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Cover Page Footnote
J.D. Candidate, 2011, Fordham University School of Law; B.A., 2003, University of Pennsylvania. I would like to thank the following for their help in the note writing process: Professor David Schmudde for his guidance; my husband, Erez, my son, Ilan, my parents, Bill and Edelle, and my sister, Mindy, for their love and support; and Legal Services NYC—Brooklyn Branch for the inspiration for this Note.
USING DISPARATE IMPACT ANALYSIS IN FAIR HOUSING ACT CLAIMS: LANDLORD WITHDRAWAL FROM THE SECTION 8 VOUCHER PROGRAM

Rebecca Tracy Rotem*

The Fair Housing Act (FHA) outlaws discrimination in housing based on race, color, religion, national origin, and sex. A plaintiff can win an FHA claim using a disparate impact theory by showing that the defendant’s actions had a disproportionately adverse impact on a protected class. This Note will address a circuit court split on whether a landlord can be held liable for discrimination under the FHA for withdrawing from the Section 8 voucher program. Section 8 is a government program that provides low-income citizens with vouchers to pay a portion of their rent. Many voucher recipients are minorities or persons with disabilities. The U.S. Courts of Appeals for the Second and Seventh Circuits have held that, as a matter of law, a landlord who withdraws from the Section 8 voucher program cannot be held liable under the FHA, even if that action has a disproportionate impact on a protected class. In contrast, the Court of Appeals for the Sixth Circuit has held that a plaintiff can rely on evidence of disparate impact to show that a landlord violated the FHA by withdrawing from Section 8. This Note argues that in order to meet the FHA’s goal of ending housing discrimination, landlords who withdraw from the Section 8 program should not be given a categorical exemption from liability under the FHA if that action has a disparate impact on a protected class.

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INTRODUCTION

The concentration of the poor in central cities creates a number of serious social problems. In poor urban areas, children often attend schools of low quality, and adults tend to lack access to employment opportunities . . . The resulting social dynamics exacerbate behavioral problems such as educational failure, detachment from the labor force, teen-age pregnancy, substance abuse, and violent crime. In turn, these social problems increase the class bias, racism, and fear of the middle class toward the minority poor, thus accelerating middle class flight to exclusionary suburbs.1

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Racial and economic segregation in the housing market has been a major problem throughout this country’s history. In 1968, Congress enacted the Fair Housing Act (FHA) as Title VIII of the Civil Rights Act of 1968 to combat racial segregation. In 1974, to further combat the concentration of poverty and racial segregation in housing, the government developed the Section 8 voucher program, which supplies vouchers to low-income tenants to assist with rental payments.

Yet, despite receiving vouchers to help with rental payments, people with these government benefits still encounter real difficulties obtaining housing. Specifically, Section 8 discrimination is a major housing issue. Under the Section 8 voucher program, recipients can use the voucher to pay a portion of their rent. Yet, participation in the Section 8 program is voluntary for landlords. Once a landlord has chosen to participate in the program, a landlord can withdraw for many reasons. Given that many of these voucher recipients are minorities or persons with disabilities, there is a potential for landlords to withdraw from the program for discriminatory reasons. "[A]s neighborhoods have gentrified, voucher holders are finding that property owners who might have taken their vouchers in the past are now turning them away ...."

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5. HUD.gov, Housing Choice Voucher Program (Section 8), http://portal.hud.gov/portal/page/portal/HUD/topics/housing_choice_voucher_program_section_8 (last visited Feb. 10, 2010).
8. Fernandez, supra note 4. This information from the New York Times is especially valuable because New York City has the largest Section 8 program in the country. I Meryl Finkel & Larry Buron, U.S. Dep’t of Hous. and Urban Dev., Study on Section 8 Voucher Success Rates, Quantitative Study of Success Rates in Metropolitan Areas 2-2 (2001), available at http://www.huduser.org/Publications/pdf/sec8success_1.pdf. Gentrification is typically defined as “[t]he restoration and upgrading of a deteriorated or aging urban neighborhood by middle-class or affluent persons, resulting in increased property values and often in displacement of lower-income residents.” BLACK’S LAW DICTIONARY 755 (9th ed. 2009). John A. Powell and Marguerite Spencer point out in their article that while many gentrification studies ignore race, “gentrification has a very clear racial component. Commonly, higher-income white households replace lower-income minority ones ....” John A. Powell & Marguerite L. Spencer, Giving Them the Old “One-Two”: Gentrification and the K.O. of Impoverished Urban Dwellers of Color, 46 HOW. L.J. 433, 436 (2003). Similarly, community organizers in New York City “think that [refusing to accept Section 8 vouchers] is really about gentrifying neighborhoods and the fact that this is a way for landlords to do race and gender discrimination under a nice-sounding name.” Manny Fernandez, Bias Is Seen As Landlords Bar Vouchers, N.Y. TIMES, Oct. 30, 2007, at A1 (quoting Bertha Lewis, executive director of New York Acorn).
In turn, courts struggle with finding a solution for plaintiffs if a landlord withdraws from the Section 8 voucher program. A split has developed among federal appellate courts. The U.S. Courts of Appeals for the Seventh and Second Circuits have held that if a landlord withdraws from the Section 8 voucher program, the landlord cannot be sued for discrimination under the FHA using a disparate impact analysis. In 2007, the U.S. Court of Appeals for the Sixth Circuit issued a decision "disagreeing with the position taken by the Second and Seventh Circuits, [and held] that a plaintiff can . . . rely on evidence of some instances of disparate impact to show that a landlord violated the Fair Housing Act by withdrawing from Section 8." This Note will address this circuit court split on whether a landlord can be held liable for discrimination under the FHA for withdrawing from the Section 8 voucher program. This Note argues that in order to meet the goals of the Fair Housing Act, landlords who withdraw from the Section 8 program should not be given a categorical exemption from liability under the FHA if their action has a disparate impact on a protected class. If a plaintiff can prove a disparate impact on a protected class, the burden should shift to the defendant to show a legitimate business reason for the action in order to avoid liability.

Part I of this Note outlines the history and purpose of the Fair Housing Act and Section 8 vouchers and describes disparate impact claims. Part II explains the circuit court split and the reasoning behind each court’s decision. In Part III, this Note explains why the approach in Graoch Associates #33 v. Louisville/Jefferson County Metro Human Relations Commission should be adopted. Courts should hold that, as a matter of law, landlords can potentially be liable for violating the FHA if withdrawing from the Section 8 voucher program disparately impacts a protected class.

I. EXPLORING THE FAIR HOUSING ACT, SECTION 8, AND THE DISPARATE IMPACT TEST

This part describes the background of the issues germane to understanding the circuit split. Part I.A describes the history and the purpose of the FHA. Part I.B describes the history and the purpose of the Section 8 voucher program. Lastly, Part I.C describes the disparate impact analysis and how it is used to find violations of the FHA.

10. Graoch, 508 F.3d at 369.
11. 508 F.3d 369.
A. History and Purpose of the Fair Housing Act

Segregated housing has a long history in the United States. Modern-day racial segregation in housing dates back to 1890. From 1890 to 1940, a period known as the Great Migration, African Americans moved in large numbers from the South and settled in urban areas in the North. During this time period, African Americans "cluster[ed] together" in urban areas. The segregation, both economic and racial, that resulted from the Great Migration has persisted for many reasons. For instance, for much of the twentieth century, racially restrictive zoning regulations were legal, neighborhoods employed racially restrictive covenants, and public housing projects were specifically segregated. Additionally, realtors steered different races to different neighborhoods, and the element of voluntary segregation in housing existed as well.

The court system has been at the forefront of ending government support of racial segregation, beginning with Shelley v. Kraemer in 1948. In Shelley, the U.S. Supreme Court ruled on the legality of racially restrictive covenants. The covenant in the neighborhood in that case provided that "property shall not be used or occupied by any person . . . except those of Caucasian race." The Court found that such covenants violated the Equal Protection Clause of the Fourteenth Amendment because the plaintiffs were denied the same property rights as other citizens on account of their race. This ruling outlawed a segregative practice that was common in many neighborhoods.

After Shelley, the next major advance in fair housing was the passage of Title VIII of the Civil Rights Act of 1968. Title VIII codified the FHA. During its enactment Congress stated that "[i]t is the policy of the United States to provide . . . for fair housing throughout the United States." The FHA "bans discrimination on the basis of race, color, religion, national origin, and sex in virtually all transactions relating to housing," including rental transactions.

12. See generally Stephen Grant Meyer, As Long As They Don't Move Next Door (2000).
14. Id.
15. Id. at 1976.
17. See id.
18. See, e.g., id. at 17; Bell & Parchomovsky, supra note 13, at 1977.
19. 334 U.S. 1 (1948); see Meyer, supra note 12, at 151.
21. Id. at 6.
22. Id. at 20–21.
25. Id. § 3601.
The legislative history of the FHA shows that the riots of the summer of 1967 brought to light the major problems of the nation's inner cities and spurred Congress to pass the bill. To solve this problem, the FHA aimed to end "the exclusionary attitude of some municipalities toward subsidized housing [that] contributed to the segregated housing patterns.

The passage of the FHA was a major fair housing accomplishment. Both Shelley and the FHA showed that courts and the government would not support housing discrimination. James A. Kushner, a law professor and housing discrimination scholar, suggests that it is important for the government and courts to take affirmative steps to end discrimination because otherwise they tacitly endorse it.

Our country still needs to aspire to end housing segregation. The reality today is that although Congress passed the FHA in 1968, racial segregation in housing remains prevalent. Studies indicate that urban cities in the United States are only slightly more integrated than during the time Congress enacted the FHA in 1968.

B. The Section 8 Voucher Program

To understand Section 8, this Note looks at the history and background of the program, requirements for the program, and, finally, current problems and potential solutions that exist for the program.


28. Id. at 127. It is interesting to note that "discrimination in housing is a major contributing factor to racial isolation in urban schools." Id. at 34 (quoting Laufman, 408 F. Supp. at 496–97). So, by solving housing problems we can also take a step towards solving education problems. See Christopher P. McCormack, Note, Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act, 54 FORDHAM L. REV. 563, 577 (1986) ("In addition to its primary effect on the housing opportunities of minorities, [racial segregation] . . . has significant secondary effects in school segregation and employment opportunity.").

29. See MEYER, supra note 12, at 215 (noting that in major cases since the Fair Housing Act’s enactment, the courts have supported the Act’s prohibition of discrimination).


31. Lisa M. Krzewinski, Book Note, Section 8’s Failure To Integrate: The Interaction of Class-Based and Racial Discrimination, 21 B.C. THIRD WORLD L.J. 315, 315 (2001); see also MEYER, supra note 12, at 1.

