This House is Not Your Home: Litigating Landlord Rejections of Housing Choice Vouchers Under the Fair Housing Act

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Over 2.2 million low-income households participate in the federal Housing Choice Voucher (HCV) program. Voucher holders, who are disproportionately people of color and individuals with disabilities, are frequently discriminated against or denied housing by landlords. This Note argues that prospective tenants who are rejected by landlords for participating in the HCV program have a right of action against landlords under the Fair Housing Act's disparate impact provisions. The Supreme Court's recent decision in Inclusive Communities *provides the necessary framework for evaluating these claims, and suggests that federal courts' historical rejection of disparate impact claims brought by voucher holders is no longer good law. Integrating state and local source of income protection laws into the* Inclusive Communities *burden-shifting resolves the tension between state and federal approaches to source of income protection, and vitiates the rights of voucher holders.*

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I. INTRODUCTION

The Crossroads at Penn Apartments in Richfield, Minnesota was once the largest source of unsubsidized but affordable rental housing in the Minneapolis-St. Paul area.[1] Many low-income households could afford units there with the help of the Section Eight Housing Choice Voucher (HCV) program, a federal program that makes rent payments directly to landlords on behalf of eligible low-income households.[2] In 2015, the Crossroads at Penn Apartments was purchased by MSP Crossroads Apartment LLC (Crossroads LLC), and rebranded as Concierge Apartments.[3] Crossroads LLC increased the rent in the complex by approximately 31%; installed new features including granite countertops, a golf simulator, and a pet spa; and went about courting "young professionals," a drastically different demographic from the low-income households that had resided at the Penn Apartments for years.[4] In addition, Crossroads LLC required all existing tenants to re-apply for housing and announced that they could no longer use HCVs to pay their rent.[5]

In response, thirty-seven tenants and a tenant organization filed suit against Crossroads LLC, alleging that Crossroads LLC's exclusionary practices and decision not to accept HCVs disproportionately affected people of color, persons with disabilities, and families with children.[6] The plaintiffs contended that thirty-five tenants relied on Section Eight housing vouchers, that all thirty-five belong to one or more protected classes under the Fair Housing Act (FHA), and that Crossroads LLC's policies would force all

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1. Press Release, Hous. Justice Ctr., HJC Files Class Action Discrimination Lawsuit on Behalf of Richfield Residents (Feb. 23, 2016), http://hjcmn.org/news/index.php?strWebAction=resource_detail&intResourceID=236 [https://perma.cc/2QBA-TECV].

2. *See* 24 C.F.R. § 982 (2017).

3. John Reinan, *Upmarket changes at Richfield complex spark federal lawsuit*, STAR TRIB. (Feb. 2, 2016) http://www.startribune.com/upscale-changes-at-massive-richfield-apartment-complex-spark-discrimination-lawsuit/367359251/ [https://perma.cc/L7EK-QKJT].

4. *Id.*; *see* Complaint at 2, Crossroads Residents Organized for Stable and Secure ResiDencieS (CROSSRDS) v. MSP Crossroads Apartments LLC, (Civil No. 16-233) 2016 WL 3661146 (2016) [hereinafter the CROSSRDS Complaint]. The CROSSRDS has since settled — the defendants agreed to implement equitable relief and pay $650,000 to settle the claims against it by former and potential residents included in the class. *See Welcome to the* Soderstrom V. MSP Crossroads Apartments LLC. *Settlement Administration Website*, JND http://www.crossroadsapartmentssettlement.com/ [https://perma.cc/K4HX-HVAA].

5. CROSSRDS Complaint, *supra* note 4, at *3.

6. *Id.* at *7.

of these tenants to relocate.[7] On July 5th 2016, the Court denied Crossroads LLC's motion to dismiss the tenants' claims, allowing the parties to commence discovery. Though *Crossroads* has since settled, the district court's decision to let the lawsuit go forward — and its explicit rejection of the defendants' contention that a landlord's practice of rejecting HCVs cannot by itself violate the FHA — is a significant departure from most federal courts' previously circumscribed application of the FHA's protections to HCV holders.[8]

Source of income is not a protected category under federal law, but landlord discrimination based on source of income in the form of refusing to accept housing vouchers has a disparate impact based on race, familial status, national origin, and disability.[9] Part II of this Note will explain the distinction between disparate impact and disparate treatment; outline the history of the FHA; and illustrate the scope and purpose of the federal Section Eight HCV program.

