, the PHA first must inspect the apartment and determine that the rent and lease terms conform to the program’s requirements.<sup>77</sup> The PHA then enters into a contract with the property owner that specifies payment amounts and other

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71. 24 C.F.R. § 982.301(b)(11) (2018).

72. *See id.* §§ 982.1(a)(3), .503(b); *see also* U.S. DEP’T OF HOUSING & URBAN DEV., *supra* note 67 (providing general rules and exceptions).

73. *See* 24 C.F.R. § 982.303 (2018).

74. *See* 42 U.S.C. § 1437f(f)(7) (2012); 24 C.F.R. § 982.1(b) (2012). For more on the portability of vouchers, see Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50,564 (Aug. 20, 2015), *as amended*, 80 Fed. Reg. 52,619 (Sept. 2, 2015); U.S. DEP’T OF HOUSING & URBAN DEV., NOTICE PIH 2016-09(HA), HOUSING CHOICE VOUCHER (HCV) FAMILY MOVES WITH CONTINUED ASSISTANCE, FAMILY BRIEFING, AND VOUCHER TERM’S SUSPENSION 4 (2016).

75. *See* 24 C.F.R. § 982.307(a)(2) (2018). Under HUD regulations that give the landlord responsibility for screening prospective HCV tenants, the landlord may consider a family’s background and tenancy history with respect to payment of rent and utility bills, caring for the apartment, respecting the rights of other residents, drug-related or other criminal activity, and compliance with other essential tenancy conditions. *Id.* § 982.307(a)(3).

76. *See id.* § 982.308(b)(2).

77. *See id.* §§ 982.302(b), .405. In order to approve the tenancy, the PHA must determine: 1) after an inspection of the apartment, that it meets the housing-quality standards established by HUD in 24 C.F.R. § 982.401 (2018); 2) that the rent is reasonable, as defined by HUD’s guidelines set forth in 24 C.F.R. § 982.507 (2018); and 3) that the lease conforms to HUD requirements.



terms.<sup>78</sup> The property owner also enters into a written lease with the assisted family.<sup>79</sup>

Congress made some changes to the Section 8 voucher program during the 1980s and 1990s.<sup>80</sup> For present purposes, the most significant was a 1987 provision mandating that landlords who participated in the program could not discriminate against other tenants who used vouchers (the so-called “Take One, Take All” requirement).<sup>81</sup> This requirement ultimately came to be seen as discouraging landlords from participating in the HCV program, and Congress repealed it in 1998.<sup>82</sup> Thereafter, landlord-participation in the program was seen as “voluntary.”<sup>83</sup>

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78. 24 C.F.R. § 982.1(b)(2) (2018); *see also* *Montgomery Cty. v. Glenmont Hills*, 936 A.2d 325, 328–30 (Md. 2007). This contract covers only the single unit and the particular assisted family involved, and it may be for a term as short as one year. *See* 24 C.F.R. §§ 982.1(b)(2), .309(a) (2018).
79. 24 C.F.R. § 982.308(b) (2018). The lease must be either the standard lease used by the landlord for non-assisted tenants or a model lease prepared by HUD, and it must include a HUD-prepared addendum that sets forth certain rights of the tenant and landlord. *See id.* §§ 982.162(a)(3), .308(b)–(f).
80. *See, e.g.*, Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461 (merging the certificate and voucher programs and changing “Section 8” to “HCV”); *see also infra* note 81 and accompanying text. *See generally* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 227–37 (3d ed. 2015) (describing the Section 8 program’s evolution).
81. *See* 42 U.S.C. § 1437f(t)(1)(B) (1988) (barring affected apartment owners from refusing “to lease any available dwelling unit . . . to a holder of a voucher . . . , a proximate cause of which is the status of such prospective tenant as a holder of such voucher”); *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1276 (7th Cir. 1995). This requirement was designed to “prevent landlords from picking and choosing from the pool of Section 8 applicants who apply to rent apartments.” *Salute v. Stratford Greens Gardens Apartments*, 136 F.3d 293, 297 (2d Cir. 1998). Cases accusing landlords of violating this provision included *Graoch Assoc. # 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm’n*, 508 F.3d 366 (6th Cir. 2007); *Knapp*, 54 F.3d at 1272; *Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301 (S.D.N.Y. 1990); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989).
82. *See Graoch Assoc. # 33*, 508 F.3d at 391; *Salute*, 136 F.3d at 297.
83. *See, e.g.*, *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019), *reh’g and reh’g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1234 (2020); *Salute*, 136 F.3d at 298 (noting “the voluntary nature of the Section 8 program”); *Knapp*, 54 F.3d at 1280 (same).

Thus, although federal law bars discrimination against voucher holders in some types of government-assisted housing,<sup>84</sup> it does not outlaw this type of discrimination by private landlords.<sup>85</sup> And from the beginning of the Section 8 program, many housing providers have refused to accept voucher holders.<sup>86</sup>

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84. *See, e.g.*, 26 U.S.C. § 42(h)(6)(B)(iv) (2012) (barring discrimination against voucher holders in the Low Income Housing Tax Credit (“LIHTC”) program); *see also* POVERTY & RACE RES. ACTION COUNCIL, *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program*, app. B at 140, 145 (2020), *available at* [https://prrac.org/state-and-local-source-of-income-nondiscrimination-laws\\_protections/](https://prrac.org/state-and-local-source-of-income-nondiscrimination-laws_protections/) [<https://perma.cc/U9LK-YAL9>] (identifying HUD programs that bar such discrimination, such as HOME and the National Housing Trust Fund).

Since its inception in 1986, the LIHTC program has supported the creation of over 3.1 million affordable-housing units. *See* Off. of Pol’y Dev. & Res., *Dataset: Low-Income Housing Tax Credits*, U.S. DEP’T OF HOUSING & URBAN DEV.: HUD USER, <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/6R8T-D58L>] (last updated May 24, 2019).

85. *See Inclusive Cmty. Project*, 920 F.3d at 900; *Salute*, 136 F.3d at 298; *Knapp*, 54 F.3d at 1280.

86. *See, e.g., Knapp*, 54 F.3d at 1280 (noting that “non-participating owners routinely reject section 8 voucher holders”); MARY CUNNINGHAM ET AL., U.S. DEP’T OF HOUSING & URBAN DEV., *A PILOT STUDY OF LANDLORD ACCEPTANCE OF HOUSING CHOICE VOUCHERS 9* (2018), *available at* <https://www.huduser.gov/portal/pilot-study-landlord-acceptance-hcv.html> [<https://perma.cc/5BZU-ZZVA>] (reviewing “16 studies that examined the extent of landlord discrimination in jurisdictions nationwide between 2000 and 2017,” and concluding that “research consistently finds evidence of both perceived and actual landlord discrimination against voucher holders”); HIREN NISAR ET AL., U.S. DEP’T OF HOUSING & URBAN DEV., *LANDLORD PARTICIPATION STUDY: MULTIDISCIPLINARY RESEARCH TEAM 13* (2018), *available at* <https://www.huduser.gov/portal/publications/Landlord-Participation-Study-Final-Report.html> [<https://perma.cc/7PPD-MXHS>] (reporting that between 2010 and 2016, when voucher use increased, the number of landlords accepting vouchers “decreased from just over 700,000 to around 640,000”); AUSTIN TENANTS’ COUNCIL, *AN AUDIT REPORT ON THE REFUSAL OF HOUSING CHOICE VOUCHERS BY LANDLORDS IN THE AUSTIN MSA 3* (2012), *available at* <https://www.austintexas.gov/edims/document.cfm?id=211114> [<https://perma.cc/PX9M-NM6P>] (reporting that 91% of private landlords in Austin, Texas, refuse to accept vouchers); LAWYERS’ COMM. FOR BETTER HOUSING, INC., *LOCKED OUT: BARRIERS TO CHOICE FOR HOUSING VOUCHER HOLDERS 11* (2002), *available at* <https://lcbh.org/reports/locked-out-barriers-choice-housing-voucher-holders> [<https://perma.cc/PRW5-TA58>] (reporting that over a decade after a Chicago law was enacted banning source-of-income discrimination, 70% of landlords tested there still discriminated on that ground).

Since its inception, the Section 8 voucher program's goals have been to aid "low-income families in obtaining a decent place to live" and to promote "economically mixed housing."<sup>87</sup> The program was popular and grew rapidly because it provided assistance quickly, allowed families a better housing choices, was designed to disperse low-income families throughout the community, did not create local objections to public projects, and was relatively inexpensive per family assisted.<sup>88</sup>

Despite its advantages, the voucher program has never achieved its full potential and continues to have many problems. Funding depends on yearly congressional appropriations, which ebb and flow with the political tide. Eligible families generally spend months on waiting lists and then have only a limited time to secure appropriate housing, leaving some vouchers unused.<sup>89</sup> This also encourages assisted families to seek units in their current low-income neighborhoods, a tendency that has been reinforced by HUD's method for determining appropriate rent levels.<sup>90</sup> The program relies on hundreds of different PHAs, whose priorities, capacities, and abilities vary greatly. From a landlord's perspective, having to deal with a local PHA and HUD—including the need for inspections and uniform lease provisions<sup>91</sup>—may appear daunting, and the economic incentives to participate in the program often depend on local-market conditions (e.g., landlords in high-opportunity neighborhoods with tight rental markets may see no reason to deal with the voucher program). And to the extent that landlords choose not to participate, a voucher user's housing search becomes that much more difficult. The result is an uncertain system in which most

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87. 42 U.S.C. § 1437f(a) (2012); *see also id.* § 5301(c)(6) (declaring that the Section 8 program's objectives include "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income").

88. *See* Seicshnaydre et al., *supra* note 64, at 187 & nn.108–09.

89. *See supra* notes 70–73 and accompanying text.

90. *See supra* note 66.

91. *See supra* notes 77–79 and accompanying text.

vouchers are mainly used in low-income, low-opportunity areas,<sup>92</sup> a practice that reinforces ethnic- and income-based segregation.<sup>93</sup>

*C. State and Local Source-of-Income Laws*

1. Locations and Variety

By 2020, seventeen states and over seventy localities had enacted housing laws that ban some form of source-of-income discrimination<sup>94</sup>: The states are: California; Connecticut; Delaware; Maine; Maryland; Massachusetts; Minnesota; New Jersey; New York; North Dakota; Oklahoma; Oregon; Utah; Vermont; Virginia; Washington; and Wisconsin.<sup>95</sup> The localities include: New York City; Los Angeles; Chicago; Philadelphia; Washington, D.C.; St. Louis; Memphis; Milwaukee; Denver; Seattle; San Francisco; and San Diego.<sup>96</sup> A handful of these laws date back to the 1970s, and another twenty were passed in the 1980s and 1990s. Most—over fifty—have been enacted since 2000,<sup>97</sup> with New York state and Los Angeles (both city and county) being among the most recent.<sup>98</sup>

These laws reflect a variety of approaches. Some states prohibit only discrimination against Section 8-voucher recipients and other

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92. *See, e.g.*, ALICIA MAZZARA & BRIAN KNUDSEN, CTR. ON BUDGET & POL'Y PRIORITIES, WHERE FAMILIES WITH CHILDREN USE HOUSING VOUCHERS: A COMPARATIVE LOOK AT THE 50 LARGEST METROPOLITAN AREAS 13 (2019), *available at* <https://prrac.org/where-families-with-children-use-housing-vouchers/> [<https://perma.cc/TB87-F82Q>]; BARBARA SARD & DOUGLAS RICE, CTR. ON BUDGET & POL'Y PRIORITIES, REALIZING THE HOUSING VOUCHER PROGRAM'S POTENTIAL TO ENABLE FAMILIES TO MOVE TO BETTER NEIGHBORHOODS 1, 6 (2016), *available at* <https://www.cbpp.org/research/housing/realizing-the-housing-voucher-programs-potential-to-enable-families-to-move-to> [<https://perma.cc/Q3UE-QVNG>]; *see also supra* note 66.
93. *See, e.g.*, Seicshnaydre et al., *supra* note 64, at 173 (noting that HUD “never structured the [voucher] program to address segregation, deconcentrate low-income persons, expand housing choice, or further fair housing”); *see also id.* at 194–97 (proposing tools for reforming historical flaws in the HCV program).
94. *See* POVERTY & RACE RES. ACTION COUNCIL, *supra* note 84.
95. *See infra* app. I (providing these laws’ statutory citations, their years of enactment, and some of their key language).
96. *See infra* app. II (providing a more detailed list of such localities).
97. *See* ALISON BELL ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS 2–3 (2018), *available at* <https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results> [<https://perma.cc/SBA8-U3WJ>].
98. *See infra* apps. I, II (describing these laws in more detail).

government housing subsidies.<sup>99</sup> Others outlaw discrimination based on a person's having received governmental "assistance," which may or may not include housing vouchers.<sup>100</sup> Others outlaw discrimination based on "source of income," but exclude voucher holders from their protection, either explicitly in the statute or by court interpretation.<sup>101</sup> Other "source of income" laws have been interpreted to include voucher

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99. See MASS. GEN. LAWS ANN. ch. 151B, § 4.10 (2019) (making it unlawful "for any person furnishing . . . rental accommodations to discriminate against any individual . . . who is a tenant receiving federal, state, or local housing subsidies . . . because the individual is such a recipient"); ME. REV. STAT. ANN. tit. 5, § 4581-A(4) (2019) (making it unlawful "[f]or any person furnishing rental premises . . . to refuse to rent . . . to any individual who is a recipient of federal, state or local public assistance, including . . . housing subsidies, primarily because of the individual's status as recipient"); *infra* app. I; *infra* notes 109–11.

100. See MINN. STAT. ANN. §§ 363A.03, .09 (2019) (barring housing discrimination because a tenant is "receiving federal, state, or local subsidies, including rental assistance or rent supplements"); see also N.D. CENT. CODE ANN. §§ 14-02.4-02(19), .5-02(1)–(2) (2019) (barring discrimination "because of . . . status with respect to . . . public assistance," which includes tenants "receiving federal, state, or local subsidies, including rental assistance or rent supplements"); VT. STAT. ANN. tit. 9, § 4503(a)(2) (2019) (barring housing discrimination "because a person is a recipient of public assistance"); *infra* app. I.

The Minnesota statute was interpreted to allow landlords to refuse Section 8 voucher holders in *Edwards v. Hopkins Plaza Limited Partnership*, 783 N.W.2d 171, 175–79 (Minn. App. 2010). For a critique of *Edwards*, see Derek Waller, *Leveraging State and Local Antidiscrimination Laws to Prohibit Discrimination Against Recipients of Federal Rental Assistance*, 27 J. AFFORDABLE HOUSING 401, 415–21 (2018).

101. See *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1282–83 (7th Cir. 1995) (interpreting Wisconsin law, which bans housing discrimination based on "lawful source of income" (WIS. STAT. ANN. § 101.22(6) (1995)), not to include Section 8 vouchers); DEL. CODE ANN. tit. 6, § 4607(j) (2019) (allowing, within Delaware's "source of income" law, landlords to not participate in government rental-assistance programs).

Oregon's source-of-income law, as originally enacted in 1995, explicitly did not include "federal rent subsidy payments under [Section 8] and any other local, state or federal housing assistance." See OR. REV. STAT. § 659A.421(d)(A) (2010). It was amended in 2013, however, to include such assistance. See 2013 Or. Laws Ch. 740 (H.B. 2639).

California amended its fair housing law in 1999 to prohibit discrimination based on a tenant's "source of income," but this was interpreted in 2010 not to cover Section 8 vouchers. See *Sabi v. Sterling*, 183 Cal. App. 4th 916, 929–30 (2010). In 2019, however, this law was amended to include such coverage. See CAL. GOV'T CODE § 12955(p)(1) (amended by Cal. Stats. 2019, c. 600 (S.B. 329)).

holders,<sup>102</sup> with some laws explicitly providing for voucher coverage.<sup>103</sup> Overall, as a result of these state and local voucher-antidiscrimination laws, about half of the households using vouchers are now protected.<sup>104</sup>

The breadth of these laws varies in other ways as well. Some apply only to rental situations,<sup>105</sup> but most cover a wider range of housing transactions by, for example, simply including in their fair housing laws “source of income” among the forbidden bases of discrimination.<sup>106</sup> In addition, some state laws have foreclosed certain potential defenses (e.g., a landlord’s objecting not just to voucher holders as tenants, but

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102. See *Comm’n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 241 (Conn. 1999); *Franklin Tower One v. N.M.*, 725 A.2d 1104, 1112–13 (N.J. 1999); see also *Montgomery Cty. v. Glenmont Hills Assocs.*, 936 A.2d 325, 333–34 (Md. 2007) (interpreting Montgomery County’s source-of-income ordinance to require landlords to accept Section 8 vouchers); *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822, 826–28 (Ill. App. 2004) (same, regarding Chicago’s source-of-income ordinance).
103. See OR. REV. STAT. § 659A.421(d)(A) (2013); *Feemster v. BSA Ltd. P’ship*, 548 F.3d 1063, 1069–71 (D.C. Cir. 2008) (noting that the D.C. Human Rights Act, which bans discrimination in “‘any transaction in real property’ . . . ‘wholly or partially’ for a discriminatory reason based on’ . . . an individual’s ‘source of income,’” “expressly defines ‘source of income’ as encompassing the Section 8 program”) (quoting D.C. CODE § 2–1402.21(a)(1)–(2) (2007)); *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 89 (D.D.C. 2008) (concluding the same); see also *City & Cty. of San Francisco v. Post*, 22 Cal. App. 5th 121, 124–25 (2018) (noting that San Francisco’s fair-housing ordinance, as amended in 1998, outlaws discrimination based on a person’s “source of income” and defines that term to include government rent subsidies) (citing S.F., CAL., POLICE CODE art. 33, § 3304(a) (1998)).
104. See *POVERTY & RACE RESEARCH ACTION COUNCIL*, *supra* note 84, app. B at 1 (noting a 2018 study estimating the figure at 34%, see *ALISON BELL ET AL.*, *supra* note 97, but concluding in early 2020 that, due to the recent passage of source-of-income laws in two states (New York and California) and several municipalities, a better estimate now would be “almost 50%”).
105. See *supra* note 99 (Massachusetts and Maine); *infra* app. I (New York, New Jersey, and Washington).
106. See, e.g., *infra* notes 115–13 and accompanying text (Connecticut); *supra* note 101 and accompanying text (California); *infra* app. I (Oregon, Utah, Vermont, and Wisconsin); *supra* note 103 (Washington, D.C. and San Francisco); *Montgomery Cty.*, 936 A.2d at 330–31 (Montgomery County, Maryland).

also to the requirements of the governmental program involved), either explicitly or by judicial interpretation;<sup>107</sup> others allow such defenses.<sup>108</sup>

Two New England states provide examples of the different approaches. In 1971, Massachusetts became the first state to enact a statute prohibiting landlords from discriminating against persons using government vouchers.<sup>109</sup> That statute did not apply to all of the transactions covered by the state's fair-housing law, but dealt only with "rental accommodations."<sup>110</sup> As originally enacted, this provision prohibited landlords from discriminating against any recipient of public assistance or housing subsidies "solely because the individual is such a recipient."<sup>111</sup> In 1987, the state supreme court interpreted "solely" to allow a landlord to refuse Section 8 voucher holders because he objected to the program's mandated lease terms.<sup>112</sup> Thereafter, the law was amended both to remove the word "solely" and to add a further prohibition barring landlords from discriminating "because of any requirement of such public assistance, rental assistance, or housing subsidy program."<sup>113</sup> As a result, Massachusetts landlords now may not reject recipients of any housing-assistance program, nor use as a defense their objection to the requirements of such a program.<sup>114</sup>

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107. *See* *DiLiddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 421, 427–31 (Mass. 2007) (Massachusetts); *Sullivan Assocs.*, 739 A.2d at 248–51 (Connecticut); *Franklin Tower One*, 725 A.2d at 1114–15 (New Jersey); *see also* *Feemster*, 548 F.3d at 1069–71 (D.C. law); *Montgomery Cty.*, 936 A.2d at 339–42 (county ordinance).

108. *See* *Dussault v. RRE Coach Lantern Holdings, LLC*, 86 A.3d 52, 58–60 (Me. 2014) (interpreting Maine law); *see also* *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822, 827 (Ill. App. 2004) (holding that, although Chicago's source-of-income ban includes Section 8 vouchers, landlords who reject voucher holders may raise defenses related to the Section 8 program).

109. *See* MASS. GEN. LAWS ch. 151B, § 4(10) (1971); *infra* app. I.

110. *See* *DiLiddo*, 876 N.E.2d at 422 n.2.

111. *Id.* at 427.

112. *Att'y Gen. v. Brown*, 511 N.E.2d 1103, 1108–10 (Mass. 1987) (distinguishing between housing discrimination that occurs "solely" because a prospective tenant uses a voucher and discrimination that occurs because a landlord refuses, for economic or other reasons, to be subject to the voucher program's requirements).

113. *See* *DiLiddo*, 876 N.E.2d at 428–29 (describing MASS. GEN. LAWS ch. 151B, § 4 (1990)).

114. *See id.* at 429–31. Thus, landlords cannot claim that their objections to a program's requirements amount to a "legitimate, non-discriminatory reason" for an otherwise unlawful refusal to rent. As the *DiLiddo* opinion put it, the amended law delineates what is "legitimate" and "nondiscriminatory" under the statute. *Id.* at 429. The law also does not permit a defense based on the fact that a housing-subsidy program's requirements may cause the landlord "substantial economic harm." *Id.* at 429–30; *cf.* *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d

By contrast, Connecticut has reached a similar result through a broader statute that, in 1990, simply added to the state's fair housing law "lawful source of income" as a prohibited basis of discrimination.<sup>115</sup> Nine years later, the state supreme court held that the statute's new language prohibits landlords from refusing to rent to otherwise qualified Section 8 tenants.<sup>116</sup>

## 2. Legal Challenges To

State and local laws that ban some form of source-of-income discrimination obviously go beyond the current FHA. But they are in no danger of federal preemption on this ground because the FHA has a provision that explicitly allows any state or local law that "grants, guarantees, or protects the same rights as are granted by" the FHA.<sup>117</sup> Some of these laws, however, have been challenged as being inconsistent with—and thus preempted by—Section 8's scheme, which makes landlord-participation in that program "voluntary."<sup>118</sup> Generally, these challenges have failed.<sup>119</sup> There is one exception, however: a 1995

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394, 406 (Mass. 2016) (holding that this law does not prevent Section 8 project-based landlords from withdrawing from this program, which is appurtenant to the rental unit, not the tenant).