1. History and Purpose of Section 8

Congress passed the Housing and Community Development Act in 1974. In passing the Act, Congress reasoned that “the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable urban communities as social, economic, and political entities.” In order to meet this goal, the Act provided for “the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.” This Act created the Section 8 voucher program, which is codified at 42 U.S.C. § 1437f. Like the FHA, the Section 8 voucher program aimed to end the segregation and “concentration of poverty” in the housing market.

Prior to the creation of Section 8, housing for the poor consisted of large-scale, traditional public housing units, which often resulted in “concentrating the misery and hopelessness of poverty in large, segregated projects that [were] toxic to . . . the residents of public housing.” Proponents of Section 8 “envisioned it as a way for poor urban minorities to escape the social ills of the city and move to the suburbs.” By allowing recipients to use their vouchers at any private apartment, the program intended to enable recipients to move outside of the concentration of poverty found in public housing projects in the inner city.

Additionally, unlike traditional public housing, recipients of governmental subsidies “would not bear the social stigma of residing in housing complexes created for the poor.” Providing alternatives to public housing projects would help avoid the social problems associated with the concentration of poverty in inner cities.

34. Id. § 101(b), 88 Stat. at 634.
35. Id. § 101(c), 88 Stat. at 634.
37. Paula Beck, Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier, 31 HARV. C.R.-C.L. L. REv. 155, 158 (1996); see also Pub. L. No. 93-383, § 8(a), 88 Stat. at 662 (reciting that the statute was enacted “[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing”).
38. J. Peter Byrne & Michael Diamond, Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed, 34 FORDHAM URB. L.J. 527, 528, 531 (2007) (noting, in addition, that “[h]ousing subsidies . . . will remain a cornerstone of approaches to poverty and to urban planning”).
40. See Byrne & Diamond, supra note 38, at 605.
41. Malaspina, supra note 1, at 296.
42. See id. at 292.
2. Requirements

The Section 8 program has many requirements. It “is the largest subsidized housing program in the U.S.” To qualify for the voucher program a household must earn below 50% of the “Area Median Income.” Once enrolled in the program, recipients who qualify for rental subsidies should be able to use the vouchers to live in any neighborhood they choose.

Voucher recipients find and rent private units, and with the vouchers, the Department of Housing and Urban Development (HUD) subsidizes their rent. Tenants pay 30% of their income to rent a private apartment, and the vouchers subsidize the rest of the rental payment.

A set of rules determine which apartments qualify for the program. To qualify for the program, the apartment must rent at fair market value. If the apartment rents at above fair market value the voucher recipient can pay extra to make up the difference. But, “[i]f the total tenant payment for a unit would exceed 40 percent of the recipients’ income, the unit does not meet the program requirements,” and the tenant cannot use his or her voucher to rent that apartment.

People who apply for the Section 8 program are placed on a waiting list. It often takes years for application approval. For example, in New York City a tenant can remain on the waiting list for over fourteen years.
before being approved for the program. Once a person is approved for a voucher he or she next needs to find an apartment with a landlord who will accept the voucher. The apartment must also meet the program’s requirements.

Under federal law, enrolling in the Section 8 voucher program is voluntary for landlords. This means that a landlord can decide whether to accept Section 8 vouchers as rental payment. If a landlord opts to become part of the program, HUD sets rules that the landlord must follow. For example, “landlords must make their units conform to [HUD’s Housing Quality Standards] before they can rent to voucher recipients.” Initially, and each subsequent year that the landlord and the Section 8 tenant renew the lease, the apartment must be inspected to make sure it complies with the program’s requirements.

3. Problems with the Section 8 Program

One of the major problems with the voucher program is that voucher recipients encounter difficulties finding apartments to rent. In 2001, HUD released a study of the success rates of voucher holders in finding and

54. See HUD.gov, Housing Choice Vouchers Fact Sheet, supra note 45; see also Byrne & Diamond, supra note 38, at 605–06.
55. See HUD.gov, Housing Choice Voucher Program, supra note 5; see also FINKEL & BURON, supra note 8, at 1–2; infra note 58 and accompanying text.
56. Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 300 (2d Cir. 1998). Many states and municipalities now have rules prohibiting discrimination against Section 8 voucher holders, such as Massachusetts, New Jersey, New York City, and Chicago. In those areas a landlord cannot refuse a tenant solely because he or she will be using a voucher to pay a portion of the rent. See MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2008) (stating that Massachusetts forbids rental discrimination “because [an] individual is . . . a recipient, or because of any requirement of [a] public assistance, rental assistance, or housing subsidy program”); Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1112–13 (N.J. 1999) (holding that Section 8 vouchers constitute a lawful source of rental payment and cannot be discriminated against); LAWYERS’ COMM. FOR BETTER HOUS., INC., supra note 45, at 4 (noting that the city of Chicago passed an ordinance making it “illegal in the City of Chicago to either refuse to accept housing vouchers or to discriminate in any way against tenants based on the fact that they are participating in the voucher program”); Fernandez, supra note 4 (“In March [2008], New York City enacted a law making it illegal for landlords to discriminate against tenants who planned to use federal subsidies known as Section 8 vouchers to help pay their rent.”). But see Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1283 (7th Cir. 1995) (holding that “section 8 vouchers do not constitute a lawful source of income” so they are not protected by a Wisconsin antidiscrimination housing law). Landlords argue that statutes requiring landlords to accept Section 8 vouchers as rental payment “turn a voluntary program riddled with bureaucratic problems into a mandatory one.” Fernandez, supra note 8.
57. See HUD.gov, Housing Choice Vouchers Fact Sheet, supra note 45.
58. Beck, supra note 37, at 157–58; see also HUD.gov, Housing Choice Vouchers Fact Sheet, supra note 45.
59. See HUD.gov, Housing Choice Vouchers Fact Sheet, supra note 45; see also Bacon, supra note 50, at 1279.
securing apartments to rent.\textsuperscript{60} In the first study, in the early 1980s, “50 percent of Section 8 certificate holders succeeded in finding housing.”\textsuperscript{61} From 1985 to 1987, 68\% had success; in 1993, 81\% had success; but in 2000, only 69\% had success.\textsuperscript{62} The low success rates can be attributed to landlords declining to accept vouchers either because of discrimination against voucher holders or due to the burdens the program places on housing providers.\textsuperscript{63}

\begin{enumerate}
\item \textbf{a. Discrimination Against Voucher Holders}

Despite the passage of the FHA in 1974, “pervasive racial discrimination and segregation exist within the public housing system, particularly in the Section 8 Program.”\textsuperscript{64} One problem with the program’s implementation is that since participation in the Section 8 program is voluntary, many recipients are unable to find landlords to accept the vouchers.\textsuperscript{65} Discrimination against voucher holders is a general problem.\textsuperscript{66} “The widespread discrimination reduces the utility of the voucher program, [and] frustrates the purported goal[] of the legislation,” which is to end housing segregated by race and income.\textsuperscript{67}

Participating in Section 8 benefits landlords. For example, it expands the number of people who can afford to rent the apartment and guarantees a certain amount of payment each month, decreasing the likelihood of missed rental payment.\textsuperscript{68} Nevertheless, Section 8 voucher holders are turned away regardless of their ability to pay the rent.\textsuperscript{69}

\begin{enumerate}
\item \textsuperscript{60} FINKEL \& BURON, supra note 8.
\item \textsuperscript{61} Id. at 1-2.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} See infra Part I.B.3.b.
\item \textsuperscript{64} Bacon, supra note 50, at 1306 (citing Florence Wagman Roisman, Long Overdue: Desegregation Litigation and Next Steps To End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs, 4 CITYSCAPE 171, 171 (1999)).
\item \textsuperscript{65} Beck, supra note 37, at 158–59. “Possession of a Section 8 subsidy marks its holder as a low-income person, a status that carries with it a multitude of negative stereotypes.” Id. at 162; see also Malaspina, supra note 1, at 288.
\item \textsuperscript{66} Bacon, supra note 50, at 1273.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} See Beck, supra note 37, at 166. Accordingly, in tight markets it takes longer for voucher holders to find an apartment, which supports the assertion that when landlords are desperate for tenants, more landlords will participate in the program and it is easier for Section 8 voucher holders to rent. See FINKEL \& BURON, supra note 8, at 2-3 (stating that Section 8 recipients had more difficulty utilizing their vouchers in tighter rental markets); Fernandez, supra note 8 (“Many property owners and real estate agents say the [Section 8] program is overly cumbersome, and in a hot rental market, they say, there is no need to take on a Section 8 tenant.”).
\item \textsuperscript{69} See Beck, supra note 37, at 163. Arguably, a landlord should not care where tenants get their money as long as the landlord gets paid. See Beck, supra note 37, at 163. """Housing...is the one commodity where the race, religion or national origin of the purchaser determines what he may buy and where he may buy it, regardless of his ability to pay. ... The free enterprise system has broken down and private prejudice has determined public policy."""" MEYER, supra note 12, at 133 (omissions in original) (quoting Nat’l Comm. Against Discrimination in Hous., A Call on the President of the United States for the
While the refusal to accept Section 8 vouchers appears racially neutral on its face, “many housing advocates believe that the acceptability and legality of Section 8 discrimination enables landlords to use it as a proxy for other legally prohibited kinds of discrimination, such as that based on race, ethnicity, national origin, gender, family status, or disability." For instance, studies show that discrimination against Section 8 voucher holders increases if the recipient is African American or Latino.70

Discrimination against Section 8 voucher holders can be used as a proxy for racial discrimination because many recipients are minorities.71 Discrimination against the poor and discrimination against minorities are intertwined:

Because most urban poor are African American, and because the vast majority of African Americans live in residential ghettos, this economic bias transforms itself into racial attitudes. “Race thus becomes a proxy, such that being a Black equates with being a poor tenant or poor neighbor.” And neighborhoods must keep these poor (black) individuals out, lest their neighborhoods become “ghetto-like” too.72

Class-based discrimination and race-based discrimination have become combined. This is one reason that Section 8 discrimination can be a proxy for race discrimination.


70. Beck, supra note 37, at 155; see also Bacon, supra note 50, at 1295. In many localities the majority of Section 8 recipients are minorities. See, e.g., Final Brief for Appellant at 22 & n.20, Graech Assocs. #33 v. Louisville/Jefferson County Metro Human Relations Comm’n, No. 06-5561 (6th Cir. Aug. 24, 2006) (stating that the majority of Section 8 recipients in Jefferson County, Kentucky, are from protected classes); Finkel & Buron, supra note 8, at 1-8 (stating that in their study “[m]ost of the voucher holders were extremely low income, minority families, headed by a female”); Greater New Orleans Fair Hous. Action Ctr., Housing Choice in Crisis: An Audit Report on Discrimination Against Housing Choice Voucher Holders in the Greater New Orleans Rental Housing Market 5 (2009), available at http://www.gnofairhousing.org/pdfs/HousingChoiceInCrisis2009.pdf (“Ninety-nine percent (99%) of voucher holders in [New Orleans] are African American.”); Fernandez, supra note 4 (noting that many Section 8 tenants are “poor, disabled or elderly black and Hispanic residents”). Therefore, the racially neutral practice of not accepting Section 8 vouchers can “disproportionately limit the housing opportunities of members of protected groups.” McCormack, supra note 28, at 579. That is why “[l]iability based on disparate impact and business necessity analysis are appropriate tools for achieving the goals of Title VIII” and perhaps goals within the Section 8 context.