Part III of this Note will describe the disagreement between the Second and Seventh Circuits with the Sixth Circuit regarding whether HCV holders may litigate landlord refusals to accept HCVs under the FHA. The Second and Seventh Circuits have barred suits in which Section Eight housing vouchers serve as a proxy for a protected class — reasoning that since landlord participation in Section Eight is voluntary landlords should not be held liable for exercising a business choice and refusing vouchers.[10] In contrast, the Sixth Circuit held that tenants could litigate such cases if they properly alleged a prima facie case of discrimination. The Supreme Court has not directly resolved this circuit split.

Part IV of this Note introduces the governing standards for disparate impact analysis as articulated in *Inclusive Communities*[11] and argues that the Second and Seventh Circuits' conclusion that a business practice cannot result in an impermissible disparate impact simply because the practice itself is a voluntary "business choice" directly conflicts with those standards.[12] Fur-

7. *Id.*
8. *See infra* Part III.A.
9. *See infra* Part III.B.
10. *See infra* Part III.A.
11. *See infra* Part IV.A.
12. *See infra* Part IV.B.

thermore, the courts' *per se* dismissal of disparate impact claims involving HCVs does not comport with established Title VII and FHA jurisprudence and is incompatible with the text of the FHA. Next, this Part argues that in accordance with Title VII and FHA disparate impact jurisprudence, defendants carry the burden of production and persuasion when asserting a "business necessity"-style affirmative defense to a *prima facie* showing of disparate impact.[13] The Minnesota district court's refusal to dismiss the tenants' disparate impact claims in *Crossroads*, therefore, correctly applies the disparate impact framework adopted in *Inclusive Communities*.

Finally, Part V of this Note argues that state and local laws banning consideration of a renter's source of income can be applied within the *Inclusive Communities* burden-shifting framework. Doing so comports with the goals of the FHA and Section Eight, and dissolves the manufactured tension between the voluntary nature of the federal HCV program and the rise of state and local source of income protection laws. This integrated approach to evaluating the "business necessity" justification in the FHA burden-shifting framework allows for a uniform application of federal standards to jurisdiction-dependent facts.

II. INTRODUCTION TO DISPARATE IMPACT AND THE FAIR HOUSING ACT

A. DISPARATE IMPACT

This Note primarily focuses on disparate impact jurisprudence in the Fair Housing context. Disparate impact, in contrast to disparate treatment, targets practices, procedures, or tests that though "neutral on their face, and even neutral in terms of intent"[14] function as "barriers . . . [that] operate invidiously to discriminate on the basis of racial or other impermissible classification."[15] A disparate treatment challenge, on the other hand, requires an invidious classification or other evidence of discriminatory intent in order to be cognizable.[16] This difference in eviden-

13. *See infra* Part IV.B.
14. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).
15. *Id.* at 431.
16. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967).

tiary burdens allows a disparate impact theory of liability to challenge practices that have disproportionate adverse effects on members of protected classes even if there is no explicit classification or evidence of discriminatory intent.

As society's acceptance of open racial animus has declined, "the notion that prejudice and discrimination against disadvantaged groups . . . is illegitimate and unethical has become an increasingly mainstream philosophy."[17] Thus, "overtly bigoted behavior has become more unfashionable, [and] evidence of intent has become harder to find. Yet this does not mean that racial discrimination has disappeared."[18] The statutory disparate impact theory of liability sustains challenges to practices and decisions that produce racially disparate outcomes in employment and housing even in the absence of evidence of racial animus or bias.[19] Perhaps even more importantly, disparate impact allows for the acknowledgement and remediation of the continuing effects of centuries of discrimination and prejudice against people of color in the United States.