By contrast, Maine's law outlawed discrimination "primarily" on the forbidden basis, which paralleled the original version of Massachusetts's law. *See* ME. REV. STAT. ANN. tit. 5, § 4581-A(4) (2019). Maine's law, however, was not amended, leading that state's supreme court to interpret it to allow a landlord to reject voucher holders if the reason for doing so was to avoid the voucher-program's requirements. *See* Dussault v. RRE Coach Lantern Holdings, LLC, 86 A.3d 52, 58–60 (Me. 2014).

115. *See* CONN. GEN. STAT. ANN. § 46a-64c(a)(1)–(2) (1989); *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 246 (Conn. 1999).

116. *See Sullivan Assocs.*, 739 A.2d 238 at 241–42 (holding that the Connecticut statute bars landlords from requiring a lease that contains either tenant-income requirements beyond those contemplated by the Section 8 program or any other deviations from the voucher-program's requirements).

117. *See supra* note 27.

118. *See supra* note 83 and accompanying text.

119. *See* *Austin Apartment Ass'n v. City of Austin*, 89 F. Supp. 3d 886, 894–96 (W.D. Tex. 2015); *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 87–89 (D.D.C. 2008); *Montgomery Cty. v. Glenmont Hills Assocs.*, 936 A.2d 325, 339–42 (Md. 2007); *Sullivan Assocs.*, 739 A.2d at 245–46; *Franklin Tower One, LLC v. N.M.*, 725 A.2d 1104, 1107–15 (N.J. 1999); *Stevenson v. San Francisco Hous. Auth.*, 24 Cal. App. 4th 269, 280–83 (Cal. Ct. App. 1994); *Att'y Gen. v. Brown*, 511 N.E.2d 1103, 1105–06 (Mass. 1987); *see also* 24 C.F.R. § 982.53(d) (2018) (explaining that the federal statutes creating the voucher program are not intended "to preempt operation of State and local laws that prohibit discrimination



decision in which the Seventh Circuit held that Wisconsin’s “source-of-income” law did not apply to Section 8 vouchers, in part because the court was hesitant “to allow a state to make a voluntary federal program mandatory.”<sup>120</sup>

The scores of different local ordinances that ban some form of source-of-income discrimination reveal an even greater variety of coverage than the states’ laws. Many of these ordinances go beyond their state’s fair-housing laws, which has prompted some landlords to challenge local laws as being inconsistent with, and thus preempted by, their state’s law.<sup>121</sup> The results of these challenges have varied depending on the specific language of the particular state law involved.

For example, California’s fair housing law—which since 1999 has banned source-of-income discrimination, but did not until 2019 cover vouchers and other government subsidies<sup>122</sup>—provides that it is intended “to occupy the field . . . encompassed” by its anti-discrimination provisions.<sup>123</sup> San Francisco’s source-of-income ordinance, passed in 1998, explicitly includes voucher holders within its protection,<sup>124</sup> leading landlords in that city to claim that this ordinance was preempted by the state law. The California court of appeals rejected that claim, reading the state’s preemption clause narrowly and thus leaving San Francisco’s broader law intact.<sup>125</sup>

On the other hand, preemption challenges to New York City’s source-of-income law—which compels landlords to accept governmental vouchers—have achieved a modicum of success based on a state statute that prevents local governments from extending their rent-control regulations. While this law does not block the City’s basic mandate to

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against a Section 8 voucher-holder because of status as a Section 8 voucher-holder”).

120. *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1282 (7th Cir. 1995).

121. *See also Fletcher Props., Inc. v. City of Minneapolis*, 931 N.W.2d 410, 429 (Minn. Ct. App. 2019) (reversing trial court’s ruling that Minneapolis ordinance, which bars rental discrimination against voucher holders and other public-assistance recipients on the basis that “the requirements of a public assistance program,” violated landlords’ rights under state constitution’s due-process and equal-protection provisions); *Apartment Ass’n of Metro. Pittsburgh, Inc. v. City of Pittsburgh*, No. 107 WAL 2019, 2019 WL 4253476 (Pa. Sept. 9, 2019) (vacating and remanding for further review lower court’s determination that Pittsburgh’s source-of-income ordinance was invalid under Pennsylvania’s “home rule” law insofar as the ordinance required landlords to accept Section 8 voucher holders).

122. *See Sabi v. Sterling*, 183 Cal. App. 4th 916, 928–30 (Cal. Ct. App. 2010).

123. CAL. GOV’T CODE § 12993(c) (2019).

124. *See City & Cty. of San Francisco v. Post*, 22 Cal. App. 5th 121, 124–25 (2018) (citing S.F., CAL. POLICE CODE art. 33, § 3304(a) (2019)).

125. *Id.*

landlords to accept vouchers,<sup>126</sup> it has been held to narrow the City's mandate so as not to compel landlords to accept a local subsidy program that requires them to extend leases at the same rent.<sup>127</sup>

Texas and Indiana both passed laws in 2015 barring localities from outlawing discrimination against voucher holders in response to local ordinances (enacted by Austin and Indianapolis, respectively).<sup>128</sup> Local landlords were initially unsuccessful in challenging Austin's 2014 ordinance, producing a decision that Texas's current law did not preempt it.<sup>129</sup> Thereafter the state passed legislation barring all of its localities from prohibiting landlords "from refusing to lease or rent . . . to a person because the person's lawful source of income to pay rent includes funding from a federal housing assistance program."<sup>130</sup> Austin responded with a federal lawsuit seeking to enjoin state officials from enforcing this law based on its alleged disparate impact on minorities.<sup>131</sup> The district court upheld this claim based on the FHA provision that condemns any state law purporting "to require or permit any action that would be a discriminatory housing practice" under the FHA,<sup>132</sup> but the Fifth Circuit ordered dismissal of the claim for lack of jurisdiction under the Eleventh Amendment.<sup>133</sup>

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126. *See* *Tapia v. Successful Mgmt. Corp.*, 915 N.Y.S.2d 19, 22 (N.Y. App. Div. 2010).

127. *See* *Alston v. Starrett City, Inc.*, 74 N.Y.S.3d 211, 215 (N.Y. App. Div. 2018).

128. *See* TEX. LOC. GOV'T CODE ANN. § 250.007(a) (West 2019); IND. CODE § 36-1-3-8.5 (2019). The Texas law was also prompted by concerns that Dallas would adopt a voucher-included source-of-income law, which it did in 2016. *See* *Inclusive Cmtys. Project, Inc. v. Abbott*, No. 3:17-CV-0440-D, 2018 WL 2415034, at \*1–2 (N.D. Tex. May 29, 2018).

129. *See* *Austin Apartment Ass'n v. City of Austin*, 89 F. Supp. 3d 886, 892–93 (W.D. Tex. 2015) (denying preliminary injunction against city's source-of-income ordinance that covers voucher holders, because plaintiff-association failed to show likelihood of success under various theories).

130. TEX. LOC. GOV'T CODE ANN. § 250.007(c) (West 2019); *see also* *Inclusive Cmtys. Project*, 2018 WL 2415034, at \*4–12 (dismissing on standing and jurisdictional grounds a private plaintiff's challenge to this law).

131. *See* *City of Austin v. Paxton*, 325 F. Supp. 3d 749 (W.D. Tex. 2018), *rev'd*, 943 F.3d 993 (5th Cir. 2019); *see also* *Inclusive Cmtys. Project, Inc.*, 2018 WL 2415034, at \*2 n.1 (quoting plaintiff's allegation that, although Texas's renter households are only 19% Black, the "Texas voucher population is 86% minority with 55% Black, Non-Hispanic tenants and 30% Hispanic tenants").

132. *See* *Paxton*, 325 F. Supp. 3d at 759–60.

133. *See* *Paxton*, 943 F.3d at 997–1004.

## II. PAST EXPERIENCE

### A. State-and-Local-Law Cases

#### 1. Types of Cases and a Caution

Virtually all of the claims brought under state and local housing laws banning source-of-income discrimination have been brought against landlords. This is explained in part by the fact that some of these laws are limited to rental situations.<sup>134</sup> Most of these laws, however, also ban discrimination in sales, financing, insurance, and other housing transactions, just as the FHA does;<sup>135</sup> and even in these places, the vast majority of source-of-income cases have involved rental housing.

For example, Chicago's fair-housing ordinance covers a wide variety of housing transactions and has outlawed source-of-income discrimination since 1990.<sup>136</sup> The agency that enforces this law—the Chicago Commission on Human Relations (“CCHR”)—has produced a total of eighteen decisions in fully litigated cases involving source-of-income discrimination, and all were brought against landlords or their agents.<sup>137</sup> A similar pattern exists in New York City and other places with an active source-of-income docket.<sup>138</sup> Indeed, source-of-income claims against defendants other than landlords have produced only a handful of reported decisions.<sup>139</sup>

A word of caution: Experience in places with source-of-income laws shows that such prohibitions are not a panacea for this type of discrimination. In New York City and Chicago, for example, housing

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134. For instance, those in Massachusetts and Maine. *See supra* notes 99, 105 and accompanying text.

135. *See supra* note 106 and accompanying text. *See generally infra* apps. I, II (describing various state and local source-of-income laws).

136. *See* CHICAGO, ILL., MUN. CODE § 5-8-030 (2019).

137. *See* CHI. COMM'N ON HUMAN RELATIONS, BOARD RULING DIGEST (2018), available at <https://www.chicago.gov/content/dam/city/depts/cchr/AdjSupportingInfo/AdjFORMS/2018AdjForms/BoardRulingsDigestFEB2018.pdf> [<https://perma.cc/FNN4-QE7R>] (describing the CCHR's rulings in cases from 2002 through February 2018, and reporting that all eighteen housing cases that alleged source-of-income discrimination involved rental situations).

138. *See* N.Y. CITY COMM'N ON HUMAN RIGHTS, FISCAL YEAR 2018 ANNUAL REPORT 22 (2018).

139. *See, e.g.*, *Sisemore v. Master Fin., Inc.* 60 Cal. Rptr. 3d 719, 724-25 (Cal. Dist. Ct. App. 2007); *see also infra* notes 181–185 and accompanying text (discussing source-of-income cases involving insurance companies that allegedly refused to provide coverage for landlords who rented to Section 8 tenants); *infra* note 356 and accompanying text (discussing cases against municipalities and others accused of harassing Section 8 voucher users).

providers' substantial non-compliance has continued years after each city enacted a source-of-income law.<sup>140</sup> In 2018, the N.Y.C. Commission on Human Rights, noting "the pervasive problem of landlords refusing to rent to tenants with housing vouchers," established a special enforcement unit "focused exclusively on combatting source of income discrimination" and used testers "to verify reports of such pervasive discrimination."<sup>141</sup> In Chicago, the CCHR, having recognized that source-of-income discrimination "continues as a significant fair housing issue," retained a local civil rights organization to conduct a tester-based study of this type of discrimination,<sup>142</sup> the results of which were published in 2018 and showed substantial on-going source-of-income discrimination.<sup>143</sup> It also seems noteworthy—and perhaps ironic—that New York City and Chicago, despite their substantial efforts to reduce source-of-income discrimination, remain among the most racially segregated metropolitan areas in the country.<sup>144</sup>

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140. See N.Y. CITY COMM'N ON HUMAN RIGHTS, *supra* note 138, at 38 (reporting that source-of-income complaints accounted for over one-third (94 of 274) of the total housing complaints received); CHI. COMM'N ON HUMAN RELATIONS, 2017 ANNUAL REPORT 11 (2018) [hereinafter CHI. 2017 REPORT] (reporting that almost half of the housing discrimination complaints received (30 of 64) "alleged source of income discrimination, most of which involve Housing Choice Vouchers"); CHI. COMM'N ON HUMAN RELATIONS, ANNUAL REPORT: 2009, at 8 (2010) (reporting that two-thirds (40 of 60) of the housing discrimination complaints received claimed source-of-income discrimination); see also Isabelle M. Thabault & Eliza P. Platts-Mills, *Discrimination Against Participants in the Housing Choice Voucher Program: An Enforcement Strategy*, 15 POVERTY & RACE 11, 12 (2006) (reporting that, although the Washington, D.C. Human Rights Act had prohibited source-of-income discrimination since 1977, a 2003–05 testing program showed that 58% of landlords there either refused to accept vouchers or placed significant limitations on their use).

141. N.Y. CITY COMM'N ON HUMAN RIGHTS, *supra* note 138, at 22, 33–34 (reporting that the N.Y.C. Commission launched its own investigations, including testing, in almost 200 housing cases, the vast majority of which involved source-of-income discrimination).

142. CHI. 2017 REPORT, *supra* note 140, at 10.

143. See CHI. LAWYERS' COMM. FOR CIVIL RIGHTS, 2018 FAIR HOUSING TESTING REPORT 2 (2018) (reporting that, even though Chicago's law has banned source-of-income discrimination since 1990, tests continue to show such discrimination); see also *Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544, 545 (7th Cir. 2005) (dealing with Chicago apartment management company that, in 2002, allegedly had a policy against renting to Section 8–voucher users); LAWYERS' COMM. FOR BETTER HOUSING, INC., *supra* note 86, at 10–11 (finding in an earlier Chicago study that "[v]oucher holders are denied access to approximately 70% of the market rate units that are supposedly available to them").

144. See *supra* note 43 and accompanying text.

## 2. Cases Against Landlords

Source-of-income cases against landlords fall into two categories: (1) those in which the defendant admits its source-of-income discrimination, but tries to justify the practice; and (2) those in which the landlord denies the charge altogether. In the former, landlords have argued that the burdens of dealing with the Section 8 program (e.g., additional paperwork, required lease provisions, inspections by government agencies) justify their non-participation in this program. Some states and localities allow such a defense, while others do not, either because their laws explicitly foreclose it or their courts have interpreted their laws to do so.<sup>145</sup>

Cases in which a landlord denies the source-of-income-discrimination charge may arise from a variety of practices, including: outright refusals to rent,<sup>146</sup> discrimination in the rental's terms or conditions;<sup>147</sup> "steering" (e.g., narrowing a prospective tenant's options to certain properties that already accept vouchers);<sup>148</sup> or discriminatory ads,

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145. See *supra* notes 104–05 and accompanying text.

146. State and local fair-housing laws modeled on the FHA ban not only outright refusals to rent on a prohibited basis, but also discriminatory negotiations and other practices that make housing unavailable. See 42 U.S.C. § 3604(a) (2012); SCHWEMM, *supra* note 11, § 13:2.

147. State and local laws modeled on the FHA also outlaw harsher terms, stricter application requirements, and other discriminatory rental conditions. See 42 U.S.C. § 3604(b) (2012); SCHWEMM, *supra* note 11, § 14:2 & nn.1–5; see also Memorandum Regarding Source of Income Protections Under Cook County Human Rights Ordinance from Ranjit Hakin, Executive Director, Cook County Department of Human Rights and Ethics (Nov. 20, 2013) (found in Housing Authority of Cook County Ownership Packet) (advising landlords and property managers that they should not treat "voucher holders less favorably than other potential tenants by inflating rents or screening such applicants more stringently" or by applying rent-to-income-ratio requirements in a manner that discriminates against voucher holders); *Brown v. Tam Khuong An Nguyen*, Chicago Comm'n on Human Rts. (CCHR) No. 15-H-7, at 4 (Jan. 12, 2017) (noting that a prima facie case of illegal discrimination under Chicago's source-of-income ordinance may be made by showing that the complainant "was offered housing on terms different from the offers made to others").

148. A landlord's "steering" has long been understood to make housing "unavailable" in violation of the FHA and similarly worded state and local laws. See 42 U.S.C. § 3604(a) (2012); SCHWEMM, *supra* note 11, §§ 13:5–:6, 14:2 n.20 (noting that this practice may also violate other provisions of these statutes, such as 42 U.S.C. § 3604(b) (2012)); see also *Hawkins v. Village Green Holding Co., LLC*, CCHR No. 14-H-35, at 9 (July 12, 2018) (rejecting source-of-income-steering claim due to inadequate proof).

statements, and other communications in which the defendant announces its policy of not renting to government-assisted tenants.<sup>149</sup>

All of these claims present issues of proof that can be decided using familiar and long-established principles, as demonstrated by the eighteen decisions issued by Chicago's CCHR over the past two decades.<sup>150</sup> For instance, a plaintiff may prove a defendant's unlawful motivation by direct evidence,<sup>151</sup> and claims proven by direct evidence generally involve a defendant's ads or statements that would also be unlawful.<sup>152</sup> In the absence of direct evidence, a plaintiff may use the prima-facie-case, burden-shifting approach to prove illegal intent.<sup>153</sup> If a prima facie case cannot be established because the plaintiff did not apply to rent from the defendant, she may use the "futile gesture" theory to excuse this failure.<sup>154</sup> And testers may be used to show that a defendant's proffered justification for not dealing with a protected-class member is really a pretext for discrimination rather than a legitimate excuse.<sup>155</sup>

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149. Ads, statements, and notices that indicate a discriminatory preference or limitation violate state and local laws if those laws include a provision similar to that in 42 U.S.C. § 3604(c) (2012). *See* SCHWEMM, *supra* note 11, § 15; *infra* Part IV.C (regarding possible § 3406(c) violations involving source-of-income discrimination).
150. The CCHR has consistently interpreted Chicago's fair-housing ordinance in line with FHA precedent. *See, e.g.,* Nibbs v. PT Chicago, LLC, CCHR No. 14-H-61, at 14 n.8 (May 11, 2017). This is also true for most states and localities with fair-housing laws. *See* SCHWEMM, *supra* note 11, § 30:2 n.4.
151. *See* SCHWEMM, *supra* note 11, § 10:2 & nn.6–8; *see also* Hall v. Woodgett, CCHR No. 13-H-51, at 4–5 (Oct. 8, 2015); Shipp v. Wagner, CCHR No. 12-H-19, at 7 (July 16, 2014); Rankin v. 6954 N. Sheridan, Inc., CCHR No. 08-H-49, at 7 (Aug. 18, 2010); Diaz v. Wykurz, CCHR No. 07-H-28, at 6–7 (Dec. 16, 2009).
152. *See* SCHWEMM, *supra* note 11, §§ 10:2 n.7 and accompanying text, 32:3; *see also* Shipp, CCHR No. 12-H-19, at 7; Hutchison v. Iftekaruddin, CCHR No. 09-H-21, at 7 (Feb. 17, 2010).
153. *See* SCHWEMM, *supra* note 11, § 10:2 nn.25–26 and accompanying text; *see also* Hawkins, CCHR No. 14-H-35, at 6; Gardner v. Ojo, CCHR No. 10-H-50, at 10 (Dec. 19, 2012); Hutchison, CCHR No. 09-H-21, at 6.
154. *See* SCHWEMM, *supra* note 11, § 10:2 n.35; *see also* Rankin v. 6954 N. Sheridan, Inc., CCHR No. 08-H-49, at 7–8 (Aug. 18, 2010); *cf.* Hawkins, CCHR No. 14-H-35, at 8–9 (ruling against futile-gesture theory on the facts here); Gardner, CCHR No. 10-H-50, at 12 (same).
155. *See* SCHWEMM, *supra* note 11, § 32:2 (discussing the use of testers to prove housing discrimination). In places where local fair-housing laws have banned source-of-income discrimination, some enforcement agencies and advocacy groups have already used testing to produce evidence of this form of discrimination. *See, e.g., supra* notes 137–140 and accompanying text; FAIR HOUSING CTR. OF WEST MICH., 50 YEARS OF FAIR HOUSING: A CONSTELLATION OF OPPORTUNITIES, 2018 ANNUAL REPORT 4 (2019)

Although less common than claims of intentional discrimination, disparate-impact claims based on source-of-income discrimination have also been dealt with in CCHR decisions. These cases usually involved a voucher-holder's challenge to a landlord's minimum-income requirement (e.g., that a tenant's income must be at least three times the rent), with the CCHR—based on FHA precedents—recognizing that such a theory may succeed, but requiring proper statistical evidence to support the claim.<sup>156</sup>

*B. Source-of-Income Claims Under the Fair Housing Act*

1. Overview

Although the FHA does not ban source-of-income discrimination, it has often been invoked to challenge policies that bar tenants who rely on vouchers, Social Security, or other forms of non-wage income. Most of these claims allege that the defendant's policy has a disparate impact on racial minorities or other FHA-protected groups, but some allege intent-based discrimination, and still others challenged refusals to accommodate disabled tenants. These FHA claims have yielded mixed results.

2. Impact Claims: Race and National Origin

Blacks, Latinos, and other FHA-protected groups are disproportionately represented among HCV recipients nationwide<sup>157</sup>—although

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(reporting on source-of-income tests in which over 60% showed evidence of discrimination); FAIR HOUSING JUSTICE CTR., *Source of Income Discrimination Lawsuit Filed*, OPENING ACTS NEWSLETTER (Oct. 26, 2018), <http://www.fairhousingjustice.org> [<https://perma.cc/22GA-XHZ3>] (reporting that the Center's "testing investigation . . . corroborated the alleged source of income discrimination" in the referenced lawsuit); see also Fred Freiberg & Gregory D. Squires, *Changing Contexts and New Directions for the Use of Testing*, 17 CITISCAPE 87, 91 (2015) (describing testing for racial discrimination in a municipality's Section 8 rental-assistance program).

156. See *Nibbs v. PT Chicago, LLC*, CCHR No. 14-H-61, at 18 (May 11, 2017) (ruling against impact claim due to inadequate proof); see also CHICAGO COMM'N ON HUMAN RTS., SUBJECT MATTER INDEX 167 (2015) (describing the use of the disparate-impact theory in the 1992 CCHR decisions *McClinton v. Antioch Haven Homes/Haynes* and *Campbell v. Brown/Dearborn Parkway Realty*), available at <https://www.chicago.gov/content/dam/city/depts/cchr/AdjSupportingInfo/AdjFORMS/2015%20Adjudication%20Forms/SubjectMatterIndexMay2015.pdf> [<https://perma.cc/ZKU5-KFSS>]. See generally SCHWEMM, *supra* note 11, § 10:6 (describing disparate-impact claims under the FHA).