72. See supra note 70 and accompanying text. Because “landlords can generally use bias against section 8 holders as a pretext for racial discrimination,” housing advocates argue, we should “take more affirmative steps against discriminating landlords via the court system.” Krzewinski, supra note 31, at 327.

73. Krzewinski, supra note 31, at 323 (citing Meyer, supra note 12, at 8; Beck, supra note 37, at 155; Malaspina, supra note 1, at 291–92); see also Bell & Parchomovsky, supra note 13, at 1975.
Studies confirm a racial component in Section 8 discrimination.\footnote{See Greater New Orleans Fair Hous. Action Ctr., supra note 70, at 11; Lawyers' Comm. for Better Hous., Inc., supra note 45, at 10–11.} A study in Chicago found that “[v]oucher holders are denied access to approximately 70% of the market rate units that are supposedly available to them.”\footnote{Id.} This means that “[v]oucher holders must choose from a pool of only about 30% of the available housing units that are within [the program’s] rental payment guidelines in Chicago.”\footnote{Id. (noting, in addition, that minorities make up a majority of voucher holders).} The study additionally showed that “once ethnicity is accounted for, the Housing Choice Voucher holder who is African-American or Hispanic has an even smaller opportunity or probability of locating suitable housing.”\footnote{See also Lawyers' Comm. for Better Hous., Inc., supra note 45, at 6 (noting “most families using voucher subsidies end up back in areas that are racially segregated with high poverty levels”); Malaspina, supra note 1, at 308 ("[A] household's use of Section 8 causes no statistically significant change in the minority concentration of its neighborhood.").} This study shows that Section 8 voucher holders encounter discrimination based on more than one trait: income level and race.\footnote{Kruszewski, supra note 31, at 320–21; see also Lawyers' Comm. for Better Hous., Inc., supra note 45, at 6 (noting “most families using voucher subsidies end up back in areas that are racially segregated with high poverty levels”); Malaspina, supra note 1, at 308 ("[A] household’s use of Section 8 causes no statistically significant change in the minority concentration of its neighborhood.").}

These studies indicate that the program has not worked entirely according to plan (to help end segregated housing). “[M]any recipients end up using their subsidies to pay for their current low-income housing units or move within their own segregated neighborhoods.”\footnote{Kushner, The Fair Housing Amendments Act of 1988, supra note 30, at 1064.} Because of discrimination against voucher holders, many subsidy recipients can only find housing in neighborhoods where they already “are in the racial majority.”\footnote{See infra notes 83–87 and accompanying text.}

b. Landlord Complaints

Landlords who choose not to participate in the Section 8 program have many reasons for this choice. To many housing providers, the Section 8 program has a bad reputation.\footnote{See infra notes 88–97 and accompanying text.} Others find the program’s administrative requirements overly burdensome.\footnote{See Christopher Swope, Subsidizing Blight, Governing, May 2002, at 34, 34.}

i. Reputation of Section 8 Tenants

Many current voucher holders previously resided in public housing.\footnote{See Greater New Orleans Fair Hous. Action Ctr., supra note 70, at 11; Lawyers' Comm. for Better Hous., Inc., supra note 45, at 10–11.} As public housing projects are being demolished in favor of vouchers, housing providers fear that these tenants bring the problems of poverty with them
into their new neighborhoods. They believe that these tenants are more likely to cause trouble by not paying their required portion of the rent, destroying the property, committing crimes, or loitering in the neighborhood. One landlord who accepts vouchers commented that he fears sending his wife to collect rent from those tenants because “Section 8 brings a life-style from the city that I tried to escape from. . . . It’s a value difference. It’s all single mothers. They let their kids stay out until midnight.” Additionally, a study in Memphis, Tennessee, suggested that crime in the city followed voucher holders.

ii. Administrative Problems

Although fear of social problems might prevent some landlords from accepting vouchers, housing activists admit that they do not have concrete proof that landlords turn away voucher holders because of racial discrimination. Landlords cite many administrative problems with the program as a deterrent. Many landlords simply do not want to deal with the bureaucracy of the program. In order to participate in Section 8, landlords must allow apartment inspections, an extra step that the landlord otherwise would not have to take to rent the apartment. The many inspections have been cited as a major deterrent for landlords who choose not to participate in the program.

“Landlords, property managers and real estate agents argue that the reluctance to take the vouchers stems from the program’s payment delays and other administrative problems, not the racial or economic background of applicants.” Complying with Section 8 adds additional work for the landlords. Some landlords receive payment from the tenants, but not the portion of the rent that comes from the housing authority. Additionally,

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84. *Id.* To avoid the negative stigma of voucher holders bringing problems of the inner-city into their new neighborhoods and creating a “horizontal” ghetto in place of a “vertical” one, one author suggests that Section 8 monitor the placement of voucher holders and limit the number that could move to any one area. *Id.*


86. *Id.* at 89–90 (quoting landlord Frank Arceneaux).


89. See GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., *supra* note 70, at 13; Fernandez, *supra* note 8.


91. See *supra* notes 57–59. The Housing Quality Standards required by Section 8 might be “less stringent than the sanitary codes in many localities.” Beck, *supra* note 37, at 175. So arguably, this is not a valid reason to avoid participating in the program: “Landlords should not be allowed to refuse to rent to Section 8 recipients because they would rather rent illegally [under substandard housing conditions] to non-Section 8 tenants.” *Id.* at 166.


93. *Id.; see also GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., supra* note 70, at 13.

94. See GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., *supra* note 70, at 13.
some landlords find it frustrating to deal with the staff at the housing authority offices.95

Participating in the program often causes delays in renting the apartment. In a study conducted in New Orleans, "[h]ousing providers commonly stated that it takes as much as two (2) to three (3) months before [the Housing Authority of New Orleans] signs a lease, and that it consistently takes 6–8 weeks to sign a contract."96 Likewise, "[o]ne small-landlord stated, 'I passed an inspection on June 9th and didn't get paid till August 11th.'"97 In situations like this, if the landlord did not rent to Section 8 tenants he or she could have started collecting rent immediately.

4. Suggestions for Improvement

The problems facing the Section 8 program directly affect rental prospects because if a recipient cannot use the voucher, he or she loses it.98 "Public housing and . . . [v]ouchers are the housing options of last resort for low-income families," and when those options fail, and "a family cannot find suitable housing because of discrimination, what options are left? The most likely answer is living on the street, in shelters, or . . . with relatives."99

Many housing advocates support an amendment to the FHA outlawing discrimination against lawful sources of income and want to include Section 8 voucher discrimination in that category.100 Some states have statutes that ban discrimination based on lawful source of income, but courts split in how they interpret vouchers and whether they constitute a source of income.101

95. Id.
96. Id.
97. Id.
98. Fernandez, supra note 8 ("Hundreds of Section 8 vouchers are terminated each year because they could not be used successfully; about 1,400 ha[d] been terminated [as of October, for the year 2007, in New York City]."); see also FINKEL & BURON, supra note 8, at 1 ("Under the voucher program, participants must find and lease qualifying units in the private rental market within the time allowed by the program. . . . Not every family or individual that receives a Section 8 tenant-based voucher succeeds in finding a qualifying unit."); Malaspina, supra note 1, at 303 ("A household may spend years on the [public housing authority] waiting list only to be given sixty days in which to find an apartment." (footnote omitted)).
99. LAWYERS’ COMM. FOR BETTER HOUS., INC., supra note 45, at 12.
100. FINKEL & BURON, supra note 8, at 3-17 (finding that "enrollees in programs that are in jurisdictions with laws that bar discrimination based on source of income (with or without Section 8) had a statistically significantly higher probability of success of over 12 percentage points" when compared to enrollees who lived in jurisdictions without such laws); Beck, supra note 37, at 162, 171 ("Although there are no data comparing Section 8 success rates in states that have protective statutes with those in states that do not, anecdotal accounts . . . suggest that provisions prohibiting discrimination against Section 8 tenants have a positive effect on Section 8 recipients’ ability to locate housing outside of high-poverty neighborhoods.").
101. Compare Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1112–13 (N.J. 1999) (holding that Section 8 vouchers constitute a lawful source of rental payment and cannot be discriminated against), with Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1283 (7th Cir.
It is likely that "neither this amendment, nor any other single measure is a panacea. A broad combination of laws, policies, beliefs, and behaviors must be marshaled to achieve the goal of ensuring that subsidized tenants have the freedom to choose where they will live." Indeed, until Congress amends the FHA or until every state has a statute that bans Section 8 discrimination—and neither is very likely to happen in the near future because both of those changes erode the voluntary nature of the program—the courts are an important vehicle for solving this housing problem.

C. Using Disparate Impact Analysis To Find Violations of the FHA

The FHA seeks to prohibit acts that discriminate against its protected classes. The FHA bans actions that have a discriminatory motive; however, what the Act contemplates regarding actions that may not be based on a discriminatory motivation, but nevertheless have a discriminatory effect, is less clear.

Generally, when a racially neutral action has a disproportionate impact on a protected class, a disparate impact test can be used to show violations of the FHA. The exact parts of the disparate impact test vary in different jurisdictions but the basic idea remains the same. Under the disparate impact test the plaintiff has the burden of using statistical evidence to show that the action taken by the defendant disproportionately impacted members of a protected class. If the plaintiff succeeds, then the burden shifts to the defendant to prove that the action had a legitimate business purpose. If the defendant provides a legitimate business purpose for the action, and shows that there was no less discriminatory way of achieving the result, he or she is not liable for violating the FHA.