B. THE FAIR HOUSING ACT

In 1968, the National Advisory Commission on Civil Disorders, known as the Kerner Commission,[20] found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight."[21] The Commission identified open and

17. Nilanjana Dasgupta, *Color Lines in the Mind: Implicit Prejudice, Discrimination, and the Potential for Change*, *in* TWENTY-FIRST CENTURY COLOR LINES: MULTIRACIAL CHANGE IN CONTEMPORARY AMERICA 97 (Andrew Grant-Thomas & Gary Orfield eds., 2008).

18. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

19. In the constitutional rather than statutory framework, disparate impact alone cannot sustain a claim of discrimination. Washington v. Davis, 426 U.S. 229, 238–39 (1976). In addition "a genuine finding of disparate impact can be highly probative of [a defendant's] motive since a racial imbalance is often a telltale sign of purposeful discrimination." *In re* Emp't Discrimination Litig. Against Ala., 198 F.3d 1305, 1321 (11th Cir. 1999) (quoting Int' Broth. Of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)).

20. President Lyndon Johnson founded the Kerner Commission by executive order to investigate the origins of and propose solutions to civil unrest in cities during the 1960s. Establishing a National Advisory Comm'n on Civil Disorders, 32 Fed. Reg. 11,111 (July 29, 1967).

21. NAT'L INST. OF JUSTICE, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 13 (1981) [hereinafter the KERNER REPORT]; *see also* Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516 (2015); Exec. Order

covert racial discrimination as a central cause of black families' inability to obtain better housing and move into integrated communities, and concluded that "[o]ur Nation is moving toward two societies, one black, one white — separate and unequal."[22] To reverse "[t]his deepening racial division," it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . . on the basis of race, creed, color, or national origin."[23]

President Lyndon Johnson signed the Civil Rights Act of 1968 shortly after Dr. Martin Luther King, Jr.'s assassination. Title VIII of the Act, known as the Fair Housing Act (FHA), was passed in order to "provide, within constitutional limitations, for fair housing throughout the United States."[24] The FHA applies to all "dwellings" except single-family houses rented or sold by an owner or properties occupied by four of fewer separate renters if the owner "actually maintains and occupies one of such living quarters as his residence."[25] For all other properties, the FHA explicitly provides that it shall be unlawful "to refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[26] The only exemptions to this prohibition were for religious organizations and private clubs.[27] Courts have interpreted the FHA's language liberally, keeping in mind that "the Act was designed primarily to prohibit discrimination . . . and to provide federal enforcement procedures for remedying such discrimination so that members of minority races would not be condemned

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No. 11,365, 32 Fed. Reg. 11,111 (July 29, 1967). The Kerner Commission, comprised of several federal judges and members of Congress, identified residential segregation in cities as a "significant, underlying cause[ ]" of the social unrest. *Inclusive Cmtys.* at 2156; *see* the KERNER REPORT.

22. KERNER REPORT, *supra* note 21, at 1.

23. *Id.* at 263.

24. Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. (2012); *see Inclusive Cmtys.*, 135 S. Ct. at 2516 ("Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act.").

25. 42 U.S.C. §§ 3603(b), (c) (2012). *See* United States v. Space Hunters, Inc., 429 F.3d 416, (2d Cir. 2005) for a discussion of the "Mrs. Murphy" exemption.

26. 42 U.S.C. § 3604(a) (2012).