157. See, e.g., 2017 HUD REPORT, *supra* note 58, at 66 (reporting that in the eighteen-month period ending September 30, 2017, voucher-receiving heads-of-households were 48.5% black, 17.3% Latino, 79.3% female, and 43.6% disabled).

the demographics vary from place to place<sup>158</sup>—and landlords with anti-voucher policies have been sued in a number of FHA-impact cases. The earliest reported decision was in 1989 in *Bronson v. Crestwood Lake Section 1 Holding Corp.*<sup>159</sup> There, the court awarded preliminary injunctive relief to two black voucher holders who had been rejected by an apartment complex in Yonkers, New York, based on the court’s view that the defendants’ anti-voucher and other screening policies “do indeed have a substantial disparate impact on minority persons.”<sup>160</sup>

A more recent example is *Fair Housing Justice Center, Inc. v. Kosova Properties, Inc.*,<sup>161</sup> where a large New York City landlord was sued in 2016 for racial discrimination under the FHA and for source-of-income discrimination under the local fair-housing law.<sup>162</sup> One of the advantages of having such a local law is that a claim under it can be brought along with a FHA claim in federal court based on supplemental jurisdiction.<sup>163</sup> Conversely, because FHA claims may be asserted in

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158. See DEBORAH J. DEVINE ET AL., U.S. DEP’T OF HOUSING & URBAN DEV., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANT AND NEIGHBORHOOD WELFARE, app. B at 101 (2003) (providing the race/ethnicity and age of the HCV populations of the nation’s fifty largest metropolitan areas), available at [https://www.huduser.gov/publications/pdf/location\\_paper.pdf](https://www.huduser.gov/publications/pdf/location_paper.pdf) [<https://perma.cc/T3QA-SXSP>]; see also MAZZARA & KNUDSEN, *supra* note 92, at 1 (finding that “figures vary widely among the 50 largest metro areas” regarding the opportunity levels of neighborhoods where vouchers are used by families with children).

159. 724 F. Supp. 148 (S.D.N.Y. 1989).

160. *Id.* at 149, 154 (“Application of Crestwood’s policy of rejecting holders of Section 8 vouchers, alone, would have the effect of disqualifying from tenancies 6.06% of the minority households in the applicant pool, but only 0.25% of non-minority households in the pool. Stated another way, the odds of being excluded from Crestwood on the basis of the Section 8 policy is over twenty-five times greater for minority persons than for non-minorities. These figures are hardly surprising given the fact that, while only 16.7% of the total applicant pool represents minority households, 82.6% of the Section 8 voucher holders within that pool are minorities.”) (citations omitted). The defendants’ other challenged requirement—that a tenant’s income be at least three times the rent—was also found to have “a substantially disparate impact upon otherwise qualified minority households.” *Id.* The plaintiffs also alleged that the defendants applied their screening policies in a racially discriminatory manner. *Id.* at 157.

161. Complaint at 1, No. 1:16-cv-03537 (S.D.N.Y. May 12, 2016).

162. *Id.* at 19, 22. The complaint also alleged intentional racial discrimination in violation of the FHA and intentional and impact-based racial discrimination in violation of the local human-rights law. *Id.* at 17–21. The New York City Human Rights Law, unlike the FHA, explicitly bans source-of-income discrimination. See N.Y.C. ADMIN. CODE § 8-107(5)(a)(1) (2019).

163. See, e.g., *Viens v. Am. Empire Surplus Lines Inc.*, 113 F. Supp. 3d 555, 560 (D. Conn. 2015) (“Plaintiffs . . . assert claims . . . under both federal



state courts,<sup>164</sup> a case involving both a race-based FHA claim and a source-of-income claim under a state or local law can be brought in state court.<sup>165</sup> In *Kosova Properties*, the defendants, after a year and a half of pre-trial activities, agreed to a judgment that included injunctive relief and \$620,000 in monetary relief.<sup>166</sup>

Another recent successful use of the FHA was *Crossroads Residents Organized for Stable and Secure Residencies v. MSP Crossroads Apartments LLC*,<sup>167</sup> where the court upheld an impact-based challenge to a Minneapolis landlord's plan to stop accepting voucher users—allegedly disproportionately people of color—as part of its effort to upgrade its large apartment complex.<sup>168</sup> The case was settled in 2018 for some \$600,000.<sup>169</sup>

But many FHA-based challenges to landlords' anti-voucher policies have failed. Indeed, in *Knapp v. Eagle Property Management Corp.*,<sup>170</sup> the Seventh Circuit opined that, because “participation in the section 8 program is voluntary,” landlords could not be held liable under the

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and state law.”); *L.C. v. Lefrak Org.*, 987 F. Supp. 2d 391, 403 (S.D.N.Y. 2013) (describing claims brought under local law along with federal claims). *See generally* 28 U.S.C. § 1367 (2018) (providing federal courts with supplemental jurisdiction over state-law claims that are factually related to a federal-question claim in the same case).

164. *See* 42 U.S.C. § 3613(a)(1)(A) (2018); *see also* SCHWEMM, *supra* note 11, § 25:1 n.2 (providing examples of state-court cases in which FHA claims were asserted).

165. *See* Daniel J. Sernovitz, *D.C. Construction and Property Management Firm Settles Housing Discrimination Suit*, WASH. BUS. J. (Dec. 11, 2017, 12:02 PM), <https://www.bizjournals.com/washington/news/2017/12/11/management-firm-settles-discrimination-lawsuit.html> [<https://perma.cc/3GNJ-EFX3>] (describing six-figure settlement of a case brought in local court that alleging race and source-of-income discrimination under both the FHA and local fair-housing law based on defendant's refusal to rent to voucher holders); *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 398 (Mass. 2016) (describing claims brought under both the FHA and Massachusetts law).

166. *See* Settlement Agreement and Order at 3–4, *Fair Hous. Justice Ctr., Inc. v. Kosova Prop., Inc.*, No. 1:16-cv-03537-LGS (S.D.N.Y. Sept. 25, 2017).

167. No. CV 16-233 ADM/KMM, 2016 WL 3661146 (D. Minn. July 5, 2016).

168. The *Crossroads Residents* plaintiffs also alleged disability-impact and intentional discrimination under the FHA. *Id.* at 6–8.

169. *See* *Soderstrom v. MSP Crossroads Apartments LLC*, No. 16-233 ADM/KMM, 2018 WL 692912, at \*2 (D. Minn. Feb. 2, 2018) (authorizing settlement that included \$300,000 for the individual tenants, \$200,000 for the housing-organization plaintiffs, and \$110,000 in attorneys' fees and costs).

170. 54 F.3d 1272 (7th Cir. 1995).

FHA “for racial discrimination under the disparate impact theory.”<sup>171</sup> Since then, two other circuits—the Second and Fifth, both in split decisions—have agreed with this position.<sup>172</sup>

The Sixth Circuit took a different approach in 2007, holding that a FHA-impact claim might lie for a landlord’s withdrawal from the voucher program,<sup>173</sup> but that the claim there failed because of inadequate proof of disparate racial impact.<sup>174</sup> In a similar vein, the Massachusetts Supreme Judicial Court ruled in 2017 that, although a FHA-impact claim could be brought to challenge a Section 8 project-based landlord’s decision to withdraw from the program,<sup>175</sup> the specific

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171. *Id.* at 1280.

172. The Second Circuit’s decision in *Salute v. Stratford Greens Gardens Apartments*, 136 F.3d 293 (2d Cir. 1998), came three years after *Knapp*. In *Salute*, the plaintiffs asserted a disability-based impact claim that challenged the defendant-landlord’s refusal to accept vouchers. The Second Circuit rejected this claim:

We agree with the Seventh Circuit’s observation that because the Section 8 program is voluntary and non-participating owners routinely reject Section 8 tenants, the owners’ “non-participation constitutes a legitimate reason for their refusal to accept section 8 tenants and . . . we therefore cannot hold them liable for . . . discrimination under the disparate impact theory.”

*Id.* at 302 (alteration in original) (quoting *Knapp*, 54 F.3d at 1280 (7th Cir. 1995)).

The Fifth Circuit’s decision came in a race-based challenge to a “No Section 8” policy. *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir.), *reh’g and reh’g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1234 (2020). There, the majority noted “the voluntary nature of landlord participation in the voucher program,” *id.* at 901, and concluded that to uphold plaintiff’s impact claim “would effectively mandate a landlord’s participation in the voucher program any time the racial makeup of multi-family rental complex does not match the demographics of a nearby metropolitan area,” *id.* at 909.

173. *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro. Hum. Relations Comm’n*, 508 F.3d 366, 377 (6th Cir. 2007). The majority agreed with *Knapp* “that a landlord should never face disparate-impact liability for non-participation in Section 8,” but held that “withdrawal” by the landlord was different from “non-participation” and could be subject to a FHA-impact challenge. *Id.*

174. *Id.* at 377–78. In dissent, Judge Moore argued that the landlord had conceded the disparate-impact point and thus the case should be remanded to consider the landlord’s “business necessity” justification for withdrawing from the voucher program. *Id.* at 393 (Moore, J., dissenting).

175. *Burbank Apartments Tenant Ass’n v. Kargman*, 48 N.E.3d 394, 409, 411 (Mass. 2016).

allegations in that case did not satisfy the requirements of such a claim.<sup>176</sup>

Other recent decisions have ruled against similar FHA-impact claims based on inadequate allegations or proof.<sup>177</sup> Noteworthy here is the Fifth Circuit's 2019 decision in *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, which, by a 2-1 vote, affirmed the dismissal of an impact-based challenge to a Dallas-area landlord's refusal to accept voucher users.<sup>178</sup> The majority held that the plaintiff's allegations were inadequate to establish a causal connection between any racial impact and the defendant's anti-voucher policy,<sup>179</sup> a conclusion the dissent vigorously disputed.<sup>180</sup>

In a variation on these cases against landlords, FHA-impact claims have succeeded in a series of cases against insurance companies that denied coverage to landlords who *do* rent to voucher holders. The first decision was in 2015 in *Jones v. Travelers Casualty Insurance Co. of America*, where a California landlord alleged that the defendant's anti-voucher policy had a disparate impact on racial minorities and other

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176. *Id.* at 412 (holding that the plaintiff's complaint failed to adequately allege a sufficient causal connection between the defendant's withdrawal from the voucher program and the alleged negative impact on minorities).

177. *See Wadley v. Park at Landmark, LP*, 264 F. App'x. 279, 281–82 (4th Cir. 2008) (affirming summary judgment for defendant-landlord who withdrew from a voucher program while facing claims of intentional and impact-based discrimination against racial minorities and disabled persons); *Lincoln Property*, 920 F.3d at 906 (describing the district court's denial of the plaintiff's claim due to a lack of causation evidence).

178. 920 F.3d at 895. In addition, the Fifth Circuit affirmed, without dissent, the dismissal of the plaintiff's FHA racial-intent claim, as well as its claim regarding discriminatory statements under 42 U.S.C. § 3604(c) (2012). *Id.* at 909–12; *see also infra* Part IV.C (regarding claims under § 3604(c)).

179. 920 F.3d at 906, 909. The district court ruled not only that the plaintiff failed to allege the necessary causal connection, but also that its allegations were inadequate to show a disparate racial impact because they were based on statistics for census tracts rather than neighborhoods or communities. *See id.* at 906. The Fifth Circuit's opinion did not rely on this distinction, although it expressed skepticism about using census-tract data for such an impact claim. *Id.* at 907 n.9. The majority also did not find it necessary to review an alternative ground for the district court's dismissal of plaintiff's impact claim: that the defendants' justification for their anti-voucher policies—avoiding the burdens of the Section 8 program—was adequate to rebut an impact claim and that the plaintiff had failed to allege a less discriminatory alternative. *See id.* at 906.

180. *Id.* at 913 (Davis, J., dissenting); *see also Inclusive Cmty. Project v. Lincoln Prop. Co.*, 930 F.3d 660, 661 (5th Cir. 2019) (en banc), *cert. denied*, 140 S. Ct. 1234 (2020) (Haynes, J., dissenting) (disputing the panel majority's reasoning in rejecting the plaintiff's impact claim).

FHA-protected groups.<sup>181</sup> The court denied the defendant's motion for summary judgment on all claims,<sup>182</sup> noting, with respect to the impact claims, that the plaintiffs' evidence showed that the defendant's "No Section 8 rule [had] a statistically significant disparate impact on the basis of race, sex, age, and familial status," and thus "Travelers' conduct predictably falls more heavily on protected classes and results in discrimination."<sup>183</sup> Similar decisions were later issued in *Viens v. America Empire Surplus Lines Insurance Co.*<sup>184</sup> and *National Fair Housing Alliance v. Travelers Indemnity Co.*<sup>185</sup>

### 3. Impact Claims: Disability and Other Protected Classes

As discussed above, some of the successful FHA-impact challenges to anti-voucher policies have alleged not only race and national-origin discrimination, but also discrimination against other FHA-protected groups.<sup>186</sup> Disability, in particular, has been involved in a number of these cases.

One noteworthy example is *L.C. v. Lefrak Organization, Inc.*,<sup>187</sup> where a prospective tenant tried to use a New York City housing subsidy for persons with HIV/AIDS and was refused by the defendant-

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181. Complaint at 1–2, 6–7, No. 5:13-CV-02390 (N.D. Cal. May 28, 2013) (alleging FHA-impact claims based on race, sex, familial status, and disability, as well as FHA-based intent and interference claims).

182. Transcript of Proceedings at \*5, *Jones*, No. 5:13-CV-02390, 2015 WL 5091908 (May 7, 2015).

183. *Id.*

184. 113 F. Supp. 3d 555 (D. Conn. 2015). The plaintiffs alleged FHA-impact claims based on race and national origin, and source-of-income claims under Connecticut's fair-housing law, all of which survived the defendant's motion to dismiss. *Id.* at 558–60. After the court denied that motion, the parties settled the case for \$475,000 and injunctive relief. *See* Consent Decree at 2, *Viens v. Am. Empire Surplus Lines Ins. Co.*, 3:14-cv-00952-JBA (D. Conn. Aug. 31, 2015).

185. 261 F. Supp. 3d 20 (D.D.C. 2017). The complaint alleged FHA violations of race, sex, and familial-status discrimination based on the claim that families using vouchers in the D.C. area are "disproportionately headed by African-American women." *Id.* at 23. The court denied the defendants' motion to dismiss, *id.* at 35, and the parties subsequently settled for \$450,000 and injunctive relief. *See National Fair Housing Alliance Settles Disparate Impact Lawsuit with Travelers Indemnity Company*, NAT'L FAIR HOUSING ALLIANCE (Feb. 23, 2018), <https://nationalfairhousing.org/2018/02/23/travelers/> [<https://perma.cc/FB5L-YYMN>]; *see also* Sisemore v. Master Fin., Inc. 60 Cal. Rptr. 3d 719, 724–25 (Cal. Ct. App. 2007) (upholding source-of-income claim against a finance company that refused Sisemore a mortgage for a home she intended to use as a day care).

186. *See supra* notes 168, 181, and 185 (describing cases involving allegations of disability, sex, familial-status, and color discrimination).

187. 987 F. Supp. 2d 391 (S.D.N.Y. 2013).

landlord. As in *Kosova Properties*, the plaintiff in *LeFrak* alleged impact-based and intentional discrimination in violation of the FHA and a source-of-income claim under the city's fair housing law, all of which prevailed in a 2013 decision.<sup>188</sup> A year after this ruling, the case was settled for \$262,500.<sup>189</sup>

Another type of FHA-disability impact claim is illustrated by *Fair Housing Rights Center in Southeastern Pennsylvania v. Morgan Properties Management Co., LLC*.<sup>190</sup> There, a large apartment company's requirement that rent be paid on the first day of the month could not be met by tenants who relied on Social Security Disability Insurance ("SSDI") benefits because those benefits did not arrive until later in the month.<sup>191</sup> The plaintiff alleged both impact and reasonable-accommodation claims under the FHA, both of which survived the defendants' motion for summary judgment.<sup>192</sup> As for the impact claim, the court held that the plaintiff established a prima facie case of disparate impact against disabled persons<sup>193</sup> and that fact issues

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188. Complaint at 18–22, *Fair Hous. Justice Ctr., Inc. v. Kosova Properties, Inc.*, No. 1:16-cv-03537 (S.D.N.Y. May 12, 2016); *LeFrak Org.*, 987 F. Supp. 2d at 401–02, 404; *see also* *Cales v. New Castle Hill Realty*, 1:10-cv-03426-DAB-KNF, 2011 WL 335599, at \*1 (S.D.N.Y. Jan. 31, 2011) (denying the defendant's motion to dismiss plaintiff's claim that landlord refused prospective tenant because she used the city's disabled-person housing subsidy). In upholding the FHA-impact claims in *LeFrak*, the court noted that the complaint states:

[A]s of 2010, New York City had a population of approximately eight million individuals, the HIV population in New York City was approximately 67,000 people, 49% of which are HASA [HIV/AIDS Services Administration] clients, the "vast majority" of which utilize a HASA housing subsidy. This adequately puts defendants on notice that plaintiffs' alleged basis for disparate impact is that the percentage of the HIV population in New York City on housing subsidies exceeds the percentage of the non-HIV New York City population on housing subsidies.

987 F. Supp. 2d at 402–03.

189. See Settlement Agreement at 9, *Chacon v. LeFrak Org.*, No. 1:13-CV-02759 (S.D.N.Y. Aug. 20, 2014).

190. No. 16-4677, 2018 WL 3208159 (E.D. Pa. June 29, 2018).

191. *Id.* at \*1.

192. *Id.* at \*5–11.

193. The plaintiff's expert noted that "many if not most SSDI recipients live benefit check to benefit check while being tied to the government's disbursement schedule, and so are unable to rent apartments from Defendants which they would otherwise be able to afford." *Id.* at \*10. The court continued:

FHRC argues that nearly all SSDI recipients, or close to one-hundred percent, are negatively impacted by this policy. It seems clear that this policy does not impact non-disabled but otherwise

remained as to whether a less discriminatory alternative could serve the defendants' legitimate business interests.<sup>194</sup> Similarly, in 1996, in *Ryan v. Ramsey*,<sup>195</sup> the court upheld FHA impact and intent claims against a Texas landlord who rejected the plaintiff because his income came from SSDI and he did not have a job.<sup>196</sup> In the same vein is *Connecticut Fair Housing Center, Inc. v. Rosow*,<sup>197</sup> which involved a FHA-disability claim based on the impact theory that challenged a Hartford landlord's "Must Be Employed" requirement.<sup>198</sup> And in recent years, HUD and

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similarly situated tenants at any rate even close to one-hundred percent. Therefore, FHRC has established a prima facie case of disparate impact.

*Id.* at \*10–11.

194. *Id.* at \*11. The court rejected the defendants' proffered legitimate reasons for the policy:

[The defendants] argue that they have imposed their challenged rental policy because their business model is set up to receive rent in the beginning of the month, all of their systems are coordinated to collect rent on the first of the month, and making their properties' mortgage payments and utility bills requires a certain amount of cash reserves which would be upset by variable rental due dates. These are legitimate, non-discriminatory reasons for their stated policy.

Defendants have failed to show[, however,] that any alternatives to their inflexible policy would impose an undue hardship under the circumstances of this specific case. [Plaintiff]'s proposed alternative is to institute a flexible, fact-specific, individualized assessment for each SSDI recipient who requests a changed due date based on their benefits schedule. Defendants argue that this proposed alternative would fundamentally alter their business and create undue financial and administrative hardship. Defendants offer little substantive evidence to support their argument. They offer no real calculation of the cost of changing this policy, and . . . their "fundamentally altered business practices" arguments are contradicted by the evidence submitted by [plaintiff] that Defendants already make similar accommodations for many of their tenants.

*Id.* at \*10–11.

195. 936 F. Supp. 417 (S.D. Tex. 1996).

196. *Id.* at 423–27. In upholding the impact claim, the court noted that "an individual's status as a Social Security disability benefit recipient is inextricably linked to his status as a disabled person." *Id.* at 427.

197. *See* Complaint at 1, No. 3:10-cv-01987-MRK (D. Conn. Dec. 17, 2010).

198. *Id.* at 8. This case settled in 2013 for \$150,000. *See* Jenna Carlesso, *Property Manager Settles Fair Housing Lawsuit*, HARTFORD COURANT (May 15, 2013), <https://www.courant.com/community/hartford/hc-xpm-2013-05-15-hc-hartford-settlement-0516-20130515-story.html> [<https://perma.cc/TQ4G-HZB5>].

other federal agencies with regulatory authority over mortgage providers have issued guidance designed to curb similar types of discrimination against SSDI recipients.<sup>199</sup>

The FHA has also been invoked in non-disability cases.<sup>200</sup> A prominent example is *Gilligan v. Jamco Development Corp.*,<sup>201</sup> where the Ninth Circuit upheld FHA impact and intent claims based on familial status that challenged a landlord's refusal to accept tenants receiving Aid-to-Families-with-Dependent-Children ("AFDC") benefits, which only go to families with children.<sup>202</sup>

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199. See CONSUMER FINANCIAL PROTECTION BUREAU, BULLETIN 2014-03, SOCIAL SECURITY DISABILITY INCOME VERIFICATION 4 (2014) (describing HUD and other agencies' guidance to lenders that they should consider SSDI benefits "likely to continue," and thus they "should not request additional documentation from the borrower to demonstrate continuance" of such income); see also *id.* at 2–3 (describing similar CFPB advice regarding lenders' obligations under the Equal Credit Opportunity Act and its implementing regulations).

200. See cases cited *supra* notes 181, 185, and *infra* note 202.

201. 108 F.3d 246 (9th Cir. 1997).

202. *Id.* at 248–51; see also *Green v. Sunpointe Assocs., Ltd.*, No. C96-1542C, 1997 WL 1526484, at \*1, \*7 (W.D. Wash. May 12, 1997) (ruling in favor of a Section 8 tenant class's FHA-impact claims against their landlord who sought to evict them as part of a decision to stop participating in the program). Statistics played an important role in the court's ruling:

The figures show that extremely high percentages (81.1 to 100[%]) of members of the protected classes at issue belong to the group of current Section 8 tenants who would be excluded from [defendant's complex] Avalon Ridge . . . . The figures show a similarly high percentage (49.3 to 84.8[%]) of these protected class members among prospective Section 8 tenants who are registered with the [local housing agency]. Moreover, the figures demonstrate that the percentage of protected class members among both current and prospective tenants are substantially higher than the percentages of those groups in the general populations of Renton and the Seattle metropolitan area.