1995) (holding that “section 8 vouchers do not constitute a lawful source of income” so they are not protected by a Wisconsin antidiscrimination housing law).
102. Beck, supra note 37, at 185.
103. See supra note 26 and accompanying text.
104. SCHWEMM, supra note 26, at 53; see also George Rutherglen, Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality, 74 FORDHAM L. REV. 2313, 2319 (2006) (“Modern fair housing legislation has received more equivocal interpretations, with the circuits split on the availability of claims for disparate impact under the Fair Housing Act of 1968.”).
107. Id. at 374.
108. See Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988) (per curiam). Town of Huntington v. Huntington Branch, NAACP illustrates how to use the disparate impact test. Id. In Huntington, the town refused to amend a zoning ordinance to allow the construction of subsidized housing units in the “white” part of town. Id. at 16–17. Plaintiffs proved that because minorities constituted the majority of citizens eligible to live in subsidized housing, the town’s refusal to amend the code disproportionately impacted a protected class. Id. at 17. After plaintiffs proved disparate impact, the burden shifted to the town to provide a legitimate reason for refusing to amend the code. Id. The town argued that it refused to allow subsidized housing in the “white” part of town because it wanted to encourage developers to build in the “deteriorated and needy section of town.” Id. Both the
Disparate impact analysis plays a role in "administering the law, [as] it allocates the burden of proof between plaintiffs and defendants."\textsuperscript{109} A disparate impact analysis "effectively shift[s] part of the plaintiff's burden of proving discrimination onto the defendant to prove absence of discrimination."\textsuperscript{110} The theory also plays a role "[a]t the abstract level of defining the ultimate aims of the law."\textsuperscript{111} If one argues that disparate impact analysis is needed because it is often impossible to prove intent to discriminate, "it [also] structures debates over equality" and how far to take the Civil Rights Acts.\textsuperscript{112}

1. Early Precedent—\textit{Griggs}

The FHA's wording prohibits discrimination "because of race."\textsuperscript{113} While the Supreme Court has not ruled on whether the FHA contemplates actions that have discriminatory effects, many courts have interpreted the FHA, Title VIII of the Civil Rights Act of 1968, analogously to Title VII of the Civil Rights Act of 1964, which relates to discrimination in employment.\textsuperscript{114} Title VII similarly prohibits discrimination "because of . . . race."\textsuperscript{115} The Supreme Court, in \textit{Griggs v. Duke Power Co.},\textsuperscript{116} interpreted the "because of race" language in Title VII to "prohibit[] job requirements with racially discriminatory effects, even if those requirements were adopted without any discriminatory motive."\textsuperscript{117} In \textit{Griggs}, plaintiffs brought suit against their employer under Title VII of the Civil Rights Act of 1964.\textsuperscript{118} The employer required a high school degree or an intelligence test for employment purposes.\textsuperscript{119} The Court noted that these requirements did not discriminate based on race, but the requirements disqualified more minority candidates than white candidates.\textsuperscript{120}
The Court saw that in passing Title VII Congress intended “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”

Given the congressional intent, the Court held that “practices . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” Thus, the Court concluded that Title VII outlawed actions that intended to discriminate as well as actions that had discriminatory effects.

The Court studied the legislative history of Title VII and, in order to effectuate congressional intent, concluded that tests for employment could be used, but only if the test reliably measured job performance. Here, requiring a high school diploma or a passing score on an intelligence test did not relate to job performance and had the effect of barring African Americans from employment, so the practice violated Title VII.

2. Fair Housing Act Cases

Most courts agree that because the language in Title VII and Title VIII is so similar, plaintiffs in Title VIII cases can also use a disparate impact analysis instead of having to prove intent to discriminate in order to prevail. Although the Supreme Court has not explicitly ruled on the issue for Title VIII cases, due to this similarity, in most cases courts allow “claimants in Title VIII actions . . . to demonstrate that an action or practice carries a discriminatory or segregative impact in order to shift the burden to the defendant.” The rationale behind the effects test is that it often is very hard for plaintiffs to prove overt discrimination.

The closest the Supreme Court has come to addressing disparate impact for FHA violation cases was in Huntington v. Huntington Branch, NAACP in 1988. In that case, Huntington, New York, was a segregated town with the majority of the town’s African American population living in

121. Id. at 429–30.
122. Id. at 430.
123. Id. at 431.
124. Id. at 436.
125. Id. at 424–25, 436.
126. The disparate impact test is sometimes referred to as an “effects test.”
127. Kushner, supra note 105, at 134 (footnote omitted); see also 2922 Sherman Ave. Tenants Ass’n v. District of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006) (“[S]ince Griggs, every one of the eleven circuits to have considered the issue has held that the FHA similarly prohibits not only intentional housing discrimination, but also housing actions having a disparate impact.” (citing John F. Stanton, The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination, 31 Hofstra L. Rev. 141, 174 n.180 (2002))).
128. Kushner, The Fair Housing Amendments Act of 1988, supra note 30, at 1074 (footnotes omitted). Kushner also notes that “Congress implicitly endorsed the effects test when it passed the Fair Housing Amendments Act of 1988 and rejected efforts to amend the bill to require an intent test.” Id. at 1075.
The town's zoning code prohibited multifamily homes except in areas mainly populated by minorities. A private developer sought to amend the code and build multifamily, subsidized housing units in a white part of town. Racial minorities would constitute the majority of people eligible to live in the subsidized housing. The town rejected the request to amend the code. The developer filed suit claiming that the town violated the FHA by refusing to change the zoning code. Since mainly minorities were eligible to live in the subsidized housing, if the town did not amend the code, a protected class would be disproportionately adversely affected. Thus, the plaintiffs argued that the court should use a disparate impact standard in considering their claim.

The case came before the Supreme Court, but the Court did not directly address the question of whether a disparate impact analysis should be used. Since both parties already agreed to use a disparate impact test, the Court would not rule on whether that was the correct test to use. It accepted the method the parties agreed to without specifically endorsing the exact analysis used. The Supreme Court decided that the plaintiffs had shown disparate impact, that the defendant did not offer sufficient justification for its actions, and that the defendant was liable under the FHA.

Metropolitan Housing Development Corp. v. Village of Arlington Heights also used disparate impact analysis to determine if a violation of the FHA existed when Arlington Heights refused to change the zoning of the plaintiff's property to allow government-funded low-income housing to be built. The plaintiffs claimed that the refusal to allow the construction had a disproportionally adverse impact on minorities since minorities constituted a majority of the people who would qualify for the houses. The Supreme Court held that absent a showing of discriminatory intent there could be no violation of the Equal Protection Clause of the

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131. Id. at 16.
132. Id.
133. Id.
134. Id. at 17.
135. Id. at 16.
136. Id. at 16–17.
137. Id.
138. Id. at 17.
139. Id. at 18.
140. Id.
141. Id.
142. Id.
143. 558 F.2d 1283 (7th Cir. 1977).
144. Id. at 1286–90.
145. Id. at 1286.
The plaintiffs did not raise the issue of an FHA violation in that case.\textsuperscript{147}

On remand, the Seventh Circuit considered an FHA claim. It held that “[b]ecause a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village’s refusal to permit [Metro Housing Development Corporation] to construct the project had a greater impact on black people” and thus also “had the effect of perpetuating segregation in Arlington Heights.”\textsuperscript{148}

Next, the court analyzed whether an effects test should be used to find a violation of the FHA.\textsuperscript{149} Consistent with the Supreme Court’s reasoning in \textit{Griggs},\textsuperscript{150} the court adopted a broad interpretation of the statutory language in the FHA, holding that “because of race” means if the “foreseeable consequence of that act is to discriminate between races” then the defendant can be held liable without proof of a discriminatory motive.\textsuperscript{151} The Seventh Circuit also noted that the Supreme Court used this reasoning in \textit{Griggs} because congressional intent in enacting Title VII “was to achieve equality of employment opportunities—and [so the Court] interpreted [the section] in a broad fashion in order to effectuate that purpose.”\textsuperscript{152} Similarly, the FHA aimed to end segregated housing, and the Seventh Circuit recognized that requiring a plaintiff to show a discriminatory intent would often be an impossible burden.\textsuperscript{153}

The court concluded by holding that “at least under some circumstances a violation of [the FHA] can be established by a showing of discriminatory effect without a showing of discriminatory intent.”\textsuperscript{154} The court then stated that it “refuse[d] to conclude that every action which produces discriminatory effects is illegal,” but, rather, “courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute.”\textsuperscript{155} Then, in its next sentence, \textit{Arlington Heights} laid out the disparate impact test to be used in that jurisdiction.\textsuperscript{156} The court also noted, “to liberally construe the Fair Housing Act, we must decide close cases in favor of integrated housing.”\textsuperscript{157}

\textsuperscript{146} Id. at 1287. The Supreme Court, in \textit{Washington v. Davis}, held that unlike in Title VII claims, plaintiffs could not use evidence of disparate impact to show a violation of equal protection under the Constitution, 426 U.S. 229, 238–39 (1976).

\textsuperscript{147} Arlington Heights, 558 F.2d at 1287.

\textsuperscript{148} Id. at 1288.

\textsuperscript{149} Id.


\textsuperscript{151} Arlington Heights, 558 F.2d at 1288.

\textsuperscript{152} Id. at 1289.

\textsuperscript{153} Id. at 1290.

\textsuperscript{154} Id. (noting that the court did not want to create a per se rule that every action that had a discriminatory effect was a violation of the FHA, and laying out a test to determine when relief would be granted).

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 1294.
3. Disparate Impact Test and Section 8 Claims

Once a housing provider chooses to participate in the Section 8 Voucher program, he or she can withdraw from the program. Most discrimination claims based on refusal to accept Section 8 vouchers will be brought under a disparate impact theory based on racial, sexual, or handicap discrimination.\(^\text{15}\) Government voucher recipients are not a protected class under the FHA, so a claim cannot proceed under a theory of discrimination against voucher holders.\(^\text{150}\) But, plaintiffs in these cases argue that a landlord’s withdrawal from the program has a disproportionate impact on minorities or the disabled, which are protected classes.\(^\text{160}\)

Courts use various tests to determine if there has been discrimination in violation of the FHA based on disparate impact on a protected class stemming from a racially neutral act.\(^\text{161}\) As discussed earlier, this is the basic disparate impact test: (1) the plaintiff proves that the act had a disparate impact on a protected class; (2) the burden shifts to the defendant to show that he or she had a legitimate business reason for the action that could not be achieved in any less discriminatory way; (3) if the defendant fails to rebut the argument, or if there is “evidence that the justification was pretextual [it] allows the inferential demonstration of intentional discrimination.”\(^\text{162}\)

Once a plaintiff shows that an action disproportionately affects a protected class, the burden of proof shifts to the defendant to defend the practice. This “lenient burden of proof makes Title VIII litigation accessible to plaintiffs and forces defendants to explain housing practices in terms of profit-based, good business policy” since often intent to discriminate is difficult to prove.\(^\text{163}\)

In Paula Beck’s 1996 article, *Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier*, she notes that the court’s refusal in *Knapp v. Eagle Property Management Corp.*\(^\text{164}\) to apply a disparate impact analysis in Section 8 withdrawal cases has led that approach to fall out of favor with the courts.\(^\text{165}\) By refusing to follow *Knapp* and creating a cause

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15. See infra notes 152–53 and accompanying text.
159. See supra note 26 and accompanying text.
160. See, e.g., Graoch Assocs. #33 v. Louisville/Jefferson County Metro Human Relations Comm’n, 508 F.3d 366 (6th Cir. 2007); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998); Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272 (7th Cir. 1995). Housing advocates also believe landlords use Section 8 discrimination as a proxy for racial discrimination. See Fernandez, supra note 8.
161. Graoch, 508 F.3d at 371. This Note does not discuss what the burden-shifting test for disparate impact claims should be or what a plaintiff has to show to prove disparate impact.
163. Id. at 1076.
164. 54 F.3d 1272.
of action under the FHA, the court in *Graoch* set the stage for the use of disparate impact analysis to come back into favor in Section 8 withdrawal cases.\(^{166}\)

The Supreme Court’s failure to rule definitively on the issue of disparate impact analysis in FHA claims has led to some discrepancy in the courts on when to use that analysis.\(^{167}\) The fact that two circuits ruled differently on the issue of whether the effects test can be used if a landlord withdraws from the Section 8 voucher program illustrates the wider question of how and when to use a disparate impact analysis in FHA claims. This Note discusses the differing views in *Knapp* and *Graoch* on whether disparate impact analysis is appropriate if a landlord withdraws from the Section 8 voucher program.