27. *Id.* § 3607. The "Mrs. Murphy" exception, which narrows the FHA's definition of "dwelling" by excluding rental properties occupied by the owner, impacts the FHA's applicability, *Id.* § 3607(b), but does not affect the operation of the FHA's prohibition of discrimination in sale or rental of property already defined as a dwelling. All actors or entities in the "business of selling or renting dwellings" are subject to liability under the FHA. *Id.* § 3607(c).

to remain in urban ghettos in dense concentrations where employment and educational opportunities were minimal."[28]

In 1988 Congress amended the FHA to expand its protection to people with disabilities and families with children.[29] The 1988 Amendments also provided for more robust administrative enforcement mechanisms.[30] Further, the 1988 Amendments delineated two exceptions to the FHA's protection, clarifying that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance;"[31] and "[n]othing in [the FHA] limits the applicability of any reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[32] The two exceptions are indicative of Congress's intent to curtail disparate impact litigation in situations where landlords' potentially exclusionary practices are conducted for the sake of maintaining tenant safety.[33]

De jure residential segregation and intentional discrimination based on an individual's membership in a protected class have long been considered unconstitutional and unlawful under the FHA.[34] Plaintiffs seeking to litigate denials of housing or other forms of residential discrimination through the FHA have had the disparate treatment theory of liability at their disposal for decades.[35] However, the FHA does not explicitly provide for a disparate impact cause of action under which a plaintiff could challenge a practice or practices that have a disproportionate adverse effect upon minorities.[36]

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28. Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (explaining that "[w]e can give vitality to § 810(a) only by a generous construction").

29. 42 U.S.C. § 3604(f) (2012); *see* Michael H. Schill & Samantha Friedman, *The Fair Housing Amendments Act of 1988: The First Decade* 4 CITYSCAPE 57, 59 (1999).

30. 42 U.S.C. §§ 3612, 3613, 3614 (2012); Schill & Friedman, *supra* note 29, at 57–58.

31. 42 U.S.C. § 3607(b)(4) (2012).

32. *Id.* § 3607(b)(1).

33. *Id.* § 3607; *see* Taylor v. Rancho Santa Barbara, 206 F.3d 932 (9th Cir. 2000); Park Place Home Brokers v. P-K Mobile Home Park, 773 F. Supp 46 (N.D. Oh. 1991).

34. Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015); *see also* Buchanan v. Warley, 245 U.S. 60 (1917).

35. *See* 42 U.S.C. § 3604(a) (2012); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

36. *See Inclusive Cmtys.*, 135 S. Ct. at 2513.

C. THE SECTION EIGHT HOUSING VOUCHER PROGRAM AND TENANT BASED VOUCHERS

The Wagner-Steagall Act of 1937, known as the United States Housing Act (USHA), was the country's first major federal piece of legislation related to public housing. Far preceding the civil unrest of the 1960s that motivated the passage of the FHA, the USHA was part of President Roosevelt's New Deal legislation, passed with the goal of creating "a new era in the economic and social life of America."[37] The USHA authorized the creation of state and local public housing agencies with the goal of "remedy[ing] the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families."[38]

Decades later, the Housing and Community Development Act of 1974 (HCDA) amended the USHA by authorizing HUD to enter into housing assistance payment contracts on behalf of eligible families occupying rental units through the Section Eight Housing Choice Voucher Program (the Section Eight Voucher Program).[39] The Voucher Program is implemented through state and local public housing agencies (PHAs), which receive federal funds and administer them in the form of rental subsidies to eligible families so that they "can afford decent, safe, and sanitary housing."[40] Section Eight assistance may be project- or tenant-based. In project-based programs, rental assistance is paid for families who live in specific housing developments or units; when assistance is tenant-based, a housing unit — which can be located anywhere in the United States within the jurisdiction of the relevant PHA — is selected by the family receiving assistance.[41] Under the Section Eight Housing Choice Voucher (HCV) Program, eligible families select and rent units that meet program housing quality standards. If the PHA approves a family's unit and tenancy, the PHA contracts with the landlord to make rent subsidy

37. Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L.R. 642, 642 (1966) (quoting Letter from President Franklin D. Roosevelt to Nathan Straus, Administrator of the U.S. Hous. Auth. (Mar. 17, 1938)).

38. 42 U.S.C. § 1437(a)(1)(A) (2012).

39. 42 U.S.C. § 5301 (2012); *see* U.S. DEP'T OF HOUS. & URBAN DEV., MAJOR LEGISLATION ON HOUSING AND URBAN DEVELOPMENT ENACTED SINCE 1932 (2014), https://portal.hud.gov/hudportal/documents/huddoc?id=Legs_Chron_June2014.pdf [https://perma.cc/Q6L2-5SBA].