Plaintiff also presents figures . . . regarding the rates at which members of the protected classes and members outside the protected classes are impacted. Plaintiff's numbers indicate that the no-Section 8 policy would have terminated the leases of 13.5[%] of the African-American tenancies at Avalon Ridge, but would have terminated the leases of only 6.7[%] of the Caucasian households. More tellingly, the policy would have evicted 17.5[%] of the households with children, but would have evicted 0[%] of the households without children. Finally, plaintiffs maintain that the policy would have evicted 31.9% of the households headed by women, but would have evicted 0[%] of the households headed by men.

*Id.* at \*5 (footnotes omitted). The court also held that the defendant's proffered justification for its new anti-voucher policy was inadequate and

#### 4. Disability: Reasonable Accommodation Claims

In some of the disability-impact cases discussed in the previous section, the plaintiffs also asserted a claim based on the FHA's reasonable-accommodation ("RA") mandate, which requires housing providers to modify their rules and policies in order to provide equal housing opportunities for persons with disabilities.<sup>203</sup> The judicial response to these RA claims has been mixed, in part because, in contrast to impact claims that focus on a challenged policy's broad statistical effect, RA claims generally depend on the particular facts of a disabled person's situation.<sup>204</sup>

One example of a plaintiff's successful RA claim is *Edwards v. Gene Salter Properties*.<sup>205</sup> There, the Eighth Circuit reversed summary judgment against would-be tenants who received SSDI benefits and thus could not show pay stubs, tax returns, or other indicia of financial worthiness required by the defendant-landlord.<sup>206</sup> The appellate court concluded that "the requested accommodation was necessary and reasonable" and that the defendant's suggested alternatives of "allowing a co-signer or prepaying the full lease term were not substitutes for accommodating plaintiffs, who had sufficient income to rent the apartment, because those options did not level the playing field but instead posed an additional burden on the disabled applicant."<sup>207</sup>

By way of contrast, a FHA-RA claim failed in *Batista v. Cooperativa de Vivienda Jardines de San Ignacio*,<sup>208</sup> where a disabled tenant whose Section 8 benefits no longer qualified her to stay in a three-bedroom apartment sought to remain there without paying the full rent. The First Circuit upheld the landlord's denial of this request:

[T]he Cooperativa[']s denial] rested solely on Batista's inability to pay, which she appears to concede arises only from her need for

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that genuine issues remained as to plaintiff's intentional-discrimination claims. *Id.* at \*7.

203. See 42 U.S.C. § 3604(f)(3)(B) (2018).

204. See SCHWEMM, *supra* note 11, § 11D:8 n.12 and accompanying text.

205. 739 F. App'x 357 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1271 (2019).

206. *Id.* at 358 ("Plaintiffs could not provide the required documentation because their only sources of income were social security disability income (SSDI), retirement benefits, and rental income. Plaintiffs offered to provide proof of these income sources, but defendants refused to accept such proof.").

207. *Id.* On remand, the district court ruled in favor of the plaintiff's reasonable-accommodation claim and awarded her \$1,380 in damages. *Edwards v. Gene Salter Props.*, No. 4:15CV00571, 2019 WL 2651109, at \*1 (E.D. Ark. June 27, 2019).

208. 776 F.3d 38 (1st Cir. 2015).



federal rental support . . . . [S]he does not contend the denial . . . resulted from any policy of the Cooperativa that would prevent her from acquiring the funds necessary to make the rent, which she does not contend must be lowered.<sup>209</sup>

The mixed results in FHA-RA cases also reflect a judicial split in principle between the Second and Ninth Circuits. In *Salute v. Stratford Greens Garden Apartments*,<sup>210</sup> a divided panel of the Second Circuit ruled against FHA and other claims by two disabled plaintiffs who received Section 8 assistance and were rejected by a large apartment complex in suburban New York that did not accept applicants with vouchers.<sup>211</sup> The majority held that the defendants did not violate the FHA-RA mandate by not accepting plaintiffs' Section 8 vouchers,<sup>212</sup> because a landlord's participation in the voucher program was sufficiently burdensome to render the plaintiffs' request unreasonable<sup>213</sup>

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209. *Id.* at 43 (citing *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir.1998) (“impecunious people with disabilities stand on the same footing as everyone else”). The court found no evidence of intentional disability discrimination, but it upheld the plaintiff's retaliation claim. *Id.* at 43–45.

210. 136 F.3d 293 (2d Cir. 1998).

211. *Id.* at 297–302. In addition to their FHA-RA claim, the plaintiffs asserted a FHA-disability impact claim and a claim under Section 8's “Take One, Take All” requirement, all of which the majority rejected. *Id.* Judge Calabresi vigorously disagreed with all three rulings. *See id.* at 302–13 (Calabresi, J., dissenting).

212. *Id.* at 299–302 (majority opinion).

213. The court reasoned:

We think . . . the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords, either as an accommodation to handicap or otherwise . . . . A landlord may consider that participation in a federal program will or may entail financial audits, maintenance requirements, inspection of the premises, reporting requirements, increased risk of litigation, and so on . . . . Moreover, the Section 8 program could end, leaving the landlord with the dilemma of evicting the participating tenants or keeping tenants who lack the wherewithal to pay the full rent—both major commercial risks.

The landlord here explained the refusal to accept Section 8 tenants in terms of a general reluctance to become involved with the federal government and its rules and regulations . . . .

In short, it is easy to conclude that, for landlords who reject voluntary Section 8 participation, the contract with the federal government, the retention of counsel to make the Section 8 arrangements, the requirements for compliance, and the limitations on use (actual and potential), are “unreasonable costs,” an “undue hardship,” and a “substantial burden,” which

and, more fundamentally, that the plaintiffs were inappropriately claiming “an entitlement to an accommodation that remedies their economic status” rather than their disabilities.<sup>214</sup> The *Salute* majority deemed it “fundamental that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps,”<sup>215</sup> concluding that the FHA-RA mandate “does not elevate the rights of the handicapped poor over the rights of the non-handicapped poor.”<sup>216</sup>

Five years later, the Ninth Circuit took a decidedly different approach in *Giebler v. M & B Associates*.<sup>217</sup> The landlord there did not refuse vouchers, but it did require prospective tenants to have a gross income of at least three times the monthly rent, a standard that the plaintiff, who received SSDI and other disability benefits and support from his mother, could not meet.<sup>218</sup> The plaintiff’s mother offered to rent the apartment or serve as a co-signer for her son, but the landlord rejected this proposal, citing a policy against allowing co-signers on leases, and then refused to waive this policy as an accommodation for the plaintiff.<sup>219</sup> The district court granted summary judgment for the landlord on the plaintiff’s FHA-RA claim,<sup>220</sup> but the Ninth Circuit reversed in an opinion that specifically “reject[ed] the

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are not required by the [FHA]’s reasonable accommodation provision.

*Id.* at 300–01 (citation omitted). Judge Calabresi, on the other hand, argued that the FHA-RA analysis required a fact-based balancing of both the landlord’s and the disabled applicants’ interests. *Id.* at 311 (Calabresi, J., dissenting).

214. *Id.* at 301–02 (majority opinion).

215. *Id.* at 301.

216. *Id.* at 302 (“Congress could not have intended the [FHA] to require reasonable accommodations for those with handicaps every time a neutral policy imposes an adverse impact on individuals who are poor . . . . Economic discrimination—such as the refusal to accept Section 8 tenants—is not cognizable as a failure to make reasonable accommodations, in violation of § 3604(f)(3)(B).”).

The dissent noted that the plaintiffs claimed “their disabilities prevent them from working, which necessarily makes them poor,” and thus they rely on Section 8 “as a direct result of their handicap.” *Id.* at 310 (Calabresi, J., dissenting).

217. 343 F.3d 1143 (9th Cir. 2003).

218. *Id.* at 1145.

219. *Id.* at 1145–46.

220. *Id.* at 1146. In addition, the district court allowed the plaintiff’s disability-intent claim to proceed, but dismissed his other claims. *Id.* Thereafter, the parties settled all claims except for the FHA-RA one, the dismissal of which plaintiff appealed. *Id.* at 1146 n.1.

reasoning of *Salute*.<sup>221</sup> The appellate court reasoned that “Giebeler’s request that he be permitted to reside in an apartment rented by his financially qualified mother is a request for an accommodation that . . . he was entitled to receive,” provided two other key elements of a FHA-RA claim were met.<sup>222</sup> The Ninth Circuit ruled that they were, holding that “defendants’ relaxation of their no cosigner policy ‘may be necessary’ to afford Giebeler equal opportunity” in housing<sup>223</sup> and that the requested accommodation was “reasonable.”<sup>224</sup> The court concluded: “Giebeler’s modest request that his financially qualified mother be allowed to rent an apartment for him to live in, affording him the opportunity to live in a suitable dwelling despite his disability, . . . should have been honored.”<sup>225</sup>

Although the RA requested in *Giebeler* differed from the one in *Salute*,<sup>226</sup> the two opinions reflect a fundamental disagreement about

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221. *Id.* at 1154, 1159.

222. *Id.* at 1155.

223. *Id.* at 1156.

224. *Id.* at 1156–59. In reaching this conclusion, the Ninth Circuit noted that the purpose of the defendants’ “minimum income requirement is to ensure that tenants have sufficient income to pay rent consistently and promptly. This interest is, of course, considerable.” *Id.* at 1157. But the court held that this interest is protected so long as *someone* can meet the financial requirements on the tenant’s behalf:

[A]llowing a financially eligible relative to rent an apartment for a disabled individual who, except for his current financial circumstances, is qualified to be a tenant does not unreasonably threaten this interest. The rental arrangement requested by Giebeler would not require [defendant] Branham to accept less rent, would not otherwise alter the essential obligations of tenancy at Branham (such as appropriate behavior and care of the premises), and would provide a lessee with the proper financial qualifications and credit history.

*Id.*; see also *id.* at 1159 (noting that “Giebeler was in no way trying to avoid payment of the usual rent for the apartment he wanted to live in, nor was he proposing to leave [defendants] without a means of ascertaining that an individual with the means to pay that rent would be responsible for doing so”).

225. *Id.* at 1159.

226. The court noted that the RAs differed in two potentially significant ways:

In *Salute*, the accommodation requested was waiver of an established policy against accepting vouchers under Section 8 . . . as payment for the rent. *Salute* emphasized that Congress had recognized the considerable bureaucratic entanglement entailed by Section 8 and consequently included in Section 8 an explicit policy against compelling landlords to accept Section 8 tenants. Here, conversely, the [FHA] . . . appears affirmatively to protect arrangements whereby a disabled person lives in an apartment rented by another.

how to evaluate a FHA-RA claim involving a prospective tenant's source of financial support. Courts outside the Second and Ninth Circuit are divided over which approach to follow.<sup>227</sup>

#### 5. Intentional Discrimination Claims

Some of the cases discussed in the previous sections have also upheld claims of intentional discrimination based on race or other FHA-prohibited factors.<sup>228</sup> Evidence of such discrimination in source-of-income cases may take either of two forms. First, to the extent that the defendant's policy is shown to have an unjustified negative impact on minorities, this fact may be an indicator of the defendant's illegal intent under the familiar analysis of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>229</sup> An example is *Williams v. City of Antioch*,<sup>230</sup> where a California municipality's hostility to Section 8 users was alleged to be race-based.<sup>231</sup> Second, a defendant's source-of-income policy may be shown to have been applied in a discriminatory manner (e.g., black Section 8 users were rejected while comparable whites were accepted). In *Bronson v. Crestwood Lake Section 1 Holding*

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Additionally, unlike the tenants in *Salute*, Giebeler proffered a proposed lessee, Ann Giebeler, who more than met the economic qualifications required to rent at [defendants' property] and demanded no special, burdensome rights as a condition of her tenancy. In contrast, the *Salute* court was concerned that "participation in a federal program will or may entail financial audits, maintenance requirements, increased risk of litigation, and so on."

*Id.* at 1158 n.12 (citations omitted).

227. *Compare* Fair Hous. Rights Ctr. in Southeastern Pennsylvania v. Morgan Props. Mgmt. Co., No. 16-4677, 2018 WL 3208159 (E.D. Pa. June 29, 2018), *with* Batista v. Cooperativa de Vivienda Jardines de San Ignacio, 776 F.3d 38 (1st Cir. 2015). *Cf.* Edwards v. Hopkins Plaza Ltd. P'ship, 783 N.W.2d 171, 180–81 (Minn. App. 2010) (rejecting, as not "reasonable," disabled tenant's RA request that defendant-landlord accept plaintiff's Section 8 voucher).

228. *See* cases cited *supra* notes 161–162, 167–168, 181, 187, 195–196.

229. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977) (explaining that discriminatory intent in an Equal Protection claim may be proved in part with evidence that the defendant's action had a discriminatory effect). Courts have often applied this analysis in FHA-intent cases. *See* SCHWEMM, *supra* note 11, § 13:12 n.13 and accompanying text.

230. No. C 08-02301 SBA, 2010 WL 3632197 (N.D. Cal. Sept. 2, 2010).

231. *Id.* at \*1–2 (certifying class-action suit asserting both a race-based impact claim for defendants' alleged harassment of local Section 8 renters and an intent claim alleging that this harassment was directed particularly toward African-Americans).

*Corp.*,<sup>232</sup> for example, the court enjoined a landlord's anti-voucher policy based on the policy's racial impact, and also noted that the defendant's harsher application of this policy to the two black plaintiffs suggested intentional racial discrimination.<sup>233</sup>

#### 6. Summary: Mixed Results

Numerous FHA decisions dealing with source-of-income claims have been reported over the past thirty years. Many have survived motions to dismiss or summary judgment motions, and some of these have resulted in substantial settlements for the plaintiffs. Others have failed, some because of the absence of necessary proof and some because the courts took a different view of the proper standards to apply in such FHA claims. Taken together, these decisions provide examples both of the FHA's ability to challenge landlords' policies that oppose vouchers and other non-traditional sources of income and of its failure to eliminate those policies.

### III. AMENDING THE FHA: ARGUMENTS FOR AND AGAINST

#### A. Overview

Many of the arguments both in favor of and opposed to amending the FHA to prohibit source-of-income discrimination have already been identified in the debates and court opinions dealing with state and local

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232. 724 F. Supp. 148, 157–58 (S.D.N.Y. 1989).

233. Regarding the evidence of the defendant's discriminatory intent, the court noted:

[D]efendant's inconsistent articulation and application of its tenant selection policies cast the sincerity of those policies in a somewhat questionable light. Throughout the course of their application process, for example, plaintiffs were never made aware of Crestwood's triple income test. It was not until well after she had submitted her credit check application, moreover, that Bronson was informed of Crestwood's Section 8 policy. Carter . . . was never told that such a policy existed. Indeed, defendant's *post hoc* objections to the Section 8 lease were, themselves, never articulated until after the Temporary Restraining Order hearing, although Crestwood was certainly given an opportunity to present such objections . . . . Moreover, despite these very objections, it does in fact appear that Crestwood currently rents apartment units to four Section 8 recipients. It is not insignificant that all four of these tenants are white.

*Id.* A later decision in this case held that the defendant's anti-voucher policy also violated the FHA's prohibition of familial-status discrimination. *See Glover v. Crestwood Lake Section 1 Holding Corp.*, 746 F. Supp. 301, 310 (S.D.N.Y. 1990).

laws that have previously taken this step.<sup>234</sup> As the variety of these laws shows, the first step in considering their pros and cons is to determine how broadly the ban on this type of discrimination should apply; that is, does it cover just voucher holders in rental situations or does it extend to all types of source-of-income discrimination in a full range of housing-related transactions? The FHA, of course, is not limited to rental transactions.

As for the voucher-only versus all-types-of-income issue, proposals to amend the FHA have included both versions,<sup>235</sup> but the leading proposals call for a broad amendment that bans all source-of-income discrimination and specifically includes vouchers within its definition of this term.<sup>236</sup> A related issue—one that the states have taken different approaches to—is whether such an amendment should allow landlords to rely on their antagonism to voucher-program requirements as a defense in a voucher-holder-discrimination claim.<sup>237</sup> For the purposes of this discussion, we will assume that the FHA amendment under consideration provides for the broadest possible coverage, including explicitly foreclosing such a defense.

#### *B. Arguments For*

A number of goals have been articulated for the various state and local source-of-income laws. Their basic objective is “to curb discrimination against individuals paying rent with non-traditional sources.”<sup>238</sup> Relatedly, they aim to increase the success rate of low-income families who use government vouchers in obtaining housing.<sup>239</sup> This, in turn, would lead to the de-concentration of poverty and more economically

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234. *See supra* Part I.C.

235. *See infra* app. III.

236. *See id.*

237. *See supra* notes 107–108 and accompanying text.

238. Tamica H. Daniel, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L. J. 769, 778 (2010); *see also* Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1106 (N.J. 1999) (noting that New Jersey’s source-of-income-law’s purpose was “to protect from housing discrimination welfare recipients, spouses dependent on alimony and child support payments and tenants receiving governmental rental assistance”).

239. *See, e.g.*, CUNNINGHAM ET AL., *supra* note 86, at 11–12 (noting a lower voucher-denial rate in jurisdictions with voucher non-discrimination laws); BELL ET AL., *supra* note 97, at 1 (“Voucher non-discrimination laws appear to be associated with substantial reductions in the share of landlords that refuse to accept vouchers.”); J. Rosie Tighe et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LIT. 3, 8 (2017) (“Early research shows promise for SOI antidiscrimination laws both increasing the likelihood of HCV recipients finding a place to live and moving to a higher-opportunity neighborhood.”).

mixed neighborhoods,<sup>240</sup> because voucher holders would not be relegated to high-poverty, low-opportunity areas.<sup>241</sup> Stated more broadly, barring source-of-income discrimination is designed to provide greater opportunities generally for low-income individuals, giving them more housing choices and making it more likely they will obtain decent homes.<sup>242</sup>

In addition, these laws outlaw a form of discrimination that disproportionately harms many of the classes protected by existing fair housing laws.<sup>243</sup> This is particularly true of racial minorities,<sup>244</sup> which means that banning source-of-income discrimination would advance the FHA's goals of reducing racial discrimination and barriers to residential integration.<sup>245</sup> An analogous situation occurred in 1988 when Congress added "familial status" to the FHA's prohibited bases of discrimination, which was done in part because discrimination against families with children was being used as a proxy for racial and national-origin discrimination.<sup>246</sup> Other FHA-protected groups would also benefit from

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240. *See supra* notes 87–88 and accompanying text.

241. *See, e.g.,* *City of Austin v. Paxton*, 325 F. Supp. 3d 749, 753 (W.D. Tex. 2018) (noting that one of the Austin ordinance's purposes was to prevent "relegat[ing] voucher holders to lower opportunity areas of the City"); *see also* Daniel, *supra* note 238, at 784.

242. *See, e.g.,* *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 248 (Conn. 1999) (noting that Connecticut's law was "designed to provide that low income families 'may not be rejected or denied a full and equal opportunity'" for housing based on their lawful source of income); *see also* Daniel, *supra* note 238, at 784.

243. *See, e.g., Paxton*, 325 F. Supp. 3d at 753 (noting that one of the Austin ordinance's purposes was to prevent a practice that "disproportionately impacts minority residents, children, and the disabled"); *see also* Austin K. Hampton, *Vouchers as Veils*, 1 U. CHI. LEGAL F. 503, 525 (2009) (concluding that "mak[ing] actionable the practice of refusing housing choice vouchers . . . ensures that the protected classes currently defined are not discriminated against under the veil of [voucher] nonparticipation").

244. *See* CHI. LAWYERS' COMM. FOR CIVIL RIGHTS, *supra* note 143 (reporting that landlords who advertise "No Section 8" are more likely to discriminate against African-American renters); MICHAEL LEPLEY & LENORE MANGIARELLI, THE HOUSING CTR., HOUSING VOUCHER DISCRIMINATION AND RACE DISCRIMINATION IN CUYAHOGA COUNTY 20 (2017) (reporting the same), *available at* <http://www.thehousingcenter.org/wp-content/uploads/2017/12/Voucher-and-Race-Discrimination.pdf> [<https://perma.cc/DF9G-EEFN>].

245. *See, e.g.,* LEPLEY & MANGIARELLI, *supra* note 244, at 9–10 (reporting that the majority of voucher holders are concentrated in racially segregated areas).

246. *See* H.R. REP. NO. 100-711, at 21 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2182 (describing FHA cases in which defendants accused of racial discrimination claimed that they refused to deal with the

outlawing source-of-income discrimination, particularly disabled persons, women, and families with children.<sup>247</sup>

Adding source-of-income as a prohibited basis of discrimination would also help resolve a number of FHA issues that have divided the courts. One prominent example is the *Salute/Geibeler* dispute over whether a landlord's discriminatory source-of-income policy should be waived in favor of a disabled tenant's reasonable-accommodation claim;<sup>248</sup> banning source-of-income discrimination would allow disabled tenants to prevail in this situation without having to litigate a RA request. Similarly, the need for impact-based claims as a predicate to a source-of-income challenge would end, thereby eliminating a type of claim that has produced mixed judicial responses.<sup>249</sup> Other FHA issues would also be clarified or resolved, such as whether a landlord's announced "No Section 8" policy violates the statute's ban on discriminatory ads and statements.<sup>250</sup>

### *C. Arguments Against*

The main push-back against a source-of-income amendment is likely to come from rental-housing providers, who have been the target of most source-of-income claims.<sup>251</sup> In particular, landlords have often objected to their forced participation in the "voluntary" Section 8 program,<sup>252</sup> which they see as imposing a variety of bureaucratic difficulties and costs on them.<sup>253</sup> A number of courts have endorsed

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plaintiffs because the plaintiffs had children); 134 CONG. REC. H4688 (daily ed. June 23, 1988) (statement of Rep. Jeffords Dellums) (noting that one purpose of the familial-status amendment was to eliminate a form of discrimination that has a negative effect on black and Latino households and that "is often used as a smokescreen to exclude minorities from housing").

247. *See supra* Part II.B.3.

248. *See supra* notes 210–227 and accompanying text.

249. *See supra* Part II.B.2–.3.

250. *See infra* Part IV.C.

251. *See supra* notes 134–139 and accompanying text.