II. USING A DISPARATE IMPACT TEST IN LANDLORD WITHDRAWAL FROM SECTION 8 CLAIMS

This part analyzes the circuit court split on whether to use disparate impact analysis under the FHA if a landlord withdraws from the Section 8 voucher program. Part II.A.1 and Part II.A.2 analyze the *Knapp v. Eagle Property Management Corp.* and *Salute v. Stratford Greens Garden Apartments*\(^{168}\) courts’ refusal to apply a disparate impact analysis to find discrimination under the FHA based on landlord withdrawal from the Section 8 voucher program. Part II.B analyzes the recent decision in *Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, which disagreed with that position and stated that as a matter of law, it would consider disparate impact “to show that a landlord violated the Fair Housing Act by withdrawing from Section 8.”\(^{169}\)

A. Knapp and Salute—Landlords Exempt from Disparate Impact Claims

Both the *Knapp*\(^{170}\) and *Salute*\(^{171}\) cases held that as a matter of law, a landlord who withdraws from the Section 8 voucher program cannot be held liable under the FHA even if that action has a disproportionate impact on a protected class.

\(^{166}\) See infra Part II.

\(^{167}\) Compare *NAACP v. Am. Family Mut. Ins. Co*, 978 F.2d 287, 292–93 (7th Cir. 1992) (suggesting it would not be appropriate to do a disparate impact analysis based on insurance “redlining”), and *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990) (refusing to do a disparate impact analysis in a racial steering claim against realtors), with *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984) (using a disparate impact test in case where a landlord tried to evict all families with children in order to maintain an adult-only building).

\(^{168}\) Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998).

\(^{169}\) Graoch Assocs. #33 v. Louisville/Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 369 (6th Cir. 2007).

\(^{170}\) 54 F.3d 1272 (7th Cir. 1995).

\(^{171}\) 136 F.3d 293.
Knapp was the first case to address the issue of whether the actions of a landlord who previously participated in the Section 8 voucher program and then withdrew could give rise to a discrimination claim under the FHA. In that case, the plaintiff, Linda Knapp, an African American mother of two children, received rental subsidies from the government through the Section 8 voucher program. She contacted the defendant to inquire about available apartments and was told that the landlord had vacant apartments and that he accepted Section 8 vouchers. But, when Knapp finally filled out an application for an apartment she was told that the landlord decided to stop accepting the vouchers as rental payment. Knapp filed suit "alleging that they had discriminatorily refused to rent her an apartment because of her race and her status as a recipient of federal rent assistance under the 'section 8' voucher program." The jury determined that the defendants did not discriminate against Knapp on the basis of race, but that they did discriminate against her based on her status as a Section 8 voucher holder. Both Knapp and the defendants appealed to the Seventh Circuit.

On appeal, the plaintiff tried to prove that "the defendants' refusal to accept any new section 8 tenants disproportionately affected African-Americans" because a high proportion of African American residents in the county received vouchers. In prior cases, the Seventh Circuit used a disparate impact analysis to determine if a racially neutral act had a disproportionate impact on a protected class, thereby violating the FHA. But, the Knapp court rejected using a disparate impact analysis in this case, stating that "disparate impact analysis is not appropriate in certain contexts."

Knapp relied on Metropolitan Housing Development Corp. v. Village of Arlington Heights where the court "refuse[d] to conclude that every action which produces discriminatory effects is illegal. . . . Rather, the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute." After citing the case for that proposition, the Knapp court then cited two

172. Knapp, 54 F.3d at 1275.
173. Id.
174. Id.
175. Id.
176. Id. (noting also that the trial court initially awarded the plaintiff $95,000 in damages, but reduced that number to $1 after determining that she could only recover contractual damages under the regulations of the Section 8 voucher program).
177. Id. at 1280.
178. Id.
179. Id. (citing NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992)).
180. 558 F.2d 1283 (7th Cir. 1977).
181. Knapp, 54 F.3d at 1280 (quoting Arlington Heights, 558 F.2d at 1290).
cases where the Seventh Circuit refused to conduct a disparate impact analysis to show that the test is not always used in FHA cases.  

In Village of Bellwood v. Dwivedi plaintiffs brought suit because of racial steering practices used by local realtors.  

The court held for the defendants stating, "[w]e cannot imagine the practice (innocent in intent, discriminatory in impact) on which a disparate impact theory might be based in this case." This was because "[e]ither the defendants deliberately tried to alter their customers' preferences in favor of a pattern of racially segregated housing," or, in the alternative, "they honestly tried to serve those preferences—and if they did the latter, but through ineptitude or sheer bad luck contributed to such a pattern in the western suburbs or (more realistically) created a risk of resegregation, they did not violate the statute." The court in Knapp quoted the language in Bellwood, "[s]ome practices lend themselves to the disparate impact method, others do not," to support its decision to create a categorical exemption for liability under the FHA for withdrawing from the Section 8 voucher program.

Since the court in Bellwood did not use disparate impact in an FHA case, the court in Knapp could similarly choose not to do so.

The Knapp court also cited NAACP v. American Family Mutual Insurance Co. as an example of a case in which an FHA-violation claim based on a "failure to insure in certain areas . . . [was] not conducive to disparate impact analysis." In American Family, the defendant conceded that the FHA claim would be subject to a disparate impact analysis, rather than an intentional racial discrimination test. But, the court noted, Huntington and Bellwood "show that [the defendant's] concession may have been imprudent." In Huntington, the Supreme Court declined to decide whether a disparate impact test was appropriate because the parties agreed to its use. In Bellwood, the second case American Family cites, the court refused to apply disparate impact analysis to a racial steering claim against realtors. By citing Huntington and Bellwood, American Family indicates that a disparate impact analysis might not have been the

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182. Id. (citing Am. Family, 978 F.2d at 290; Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1533 (7th Cir. 1990)).
183. 895 F.2d at 1525. Racial steering is the practice of showing different neighborhoods to prospective home buyers depending on their race. Id. at 1529.
184. Id. at 1533 (citing Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)).
185. Id.
186. Knapp, 54 F.3d at 1280 (quoting Bellwood, 895 F.2d at 1533). This Note studies withdrawal from the Section 8 voucher program and disparate impact analysis under the FHA, but this quote in Knapp illustrates the wider split among courts about whether and when disparate impact analysis should be used in FHA claims. Particularly because the circuits are split on using the test for the exact same issue, clarification is needed.
187. 978 F.2d 287.
188. Knapp, 54 F.3d at 1280 (citing Am. Family, 978 F.2d at 290).
189. Am. Family, 978 F.2d at 292.
190. Id. at 292–93 (citing Bellwood, 895 F.2d 1521; Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988)).
191. 488 U.S. at 18.
192. Bellwood, 895 F.2d at 1533.
appropriate test for the failure-to-insure context either. Thus, Bellwood and American Family suggest that a disparate impact analysis should not always be used in cases alleging FHA violations. Based on these cases, the Knapp court concluded that, at least in the Section 8 case before it, it could similarly decline to use a disparate impact analysis.

The court in Knapp, relying on the voluntary nature of the Section 8 program, concluded that it should not apply disparate impact analysis. The court determined that “[t]he actions of both non-participating and participating owners have the same impact on minorities and to hold only the latter liable for racial discrimination for that conduct would deter them from joining or remaining involved in the program.”

In Knapp, the Seventh Circuit ultimately established a categorical exemption from liability under the FHA for landlords who withdraw from the Section 8 program, regardless of whether that action had a disparate impact on a protected class. The plaintiff, Knapp, could not win a claim against her landlord using a disparate impact test to find a violation of the FHA.

2. Salute

Similarly, in Salute v. Stratford Greens Garden Apartments the landlord accepted Section 8 vouchers, but only from residents approved for the program after they had already been living there. The two plaintiffs in this case were disabled Section 8 voucher recipients. The landlord refused to accept the plaintiffs’ application for an apartment because they received Section 8 vouchers. The plaintiffs then tried to argue that refusing to accept vouchers from new tenants after the apartment already participated in the Section 8 program had a disparate impact on a protected class (in this case, people with a disability).

To support their disparate impact claim at the trial court level, the plaintiffs submitted an affidavit from a sociologist who conducted a statistical analysis and concluded that “a higher proportion of those households with a disabled person as householder are eligible for Section 8 benefits than those in households where the householder was not disabled.” The trial court expressed doubt that a disparate impact claim

195. Id. at 1280–81.
196. Id. at 1280.
197. Id.
198. Id.
199. 136 F.3d 293 (2d Cir. 1998).
200. Id. at 296.
201. Id. at 294.
202. Id. at 296.
203. Id. at 302.
should be used in this context and held that, regardless, the plaintiffs did not correctly establish such a claim here.\textsuperscript{205}

Plaintiffs appealed the trial court decision.\textsuperscript{206} The Second Circuit cited \textit{Knapp} and agreed that since the Section 8 program is voluntary, it would not apply disparate impact analysis to a landlord’s refusal to accept their vouchers.\textsuperscript{207}

\textit{Knapp} and \textit{Salute} largely based their decisions on the fact that Section 8 is a voluntary program. Because of the voluntary nature of the program, both cases held that in Section 8 withdrawal cases there could be no cause of action under the FHA using a disparate impact approach.

\section*{B. Graoch—Allow Disparate Impact Claim To Proceed Against Landlords}

\textit{Graoch}, decided by the Sixth Circuit in 2007, created the circuit court split. \textit{Graoch} would allow plaintiffs to proceed using a disparate impact analysis to determine if a housing provider violated the FHA by withdrawing from the Section 8 voucher program.