40. 24 C.F.R. § 982.1(a)(1) (2017).

41. *Id.* § 982.1(b)(1).

payments on behalf of the family.[42] The subsidy is based on a local payment standard that reflects the cost to lease a unit in the local housing market.[43] If the rent is less than the payment standard, the family generally pays 30 percent of adjusted monthly income for rent. If the rent is more than the payment standard, the family pays a greater portion of the rent.[44] The PHA contract with the landlord only covers a single unit and a specific assisted family; therefore, if the family moves out of the leased unit, the contract with the owner terminates.[45] Following the termination of such a contract, a family may move to another unit with continued assistance so long as the family is complying with program requirements.[46]

Eligibility for a HCV program voucher is determined by each PHA and is based on total annual gross income and family size. Generally, a family's income may not exceed 50% of the median income for the county or metropolitan area in which the relevant PHA is located.[47] By law, a PHA must provide 75 percent of its vouchers to applicants whose incomes do not exceed 30 percent of the area median income.[48] Once a contract between a PHA, landlord, and tenant is executed, the landlord has the responsibility "to provide decent, safe, and sanitary housing to a tenant at a reasonable rent."[49] In addition, "[t]he dwelling unit must pass the program's housing quality standards and be maintained up to those standards as long as the owner receives housing assistance payments."[50]

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42. *Id.* § 982.1(a)(2).

43. *Id.* § 982.1(a)(3). HUD determines the local payment standard based on "fair market rent" — the "40th percentile of rents for 'typical' units occupies by 'recent movers'" in a metropolitan area or non-metropolitan county. OFFICE OF POL'Y DEV. & RESEARCH , U.S. DEP'T OF HOUS. & URBAN DEV., FAIR MARKET RENTS FOR THE SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM (July 2007), https://www.huduser.gov/portal/datasets/fmr/fmrover_071707R2.doc [https://perma.cc/5328-MEW8]. Local housing authorities that contract with HUD have substantial discretion over spending and organization of the HCV program. *See e.g.* Liberty Res. Inc. v. Phila. Hous. Auth., 528 F. Supp.2d 553, 558 (E.D. Pa. 2007).

44. 24 C.F.R. § 982.1(a)(3).

45. *Id.* § 982.1(a)(b)(2).

46. *Id.* § 982.1(b)(2).

47. U.S. DEP'T OF HOUS. & URBAN DEV., *Housing Choice Voucher Fact Sheet* (last accessed Jan. 22, 2018), https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet [https://perma.cc/ZPJ4-4P64].

48. *Id.*

49. *Id.*

50. *Id.*

The HCV Program operates on a massive scale. Currently, over five million people, or 2.2 million low-income households, use the HCV Program.[51] In 2016 alone, landlords received over seventeen billion dollars of HCV assistance.[52] Furthermore, data indicates that children whose families move into better neighborhoods through HCV assistance are more likely to attend college (21.7% vs. 16.5%), less likely to become single parents (23% vs. 33%), and likely to earn more as adults.[53] The HCV program has become a key component of housing advocates' efforts to achieve the UCHA's goal of making decent and safe dwellings available for low-income families.

III. A CIRCUIT SPLIT LEAVES VOUCHER HOLDERS WITHOUT A REMEDY

The HCV program's success has been undermined by rampant discriminatory denials of housing to voucher holders.[54] Voucher holders' pre-*Inclusive Communities* attempts to litigate these denials under the FHA's disparate impact provisions have largely