252. *See supra* note 83 and accompanying text; *see also* CUNNINGHAM ET AL., *supra* note 86, at 10–12 (noting that a significant percentage of landlords oppose participating in the voucher program).

253. *See, e.g.*, PHILIP GARBODEN ET AL., JOHNS HOPKINS U. POVERTY & INEQ. RES. LAB, URBAN LANDLORDS AND THE HOUSING CHOICE VOUCHER PROGRAM 26–31 (2018), *available at* <https://www.huduser.gov/portal/sites/default/files/pdf/Urban-Landlords-HCV-Program.pdf> [<https://perma.cc/WM6N-7DRV>] (recounting some of the difficulties for landlords in participating in the Section 8 program); LEPLEY & MANGIARELLI, *supra* note 244, at 7 (reporting that over 50% of the landlords who participated in the voucher program "reported dissatisfaction with [it]").



their objections.<sup>254</sup> For example, in 2017, a federal judge in Texas rejected a FHA race-impact challenge to a landlord's anti-voucher policy, noting that the defendant's desires to avoid Section 8's "regulatory requirements" and to not "be subjected to increased costs, administrative delays for payment, and various other financial risks," along with "the possibility of increased litigation," all were "substantial, legitimate, nondiscriminatory interests."<sup>255</sup>

Some of these concerns can be discounted. For one thing, the FHA's exemptions for single-family and "Mrs. Murphy" landlords,<sup>256</sup> who account for almost half of all units rented in the United States,<sup>257</sup> mean that these exempt housing providers would not be subject to a FHA ban on source-of-income discrimination.<sup>258</sup> Further, those landlords who are covered by the FHA would not thereby be required to participate in the Section 8 program. As courts construing state and local source-of-income laws have noted: "Landlords remain free not to rent to voucher holders provided they do so on other legitimate, non-discriminatory grounds, such as an applicant's rental history or criminal history."<sup>259</sup> Indeed, given the HCV program's ceiling on assistance

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254. *See, e.g.*, cases discussed *supra* note 213.

255. *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, No. 3:17-CV-206-K, 2017 WL 2984048, at \*11 (N.D. Tex. July 13, 2017), *aff'd*, 920 F.3d 890 (5th Cir.), *reh'g and reh'g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1234 (2020).

256. *See* 42 U.S.C. § 3603(b) (2012) (providing exemptions under certain circumstances for single-family-home rentals and for units in buildings where the owner lives and that contain four or fewer units).

257. *See* JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING 2017, at 14 (2017) (reporting that single-family homes make up 39% of the nation's rental units and another 18% are located in two-to four-unit multifamily buildings), *available at* [http://www.jchs.harvard.edu/sites/default/files/harvard\\_jchs\\_americas\\_rental\\_housing\\_2017\\_0.pdf](http://www.jchs.harvard.edu/sites/default/files/harvard_jchs_americas_rental_housing_2017_0.pdf) [<https://perma.cc/X9F5-LG6B>].

258. These exempt landlords would, however, be subject to the ban on discriminatory advertising and statements in 42 U.S.C. § 3604(c) (2012). *See* SCHWEMM, *supra* note 11, § 15:1 nn.10–11 and accompanying text. For more on the FHA's ban on such ads and statements, see *infra* Part IV.C.

259. *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 87 (D.D.C. 2008) (citing *Montgomery Cnty. v. Glenmont Hills Assocs.*, 936 A.2d 325, 330 (Md. 2007)); *see also* Waller, *supra* note 100, at 433 (noting that "the realities of the Section 8 program [are such that] landlords may still reject tenants for non-discriminatory reasons").

payments,<sup>260</sup> landlords whose units rent for higher amounts would simply be beyond the reach of voucher users.<sup>261</sup>

And housing providers who do participate in the HCV program enjoy some benefits that might at least partly offset the perceived burdens. Voucher holders are incentivized to maintain their vouchers and to pay rent on time, and the government-assisted rent payments are reliable.<sup>262</sup> Further, participating landlords remain free to charge their regular rents, security deposits, and other fees, and can use their regular screening criteria regarding tenant history.<sup>263</sup> Such landlords can also evict voucher users for “good cause,” just as they do all other tenants.<sup>264</sup>

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260. See *supra* notes 66–67 and accompanying text.

261. See, e.g., *Bourbeau*, 549 F. Supp. 2d at 87; see also Waller, *supra* note 100, at 433 (“[I]f a unit’s fair market value rent exceeds the area median, the property is too expensive for a Section 8 recipient and the landlord may not participate in the program.”). This assumes that landlords charge higher rents on a non-discriminatory basis; that is, not just to voucher users—a practice that would, of course, violate a ban on source-of-income discrimination. See *id.*

An additional issue is whether a landlord could set rents too high for voucher users *just* to avoid dealing with them. Some FHA decisions have found a defendant liable when he used otherwise legitimate economic methods to block a protected-class-member’s opportunity to obtain housing. See, e.g., *Phillips v. Hunter Trails Cmty. Ass’n*, 685 F.2d 184, 187 (7th Cir. 1982); see also *infra* note 286. As the Sixth Circuit recently noted: “The existence of economic . . . motivations does not protect the defendants from housing discrimination claims when their actions had a clear discriminatory effect. Economic motivation does not cleanse discrimination.” *Linkletter v. W. & S. Fin. Grp., Inc.*, 851 F.3d 632, 640 (6th Cir. 2017); see also *infra* Part IV.G.3 (discussing the implications of a source-of-income amendment on gentrification, e.g., by landlords who raise rents after upgrading their properties).

262. See *BELL ET AL.*, *supra* note 97, at 13–14; see also Hampton, *supra* note 243, at 525 (noting that landlords that participate in the voucher program benefit from having “an increased pool of available tenants” and a “guarantee of income” by the government).

263. See, e.g., *BELL ET AL.*, *supra* note 97, at 12–13.

264. See 24 C.F.R. § 982.310(d)(1) (2018). “Good cause” to evict a tenant includes:

- (i) Failure by the family to accept the offer of a new lease or revision;
- (ii) A family history of disturbance of neighbors or destruction of property, or of living or housekeeping habits resulting in damage to the unit or premises;
- (iii) The owner’s desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or

Still, landlords faced with a national mandate not to discriminate against voucher holders would no doubt incur some additional costs and burdens.<sup>265</sup> Would this provide a defense to a FHA claim based on refusing to rent to such tenants? Stated another way: would a landlord violate the FHA if her refusal was prompted by both an outlawed reason (e.g., source of income) and a legitimate one (e.g., avoiding regulatory burdens)? The problem is exacerbated by the fact that this “mixed motive” issue, historically, has been a difficult one in FHA cases, and it remains so today.<sup>266</sup>

As noted above, the administrative-burden defense has been addressed a number of times and in different ways by states and localities with source-of-income laws.<sup>267</sup> Their courts have generally not allowed such a defense, because to allow it would create such a large exception as to essentially nullify these laws.<sup>268</sup> A FHA amendment would presumably need to do the same,<sup>269</sup> both to avoid needless litigation under the new mandate and to allow the law to fully achieve its goal of banning discrimination against voucher-assisted families.

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(iv) A business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental).

*Id.*

265. *See supra* notes 213, 255 and accompanying text.

266. *See* SCHWEMM, *supra* note 11, § 10:3 nn.23–37 and accompanying text. Congress, in the 1991 amendments to Title VII, clarified the mixed-motive issue for employment discrimination cases, but not for cases brought under other statutes, thereby leaving the FHA standard for this type of case uncertain. *See id.* § 10:3 n.25 and accompanying text; *see also* Gross v. FML Fin. Servs., Inc., 557 U.S. 167 (2009) (declining to apply Title VII’s amended mixed-motive standard to a claim under the Age Discrimination in Employment Act).

267. *See supra* notes 107–108 and accompanying text.

268. *See* cases cited *supra* note 107. Other cases rejecting landlords’ administrative-burden defenses in source-of-income claims based on state and local laws include *Cales v. New Castle Hill Realty*, No. 10 Civ. 3426(DAB), 2011 WL 335599, at \*5 (S.D.N.Y. Jan. 31, 2011) (New York City law), and *Diaz v. Wykurz*, CCHR No. 07-H-28 (Dec. 16, 2009) (Chicago law). *See generally* Armen H. Merijan, *Attempted Nullification: The Administrative Burden Defense in Source of Income Discrimination Cases*, 22 GEO. J. ON POVERTY L. & POL’Y 211, 212–13 (2015) (arguing that allowing an administrative-burden defense would effectively nullify source-of-income laws).

269. One way this could be done is by adding language to the FHA’s definition of source-of-income discrimination similar to that adopted by Massachusetts in 1990, which prohibits discrimination “because of any requirement of such public assistance, rental assistance, or housing subsidy program.” *See* DiLiddo v. Oxford St. Realty, Inc., 876 N.E.2d 421, 428–29 (Mass. 2007).

While the advantages of explicitly dealing with this issue in an amended FHA are apparent, doing so would likely create even more opposition from the housing-provider community. At the very least, therefore, a FHA amendment should be accompanied by congressional and HUD efforts that make the Section 8-participation burdens less onerous on landlords.<sup>270</sup>

In addition to administrative burdens, landlords may object to participating in the Section 8 program based on its perceived added costs.<sup>271</sup> To the extent the added financial burdens are real, a landlord would presumably be able to try to recoup those costs by charging higher rents. This would, of course, have to be done across the board for all tenants, not just for those using vouchers.<sup>272</sup> If banning source-of-income discrimination would, in fact, result in higher rent levels and thus possibly a net loss of affordable-housing units,<sup>273</sup> a legitimate policy issue would be raised. But this added-cost issue has not been a major concern in cities and states that have already banned source-of-income discrimination, and assuming otherwise at the national level is speculative at this stage. Moreover, Congress has previously shown itself willing to impose some modest costs on housing providers when adding new protected classes to the FHA.<sup>274</sup>

#### IV. AN AMENDED FAIR HOUSING ACT – IMPLICATIONS AND APPLICATIONS

The Fair Housing Act “prohibits a wide range of conduct” and is a “far reaching [statute that] . . . takes aim at discrimination that might be found throughout the real estate market and throughout the process

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270. See, e.g., NISAR ET AL., *supra* note 86, at 23–44 (identifying the primary reasons that landlords choose not to participate in the voucher program, and potential improvements to that program to address these reasons, such as increased payment standards, security-deposit assistance, streamlined inspections, and education programs).

271. See *id.* at 23–24. A third concern—having to deal with low-income tenants—is less important, and, in any event, would be illegal under a source-of-income amendment to the FHA. See *id.* at 29.

272. See *supra* note 147 and accompanying text.

273. See *supra* notes 260–261 and accompanying text.

274. See SCHWEMM, *supra* note 11, § 11D:8 n.13 and accompanying text (regarding the reasonable-accommodation requirement in disability cases); H.R. REP. NO. 100-711, at 18 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (regarding the accessibility requirements in disability cases); *cf.* Int’l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 210–11 (1991) (interpreting Title VII’s ban on gender discrimination as not allowing for an extra-cost defense except perhaps in “a case in which costs would be so prohibitive as to threaten the survival of the employer’s business”).

of buying, maintaining, or selling a home.”<sup>275</sup> This Part reviews potential applications of a FHA amendment that would add source-of-income (including vouchers and other forms of governmental assistance) to the statute’s prohibited bases of discrimination. Separate sections cover: (A) refusals to rent and landlords’ other discriminatory practices; (B) exclusionary-zoning policies and other local-government land-use restrictions on affordable housing; (C) discriminatory ads, notices, and statements; (D) sales, mortgage, and home-insurance discrimination; (E) harassment and retaliation; and (F) other applications and issues.

### *A. Rental Discrimination*

#### 1. Overview

As noted above, claims based on state and local housing laws that ban source-of-income discrimination have been brought, almost exclusively, against landlords and their agents.<sup>276</sup> Also, experience in cities with such laws shows that they are not a panacea for this type of discrimination, as substantial non-compliance by housing providers continues years after the law’s enactment.<sup>277</sup> This may not be surprising, in light of the widespread racial discrimination that still occurs in rental markets decades after the FHA’s passage in 1968.<sup>278</sup> Another, more optimistic experience is suggested by the 1988 FHA amendment banning familial status discrimination,<sup>279</sup> which initially resulted in large numbers of rental complaints, but has since settled into a period of modest litigation that involves mainly a few recurring issues.<sup>280</sup> As in the racial and familial-status areas, compliance with a

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275. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1278–79 (11th Cir. 2019), *vacated on other grounds*, 140 S. Ct. 1259 (2020).

276. *See supra* Part II.A.1.

277. *See supra* notes 134–139 and accompanying text.

278. *See supra* notes 140–143 and accompanying text.

279. *See supra* note 19 and accompanying text.

280. In the early 1990s, familial status was the second-most frequently claimed basis of discrimination in FHA complaints to fair-housing agencies, accounting for 35.4% of the total claims in FY 1992, 26.2% in FY 1993, and 24.7% in FY 1994. *See* U.S. DEP’T OF HOUSING & URBAN DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS 14 (1996). In recent years, however, familial-status claims have accounted for just over 10% of total claims. *See* HUD 2017 REPORT, *supra* note 58, at 15 (10.6% in FY 2017); U.S. DEP’T OF HOUSING & URBAN DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS 25 (2016) (12.5% in FY 2015, and 12.4% in FY 2014).

national source-of-income law will likely take some years of litigation and other enforcement and educational efforts.<sup>281</sup>

Source-of-income cases against landlords fall into two categories: (1) those in which the landlord admits its source-of-income discrimination, but tries to justify the practice; and (2) those in which a landlord denies the charge.<sup>282</sup> The latter cases can present a variety of prohibited practices under the FHA, but all of them are governed by well-established principles developed over decades of FHA litigation involving other protected classes;<sup>283</sup> the former requires a more detailed consideration of FHA law.

## 2. Landlord Justifications for Admitted Source-of-Income Discrimination

This type of case would involve facially illegal discrimination, with the litigation focusing on whether the landlord's justification provides a legally sufficient defense. A key issue will be whether the FHA's source-of-income ban includes an explicit provision outlawing a "cost-and-administrative burden" defense in voucher cases; if it does not, as noted above, a good deal of litigation may be expected over this issue.<sup>284</sup>

Even if the amended FHA resolves this particular issue, housing providers may assert other justifications for continuing to engage in source-of-income discrimination. Again, it is worth noting that, in this type of case, it will be easy to prove intentional ("disparate treatment") discrimination. As Judge Posner pointed out some thirty years ago,<sup>285</sup>

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281. See NISAR ET AL., *supra* note 86, at 32–38; see also Memorandum Regarding Source of Income Protections Under Cook County Human Rights Ordinance from Ranjit Hakin, *supra* note 147.

282. See *supra* Part II.A.2.

283. See *supra* notes 146–155 and accompanying text. This includes discriminatory-effect claims, more about which is discussed *infra* Part IV.G.2.

284. See, e.g., cases cited *supra* notes 107–108, 268.

A compromise is also possible, as demonstrated by Congress's decision in the 1988 Fair Housing Amendment Act, which added disability and familial status to the FHA's protected classes and provided a narrow exemption for each of these two newly outlawed bases of discrimination. See 42 U.S.C. § 3604(f)(9) (2012) (providing a "direct threat" defense in disability cases); *id.* § 3607(b)(1)–(3) (2012) (exempting "housing for older persons" from the familial status provisions). In both of these situations, courts have made clear that the exemptions are to be construed narrowly and that a defendant has the burden of showing its situation comes within the exemption. See *infra* note 297 and accompanying text; SCHWEMM, *supra* note 11, § 11D:3 nn.21–22 and accompanying text (regarding the "direct threat" defense); *id.* § 11E:5 n.5 and accompanying text (regarding the "housing for older persons" defense).

285. *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990).

a FHA defendant who acts on the basis of a forbidden factor has engaged in intentional discrimination, even if he has no malice toward the group involved and even if his motivation for such discrimination is economic.<sup>286</sup>

Thus, a would-be tenant who is rejected because he uses a housing voucher will be able to prove “disparate treatment through explicit facial discrimination.”<sup>287</sup> The court will not have to focus on whether the defendant’s obvious discrimination deprived the plaintiff of a housing opportunity,<sup>288</sup> but only on whether the defendant can justify it.

Note that the defendant’s opportunity here is different from that in disparate-impact claims, where a FHA violation is not established until

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286. According to Judge Posner’s opinion in *Dwivedi*:

Suppose a merchant refuses to hire black workers not because he is racist but because he believes that his customers do not like blacks and will take their business elsewhere if he hires any. The refusal is nevertheless discrimination, because it is treating people differently on account of their race. It is intentional discrimination, because it necessarily is based on the merchant’s awareness of racial difference and his decision to base employment decisions on that awareness. And it is actionable discrimination, regardless of its effects and notwithstanding the merchant’s own freedom from racial animus.

The parallel in [the Fair Housing Act] . . . is the broker who refuses to show the customer a property in which the customer is interested and does so not because he dislikes persons of the customer’s race but because he fears being boycotted by persons of a different race if he refuses to abide by the community’s racial mores. Such a broker is discriminating against his customer on grounds of race and therefore violates the statute.

*Id.* at 1530–31; *see also* *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (noting that a FHA plaintiff may prove intentional discrimination “merely by showing that a protected group has been subjected to explicitly differential—i.e., discriminatory—treatment,” and that she is not required to prove the defendant’s conduct was motivated by “malice or discriminatory animus”); *cf.* *Equal Emp’t Opportunity Comm’n v. Dolgencorp, LLC*, 899 F.3d 428, 436 (6th Cir. 2018) (noting that a defendant’s illegal intent could be shown “even if all of the evidence showed that cost-savings, not animus . . . , motivated the company”).

287. *Cornerstone Residence, Inc. v. City of Clairton*, 754 F. App’x 89, 91–92 (3d Cir. 2018) (quoting *Cnty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177 (3d Cir. 2005)); *accord* *Curto v. A Country Place Condo. Ass’n, Inc.*, 921 F.3d 405, 410 (3d Cir. 2019) (“[A] showing of malice is not required ‘where a plaintiff demonstrates that the challenged action involves disparate treatment through explicit facial discrimination . . . . Rather, the focus is on the explicit terms of the discrimination.’”) (quoting *Wind Gap*, 421 F.3d at 177) (alteration in original).

288. *See* *Cornerstone Residence*, 754 F. App’x at 91–92.

the court evaluates the landlord's proffered justification.<sup>289</sup> Indeed, regarding intentional-discrimination claims based on race and some other FHA-prohibited factors, it is not clear that a defendant can *ever* prevail through a justification defense.<sup>290</sup>

Still, in FHA cases based on familial status and disability, some courts have held that, in limited circumstances, defendants may be able to justify their facially discriminatory rules.<sup>291</sup> For example, some FHA cases involving challenges to landlords' rules that restrict children have recognized a "legitimate safety concerns" defense.<sup>292</sup>

The Tenth Circuit's 1995 decision in *Bangerter v. Orem City Corp.*<sup>293</sup> is instructive on this point. There, in the course of reviewing a city's facially discriminatory restrictions on group homes for disabled persons, the court opined that these restrictions might be justified if they were shown to be either required by "public safety" or "benign discrimination" favoring the disabled residents.<sup>294</sup> As to the "public safety" defense, the court noted that the FHA explicitly addresses safety concerns in disability cases by providing that housing need not be "made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."<sup>295</sup> According to the Tenth Circuit, this provision permits landlords to impose "reasonable restrictions on the terms or conditions of housing when justified by public safety concerns,"<sup>296</sup> but, like all

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289. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2522–24 (2015).

290. *See* 24 C.F.R. § 100.500(d) (2017) (explaining in a HUD regulation governing FHA-impact claims that "[a] demonstration that a practice is supported by a legally sufficient justification . . . may not be used as a defense against a claim of intentional discrimination"); *see also* 42 U.S.C. § 2000e-2(k)(2) (2012) (providing that a defendant's "demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination").

291. *See Curto*, 921 F.3d at 412 (Fuentes, J., concurring) (noting that the Sixth, Ninth, and Tenth Circuits found that "in certain circumstances, there may be legal justifications for facial discrimination under the FHA").

292. *See, e.g.,* *Belcher v. The Grand Reserve MGM*, No. 2:15-CV-834-KS-WC, 2019 WL 469900, at \*1 (M.D. Ala. Feb. 6, 2019) (upholding defendant-landlord's rules that facially discriminated against families with children, because they were prompted by "legitimate safety concerns"); *see also* SCHWEMM, *supra* note 11, § 11E:2 n.27.

293. 46 F.3d 1491 (10th Cir. 1995).

294. *Id.* at 1503.

295. *Id.* (quoting 42 U.S.C. § 3604(f)(9) (1994)).

296. *Id.*



other exceptions to the FHA, it “should be narrowly construed.”<sup>297</sup> As to the possible “benign discrimination” defense, the Tenth Circuit opined that the FHA “should not be interpreted to preclude special restrictions upon the disabled that are really beneficial to, rather than discriminatory against, the handicapped.”<sup>298</sup> Yet the court also cautioned against a wholesale acceptance of this defense: “We should be chary about accepting the justification that a particular restriction upon the handicapped really advances their housing opportunities rather than discriminates against them in housing.”<sup>299</sup> Beyond these possible “public safety” and “benign discrimination” justifications, *Bangerter* left open the possibility that other defenses based on such benign motives might also be permissible.<sup>300</sup>

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297. *Id.* Thus:

Restrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents . . . . “Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.” [H.R. REP. NO. 100-711, at 18 (1988).] Any special requirements placed on housing for the handicapped based on concerns for the protection of the disabled themselves or the community must be “individualiz[ed . . . to the needs or abilities of particular kinds of developmental disabilities,” *Marbrunak, Inc., v. City of Stow*, 974 F.2d 43, 47 (6th Cir. 1992), and must have a “necessary correlation to the actual abilities of the persons upon whom it is imposed,” *Pontiac [Grp. Home Corp. v. Montgomery Cty.]*, 823 F. Supp. 1285, 1300 (D. Md. 1993)].

*Id.* at 1503–04. The court did not opine as to whether a defendant accused of intentional disability discrimination could successfully assert “safety concerns” that go beyond those covered by § 3604(f)(9). *Id.* at 1503.

298. *Id.* at 1504.