In this case, the landlord of the Autumn Run apartments, Graoch Associates (Graoch), originally participated in the Section 8 voucher program.\textsuperscript{208} Then, it decided to withdraw from the program and refused to renew the leases of current Section 8 tenants or accept new leases from tenants receiving the vouchers.\textsuperscript{209} At the time Graoch withdrew from the Section 8 program, eighteen families living at the Autumn Run apartments received Section 8 vouchers, and seventeen of those families were African American.\textsuperscript{210} Additionally, “[a]s of 2003, 6,270 of the 8,849 Jefferson County residents receiving Section 8 vouchers were black.”\textsuperscript{211} After Graoch’s withdrawal from the program, three Autumn Run tenants and voucher recipients and the Kentucky Fair Housing Council filed a complaint against the landlord with the Metro Human Relations Commission (the Commission).\textsuperscript{212}

Graoch stated that it withdrew from the program because of disputes with the local housing authority and the difficulty of meeting the housing quality standards required by the program.\textsuperscript{213} The Commission, however, conducted an investigation and found “probable cause to believe that Graoch’s withdrawal from the Section 8 program constituted unlawful racial discrimination because it had a disparate impact on blacks.”\textsuperscript{214} Next, the Commission planned to bring an administrative proceeding against

\begin{itemize}
  \item \textsuperscript{205} \textit{Id.} at 667–68.
  \item \textsuperscript{206} \textit{Salute}, 136 F.3d at 295.
  \item \textsuperscript{207} \textit{Id.} at 302.
  \item \textsuperscript{208} Graoch Assocs. #33 v. Louisville/Jefferson County Metro Human Relations Comm’n, 508 F.3d 366, 369–70 (6th Cir. 2007).
  \item \textsuperscript{209} \textit{Id.}
  \item \textsuperscript{210} \textit{Id.} at 370.
  \item \textsuperscript{211} \textit{Id.}
  \item \textsuperscript{212} \textit{Id.}
  \item \textsuperscript{213} \textit{Id.}
  \item \textsuperscript{214} \textit{Id.}
\end{itemize}
Graoch, but Graoch sought declaratory relief from federal court stating that it did not violate the FHA when it withdrew from the Section 8 program.\(^{215}\)

The trial court found for Graoch and held that a landlord’s withdrawal from the Section 8 voucher program could never violate the FHA “solely because it has a disparate impact on members of a protected class.”\(^{216}\) The trial court cited *Knapp* and *Salute* as precedents and agreed that because of the voluntary nature of the Section 8 program, using disparate impact analysis would deter landlords from participating in the program in the first place.\(^{217}\) The court wrote that if landlords are deterred from joining the program because of fear of liability under the FHA if he or she chooses to withdraw from the program, “[s]uch a result would certainly not be consistent with Congress’ intent in creating such program.”\(^{218}\) The Commission appealed the trial court decision to the Sixth Circuit\(^{219}\).

The Commission argued that “[the landlord’s] withdrawal from the Section 8 program constituted unlawful racial discrimination because it had a disparate impact on blacks.”\(^{220}\) This time, the Sixth Circuit decided that as a matter of law, a landlord’s withdrawal from the Section 8 program could provide the basis for a discrimination claim under the FHA using a disparate impact analysis.\(^{221}\)

*Graoch* echoed *Arlington Heights*’s sentiment\(^{222}\) and stated that “not every housing practice that has a disparate impact is illegal.”\(^{223}\) To ascertain which practices were illegal, *Graoch* would use a disparate impact analysis and the burden-shifting framework to determine which actions violated the FHA.\(^{224}\)

The court noted that *Knapp* and *Salute* understood *Arlington Heights* differently.\(^{225}\) *Knapp* and *Salute* used *Arlington Heights* to stand for the proposition that courts “must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute.”\(^{226}\) Under *Knapp* and *Salute*’s reading of the case, disparate impact

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\(^{215}\) Id.

\(^{216}\) Id. at 369.

\(^{217}\) Graoch Assocs. #33 v. Louisville/Jefferson County Metro Human Relations Comm’n, 430 F. Supp. 2d 679, 679 & n.2 (W.D. Ky. 2006) (noting “the Orwellian absurdity of a ‘voluntary’ program attracting participants through a one-way door, past which they would become trapped forever by the impact of any attempt to leave”).

\(^{218}\) Id. at 679 (citing Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1280 (7th Cir. 1995)).

\(^{219}\) Graoch, 508 F.3d at 370. Ultimately, the Sixth Circuit reversed the trial court’s decision that as a matter of law a landlord could not be found liable under the FHA for withdrawing from Section 8. *Id.* at 369. Still, the Court of Appeals found that there was not sufficient proof of disparate impact for the Commission to prevail in this case. *Id.*

\(^{220}\) Id. at 370.

\(^{221}\) Id. at 369.

\(^{222}\) See supra note 155 and accompanying text.

\(^{223}\) Graoch, 508 F.3d at 374.

\(^{224}\) Id.

\(^{225}\) Id. at 375.

\(^{226}\) Id. (quoting Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977)).
analysis would not always be used to determine if a particular practice was illegal.\textsuperscript{227} Courts would use their discretion to decide when to use the analysis.\textsuperscript{228}

1. Categorical Bans on Disparate Impact Claims Under the FHA

The Sixth Circuit disagreed with \textit{Knapp} and \textit{Salute}'s reading of \textit{Arlington Heights}.\textsuperscript{229} Under \textit{Knapp} and \textit{Salute}'s reading, even if a plaintiff could succeed using a disparate impact analysis, a court could use its discretion to decide whether to apply such a test.\textsuperscript{230} Even in some instances where a plaintiff could win using that test, the court could choose not to apply it.\textsuperscript{231}

Instead, \textit{Graoch} would conduct a disparate impact analysis and only deny the use of such a test in situations where "no disparate-impact challenge to a particular practice ever could succeed under the burden-shifting framework."\textsuperscript{232} And only if a disparate impact claim would never succeed may a court categorically "bar all disparate-impact challenges to that practice."\textsuperscript{233} \textit{Graoch} concluded that this reasoning also explained the holdings in \textit{NAACP v. American Family Mutual Insurance Co.} and \textit{Village of Bellwood v. Dwivedi},\textsuperscript{234} the two cases \textit{Knapp} relied on to support its claim that a court can pick and choose when to use a disparate impact analysis.\textsuperscript{235}

\textit{Graoch} saw the cases \textit{Knapp} cited, \textit{American Family} and \textit{Bellwood}, as cases where a disparate impact claim would never succeed.\textsuperscript{236} Therefore, it reasoned, those courts were justified in refusing to use the analysis in those situations.\textsuperscript{237} It did not see those cases as examples in which a plaintiff could win using a disparate impact analysis but the court still chose not to use the test, as \textit{Knapp} suggested.\textsuperscript{238}

\textit{Graoch} analyzed \textit{American Family}, where the court would not use disparate impact analysis for insurers who "charg[ed] higher rates or declin[ed] to write insurance for people who live in particular areas."\textsuperscript{239} It determined that it was reasonable not to apply such a test here because \textit{American Family} "[c]onduct[ed] an inquiry analogous to ... the third step

\begin{footnotes}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.} (citing \textit{Knapp v. Eagle Prop. Mgmt. Corp.}, 54 F.3d 1272, 1280 (7th Cir. 1995)).
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{Id.}
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\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.}
\end{footnotes}
in the burden-shifting framework,\textsuperscript{240} and concluded that the strength of the insurer’s interest in declining to insure in certain areas outweighed the strength of any possible disparate impact the policy could have.\textsuperscript{241} Thus, in such a case a disparate impact claim would never succeed; therefore the court could categorically bar its use in such contexts.

Similarly, Graoch considered Bellwood to be just such a context where a disparate impact claim could never succeed, which justified the court’s refusal to apply such a test there.\textsuperscript{242} In that case, “the court concluded that claims of ‘racial steering’ were not subject to disparate-impact analysis because racial steering necessarily involves disparate treatment, not a facially neutral policy that has a discriminatory effect.”\textsuperscript{243}

Graoch agreed that in instances where a plaintiff would never win a disparate impact test, there was “no reason to require courts to engage in the Sisyphean task of working through the burden-shifting framework in each individual case when the plaintiff has no chance of success (for example, when a plaintiff brings a disparate-impact challenge to a landlord’s decision to charge rent).”\textsuperscript{244} To save time and judicial resources, in cases where a plaintiff could never win a disparate impact challenge, it would be appropriate to apply a categorical ban.\textsuperscript{245} But, according to the court, it would not make sense to apply a bar in cases where a plaintiff could conceivably win under a disparate impact test.\textsuperscript{246}

Graoch did not presume that a plaintiff would always fail using a disparate impact test in Section 8 withdrawal cases, so such a bar on using that test would not be appropriate.\textsuperscript{247} The court gave a hypothetical situation in which a plaintiff could succeed using a disparate impact test:

All of the non-Section 8 tenants at a housing complex are white. The landlord decides to participate in the Section 8 voucher program. A number of Section 8 participants move in, including the plaintiff. All are black. The landlord quickly decides to withdraw from Section 8 and refuses to renew the leases of existing Section 8 tenants. He explains his decision by saying simply that he no longer wished to participate in the program, without claiming that his participation cost him money, time, business opportunities, or any other benefit.\textsuperscript{248}

Under such a scenario, the plaintiff would succeed if the court allowed a disparate impact analysis to be used.\textsuperscript{249} And if some claims can succeed

\textsuperscript{240} That is, the court determined that the defendant had a legitimate business interest, which would protect it even if the action had a disproportionately adverse effect on a protected class.

\textsuperscript{241} Graoch, 508 F.3d at 375 (citing \textit{Am. Family}, 978 F.2d at 290–91).

\textsuperscript{242} \textit{Id.} at 375–76.

\textsuperscript{243} \textit{Id.} (citing Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1533 (7th Cir. 1990)).

\textsuperscript{244} \textit{Id.} at 376.

\textsuperscript{245} \textit{Id.} at 375–76.

\textsuperscript{246} \textit{Id.} at 376.

\textsuperscript{247} \textit{Id.}

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} \textit{Id.}
under that test, there should not be a categorical bar on using the test in the given context.

Furthering its disagreement with Knapp's decision, Graoch also noted that "[n]othing in the text of the FHA instructs us to create practice-specific exceptions." Therefore, the court would not create, as a matter of law, an exemption for liability under the FHA for landlords who withdraw from the Section 8 voucher program.

Green v. Sunpointe Associates also applied similar reasoning to the Graoch case. The facts of this case are very similar to Graoch. The plaintiff was a single African American mother of two children and received a Section 8 voucher. Initially the apartment accepted her voucher, but the defendant landlord terminated her lease when it chose to withdraw from the Section 8 program. The plaintiff brought suit based on discrimination under the FHA using a disparate impact claim.