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51. CTR. ON BUDGET & POL'Y PRIORITIES, *Fact Sheet: The Housing Choice Voucher Program* (July 21, 2016), available at: http://www.cbpp.org/sites/default/files/atoms/files/3-10-14hous-factsheets_us.pdf [https://perma.cc/2YMC-VTRS]. These numbers do not include the millions of households currently on HCV waitlists of attempting to get onto waitlists. The public's need for affordable housing far outstrips the HCV program's capacity to provide it. In Los Angeles, the waitlist, which was closed for thirteen years, has an eleven-year wait time. Susan Abram, *40,000 waiting for Section 8 housing in LA County — many for more than a decade*, L.A. DAILY NEWS (Mar. 28, 2017), https://www.dailynews.com/2017/03/28/40000-waiting-for-section-8-housing-in-la-county-many-for-more-than-a-decade/ [https://perma.cc/P6X8-RWUD]. When the Los Angeles HCV waiting list opened for a single week in 2017, 600,000 households applied for 20,000 spots on the waitlist. Matt Tonoco, *Los Angeles Expects to Turn Away 96 Percent of Subsidized Housing Applicants*, MOTHER JONES (Oct. 17, 2017), https://www.motherjones.com/kevin-drum/2017/10/los-angeles-expects-to-turn-away-96-percent-of-subsidized-housing-applicants/ [https://perma.cc/J5X3-SDMM]. 42,000 people are on the waiting list for vouchers in Chicago. Maya Dukmasova, *Chicago Housing Authority's sleeping giant*, THE CHICAGO READER (Oct. 18, 2017), https://www.chicagoreader.com/chicago/chicago-housing-authority-cha-section-8-vouchers-hcv-participant-council/Content?oid=32579792 [https://perma.cc/CE3D-G5AT]. In 2014, when the Chicago Housing Authority opened a lottery to make it onto the waiting list for either a voucher or public-housing unit 280,000 families, a quarter of all households in Chicago, entered their names. Ben Austen, *The Towers Came Down, and With Them the Promise of Public Housing*, N.Y. TIMES MAG. (Feb. 6, 2018), https://www.nytimes.com/2018/02/06/magazine/the-towers-came-down-and-with-them-the-promise-of-public-housing.html [https://perma.cc/86C6-ZJCA].

52. CTR. ON BUDGET & POL'Y PRIORITIES, *Fact Sheet*, *supra* note 51.

53. *Id.*; *see also* Kirk McClure, *The Prospects for Guiding Housing Choice Voucher Households to High-Opportunity Neighborhoods*, 12 CITYSCAPE 101 (2010).

54. *See infra* Part III.B.

failed.[55] This Part argues that the courts' rejection of disparate impact claims litigating denials of housing to voucher holders perpetuates housing discrimination and undermines the goals of the Section 8 program.

A. PRE-*INCLUSIVE COMMUNITIES* CIRCUIT SPLIT

A prospective tenant's source of income is not a protected class under the FHA;[56] therefore, the Act does not provide a disparate treatment cause of action to individuals who have been denied housing by a landlord because of their participation in the HCV program. Furthermore, USHA does not provide a private right of action to tenants or potential tenants based on a landlord's refusal to accept a Section Eight voucher. However, a landlord's practice of refusing to accept tenants who participate in the HCV program may result in an adverse disparate impact on classes that are protected by the FHA. Prior to *Inclusive Communities*, plaintiffs in the Second, Sixth, and Seventh Circuits brought disparate impact claims under the FHA against their landlords, alleging that the landlord's practice of refusing to accept HCVs led to a disparate impact based on race, national origin, familial status, and/or disability.[57] The Second and Seventh Circuits held that a landlord's decision to reject HCVs was categorically exempt from disparate impact liability under the FHA.[58] In contrast, the Sixth Circuit found that under particular circumstances, landlord nonparticipation or withdrawal from the voucher program could trigger disparate impact liability under the FHA.[59]

In *Knapp v. Eagle Property Management Co.*, an African American woman alleged that a landlord refused to rent an apartment to her due to her race and participation in the HCV Program, in violation of the FHA and the Wisconsin Open Housing Act (the Wisconsin Act).[60] The defendant initially told Knapp

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55. *See infra* Part III.A.

56. 42 U.S.C. § 3604 (2012) ("[I]t shall be unlawful . . . to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.").

57. Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n, 508 F.3d 366 (6th Cir. 2007); Salute v. Stratford Greens Apartments, 136 F.3d 293 (2d Cir. 1998); Knapp v. Eagle Prop. Mgmt. Co., 54 F.3d 1272 (7th Cir. 1995).

58. *See supra* notes 60-71 and accompanying text.

59. *See supra* notes 76–83 and accompanying text.

60. *Knapp*, 54 F.3d at 1275.

that he had an apartment available for her, but when she filled out an application he refused to accept it, telling her "we don't accept Section Eight."[61] At trial, a jury found that the defendant had violated the Wisconsin Open Housing Act's prohibition on discrimination based on lawful source of income.[62] However, in response to the defendant's post-trial motion for judgment as a matter of law, the district court reduced Knapp's award to $1 on the basis that she had not proven any foreseeable economic damages associated with finding and renting a different apartment.[63] The district court also excluded evidence offered by the plaintiff that the landlord's practice of refusing HCVs had a disparate impact on African Americans.[64] The Seventh Circuit Court of Appeals affirmed the district court's decision on appeal, determining that HCVs were more analogous to subsidies than income and therefore did not constitute a lawful source of income under the Wisconsin Act.[65] The circuit court also affirmed the district court's decision to exclude evidence demonstrating that the practice of refusing to accept HCVs had a disparate impact base on race.[66] Following Seventh Circuit precedent of allowing courts discretion in determining whether "disparate impact analysis is . . . appropriate in certain contexts," the circuit court concluded that the disparate impact theory of liability was not appropriate in the HCV context.[67]

The Second Circuit followed the Seventh Circuit's lead in *Salute v. Stratford Greens Apartments*, a case in which disabled

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61. *Id.* at 1275.
62. *Id.*
63. *Id.* at 1276.
64. *Id.*
65. *Id.* at 1282.
66. *Id.* at 1281.
67. *Id.* at 1280; *see* NAACP v. American Family Mutual Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992) (considering a claim alleging failure to insure in certain areas violated the Act not conducive to disparate impact analysis), *cert. denied*, 508 U.S. 907 (1993); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1533 (7th Cir. 1990) ("Some practices lend themselves to disparate impact method, others not."). The Knapp decision is complicated by the fact that the defendant was, at the time of his refusal of Knapp's application, already renting to several HCV participants and that his policy was one of refusing to accept *additional* tenants with HCVs. Under the "take one take all" provision of the HCDA, which has since been repealed, landlords willingly participating in the HCV program were required not to discriminate within the pool of HCV applicants. This influenced the *Knapp* court, which was concerned that since "the actions of both non-participating and participating owners have the same impact on minorities . . . to hold only the latter liable for racial discrimination for that conduct would deter them from joining or remaining involved in the program." *Knapp*, 54 F.3d at 1280.

plaintiffs who qualified for the HCV Program were denied housing by the defendant landlord.[68] The plaintiffs alleged that the defendant's policy of refusing applications from HCV participants produced a disparate impact on people with disabilities.[69] Though the Second Circuit Court of Appeals acknowledged its own precedent holding that violation of the FHA may be premised on a theory of disparate liability, it ultimately dispensed with the plaintiffs' disparate impact claim with just one sentence. The court found that because the "Section Eight program is voluntary and non-participating owners routinely reject Section Eight tenants, the owners' 'non-participation constitutes a legitimate reason for their refusal to accept Section Eight tenants and . . . we therefore cannot hold them liable for . . . discrimination under the disparate impact theory.'"[70] The *Salute* court implicitly endorsed the view that the defendants' stated desire "not to get involved with the federal government and its rules and regulations" constituted a legitimate reason for refusing HCVs.[71]

Judge Calabresi dissented, pointing out the superficial nature of the *Salute* majority's dismissal of the disparate impact claim and noting that while:

> the majority correctly lays out the burden-shifting framework applicable in disparate impact claims under the Fair Housing Act . . . it then adopts a novel per se defense to such claims. It holds that landlords who do not participate in Section Eight are immune from liability for discrimination, no matter how great the disparate impact of their actions may be.[72]