299. *Id.* Explaining its caution, the Tenth Circuit noted:

Restrictions that are based upon unsupported stereotypes or upon prejudice and fear stemming from ignorance or generalizations, for example, would not pass muster. However, restrictions that are narrowly tailored to the particular individuals affected could be acceptable under the [FHA] if the benefit to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them.

*Id.* On the “benign discrimination” point, the court concluded by recognizing “the importance of leaving room for flexible solutions to address the complex problem of discrimination and to realize the goals established by Congress in the Fair Housing Act.” *Id.* at 1505.

300. *Id.* at 1503 (noting that the “public safety” and “benign discrimination” defenses were among the “potential justifications [that] seem relevant for inquiry here”); *see also* *Larkin v. Mich. Dep’t of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996) (holding that facially discriminatory restrictions on housing for disabled persons violate the FHA unless justified “by the

*B. Exclusionary Zoning*

Throughout the FHA's history, a key part of its litigation has involved challenges to local governments' zoning and other land-use restrictions on affordable housing.<sup>301</sup> In its 2015 decision endorsing the FHA's disparate-impact theory of liability, the Supreme Court referred to these cases as being "at the heartland of" of this theory.<sup>302</sup> The gist of FHA law is that a local government cannot block housing of particular value to minorities if that action is motivated by race or has an unjustified racial effect.<sup>303</sup> And because the 1988 amendments to the FHA banned disability discrimination, the same principles have been applied in numerous cases challenging municipal restrictions on group homes for people with disabilities.<sup>304</sup>

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unique and specific needs and abilities" of people with disabilities) (quoting *Marbrunak*, 974 F.2d at 47).

301. "Affordable housing" is generally understood to mean housing that "requires no more than 30% of a household's income for households earning 80% or less" of the median income in the local metropolitan area. *See* *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 588 n.1 (2d Cir. 2016).
302. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2511 (2015) ("Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability."); *see also id.* at 2521–22 (explaining that FHA-outlawed practices "include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification").
303. *See, e.g., Inclusive Cmty. Project, Inc. v. Lincoln Props. Co.*, 920 F.3d 890, 908 (5th Cir.), *reh'g and reh'g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1234 (2020) (noting that the "heartland" decisions described by the Supreme Court in *Inclusive Communities* "employed the FHA to remove indefensible government policies that operated to perpetuate segregation by *unreasonably* restricting *private* construction of multi-family housing that would increase affordable housing options for minorities"); *Mhany Mgmt.*, 819 F.3d at 606–15; *Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 503–13 (9th Cir. 2016). *See generally* SCHWEMM, *supra* note 11, § 13:8–:10 (describing FHA exclusionary-zoning claims).
304. *See, e.g., Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216–18 (11th Cir. 2008); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573–80 (2d Cir. 2003). *See generally* SCHWEMM, *supra* note 11, § 11D:5 nn.20–21. In addition to disparate-treatment and disparate-impact claims, group homes may also challenge such restrictions based on the defendant's duty to reasonably accommodate housing for disabled persons, a FHA mandate that does not apply to other protected classes. *See, e.g., Schwarz*, 544 F.3d at 1218–28; *Tsombanidis*, 352 F.3d at 578–580; *see also* SCHWEMM, *supra* note 11, § 11D:5 n.22.

But proving a municipality's discriminatory intent or unjustified impact is often difficult, and absent such proof, a challenged restriction is generally upheld.<sup>305</sup> Even when a plaintiff ultimately prevails, the case may take years and millions of dollars to litigate,<sup>306</sup> and even then may not result in the proposed housing actually being built.<sup>307</sup> Thus, while FHA race-based claims challenging municipal restrictions on affordable housing have often succeeded as a matter of law, they have not been all that effective in opening up segregated areas of opportunity to racial minorities. And HUD's long-delayed efforts to use the FHA's "affirmatively furthering" mandate to require local governments to accept more affordable housing has now been derailed by the Trump Administration.<sup>308</sup>

How would a source-of-income amendment to the FHA affect this type of litigation? A typical claim accuses a town of illegal discrimination in blocking a proposed multi-family affordable-housing development. If, for example, the proposal calls for a substantial number of Section 8 units<sup>309</sup> and the developer can show that the town treated market-rate projects more favorably,<sup>310</sup> this would prove at least a prima facie case of intentional source-of-income discrimination.<sup>311</sup> As

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305. See, e.g., *Hallmark Developers, Inc. v. Fulton Cty.*, 466 F.3d 1276, 1283–88 (11th Cir. 2006).

306. See, e.g., *Mhany Mgmt.*, 819 F.3d at 590–91 (describing key events beginning in 2003 in a 2016 appellate decision); *Avenue 6E*, 818 F.3d at 498 (describing key events beginning in 2002 in a 2016 appellate decision); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir.) (describing the dispute's key events beginning in 1981 in a 1988 appellate decision); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1286 (7th Cir. 1977) (describing key events beginning in 1971 in a 1977 appellate decision).

307. See, e.g., *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1037 & n.2 (8th Cir. 1979); see also *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1007, 1009 (7th Cir. 1980) (approving a settlement calling for a different project to be built at an alternative site adjacent to defendant-village).

308. See *Nat'l Fair Hous. Alliance v. Carson*, 330 F. Supp. 3d 14, 22–23, 32–34 (D.D.C. 2018) (describing 2018 HUD directives that effectively blocked key provisions of HUD's "Affirmatively Furthering" regulations promulgated in 2013 by the Obama Administration), *motion to amend denied*, 397 F. Supp. 3d 1 (D.D.C. 2019); see also *supra* notes 22–23 and accompanying text.

309. See, e.g., *Mhany Mgmt.*, 819 F.3d at 597; *Huntington Branch, NAACP*, 844 F.2d at 929–31.

310. See, e.g., *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216–17 (11th Cir. 2008).

311. See, e.g., *Mhany Mgmt.*, 819 F.3d at 606–12; see also SCHWEMM, *supra* note 11, §§ 10:2, 11D:5 nn.45–48 and accompanying text.

in all such intent-based FHA cases, liability would then turn on whether the defendant-town could articulate a non-discriminatory reason for its action (e.g., the site chosen for plaintiff's development is zoned for single-family homes), and if so, whether this rationale is then shown to be merely pretextual.<sup>312</sup>

In most exclusionary-zoning cases, however, the town's illegal intent has not been focused on the developer, but rather the people likely to live in the proposed development, with the town being accused of hostility to the race or other protected-class status of these prospective residents.<sup>313</sup> Under an amended FHA, the alleged violation could be based on the future residents' source of income, as well as their race, national origin, disability, or familial status.

But having a particular source-of-income is not the same as having an income low enough to qualify for affordable housing.<sup>314</sup> Thus, while showing that a town discriminated against a proposed low-income project might demonstrate hostility to the prospective residents' economic status, it would not necessarily prove discrimination based on their source of income.<sup>315</sup> In other words, establishing an intent-based FHA violation in such a case would involve the same types of evidentiary issues that arise in racial-discrimination cases: the plaintiffs would need to produce additional evidence connecting the defendant's hostility to low-income people with a FHA-protected class (e.g., statements by town officials or the public that equate low-income persons with voucher users).<sup>316</sup> A source-of-income FHA amendment would not make this type of intent-based case any easier to win, except for the fact that local officials and citizens may, at least in the early years of such an amendment, be less circumspect about making explicitly hostile remarks about voucher users than racial minorities.<sup>317</sup>

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312. See, e.g., *Mhany Mgmt.*, 819 F.3d at 612–13; see also SCHWEMM, *supra* note 11, §§ 10:2 nn.49–52 and accompanying text, 11D:5 n.49 and accompanying text.

313. See, e.g., *Mhany Mgmt.*, 819 F.3d at 606–07; *Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 503–04 (9th Cir. 2016).

314. See *supra* notes 10–12, 68–70, 188, 198, 218–225, 238, 253–261 and accompanying text.

315. This presumes that the town has not discriminated against the proposed subsidized development vis-à-vis other affordable, albeit non-subsidized, multi-family developments. If it has, then its blocking of the subsidized development might well run afoul of a source-of-income amendment.

316. See, e.g., *Mhany Mgmt.*, 819 F.3d at 608–10; *Avenue 6E*, 818 F.3d at 504–07. See generally SCHWEMM, *supra* note 11, § 13:12 n.21.

317. Such hostile remarks may include code words for FHA-protected class members. See, e.g., *Mhany Mgmt.*, 819 F.3d at 608–11; *Avenue 6E*, 818 F.3d at 505–07; see also *infra* note 334 and accompanying text.

In addition to intent-based claims, the FHA allows for discriminatory-effect claims in exclusionary-zoning cases based on two independent theories: (1) that the defendant-town's action has a disproportionate impact on minorities or other FHA-protected groups; and (2) that the action perpetuates residential segregation based on a FHA-prohibited factor.<sup>318</sup> The former focuses on the fact that the blocked project would include disproportionate numbers of racial minorities, families with children, persons with disabilities, and the like. The success of such a claim depends on statistical proof of this disparate impact.<sup>319</sup> The would also be true under an amended FHA for a claim that persons whose source of income includes government assistance might make up a large portion of the development's residents. In other words, such a claim's success, whether based on source-of-income or some other prohibited factor, would depend on the particular demographics of the local market for the proposed development.<sup>320</sup>

A segregative-effect claim also depends on statistical proof, but its focus is on how the town's current, segregated population would be changed by the influx of hitherto underrepresented groups who are likely to live in the new development.<sup>321</sup> At first blush, it might seem that *every* rich suburb would be subject to liability under this theory—regardless of whether it objects to the project just at a particular site or whether it forbids *all* multi-family housing—because the project would introduce at least *some* low-income people into the town.<sup>322</sup> But, again, this confuses the new residents' economic status with their source of income. If, for example, there is no evidence that the newcomers are likely to have anything but traditional wage-based income (albeit less than the suburb's current residents), then their arrival would not necessarily “integrate” the town vis-à-vis sources of income. Still, if the proposal itself were for a project-based Section 8 development<sup>323</sup>—

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318. See SCHWEMM, *supra* note 11, §§ 10:6–7, 13:10.

319. See, e.g., *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo*, 759 F. App'x 828, 833–36 (11th Cir. 2018) (affirming summary judgment for the city against FHA disparate-impact claim due to the inadequacy of plaintiff's statistical evidence). See generally SCHWEMM, *supra* note 11, § 10:6 nn.14–20 and accompanying text (describing the statistical-evidence requirement for disparate-impact FHA claims and gathering cases).

320. See, e.g., *Oviedo Town Ctr.*, 759 F. App'x at 833–36.

321. See, e.g., *Mhany*, 819 F.3d at 608, 619–20; *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937–38 (2d Cir.); see also SCHWEMM, *supra* note 11, § 10:7 nn.28–30 and accompanying text.

322. See Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 742–43 (2018). See generally SCHWEMM, *supra* note 11, § 10:7 (describing segregative-effect theory in exclusionary-zoning cases).

323. For a description of project-based Section 8 housing, see *supra* note 61.

meaning that all of its residents would be Section 8 users—then a town that has no or few residents receiving government assistance could not block such a proposal absent a substantial justification without inviting a segregative-effect claim.<sup>324</sup>

*C. § 3604(c): Discriminatory Ads, Notices, and Statements*

Section 3604(c) of the FHA outlaws housing notices, statements, and advertisements that indicate a preference, limitation, or discrimination based on a prohibited factor.<sup>325</sup> Some advocates have tried to use the current law to challenge “No Section 8” policies as conveying an anti-minority message, but these efforts have generally failed.<sup>326</sup> Obviously, such claims could be sustained under an amended FHA, as they already have been in states and localities that have banned “source-of-income” discrimination under their fair-housing laws.<sup>327</sup> The same would also be true for rental policies that block would-be tenants based on their use of Social Security, welfare, or other government-assistance programs.<sup>328</sup> A noteworthy feature of § 3604(c) is that it applies to all housing ads and statements, even those by “Mrs. Murphy” and other small landlords who are otherwise exempt from the FHA.<sup>329</sup> This means that such a landlord, although free to refuse to rent to voucher holders or otherwise discriminate based

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324. This would also be true for affordable-housing developers whose funding source is some other government assistance program. *See, e.g.*, note 84 and accompanying text (describing the LIHTC program).

325. 42 U.S.C. § 3604(c) (2012).

326. *See Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 912 (5th Cir.), *reh'g and reh'g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1234 (2020) (affirming dismissal of § 3604(c) claim alleging that an apartment manager’s ads announcing its “no vouchers” policy “appeal to the stereotype that because voucher tenants are Black, voucher tenants are undesirable as tenants and that the exclusion of voucher households makes the complex a more desirable place for White non-Hispanic tenants to live”).

327. Examples from the Chicago Commission on Human Relations include *Hall v. Woodgett*, CCHR No. 13-H-51, at 3–4 (Oct. 8, 2015) (finding violation based on landlord’s statement to applicant that she would not be approved because she used a voucher), and *Shipp v. Wagner*, CCHR No. 12-H-19, at 2–4 (July 16, 2014) (finding violations based on landlord’s ads stating “No Section 8” and “Not Section 8 Approved”).

328. *See, e.g.*, *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 247–48 (9th Cir. 1997) (welfare benefits); *Edwards v. Gene Salter Props.*, 739 F. App’x 357, 358 (8th Cir. 2018) (SSDI, retirement benefits, and rental income), *cert. denied*, 139 S. Ct. 1271 (2019); *Green v. Sunpointe Assocs., Ltd.*, No. C96–1542C, 1997 WL 1526484, at \*5 (W.D. Wash. May 12, 1997) (Section 8); *see also supra* text accompanying notes 202 and 206.

329. *See SCHWEMM, supra* note 11, § 15:1 n.10 (gathering cases).

on a prospect's source-of-income, could not advertise or make statements to this effect. Further, § 3604(c) covers not only explicitly discriminatory communications, but also those that would be understood by an ordinary reader or listener to convey a discriminatory message<sup>330</sup>—such as a landlord's statements that her units are “not Section 8 approved” or that she has had “bad experiences with Section 8” in the past—<sup>331</sup>even if such statements do not result in the landlord actually following a “No Section 8” policy.<sup>332</sup>

The fact that § 3604(c) violations do not require explicit references to the FHA's protected classes means that code words and phrases understood to refer to these groups may also be problematic. This was the plaintiff's theory in *Lincoln Properties*, i.e., that “No Section 8” would be taken to mean racial minorities.<sup>333</sup> Adding source-of-income as a FHA-outlawed basis of discrimination would mean that other phrases might be understood to refer to this factor and thus violate § 3604(c). Examples might include hostile statements about “low-income people,” “low-income housing,” and “welfare types”; or, on the other hand, favorable references in ads for “high-class” or “exclusive” neighborhoods or complexes.<sup>334</sup>

Could a landlord even inquire about a prospective tenant's source of income? In the racial context, courts have opined that § 3604(c) bars housing providers from asking about a prospect's race, on the theory that “[t]here is simply no legitimate reason for considering an

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330. *See, e.g.*, *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 577 (6th Cir. 2013); *Soules v. U.S. Dep't Hous. & Urban Dev.*, 967 F.2d 817, 824 (2d Cir. 1992); *see also* SCHWEMM, *supra* note 11, §§ 15:3 n.4, 15:6 nn.18–21, 15:8 n.2 (gathering cases).

331. *See, e.g.*, *Shipp*, CCHR No. 12-H-19, at 2–4; *Hutchison v. Iftekaruddin*, CCHR No. 09-H-21, at 4–7, 7 n.8 (Feb. 17, 2010) (finding violations based on landlord's statements to applicant that “he didn't think Section 8 would pay for [the unit]” and that a Section 8 inspection “would take at least three weeks,” as well as his statements to applicant's representative that he had “bad experiences with Section 8” in the past).

332. *See* SCHWEMM, *supra* note 11, § 15:9 nn.15–16 and accompanying text.

333. *See supra* note 326 (describing *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 910 (5th Cir.), *reh'g and reh'g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1234 (2020)).

334. *See* 24 C.F.R. § 100.75 (2018); *see also* SCHWEMM, *supra* note 11, § 15:5 n.4 and accompanying text (noting HUD's view that words like “restrictive,” “private,” and “traditional” in housing ads might violate § 3604(c) if used in a discriminatory context); *cf.* *Hawkins v. Vill. Green Holdings Co.*, CCHR No. 14-H-35, at 9 (July 12, 2018) (noting that “use of code words such as, we do not accept your form of payment, *could* be a means of proving” violation of local fair-housing ordinance that bans source-of-income discrimination).

applicant's race."<sup>335</sup> In an early familial status case,<sup>336</sup> however, the Second Circuit held that a landlord could ask about the number and age of a prospect's children without violating § 3604(c), because there are situations that might constitute a valid reason for asking such questions.<sup>337</sup> Similarly, a landlord's mere inquiry about an applicant's source of income should not violate § 3604(c), because, as in *Soules*, there may be legitimate reasons for this inquiry (e.g., whether the unit must be government-inspected before rental).<sup>338</sup> Still, although such an inquiry may be justified, context matters,<sup>339</sup> and a § 3604(c) violation may occur if the inquiry is accompanied by negative comments about the voucher program or a prospect's other sources of income.<sup>340</sup>

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335. *Soules*, 967 F.2d at 824 (agreeing that race is never a valid consideration); see also SCHWEMM, *supra* note 11, § 15:9 n.5 (gathering cases).

336. *Soules*, 967 F.2d 817.

337. *Id.* at 824. These situations, according to the *Soules* opinion, might include "local zoning regulations." *Id.* Also:

Conditions in the neighborhood known to be either ideally suited to or inherently dangerous to occupancy by families with children might well permit an inquiry about the ages of the family members. [Thus], standing alone, an inquiry into whether a prospective tenant has a child does not constitute an FHA violation.

*Id.*; see also SCHWEMM, *supra* note 11, § 15:9 nn.12–14 and accompanying text (discussing *Soules* and other § 3604(c)–statement cases involving familial status).

338. See *supra* note 77 and accompanying text; see also Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co., No. 3:17-CV-206-K, 2017 WL 2984048, at \*11 (N.D. Tex. July 13, 2017) (referring to the possibility of "administrative delays for payment" due to the tenant's receiving certain forms of government assistance), *aff'd*, 920 F.3d 890 (5th Cir.), *reh'g and reh'g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1234 (2020).

339. See, e.g., *Soules*, 967 F.2d at 825 (noting that in § 3604(c)–statement cases, the context of the defendant's remarks and the speaker's intent may be examined, "not because a lack of design constitutes an affirmative defense to an FHA violation, but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it").

340. See, e.g., *Hawkins v. Vill. Green Holdings Co.*, CCHR No. 14-H-35, at 9–10 (July 12, 2018) (finding no violation based on apartment agent's comment to Section 8 applicant that her "form of payment" might not be acceptable, because it was unclear whether this referred to applicant's check, money order, or credit or debit card (which would be justified) or to applicant's voucher use (which would not)).



*D. Discriminatory Sales, Financing, and Home Insurance*

A source-of-income amendment to the FHA seems unlikely to generate much litigation involving refusals to sell. By definition, the Section 8 voucher program is limited to rentals, as are most other government-housing assistance programs.<sup>341</sup> It is hard to imagine why home sellers would care about the source of their buyers' income (as opposed to the amount of this income). Indeed, no sales case has been reported under a state or local source-of-income law or as an impact claim under the FHA.<sup>342</sup>

A real estate broker may be concerned about a home-buyer's ability to secure a traditional mortgage, and thus may be less inclined to provide equal service to those using VA or other federal mortgage assistance. A realtor may also steer clients who rely on Social Security, AFDC, or other government benefits to less affluent areas, and such steering would violate an amended FHA.<sup>343</sup>

Mortgage providers themselves may be inclined to treat welfare recipients less favorably than traditional wage-earners. Countering this expectation, however, is the fact that such creditors have for decades been subject to the 1974 Equal Credit Opportunity Act,<sup>344</sup> which has always banned discrimination not only on the basis of race, color, religion, national origin, and sex, but also on the basis that "all or part of the applicant's income derives from any public assistance program."<sup>345</sup> Few cases have been reported under this provision,<sup>346</sup> but its mandate has prompted federal regulators to regularly issue guidance reminding mortgage providers and other creditors of their responsibilities to treat SSDI and similar sources of income as just as reliable as wages.<sup>347</sup> The very fact that regulators feel the need to issue such "reminders" suggests that some lenders are likely to run afoul of a

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341. *See supra* Part I.B.

342. *See, e.g.*, CHI. COMM'N ON HUMAN RELATIONS, *supra* note 137 (reporting no such cases under Chicago's ban on source-of-income discrimination during a sixteen-year period ending in 2018).

343. *See* SCHWEMM, *supra* note 11, § 13:5 nn.9–12 and accompanying text (describing the FHA's ban on realtor steering).

344. 15 U.S.C. § 1691(a) (2012).

345. *Id.* § 1691(a)(1)–(2). The ECOA also outlaws discrimination based on marital status, age, and the exercising of any right under the Consumer Credit Protection Act. *Id.* § 1691(a)(1), (3).

346. One interesting example is *Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544 (7th Cir. 2005), where the court rejected a claim against an apartment manager who refused Section 8 voucher users on the ground that the ECOA does not apply to residential leases. *Id.* at 547.

347. *See supra* note 199 and accompanying text.

FHA amended to outlaw source-of-income discrimination in dealing with individual applicants.<sup>348</sup>

But the other major type of FHA mortgage litigation—“redlining,” in which whole neighborhoods are discriminated against because their residents are mostly members of a protected class—seems an unlikely candidate for source-of-income litigation. This is because, as noted above with respect to exclusionary-zoning cases, being poor is not the same as having a particular source of income.<sup>349</sup> Thus, while lenders may well provide inferior services for home mortgages in poor neighborhoods, their doing so would not necessarily relate to the sources of income of those neighborhoods’ residents. And, although making out a source-of-income impact claim might be possible in this situation, assembling the necessary statistical support for such a claim would be no easier—and perhaps harder—than doing so for a race or national-origin discrimination claim.

The home-insurance industry has long fought against FHA coverage, but with limited success.<sup>350</sup> By now, it is well established that the FHA bans insurance discrimination against both individual protected-class homeowners and minority neighborhoods (“insurance redlining”).<sup>351</sup> In addition to intent-based claims, plaintiffs have challenged insurance companies’ policies for having a negative impact on minorities or minority neighborhoods. Indeed, as noted above, hostility to the Section 8 program has already prompted some FHA race-impact claims against insurers that refused to provide coverage for landlords who rented to voucher users.<sup>352</sup> A source-of-income amendment to the FHA would make clear the illegality of such policies without the need for statistical proof of their race-based disparate impact.