In this case, the court noted that "it has been made clear that the Section 8 program is to be run in conformance with the requirements of the FHA." The FHA states, "All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [the Act]." The court also noted that "[p]articipation in [the Section 8] program requires compliance with [the FHA]." The FHA does not include any provisions that would exempt landlords who participate in the Section 8 program from liability.

Like in Graoch, the court concluded that if a housing provider withdraws from the voucher program, "[t]he solution is not . . . to impose a per se rule against disparate impact claims based on a withdrawal from the Section 8 program." Instead, if a plaintiff can prove that the action disparately impacted a protected class, "a landlord may present his goal to terminate participation in the Section 8 program as a business necessity. Because

250. Id. at 375. The court also noted that "[a]lthough Congress created the Section 8 program six years after passing the FHA, . . . it did not include language indicating that Section 8 landlords should be exempt from any FHA requirements." Id. at 376 n.5 (citing Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 653 (codified as amended at 42 U.S.C. §§ 1437–1437f (2006))).
252. Id. at *1.
253. Id.
254. Id. at *1, *4 ("[T]he plaintiff assert[ed] that 81.8 percent of the 22 Section 8 households at Avalon Ridge are African-American, 100 percent are headed by females, and 100 percent have children.").
255. Id. at *3.
256. Id. (quoting 42 U.S.C. § 3608(d)).
257. Id. (quoting 24 C.F.R. § 107.20(a)).
258. Id.
259. Id. at *4.
Congress had made clear that participation in the program remains voluntary, substantial weight must be given to such a goal.260

2. The Voluntary Nature of the Section 8 Program

Unlike the Second and Seventh Circuits, the Graoch court did not find it determinative that the Section 8 program is voluntary.261 Although it is a voluntary program, if a housing provider withdrew from it for discriminatory reasons it could still be held liable under the FHA.262 It reasoned, “almost every action that could create disparate-impact liability under the FHA is voluntary” and cited examples, such as “approving building site plans” and “varying of rent based on number of occupants,” as optional actions by landlords where courts used a disparate impact analysis.263

In the case related to rent varying, Maki v. Laakko,264 the court indicated that it would have considered doing a disparate impact analysis.265 In the end, however, the court in Maki did not adopt a disparate impact analysis. It reasoned that, while the FHA bans discrimination based on familial status, under “a rental pricing system that charges additional rent for additional occupants, a mother, father, and one child would be charged the same amount of rent as three unrelated individuals. Therefore, such a rental policy is neutral with respect to family status.”266 Graoch relied on this case because this decision shows that a landlord can charge different rents based on the number of people residing in an apartment if the pricing scheme does not adversely and disproportionately affect a protected class.267 A landlord could not do the same thing if it disparately affected a protected class and violated the FHA.268 Similarly, Graoch reasoned, “[t]he mere fact that a landlord often can withdraw from Section 8 without violating the terms of Section 8 or the FHA does not mean that withdrawal from Section 8 never can constitute a violation of the FHA.”269

Judge Karen Nelson Moore’s concurring opinion in Graoch also noted that “[t]he FHA imposes a non-discrimination mandate on actors engaging in many different types of voluntary actions” and cited Betsey v. Turtle

260. Id. This means that the voluntary nature of the program may be considered in the landlord’s rebuttal when the court conducts a disparate impact analysis.
262. Id. at 377.
263. Id. (citing Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 631–32 (6th Cir. 2001); Maki v. Laakko, 88 F.3d 361, 364 (6th Cir. 1996)).
264. 88 F.3d 361.
265. Id. at 367.
266. Id.
267. Graoch, 508 F.3d at 376–77 (citing Maki, 88 F.3d at 364); see also Maki, 88 F.3d at 367.
268. See Maki, 88 F.3d at 367.
269. Graoch, 508 F.3d at 377.
In Betsey, the court “allow[ed] a disparate-impact claim to proceed where a private landlord issued eviction notices to families with children in an effort to institute an all-adult rental policy.” In that case an adult-only conversion policy for an apartment had an adverse impact on minorities, which could then be used to establish a prima facie case for discriminatory impact under the FHA.

Maki and Betsey are examples where voluntary acts by landlords might adversely affect a protected class. If so, the courts would consider a disparate impact analysis. Since these other cases would use optional actions by housing providers to give rise to FHA claims under a disparate impact theory, the Graoch court concluded that there was no reason to create a special exemption for claims related to Section 8 vouchers.

Regarding the voluntary nature of the Section 8 program, Judge Moore, in her concurring opinion, opined that it is acceptable for landlords who decline to participate in the program to be free from legal scrutiny since the program is voluntary. But, that is no reason to exclude a landlord who has chosen to participate from that scrutiny. Once a landlord voluntarily joins the Section 8 program, “he or she necessarily accepts a new set of responsibilities toward tenants under the FHA.” This would include “refrain[ing] from intentional discrimination on the basis of a protected characteristic and, in the case of a business practice that has a disparate impact on a protected class, to implement when possible an alternative business practice with less discriminatory effects.” For these reasons, she would allow the plaintiffs to use an effects test to prove a violation of the FHA by the landlord, if the landlord withdraws from the voucher program.

Similarly, the majority opinion also addressed Knapp’s conclusion that landlords who withdraw from the program should not be subject to liability under the FHA because the program is voluntary, and landlords who do not participate in the program at all would not be subject to liability. Graoch did not “think that withdrawal and non-participation are functionally identical.” On one hand, “[w]ithdrawal affects an identifiable group: tenants receiving Section 8 assistance.” On the other hand, “[n]on-
participation could be said to have a theoretical impact on members of a protected class, but the size and composition of the affected group is indeterminate.”

Therefore, Graoch believed a legitimate reason existed to hold withdrawing landlords liable under the FHA, while failing to hold landlords who did not participate at all to the same liability.

Judge Guido Calabresi’s dissent in Salute echoes this same sentiment. He wrote, “[e]ven if the per se defense were appropriate for landlords who eschew any involvement with Section 8, it clearly has no place in dealing with those who have chosen to accept some Section 8 tenants.” He reasoned that there is no reason not to apply a disparate impact analysis under those situations and lamented the majority’s reliance on Knapp because he felt the plaintiffs showed that the landlord’s policy had a “disproportionately adverse effect on the disabled.”

3. Deterring Landlord Participation in Section 8

Judge Moore’s concurring opinion in Graoch also addressed the argument that allowing a disparate impact claim to proceed would deter landlord participation in Section 8. She pointed out that “[a] plaintiff’s showing that a withdrawal from the Section 8 program has a disparate effect on a protected class merely establishes a plaintiff’s prima facie case and does not automatically result in liability.” The landlord then would have the opportunity to show a business necessity to refute the claim.

Additionally, “[l]andlords have a considerable financial incentive to accept Section 8 tenants because the federal government’s subsidy of a portion of the market-based rent expands the pool of available tenants.” And because of “[t]his economic reality [it] makes it less likely that the potential of disparate-impact claims upon withdrawal from Section 8 will deter landlords from entering the program.”

Graoch would allow a claim to proceed under the FHA using a disparate impact analysis in Section 8 withdrawal cases. The court determined that a landlord could withdraw from the program for discriminatory reasons. A plaintiff could theoretically prevail in the case using the disparate impact test. In such a situation, there should not be a categorical ban on landlord liability.

282. Id.
284. See id. at 312 n.23.
285. Id. at 312.
286. Graoch, 508 F.3d at 392 (Moore, J., concurring in part and dissenting in part).
288. Id. (citing Alfred M. Clark III, Can America Afford To Abandon a National Housing Policy?, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 185, 188 (1997)).
289. Id.
290. Id. at 376 (majority opinion).
291. See id.
III. PROTECTING VICTIMS OF HOUSING DISCRIMINATION

This Note analyzes the split between the U.S. Courts of Appeals for the Seventh and Second Circuits in *Knapp* and *Salute*, and the Sixth Circuit in *Graoch* on whether a landlord can be sued under the FHA using a disparate impact analysis if the landlord withdraws from the Section 8 voucher program. The Seventh and Second Circuits based their decision to exempt landlords from liability on the voluntary nature of the program. The Sixth Circuit reasoned that the voluntary nature of the program is not dispositive and nothing in the text or history of the FHA suggests creating practice-specific exemptions. This Note argues that the holding in *Graoch* should be adopted, and that disparate impact analysis should be used if a plaintiff can prove that a landlord withdrawing from the Section 8 voucher program disproportionately affected a class protected by the FHA. Part III.A argues that disparate impact analysis should be used when a landlord withdraws from the Section 8 voucher program in order to comply with the goals of the FHA. Next, Part III.B suggests that allowing courts to use a disparate impact analysis in this situation would not change the voluntary nature of the Section 8 program. Finally, Part III.C advocates for using the courts and the disparate impact test as vehicles for upholding civil rights.

A. Purpose of the FHA

This Note shows the broader question that the Supreme Court has not ruled on: whether the disparate impact test is correct for FHA claims, and if so, whether there should be any practice-specific exemptions. This Note argues that in order to stay true to the intent of the FHA—to end discriminatory housing practices—the disparate impact analysis should be used without creating any practice-specific exemptions. As discussed earlier, that would not lead to automatic liability for the defendant. Instead, the housing provider would have to prove that the action was necessary and that it could not achieve the result using a less discriminatory method. *Knapp* and *Salute*'s exemptions enable actions that have a disproportionately adverse effect on protected classes to go unchecked.

This Note sides with the court in *Graoch* and argues that there is no reason not to at least allow a disparate impact analysis to determine whether there has been unlawful discrimination under the FHA based on a landlord's withdrawal from the Section 8 voucher program. In *Graoch*'s majority opinion and *Salute*'s dissent, the judges posited that there is no reason to create a categorical exemption for withdrawals from the Section 8

292. See supra note 168 and accompanying text.
293. See supra note 169 and accompanying text.
294. See supra note 195 and accompanying text.
295. See supra note 250 and accompanying text.
296. See supra note 28 and accompanying text.
297. See supra note 162 and accompanying text.
298. See supra notes 107–08 and accompanying text.
This Note suggests that it would not hurt to conduct a disparate impact analysis, and, if a landlord withdrew from the program for discriminatory reasons, he or she should not be shielded from liability. The purpose of the FHA is to protect against discrimination, so courts should not have a rule that allows for practice-specific exemptions under which a housing provider would not be liable for discriminatory practices.

1. Analysis of Arlington Heights

Both Knapp and Graoch used Arlington Heights as precedent. Knapp relied heavily on Arlington Heights's holding that in some instances a violation of the FHA can be shown based on an effects test. Knapp took that language to mean that not in all circumstances should a disparate impact analysis be used, and determined that withdrawing from the Section 8 voucher program would be a situation when the test should not be used.