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348. *Cf. Sisemore v. Master Fin., Inc.*, 60 Cal. Rptr. 3d 719 (Cal. Ct. App. 2007) (upholding source-of-income claim under California’s fair-housing law against finance company that refused to finance a home Sisemore intended to use as a day care).

349. *See supra* note 314 and accompanying text.

350. *See Application of the Fair Housing Act’s Discriminatory Effect Standard to Insurance*, 81 Fed. Reg. 69012 (Oct. 5, 2016); *Property Cas. Insurers Ass’n of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1031–32 (N.D. Ill. 2014) (describing insurance industry’s objections to being subject to the FHA and its disparate-impact standard).

351. *See SCHWEMM, supra* note 11, § 13:15 nn.19–32 and accompanying text.

352. *See supra* notes 181–185 and accompanying text.

*F. Harassment and Retaliation*

The FHA's prohibition of discriminatory terms and conditions, in § 3604(b), covers housing providers' harassment of residents.<sup>353</sup> Among other things, this prevents landlords from threatening to evict tenants because of their or their guests' protected-class status.<sup>354</sup>

Further, § 3617, which bans interference with those who exercise FHA rights, extends the anti-harassment mandate to everyone, including neighbors and municipalities.<sup>355</sup> Hostility to Section 8 users by up-scale municipalities has been alleged in a number of race-based FHA cases.<sup>356</sup> A FHA source-of-income amendment would make such harassment practices unlawful without the need for proof of their race-based impact.<sup>357</sup>

Section 3617 also bans retaliation against persons who file a discrimination complaint or otherwise engage in FHA-protected activities.<sup>358</sup> Indeed, retaliation claims have grown in popularity to the point where they now make up the fourth-largest category of FHA complaints.<sup>359</sup>

A variety of practices under these anti-harassment and anti-retaliation provisions could be challenged under a FHA amendment

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353. See SCHWEMM, *supra* note 11, § 14:3 nn.1–28 and accompanying text; see also *id.* § 11C:2 n.36 and accompanying text (gathering sex-harassment cases under § 3604(b)).

354. See *id.* § 14:3 n.29 and accompanying text.

355. See *id.* § 20:3 n.11 and accompanying text.

356. See Complaint at 1–3, Long Island Hous. Services, Inc. v. Vill. of Mastic Beach, No. 2:15-cv-00629 (E.D.N.Y. Aug. 23, 2017), 2015 WL 4751374 (ultimately settled for \$387,500); Cmty. Action League v. City of Palmdale, No. CV 11-4817 ODW VBKX, 2012 WL 10647285, at \*6–7 (C.D. Cal. Feb. 1, 2012) (upholding FHA-intent and -impact claims against two municipalities based on defendants' hostility to Section 8 tenants); Williams v. City of Antioch, No. C 08–02301 SBA, 2010 WL 3632197 (N.D. Cal. Sept. 2, 2010) (certifying a class of African-Americans in Antioch, California who hold Section 8 housing vouchers). See generally Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 U.C.L.A. L. REV. 1540, 1572–81 (2012) (describing police harassment and other actions undertaken by certain predominantly white California communities in response to their growing number of Section 8 households).

357. See *supra* notes 350–352 and accompanying text.

358. See SCHWEMM, *supra* note 11, § 20:5 nn.3–5 and accompanying text.

359. See HUD 2017 REPORT, *supra* note 58, at 15 (reporting that retaliation accounted for 10.2% of all FHA complaints received by HUD and substantially equivalent state and local agencies in FY 2017, making it the fourth-most frequent complaint of eight categories (after disability, race, and familial status; before national origin, sex, religion, and color)).

banning source-of-income discrimination, but all of these cases would be governed by well-established principles developed over decades of FHA litigation involving other protected classes.<sup>360</sup> For present purposes, it is sufficient to note that these new opportunities for litigation would exist and to highlight one example: a landlord could not evict or threaten to evict a tenant under an amended FHA for seeking to use a Section 8 voucher or some other housing assistance.<sup>361</sup>

### *G. Other Applications*

#### 1. Standing to Sue

As discussed earlier, the Supreme Court has broadly interpreted standing to sue under the FHA to include not only the direct targets of a defendant's unlawful practices, but also a variety of others who are injured by these practices, including housing providers, fair-housing organizations, municipalities, and local residents.<sup>362</sup> As with much of modern FHA litigation, suits by fair-housing organizations will likely be important in enforcing a source-of-income amendment.<sup>363</sup> The same is true for housing providers, at least in those source-of-income claims that challenge exclusionary land-use practices.<sup>364</sup>

The most intriguing type of plaintiff in FHA source-of-income cases would be local residents who, ever since the Supreme Court's 1972 decision in *Trafficante*,<sup>365</sup> have been allowed to challenge a landlord's discrimination against outsiders as a deprivation of their right to live in an integrated community. Although most of these claims have alleged racial discrimination, the *Trafficante* theory has also been used in

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360. See *supra* notes 146–155 and accompanying text; see also *infra* Part IV.G.2 (discussing discriminatory-effect claims).

361. Cf. *Gorski v. Troy*, 929 F.2d 1183, 1187–90 (7th Cir. 1991) (finding that would-be foster parents who had not yet been assigned any children may challenge their eviction based on the FHA's prohibition of familial-status discrimination).

362. See *supra* notes 32–35 and accompanying text.

363. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982); see also *supra* notes 139, 161, 165, 169, 185, and 190 (discussing cases in which fair-housing organizations brought source-of-income claims either under a state or local fair-housing law banning this type of discrimination or as impact-based claims under the current FHA).

364. See *supra* Part IV.B.

365. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); see also *Havens Realty*, 455 U.S. at 375–78; *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111–15 (extending *Trafficante's* standing rationale to local residents who challenged realtors' steering).

familial-status and disability cases.<sup>366</sup> A source-of-income version of *Trafficante* would likely see current, affluent resident-plaintiffs objecting to, say, their landlord's refusal to rent to Section 8 or other government-assisted tenants. A variation on this claim, also recognized in early FHA race cases,<sup>367</sup> might be a suit brought by local residents in an area already heavily populated by voucher users in which the local residents object to a further influx of subsidized housing as perpetuating source-of-income segregation.

Among other things, these types of claims under an amended FHA might succeed in cases similar to *Inclusive Communities*, where, on remand from the Supreme Court, the plaintiffs' challenge to the disproportionate siting of subsidized projects in poor areas of Dallas failed as a race-impact claim.<sup>368</sup> The caveat here, as it has been throughout this Article, is that having a *particular* source-of-income is not the same as being *low* income. Thus, a claim based on local residents' being deprived of integrated opportunities or on having source-of-income segregation reinforced would have to be proved by showing the benefits of integration not just regarding poorer people, but regarding people who receive certain sources of income.

## 2. Discriminatory-Effect Claims; Income-to-Rent Policies

Challenges to a housing practice based on its unjustified discriminatory effect on a protected class have become a well-established part of FHA litigation. In the 1970s, appellate courts began to apply this theory in FHA cases, based on the Supreme Court's approval of it in Title VII employment-discrimination cases beginning with *Griggs v. Duke Power Co.*<sup>369</sup> By 2015, when the Court endorsed disparate-impact claims under the FHA in *Inclusive Communities*,<sup>370</sup> the lower courts had produced dozens of FHA decisions dealing with

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366. See, e.g., *Hamad v. Woodcrest Condominium Ass'n*, 328 F.3d 224, 229–31 (6th Cir. 2003) (familial status); *Ventura Vill. Inc. v. City of Minneapolis*, 318 F. Supp. 2d 822, 824–26 (D. Minn. 2004) (disability).

367. See *Jorman v. Veterans Admin.*, 830 F.2d 1420, 1424 (7th Cir. 1987); *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 811–12 (3d Cir. 1970).

368. See *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. and Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322, at \*11–12 (N.D. Tex. Aug. 26, 2016).

369. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432–33 (1971). For early appellate cases applying *Griggs* to the FHA, see *supra* note 9 and accompanying text.

370. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

this theory,<sup>371</sup> and HUD had provided detailed guidance for it in a 2013 regulation.<sup>372</sup>

As the *Inclusive Communities* opinion noted, many of the FHA's disparate-impact cases—as the Court put it, those at the “heartland” of this theory<sup>373</sup>—have involved challenges to local governments' restrictions on housing proposals of particular value to racial minorities.<sup>374</sup> These “exclusionary zoning” cases—and how a source-of-income amendment to the FHA would affect them—were discussed earlier in Part IV.B,<sup>375</sup> and similar issues involving home financing and insurance were dealt with in Part IV.D.

Another type of disparate-impact claim that is likely to arise under a FHA source-of-income amendment would be challenges to landlords' requirements that prospective tenants have a certain minimum income-to-rent ratio (e.g., that their income be at least three times the rent). This is a common type of tenant-screening requirement, and there is a long history of its being targeted in FHA-impact claims that allege racial discrimination.

Indeed, such a claim was involved in one of the earliest appellate cases to consider *Griggs's* applicability to the FHA. In *Boyd v. Lefrak Organization*,<sup>376</sup> the defendant-landlord operated 119 buildings with over 15,000 apartments and required applicants to have a weekly net income of at least 90% of the monthly rent for their desired unit.<sup>377</sup> A

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371. See, e.g., *id.* at 2519 (noting the consensus among the federal appellate courts that the FHA encompassed disparate-impact claims).

372. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500). For HUD's recent proposed changes to its 2013 impact regulation, see HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,857 (Aug. 19, 2019).

373. *Inclusive Cmty. Project*, 135 S. Ct. at 2521–22.

374. See *id.*; see also *supra* notes 301–304 and accompanying text.

375. See also *supra* note 304 and accompanying text (discussing similar issues involving municipal restrictions on group homes for disabled people).

376. *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir. 1975).

377. *Id.* at 1111. As an alternative to satisfying this 90% rule, an applicant could provide a co-signer whose weekly net income was equal to 110% of the monthly rent. *Id.*

The defendants' 90% rule appears to have been prompted by an earlier FHA case in which they had been accused of racial discrimination by the Justice Department in a “pattern and practice” suit. This suit ended in a 1971 consent decree that called for the defendants, *inter alia*, to use the 90% rule. *Id.* at 1112. This consent decree was later amended to allow welfare recipients, in lieu of meeting the 90% rule, to provide a legally enforceable guarantee by a government agency, but no such guarantee was ever used. *Id.* at 1112 n.3.

class of black welfare recipients challenged this 90% rule on the ground that it excluded a disproportionately high percentage of minorities.<sup>378</sup> After a bench trial, the district judge, retired Supreme Court Justice Tom Clark, ruled for the plaintiffs and enjoined the defendants' use of the 90% rule, but a divided panel of the Second Circuit reversed.<sup>379</sup> The majority held that the *Griggs* theory was "inapposite here,"<sup>380</sup> and thus a "private landlord in choosing his tenants is free to use any grounds he likes so long as no discriminatory purpose is shown."<sup>381</sup>

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378. *See id.* at 1112 (describing the basis of plaintiffs' claim as being that the 90% rule excludes most public assistance recipients and "that a large majority of public assistance recipients in New York City are black or Puerto Rican").

379. *Id.* at 1111–12.

380. *Id.* at 1114 (calling plaintiffs' reliance on *Griggs* "misplaced"); *see also id.* at 1113 (concluding that a disparate-impact "analysis is inappropriate in the context of a purely private action asserting a claim of racial discrimination" under the FHA).

The dissent determined that "[t]his case should be governed by the [*Griggs*] principle." *Id.* at 1115 (Mansfield, J., dissenting). Judge Mansfield noted that the evidence showed that defendants had a policy of not renting to welfare recipients, and that their 90% rule had a disproportionately high racial impact, given that 77% of all such recipients in New York City "were minority persons." *Id.* at 1117. He also noted that white-household eligibility under the 90% rule "would be four times as great as that of Black households and ten times as great as that of Puerto Rican households." *Id.* The dissent concluded that, although no one questions either "the importance to a landlord of a prospective tenant's payment of rent" or that a landlord "may adopt reasonably appropriate economic standards or tests designed to assure the tenant's future ability to pay rent on an on-going basis," defendants had failed to show that the 90% rule "was reasonably necessary to insure tenants' payment of rent . . . [or] that welfare recipients as tenants have a greater incidence of rent failures or defaults than other tenants." *Id.* at 1116, 1118. Indeed, the evidence showed that a "welfare recipient's ability to pay . . . is not properly measurable by his or her aggregate income" and that, unknown to defendants, hundreds of welfare recipients actually lived in their apartments, which suffered few rent defaults. *Id.* at 1118. Based on this evidence, Judge Mansfield concluded that *Griggs* "mandates affirmance of the district court's decision." *Id.*

381. *Id.* at 1114 (majority opinion). According to the majority:

A businessman's differential treatment of different economic groups is not necessarily racial discrimination and is not made so because minorities are statistically overrepresented in the poorer economic groups. The fact that differentiation in eligibility rates for defendants' apartments is correlated with race proves merely that minorities tend to be poorer than is the general population.

*Id.* at 1113.

By the late 1980s, however, the Second Circuit, along with other courts of appeals, had come to accept the discriminatory-effect theory's applicability to the FHA.<sup>382</sup> Thus, in 1989, a district court in New York<sup>383</sup> felt free to, and did, approve an impact-based challenge by black applicants against a landlord's requirement that tenants have income equal to at least three times the rent.<sup>384</sup> As discussed above, the *Bronson* court also enjoined the defendant-landlord's "No Section 8" policy because it found that the policy had an unjustified racial impact and was perhaps prompted by racially discriminatory intent.<sup>385</sup> But the case's significance here is that the court independently determined that the defendant's "triple rent" policy ran afoul of FHA because of its unjustified negative impact on racial minorities.<sup>386</sup> Later decisions, however, provided a mixed response to impact-based challenges to "No Section 8" policies based on racial discrimination,<sup>387</sup> and few, if any, subsequent plaintiffs brought this type of claim against a landlord's income-to-rent-ratio policy.<sup>388</sup>

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382. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.) (doubting *Boyd's* continued validity while ruling in favor of discriminatory-effect challenges to a municipality's exclusionary-zoning practices); see also *supra* notes 9, 371 (discussing other 1970s and 1980s decisions).

383. *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989).

384. *Id.* at 154–56.

385. See *supra* notes 160, 232–233 and accompanying text.

386. In *Bronson*, the court found that defendant's "triple income" requirement resulted in a disparate impact because "non-minorities qualify [for defendant's complex] at a rate of more than twice that for minorities." 724 F. Supp. at 154 (14% of minority households, compared to 28% of non-minority households). As for the defendant's justification, the court noted that the FHA allows a landlord to seek "assurance that prospective tenants will be able to meet their rental responsibilities." *Id.* at 156 (quoting *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1114 (2d Cir. 1975)). Nevertheless, the court held that the defendant failed to show its triple-income policy was "reasonably necessary to insure payment of rent or . . . [to avoid] losses or defaults." *Id.* at 154.

387. See *supra* note 160 and accompanying text.

388. Cf. *supra* notes 217–225 and accompanying text (discussing the Ninth Circuit's endorsement of a reasonable-accommodation challenge to a landlord's triple-income requirement).

In 1991, the California Supreme Court interpreted California's Unruh Civil Rights Act, CAL. CIVIL CODE § 51 (2016), to not bar a landlord's requirement that prospective tenants have gross monthly incomes of at least three times the rent, both because such a requirement was not a form of arbitrary economic discrimination and because the Unruh Act did not include a disparate-impact standard (thus defeating plaintiff's claim that the triple-income requirement had an unlawful impact on women).



How would such claims fare under a FHA amended to outlaw source-of-income discrimination? Clearly, such a law would prohibit landlords from having “No Section 8” or “No Welfare” policies.<sup>389</sup> But would such an amendment also support an impact-based challenge to a landlord’s income-to-rent-ratio requirement? The answer will likely depend—as it does with FHA-impact claims generally—on the specific statistical proof offered by the plaintiff and the defendant’s proffered justifications for its policy.

For example, in *Nibbs v. PT Chicago, LLC*,<sup>390</sup> the Chicago Commission on Human Relations approved the theory of an impact-based challenge by a Section 8 voucher holder to a landlord’s requirement that prospective tenants have a rent-to-income ratio of 34% or less,<sup>391</sup> but ultimately held that the proof of disparate impact was inadequate.<sup>392</sup> This case was complicated by the fact that the landlord accepted some voucher holders (e.g., those with a guarantor who met the “34% rule”), making it difficult for the complainant to produce data about how this policy impacted voucher holders.<sup>393</sup> But even accepting the complainant’s view that the landlord’s “minimum-income require-

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*See Harris v. Capital Growth Inv’rs XIV*, 805 P.2d 873, 878–81, 893 (Cal. 1991). A year later, the state legislature amended the Unruh Act to allow disparate-impact claims in some circumstances, and in 1999, it amended the state’s fair-housing law to ban source-of-income discrimination. *See Munson v. Del Taco, Inc.*, 208 P.3d 623, 627–28 (Cal. 2009); *infra* app. I.

389. *See supra* notes 146–149 and accompanying text.

390. CCHR No. 14-H-61 (May 11, 2017).

391. *Id.* at 11–13. The CCHR distinguished two earlier decisions—*Boyd v. Parkview Mgmt. Corp.*, CCHR No. 10-H-48 (June 18, 2013), and *Jackson v. Wilmette Realty*, CCHR No. 99-H-32 (Sept. 27, 1999)—in which it had rejected challenges to similar income-to-rent-ratio requirements brought by Social Security recipients. *Nibbs*, CCHR No. 14-H-61, at 11–13. According to the CCHR, the analysis of minimum-income requirements differs depending on whether the applicant’s source of income is Social Security or the voucher program, because:

The Housing Choice voucher covers a portion, and in some cases all, of the recipient’s rent, which is cash income. Therefore, the property owner can reasonably expect that any income in addition to the voucher can be used to cover the obligations of tenancy and living expenses. On the other hand, Social Security benefits are cash income paid to the recipient. Thus, if a rental applicant does not have income sufficient to cover the obligations of tenancy and the rent, a property owner can reasonably refuse to rent to that applicant.

*Boyd*, CCHR No. 10-H-48, at 3.

392. *Nibbs*, CCHR No. 14-H-61, at 13–15, 18.

393. *Id.* at 15–17, 17 n.12.

ment would automatically exclude at least 75% of Chicago Voucher holders if strictly applied,”<sup>394</sup> the CCHR ruled that the evidence failed to establish a disparate impact because it did not also show how this requirement impacted “market rate applicants.”<sup>395</sup> Because a prima facie case of disparate impact was not established, the CCHR did not go on to address “the remaining questions of whether Respondents have a business justification for their policy and—if so—whether a less-discriminatory alternative was available to achieve Respondents’ legitimate objectives.”<sup>396</sup>

*Nibbs* nicely demonstrates how impact-based challenges to landlords’ income-to-rent-ratio policies, though proper in theory under a law that prohibits source-of-income discrimination, will succeed or fail depending on each case’s particular facts. Key facts include: whether the landlord strictly enforces such a policy or allows exceptions to it; the plaintiff’s ability to produce statistics showing that the landlord’s policy has a greater adverse impact on government-assisted prospective renters compared to those without government-assisted incomes; and the alternatives available to the landlord to insure that those who fail to meet its required ratio will still be able to meet their rental obligations. The upshot is that this type of screening device may have to be adjusted in some instances to avoid liability under an amended FHA.<sup>397</sup>

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394. *Id.* at 15.

395. *Id.* at 17. This gap, according to *Nibbs*, distinguished this case from *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989), which the CCHR seemed to accept as good law. *See Nibbs*, CCHR No. 14-H-61, at 15–16.

396. *Nibbs*, CCHR No. 14-H-61, at 18. In earlier cases, the CCHR had recognized that landlords have some leeway in setting income-ratio policies:

A property owner . . . may establish and enforce reasonable policies as to the *amount* of income a potential tenant must have in relation to the amount of rent . . . [S]uch policies have the legitimate, non-discriminatory purpose of assuring the property owner that the prospective tenant of a dwelling unit will be able to pay the rent.

*Id.* at 11–12 (quoting *Jackson v. Wilmette Realty*, CCHR No. 99-H-32, at 4 (Sept. 27, 1999)).

397. An analogous situation has played out in recent years involving landlords’ “No Criminal Record” screening rules. Those rules’ disparate racial impact allegedly violates the FHA unless they are narrowed to more precisely advance the landlord’s legitimate interest in quality tenants. *See, e.g.*, *Fortune Soc’y v. Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145, 172–77 (E.D.N.Y. 2019); *Sams v. Ga. W. Gate, LLC*, No. CV415-282, 2017 WL 436281 at \*1–2, \*5 (S.D. Ga. Jan. 30, 2017); *see also* HOUSING OPPORTUNITIES MADE EQUAL OF VIRGINIA, *HOME Settles Race Discrimination Lawsuit Against Sterling Glen Apartments* (Aug. 6,

The FHA's discriminatory-effect theory of liability may produce other types of claims if the statute is amended to ban source-of-income discrimination.<sup>398</sup> In these situations, as well as the income-to-rent-ratio cases, it is worth noting that a landlord's continued articulation and enforcement of a policy that has a discriminatory effect can also run afoul of the statute's prohibition against discriminatory notices and statements,<sup>399</sup> and can ultimately be the target of serious sanctions.<sup>400</sup>

### 3. Gentrification

A major fair-housing issue in recent years has been "gentrification," which refers to the movement of middle-class, mostly white residents into city neighborhoods whose residents, before this influx, were predominantly low-income minorities.<sup>401</sup> In terms of racial movement, gentrification is the opposite of the old "changing neighborhood"

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2019) (describing settlement of such a case in which the defendant-landlord agreed to a less restrictive policy, limited to "relevant criminal background screening" for "specific categories of offenses"), *available at* <https://homeofva.org/wp-content/uploads/2019/08/190806-NR-Sterling-Glen-settlement-Final.pdf> [<https://perma.cc/FH5U-ASAT>].

398. *See, e.g.*, *Fulk v. Lee*, 31 Conn. L. Rptr. 375 (Conn. Super. Ct. 2002) (holding that landlord's refusal to rent to Section 8 voucher user "because she had no employment" violated Connecticut's source-of-income law, because "[b]y rejecting her on the basis that she had no employment, the defendants accomplished indirectly what they could not do directly"); *see also* *Cohen v. Monroe Cty.*, 749 F. App'x 855 (11th Cir. 2018) (rejecting FHA disability-discrimination claim challenging the county's requirement that 70% of resident's current income must derive from local employment).

399. *See supra* Part IV.C.

400. *See, e.g.*, *Fair Hous. Ctr. of Wash. v. Breier-Scheetz Props., LLC*, No. C16-922 TSZ, 2019 WL 1987055, at \*3 (W.D. Wash. May 6, 2019) (imposing civil-contempt sanctions based on landlords' continued use of occupancy restrictions after earlier ruling that the restrictions violated the FHA based on their disparate impact on families with children).

401. *See* NYU FURMAN CTR., HOW NYCHA PRESERVES DIVERSITY IN NEW YORK'S CHANGING NEIGHBORHOODS 9 (2019) (describing "gentrifying neighborhoods" as those that were "low-income in 1990 and experienced rent growth above the median SBA rent growth between 1990 and 2010–2014," and identifying fifteen of New York City's twenty-two low-income neighborhoods in 1990 as currently gentrifying), *available at* [https://furmancenter.org/files/NYCHA\\_Diversity\\_Brief\\_Final\\_4-30-2019.pdf](https://furmancenter.org/files/NYCHA_Diversity_Brief_Final_4-30-2019.pdf) [<https://perma.cc/97QE-55WQ>]; *see also* Ingrid Gould Ellen & Gerard Torrats-Espinosa, *Gentrification and Fair Housing: Does Gentrification Further Integration?* 4 (Aug. 19, 2018) (unpublished manuscript) (available at <https://www.tandfonline.com/doi/full/10.1080/10511482.2018.1524440>) (labeling a census tract "as gentrifying if it experienced an increase in the ratio of its median income to the median income of the [Core-based Statistical Area] of at least 0.1 over a decade").

scenario that has existed for much the FHA's history, in which blacks move out of a city's heavily minority areas into whiter, more affluent communities.<sup>402</sup>

In one respect, gentrification advances a core goal of the FHA by helping to integrate some city neighborhoods.<sup>403</sup> But too often, critics assert, this is accomplished by displacing minority families. Those families are often unable to afford the rising rents and other costs associated with this phenomenon, forcing them to leave communities they have long called home, perhaps becoming homeless or having to move to areas that are not only less familiar, but offer fewer opportunities and, ultimately, a racially impacted demographic of their own.<sup>404</sup> Thus, while few argue that gentrification can or should be stopped, many advocate that government should try to reduce its negative impact on the long-time residents of newly-gentrified-areas.<sup>405</sup>

The FHA has occasionally been invoked on behalf of families facing displacement by gentrification, but with limited success.<sup>406</sup> To the

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402. See Sander, *supra* note 44, at 873–74, 888.

403. See, e.g., Gould Ellen & Torrats-Espinosa, *supra* note 401, at 1, 8 (noting that “gentrification . . . offers a glimmer of hope, as the moves that higher-income, white households make into predominantly minority, lower-income neighborhoods are moves that help to integrate those neighborhoods, at least in the near-term” and concluding that the “long-term picture suggests that gentrification has spawned some stable, racially integrated neighborhoods”); Lance Freeman, *Creating Integrated Communities Is More Than Preventing Displacement*, in *THE DREAM REVISITED*, *supra* note 50, at 327, 327 (describing research showing that neighborhoods experiencing gentrification in the 1980s and 1990s “were more diverse, both in racial and ethnic terms and in terms of socioeconomic status, than other central-city neighborhoods that did not experience gentrification”).

404. See, e.g., Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law's Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. 629, 652–56 (2019); Rachel D. Godsil, *Transforming Gentrification Into Integration*, in *THE DREAM REVISITED*, *supra* note 50, at 322, 322–23.

405. See, e.g., Sander, *supra* note 44, at 898–900; Freeman, *supra* note 403, at 327–29; Brad Lander, *It Will Take More Than a Voucher*, in *THE DREAM REVISITED*, *supra* note 50, at 330, 332–33; see also Alfieri, *supra* note 404, at 698 (noting Richard Rothstein's assertion that “housing proposals for segregated neighborhoods that purport to contribute to ‘revitalization’ must be part of a concerted plan of revitalization that includes . . . preserving affordability for those with moderate and lower incomes”) (quoting Richard Rothstein, *The Supreme Court's Challenge to Housing Segregation*, AM. PROSPECT (July 5, 2015), <https://prospect.org/article/supreme-courts-challenge-housing-segregation> [<https://perma.cc/6E9F-5ZVG>]).

406. See *Wadley v. Park at Landmark LP*, 264 F. App'x 279, 280–82 (4th Cir. 2008) (affirming summary judgment against FHA-race claim based on landlord's decision to phase out its Section 8 tenants through non-renewal of their leases so it could pursue market-rate tenants); *Barry Farms Tenants v. D.C. Hous. Auth.*, 311 F. Supp. 3d 57, 68–69 (D.D.C. 2018)

extent that displacement can be ameliorated with the use of Section 8 vouchers or other government assistance for current residents,<sup>407</sup> it is possible that a source-of-income FHA amendment would add some protection against the eviction of these residents by housing providers intent upon “upgrading” their developments. The success of such litigation would likely turn on the degree to which displaced tenants are afforded sufficient relocation assistance so that they can maintain comparable housing.<sup>408</sup>

## CONCLUSION

The 1968 Fair Housing Act, last significantly amended in 1988, has advanced the interests of countless minority home-seekers, but it has fallen short in fulfilling its primary goal of reducing racial discrimination and segregation. One reason for this is that the FHA allows housing providers to discriminate against people who rely on Section 8 vouchers and other forms of governmental assistance. Such source-of-income discrimination not only undercuts the federal government’s principal housing-assistance program, but it also disproportionately harms racial minorities and other FHA-protected groups. A growing number of states and localities have now addressed this problem by amending their fair-housing laws to ban source-of-income discrimination. The time has come for Congress to do the same.

This Article has reviewed the various state and local source-of-income laws, as well as the FHA-impact cases that have challenged

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(dismissing on ripeness grounds a FHA familial-status claim challenging landlords’ plan to transform large public housing complex into a mixed-income community); *cf.* *Crossroads Residents v. MSP Crossroads Apartments LLC*, No. CV 16-233 ADM/KMM, 2016 WL 3661146 (D. Minn. July 5, 2016). *See generally* Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 848–61 (2019) (concluding that “the FHA is an important but limited tool for addressing the potential harms of gentrification”); Alfieri, *supra* note 404, at 667–88 (surveying FHA litigation theory’s possible responses to gentrification).

407. *See, e.g.*, *Godsil*, *supra* note 404, at 323 (arguing that cities undergoing gentrification “should use rental vouchers or low-interest loans to restore the autonomy of current residents”); NYU FURMAN CTR., *supra* note 401, at 1 (describing how the availability of public housing helps maintain diversity in gentrifying neighborhoods in New York City).

408. *See City of Alameda v. FG Managing Member, Inc.*, No. C 04-04010 WHA, 2004 WL 2403848, at \*4–5 (N.D. Cal. Oct. 26, 2004) (rejecting California Fair Housing Act claim, which alleged that defendant-landlord’s renovation of a complex housing many Section 8 users had caused a “loss of housing for minorities, disabled, and especially families who rely on government rent subsidies,” primarily because all current tenants, though temporarily displaced, were assured by the defendant that they would be relocated); *see also Crossroads Residents*, 2016 WL 3661146, at \*11.

source-of-income discrimination because of its negative effect on the FHA's current protected classes. This review demonstrates some of the advantages—and disadvantages—of adding source-of-income to the FHA's list of prohibited bases of discrimination. The Article has also identified and analyzed the various types of FHA claims that are likely to arise if such an amendment is adopted.

A source-of-income amendment, though not a panacea, would be an important step forward in expanding housing opportunities for all, in ending arbitrary limits on housing choice, and in helping the FHA achieve its core mission of reducing segregation. Such an amendment is the next logical step in the evolution of the FHA, an Act whose ultimate measure of success depends on how much it can reduce the long-entrenched patterns of residential segregation that continue to divide the nation.

APPENDIX I

*State Laws Outlawing Housing Discrimination Based on Source-of-Income*

[year enacted in brackets]

California: CAL. GOV'T CODE § 12955 [1999]: “source of income” made part of state’s fair housing law and defined in subsec. (p)(1) as meaning “lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant.” This definition was amended in 2019 to include Section 8 vouchers and other government assistance “paid to a housing owner or landlord on behalf of a tenant.”

– this provision and cases dealing with it are discussed *supra* notes 98 and 119-20 and accompanying text; *see also supra* note 388 (dealing with California’s Unruh Civil Rights Act, CAL. GOV'T CODE §§ 51-52).

Connecticut: CONN. GEN. STAT. ANN. § 46a-64c [1989]: “lawful source of income” regarding housing transactions made part of state’s public accommodations law in 1989 and, in 1990, made part of state’s fair housing law (which uses prohibitory language that is virtually identical to the federal FHA) and defining, in § 46a-63(3), “‘Lawful source of income’ as meaning “income derived from Social Security, supplemental security income, housing assistance, child support, alimony or public or state-administered general assistance.”

– this provision and cases dealing with it are discussed *supra* notes 99, 104, 112-13, 116, and 242 and accompanying text).

Delaware: DEL. CODE ANN. tit. 6, § 4603(b) [2016]: “source of income” added to five prohibitions of state’s fair housing law and defined to mean “any lawful source of money paid directly, indirectly, or on behalf of a renter or buyer of housing including: . . . (b) Income or rental payments derived from any government or private assistance, grant, or loan program.” § 4602(25).

– allows landlords not to accept vouchers (§ 4607(j)): “A landlord is not required to participate in any government-sponsored rental assistance program, voucher, or certificate system. A landlord’s nonparticipation in any government-sponsored rental assistance program, voucher, or certificate system may not serve as the basis for any administrative or judicial proceeding under this chapter.”

Maine: ME. REV. STAT. ANN. tit. 5, § 4581-A [1975]: in separate provision from state fair housing law’s main prohibitions; (4): “Receipt of public assistance. For any person furnishing rental premises or public accommodations to refuse to rent or impose different terms of tenancy to any individual who is a recipient of federal, state or local public assistance, including medical assistance and housing subsidies, primarily because of the individual’s status as recipient.”

– this provision and cases dealing with it are discussed *supra* notes 102, 105, and 111.

Maryland: MD. CODE ANN., STATE GOV'T § 20-705 [2020]: “source of income” made part of state’s fair housing law and defined to mean “any lawful source of money paid directly or indirectly to or on behalf of a renter or buyer of housing [including income from any] government or private assistance, grant, loan, or rental assistance program, including low-income housing assistance certificates and vouchers issued under the United States Housing Act of 1937.” § 20-701(j).

Massachusetts: MASS. GEN. LAWS ch. 151B, § 4.10 [1971]: limited to rental accommodations (not part of state’s main fair housing law), which, as amended in 1990, provides:

It shall be an unlawful practice . . . [f]or any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.

– this provision and cases dealing with it are discussed *supra* notes 104, 106-11, and 172-73 and accompanying text.

Minnesota: MINN. STAT. ANN. § 363A.09 subd. 1 [1990]: “status with regard to public assistance” made part of state’s civil rights laws and defined as meaning “the condition of being a recipient of federal, state, or local assistance, including medical assistance, or of being a tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements.” § 363A.03 subd. 47.

– this provision and cases dealing with it are discussed *supra* notes 97 and 227 and accompanying text.

New Jersey: N.J. STAT. ANN. §§ 10:5-4, 10:5-12g [1981 (covers vouchers); amended in 2002 to add “source of lawful income used for rental or mortgage payments” to state’s civil rights laws]:

10:5-4: All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, . . . or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.



10:5-12g. For any person, including but not limited to, any owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any real property or part or portion thereof, or any agent or employee of any of these:

(1) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of race, . . . or source of lawful income used for rental or mortgage payments.

– these provisions and cases dealing with them are discussed *supra* notes 99, 104, 116, and 238 and accompanying text.

New York: N.Y. EXEC. LAW § 296.2-a(a)-(e) [2019]: “source of income” added to state’s fair housing law applicable to rental accommodations:

2-a. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

(a) To refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, . . . lawful source of income or familial status of such person or persons . . . .

North Dakota: N.D. CENT. CODE ANN. §§ 14-02.5.02(1)-(2) [1999]: “status with regard to . . . public assistance” added to state’s fair housing law and defined to mean “the condition of being a recipient of federal, state, or local assistance, including medical assistance, or of being a tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements” (§ 14-02.4-02 (19)).

Oklahoma: OKLA. STAT. ANN. tit. 25, § 1452.A.8 [1985]: not part of state’s main fair housing prohibitions; makes it unlawful “To refuse to consider as a valid source of income any public assistance, alimony, or child support, awarded by a court, when that source can be verified as to its amount, length of time received, regularity, or receipt because of race, color, religion, gender, national origin, age, familial status, or handicap.”

Oregon: OR. STAT. ANN. § 659A.421(2)-(6) [1995; 2013 amendment deleted exemption for vouchers]: “source of income” made a part of state’s fair housing law and now defined to include Section 8 vouchers and any other government “housing assistance” in § 659A.421(1)(d)(A).

Utah: UTAH CODE ANN. § 57-21-5 [1993]: “source of income” defined to mean “the verifiable condition of being a recipient of federal, state, or local assistance, including medical assistance, or of being a tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements.” § 57-21-2(24).

Virginia: VA. CODE ANN. § 36-96.1 [2020]: “source of funds” made part of state’s fair housing law and defined to mean “any source that lawfully provides funds to or on behalf of a renter or buyer of housing, including any assistance, benefit, or subsidy program, whether such program is administered by a governmental or nongovernmental entity.” § 36-96.1.1.

Vermont: VT. STAT. ANN. tit. 9, § 4503(a) [1987]: “because a person is a recipient of public assistance” added to state’s fair housing law; not defined.

Washington: WASH. REV. CODE § 59.18 [2018]: prohibits discrimination by landlords based on a tenant’s source-of-income (defined to include subsidy programs) using prohibitory language similar to the FHA’s.

Wisconsin: WIS. STAT. ANN. § 106.50(1) [1980]: “lawful source of income” added to state’s fair housing law, but not defined in the statute (definition in state administrative regulations include “public assistance” and any “coupon or voucher representing monetary value such as food stamps” (Wis. Admin. Code DWD § 202.02(8))).

## APPENDIX II

### *Selected Local Laws Outlawing Housing Discrimination Based on Source-of-Income*<sup>409</sup>

[year enacted in brackets]

Austin, Texas: AUSTIN ORD. NO. 20141211-050 [2014]; invalidated by subsequent state law.

Boston, Massachusetts: BOS. MUN. CODE § 10-3.1 [1982]: amends the City's fair housing code to prohibit housing discrimination on the basis of "source of income."

Chicago, Illinois: CHI. MUN. CODE § 5-8-030 § 5-8-030 (basic prohibition), -040 (definition of "source of income") [1990].

Cook County, Illinois: COOK CNTY. CODE § 42-38(b) [2013]: fair housing law (§ 42-30 et seq.) amended to bar discrimination based on housing-choice-voucher status.

Dallas, Texas: DALL. CITY CODE Vol. 1, Ch. 20A [2016]; invalidated by subsequent state law.

Denver, Colorado: DEN. REV. MUN. CODE Ch. 3, Art. IV, § 28-95 [2018].

Los Angeles City, California: L.A. MUN. CODE Ch. IV Sec. 1 Art. 5.6.1 [2019]: prohibits rental discrimination based on source of income (Sec. 45.67) and defines "source of income" to include "the Section 8 voucher program . . . or any other housing subsidy program, homeless assistance or prevention program or security deposit assistance program." (Sec. 45.66)

Los Angeles County, California: L.A. CNTY. CODE OF ORD.S Ch. 858 [2019]: prohibits rental discrimination based on source of income (Sec. 8.58.030) and defines "source of income" to include the Section 8 Housing Choice Vouchers program and other government-funded rental assistance programs (Sec. 8.58.020).

Miami-Dade County, Florida: MIAMI-DADE CNTY. CODE OF ORD.S § 11A-12 [2009].

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409. The jurisdictions listed here are those with the largest populations (e.g., New York, Los Angeles, Chicago) and those that have produced cases discussed elsewhere in this Article. For a full list of the places with such laws, see POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 84, at app. B.

Memphis, Tennessee: MEMPHIS CODE OF ORD.S § 10-36 [2002].

Milwaukee, Wisconsin: MILWAUKEE CODE OF ORD.S Ch. 109 [2018].

Minneapolis, Minnesota: MINN. CODE OF ORD.S Tit. 7, Ch. 139 [2017].

Montgomery County, Maryland: MONTGOMERY CNTY. CODE Part II, Ch. 27, Art. I [1991].

New York City, New York: N.Y.C. HUMAN RIGHTS LAW §§ 8-107(5)(a)(1)+(3) [2008]: defines “lawful source of income” as including “without limitation income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers.”

Philadelphia, Pennsylvania: PHILA. CODE, FAIR HOUSING ORD. Ch. 9-800 [1980]: making it illegal for landlords to discriminate against tenants because of their source of income.

Pittsburgh, Pennsylvania: PITTS. CODE OF ORD.S Tit. Six, Art. V, Ch. 659.03 [2015].

San Diego, California: SAN DIEGO MUN. CODE Ch. 9, Art. 8, Div. 8 [2018]: “source of income” added to city’s fair housing ordinance and defined to include government rent subsidies.

San Francisco, California: S.F. POLICE CODE § 3304, subd. (a) [1998]: “source of income” added to city’s fair housing ordinance and defined to include government rent subsidies.

St. Louis, Missouri: ST. LOUIS CITY ORD. Title 3 Ch. 44 Sec. 3.44.080 [2015]: “Source of income” means the point or form of the origination of legal gains of income accruing to a person in a stated period of time; from any occupation, profession or activity, from any contract, agreement or settlement, from federal, state or local payments, including Section 8 or any other rent subsidy or rent assistance program, from court ordered payments or from payments received as gifts, bequests, annuities or life insurance policies.” (Sec.344.010).

Seattle, Washington: SEATTLE MUN. CODE Tit. 14, Ch. 14.08 [1989].

Washington, D.C.: D.C. CODE § 2-1402.21(a), § 2-1401.02(29): 1997: added “source of income” to local fair housing law (which makes it unlawful to discriminate “wholly or partially for a discriminatory reason based on [identified factors]”) and defined to “source of income” include “federal payments”; 2002: amended to expressly include HCV program assistance within law’s “source of income” (D.C.Code § 42-2851.06); 2005: technical amendments to correct an error that had applied this provision to public accommodations rather than to private housing (D.C.Code § 2-1402.21(e)); this provision and cases dealing with it are discussed *supra* notes 100, 116, 259, and 261.

APPENDIX III

*Proposed Source-of-Income Amendments to the Fair Housing Act*

2019:

American Housing and Economic Mobility Act of 2019, S. 787, 116th Cong. § 301 (2019) (Senator Warren and others), and H.R. 1737, 116th Cong. § 301 (2019) (Rep.s Richmond and others): adds source of income and three other protected classes (sexual orientation, gender identify, and marital status) to the FHA; “‘Source of income’ includes income for which there is a reasonable expectation that the income will continue from—

“(1) a profession, occupation or job;

“(2) any government or private assistance, grant, loan or rental assistance program, including low-income housing assistance certificates and vouchers issued under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.);

“(3) a gift, an inheritance, a pension, an annuity, alimony, child support, or other consideration or benefit; or

“(4) the sale or pledge of property or an interest in property.”

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Landlord Accountability Act of 2019, H.R. 232, 116th Cong. (2019) (Rep. Velazquez): adds new subsection (g) to § 3604 outlawing rental-only discrimination because “tenant is the holder of a housing voucher.”

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Fair Housing Improvement Act of 2019, S. 1986, 116th Cong. (2019) (Senators Kaine and Rosen), and H.R. 3516, 116th Cong. (2019) (Rep.s Peters and others): adds source of income and military status as protected classes under the FHA; defines, in Sec. 2(a)(1)(q), “source of income” to include—

“(1) a housing voucher under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) and any form of Federal, State, or local housing assistance provided to a family or provided to a housing owner on behalf of a family, including rental vouchers, rental assistance, and rental subsidies from nongovernmental organizations;

“(2) income received during a taxable year as Social Security benefits, as defined in section 86(d) of the Internal Revenue Code of 1986, or as supplemental security income benefits under title XVI of the Social Security Act (42 U.S.C. 1381 et seq.);

“(3) income received by court order, including spousal support and child support;

“(4) any payment from a trust, guardian, or conservator; and

“(5) any other lawful source of income.”

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A Just Society: A Place to Prosper Act of 2019, H.R. 5072, 116th Cong. § 4 (2019) (Rep.s Ocasio-Cortez and others): adds source of income as a protected class to the FHA; provides, in Sec. 4(a)(1), the same

definition of “source of income” as in S. 1986 (Kaine and Rosen) and H.R. 3516 (Peters and others) supra.

Before 2019:

American Housing and Economic Mobility Act of 2018, S. 3503, 115th Cong. § 301 (2018) (Senator Warren), and H.R. 7262, 115th Cong. § 301 (Dec. 11, 2018) (Rep. Richmond and others) (see “2019” above for description).

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Landlord Accountability Act of 2017, H.R. 202, 115th Cong. (2017), and H.R. 5401, 114th Cong. (2016) (Rep. Velazquez) (see “2019” above for description).

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Fair Housing Improvement Act of 2018, S. 3612, 115th Cong. sec. 2(p) (2018) (Senators Hatch and Kaine): virtually identical to Senator Kaine’s S. 1986 (see “2019” above for description).

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Housing Opportunities Made Equal (HOME) Act of 2013, S. 1242, 113th Cong. § 2 (2013) (Senator Brown and others): adds source of income and three other protected classes (sexual orientation, gender identify, and marital status) to the FHA; “‘Source of income’ means the receipt of Federal, State, or local public assistance including medical assistance, or the receipt by a tenant or applicant of Federal, State, or local housing subsidies, including rental assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) or other rental assistance or rental supplements.”