In Arlington Heights the court did, indeed, state that it “refuse[d] to conclude that every action which produces discriminatory effects is illegal” and that “the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute.” Knapp believed that statement meant that courts have the discretion to simply pick and choose when to do a disparate impact analysis. To Graoch, on the other hand, that statement meant that a court would use its discretion as it performed a disparate impact analysis to determine when relief should be granted.

Graoch's reading of Arlington Heights seems more accurate. Arlington Heights said courts should use their discretion, and then in its very next sentence laid out the disparate impact test to use. That structure makes it more likely that Arlington Heights meant that courts can use their discretion as they perform the burden-shifting disparate impact test to determine when to give plaintiffs relief. Knapp's reading—that Arlington Heights left whether to use an effects test at all up to the court's discretion—seems incorrect. What makes an action that produces a discriminatory effect legal or illegal would depend on the court's discretion as it conducts a disparate impact test and considers whether the landlord had appropriate justifications for the action that disproportionately impacted a protected class.

Furthermore, the rest of the language of the Arlington Heights opinion stressed a broad interpretation of the FHA, and in “close cases,” instructed
that courts should rule in favor of integrated housing.307 That language strongly suggests that Graoch correctly interpreted the case. Like the FHA, the Section 8 program aimed to encourage integration in housing.308 As Arlington Heights suggested, courts should allow plaintiffs to use a disparate impact test in Section 8 withdrawal cases because that would favor integrated housing.

2. Using Vouchers as a Proxy for Racial Discrimination

Housing providers may leave the Section 8 voucher program for discriminatory reasons. One reason landlords might accept Section 8 vouchers is because doing so increases the market of eligible tenants.309 But if that area gentrifies, landlords might back out of the program in an effort to attract white or middle-class tenants.310 Gentrification has a racial component,311 and Section 8 voucher discrimination can be used as a proxy for racial discrimination.312 Because of the FHA, landlords cannot be overt in their discrimination and possibly need to find less obvious ways of doing it. Because “landlords can generally use bias against Section 8 holders as a pretext for racial discrimination,” we should “take more affirmative steps against discriminating landlords via the court system.”313 Since it is possible that housing providers could withdraw from the voucher program for discriminatory reasons, landlords who withdraw should not be given an exemption from liability under the FHA.

Additionally, in many cities314 the majority of Section 8 voucher recipients are minorities. Therefore, even if withdrawing from the Section 8 program is a racially neutral act, it disproportionately and adversely affects a protected class. Landlord withdrawal diminishes minorities’ housing options the most. Thus, disparate impact is the appropriate analysis, especially in such a circumstance where the voucher status can be used as a proxy for racial discrimination.315

Furthermore, in Griggs, the seminal employment case, the Supreme Court used a disparate impact test because “practices . . . neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”316 Because housing segregated by race and class “freezes” the status quo, if a landlord backs out of the Section 8 voucher program, courts should allow disparate impact claims to proceed against landlords withdrawing from the Section 8 program.

307. See supra note 157 and accompanying text.
308. See supra note 37 and accompanying text.
309. See supra note 68 and accompanying text.
310. See supra note 8 and accompanying text.
311. See supra note 8.
312. See supra notes 8, 70 and accompanying text.
313. See supra note 72.
314. See supra note 70.
315. See supra note 69 and accompanying text.
316. See supra note 122 and accompanying text.
B. Voluntary Nature of the Section 8 Program

Knapp and Salute reasoned that allowing a disparate impact claim against a landlord who withdrew from Section 8 would erode the voluntary nature of the program.\textsuperscript{317} Their analysis is flawed. Using a disparate impact test would not mean that a housing provider could never back out but, rather, that it would have to show a legitimate business reason for doing so. In that sense, allowing an FHA claim to proceed creates some concern in that it does add more burden to the landlords. But, the landlord would only be required to show a valid reason for withdrawing from the program, which should not be such an undue burden.

Adopting the Graoch standard would not force landlords to remain in the Section 8 program indefinitely because it would not make it so that a housing provider cannot ever leave the program—it just cannot do so for discriminatory reasons. That is the main reason why it cannot hurt to do a disparate impact analysis. The landlord eschews liability by showing that a business necessity caused him or her to take the action and he or she could not do it in a less discriminatory way.

It seems almost as though Salute and Knapp admit that landlords withdraw from the program for discriminatory reasons. If not, there would be no harm in allowing a disparate impact claim to proceed. If discrimination did not play a part in the withdrawal, no landlords would be deterred from participating because they would show a legitimate business reason for their action and avoid liability. One could argue that a landlord would still have to go into court to prove that to begin with, but civil suits are often a cost of doing business. A housing provider’s activities subject it to lawsuits and liabilities for any number of reasons.

Knapp continued with more unpersuasive arguments. The court said that if a landlord never participated in Section 8 it would have the same effect as a landlord withdrawing from the program.\textsuperscript{318} Because the program is voluntary, there can be no liability for a landlord who never participates.\textsuperscript{319} Therefore, it would be unfair to hold a landlord who had once participated liable.\textsuperscript{320} This argument remains unconvincing. It says that because the court cannot hold everyone liable for discrimination, it will not hold anyone liable. Graoch correctly concludes that there are reasons to hold a landlord who withdraws from the program liable under the FHA.\textsuperscript{321} It would be difficult to hold nonparticipating landlords liable because an indefinite amount of people could be affected.\textsuperscript{322} In contrast, a withdrawing landlord’s actions affect a definable class: current tenants with vouchers.\textsuperscript{323} Therefore, withdrawing landlords should be subject to the FHA.

\textsuperscript{317} See supra note 207 and accompanying text.
\textsuperscript{318} See supra note 196 and accompanying text.
\textsuperscript{319} See supra note 196 and accompanying text.
\textsuperscript{320} See supra note 196 and accompanying text.
\textsuperscript{321} See supra notes 279–83 and accompanying text.
\textsuperscript{322} See supra note 282 and accompanying text.
\textsuperscript{323} See supra note 281 and accompanying text.
C. Promoting Civil Rights Through the Courts

Judicial precedents in the realm of civil rights are important. They show that courts are standing behind the poor and classes that should be protected by the Fair Housing Act. Court decisions should show that if protected classes can prove they are being treated differently, this kind of discrimination will not be tolerated.

If the government allows discrimination in the private sector, the government effectively sanctions it. The court system legitimizes the discrimination by not allowing Section 8 recipients to use a disparate impact test as in Knapp and Salute. Those cases will not allow such a test even if the landlord’s actions adversely and disproportionately impact a protected class. Refusing to give plaintiffs a claim against the landlord amounts to court sanctioning of an act that disparately impacts minorities or persons with disabilities because they are not given recourse in the judicial system.

Housing activists admit that they lack concrete proof that landlords turn away voucher holders as a proxy for racial discrimination, but that is the reason why disparate impact analysis was created. The courts realized that it was too difficult for plaintiffs to ever win if they had to rely on overt racism. As with the Supreme Court’s practice-changing decision in Shelley v. Kraemer, courts should allow a disparate impact test in Section 8 withdrawal cases and continue to lead the way for governmental reversal of discrimination. The effects test allows plaintiffs to assert a claim that the landlord can rebut, instead of affording plaintiffs no recourse at all.

Knapp and Salute were poorly decided. They were the first cases decided on the subject and set precedents a long time ago. Knapp is a particularly landlord-friendly and tenant-unfriendly decision. Other courts disagree with two of its landlord-friendly holdings. For one of its findings, Knapp held that Section 8 vouchers do not constitute a lawful source of income under a Wisconsin statute, and other courts hold that the vouchers do constitute a lawful source of income. And for the topic of this Note, Knapp held that a disparate impact test cannot be used in Section 8 withdrawal cases. Recently, Graoch declined to follow that precedent, and other courts should follow this trend instead.

Decided in 2007, Graoch did not have to set a new standard but nevertheless chose to do so. Section 8 discrimination is an important issue, perhaps more so than when the Seventh Circuit ruled in Knapp. Since Knapp’s ruling there have been societal changes regarding Section 8

324. See supra note 30 and accompanying text.
325. See supra note 88 and accompanying text.
326. See supra notes 153, 163 and accompanying text.
327. See supra notes 20–22 and accompanying text.
328. See supra notes 10, 101 and accompanying text.
329. See supra note 56.
330. See supra note 56.
331. See supra note 170 and accompanying text.
vouchers. More and more places have adopted statutes that ban discrimination based on lawful sources of income,\textsuperscript{332} including housing vouchers. It is time for courts to change the test for Section 8 withdrawal to side with Graoch.

\textbf{CONCLUSION}

Achieving fair housing in the United States is not a goal that will be easily accomplished. Many changes in our society need to occur. More courts adopting Graoch's solution can be part of this change to help make the housing situation better for low-income tenants.

As Beck suggests, one change will not likely solve the problem, but "[a] broad combination of laws, policies, beliefs, and behaviors must be marshaled to achieve the goal of ensuring that subsidized tenants have the freedom to choose where they will live."\textsuperscript{333} To start, housing advocates push for an amendment to the FHA to outlaw Section 8 discrimination, and they push for more states to adopt laws banning it.\textsuperscript{334}

There needs to be a combination of approaches to improve housing for low-income citizens. In the Graoch opinion the Sixth Circuit set up a solution to try to ensure that at least classes protected under the FHA are not discriminated against in withdrawals from the Section 8 program. Adopting the holding in Graoch, and allowing a disparate impact claim to proceed against a landlord for withdrawing from Section 8, ensures that, while Section 8 discrimination is still legal, landlords can no longer use Section 8 discrimination as a proxy for racial discrimination; if their actions have an unjustifiable and disproportionate impact on a protected class, they will be liable for violating the FHA. This could ease the plight of the poor searching for decent housing because it would force landlords to provide a lawful reason for backing out of the program. That would empower poor, protected classes to assert their lawful right under the FHA not to be discriminated against.

The goals of the FHA and the Section 8 voucher program are aligned to end segregation on the basis of race and income level in housing. By construing the statutory language of the FHA broadly to comport with the congressional intent in enacting the statute, the correct test for liability under the FHA for a landlord who withdraws from the Section 8 voucher program is a disparate impact test.

In general, to comport with the purpose of the FHA, a disparate impact test with no practice-specific exemptions needs to be used in Title VIII cases. Courts should take the lead here; hopefully an amendment to the FHA will follow, or more places will adopt statutes prohibiting Section 8 discrimination. Giving plaintiffs a claim gives them power against discrimination.

\textsuperscript{332} See \textit{supra} note 56 and accompanying text.
\textsuperscript{333} See \textit{supra} note 102 and accompanying text.
\textsuperscript{334} See \textit{supra} note 100 and accompanying text.