This approach, Judge Calabresi argued, is incompatible with the Second Circuit's own precedent, which created a burden-shifting approach to disparate impact litigation under the FHA.[73] Since the plaintiffs met their burden of demonstrating that the defendant's policy of refusing to lease apartments to HCV holders had a disproportionate adverse effect on the disabled, under the Second

68. Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 295 (2d Cir. 1998).
69. *Id.* at 302.
70. *Id.* at 302 (quoting *Knapp*, 54 F.3d at 1280).
71. *Id.* at 296.
72. *Id.* at 308.
73. *See id.* at 308; *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988).

Circuit's precedent, the burden should be shifted to the defendants to show that their policy furthered a legitimate business interest and that no alternative would serve that interest with a less discriminatory effect.[74] As the defendants neither justified their practice nor demonstrated that no less discriminatory alternative was available, Judge Calabresi concluded that the plaintiff's disparate impact claim was improperly and prematurely dismissed.[75]

The Sixth Circuit, in *Graoch Associates*, explicitly rejected the Second and Seventh Circuits' "circumscribed view of disparate impact liability under the FHA."[76] In *Graoch*, the Jefferson County Metro Human Relations Commission brought a complaint on behalf of tenants participating in the HCV program. The defendant, the owner of an apartment complex, notified the local Housing Authority that he intended to withdraw from his participation in the Section Eight voucher program, stating that he would honor existing leases by Section Eight tenants but would not renew those leases or sign any new HCV leases.[77] At the time of the defendant's announcement, eighteen families participating in HCV leases lived at his apartment complex. Seventeen of those families were African American.[78] The plaintiffs did not submit any information regarding the race of non-Section Eight tenants at the complex.

The Sixth Circuit Court of Appeals, departing from the Second and Seventh Circuits' analysis, held that a plaintiff can, "in principle, rely on evidence of some instances of disparate impact to show that a landlord violated the Fair Housing Act by withdrawing from Section Eight."[79] The Court adopted the burden-shifting framework from the Title VII context: first, the plaintiff must make a prima facie case of discrimination by "identifying and challenging a specific housing practice, and then showing an adverse effect by offering statistical evidence of a kind or degree sufficient to show that the practice in question has caused the

74. *Salute*, at 312 (quoting *Huntington Branch, NAACP*, 844 F.2d at 936).
75. *Id.* at 313.
76. Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Com'n, 508 F.3d 366, 374–375 (6th Cir. 2007) ("The Knapp court . . . appears to say that some disparate-impact claims should fail even if the plaintiff could prevail under the standard burden-shifting framework. We cannot endorse this view.").
77. *Id.* at 369–370.
78. *Id.* at 370.
79. *Id.* at 369.

adverse effect in question";[80] next, the defendant must offer a "legitimate business reason" for the challenged practice; and finally:

> to determine whether a defendant's proffered business reason is a pretext for discrimination, or whether an alternative practice exists that would achieve the same business ends with a less discriminatory impact, we must consider the strength of the plaintiff's statistical evidence of disparate impact and the strength of the defendant's interest in maintaining the challenged practice.[81]

Ultimately, the *Graoch* court upheld summary judgment for the defendant on the basis that the plaintiff had not made out a prima facie case of discrimination.[82] The court of appeals held that because the plaintiffs had failed to provide data regarding the racial makeup of non-HCV tenants in the housing complex, they could not demonstrate that the defendant's rejection of non-HCV tenants had a disparate impact on African Americans.[83] Despite this outcome, the court did empower future plaintiffs to successfully make out a claim of disparate impact for HCV denials under the FHA.

B. *KNAPP* AND *SALUTE* UNDERMINE THE SECTION EIGHT PROGRAM

Knapp and *Salute*'s conclusion — that nonparticipation in the HCV program was not legally actionable under the FHA — severely curtailed the protections available to HCV tenants and chilled fair housing advocates' attempts to promote housing mobility and combat discrimination in renting.[84] As a result, plaintiffs have been driven to challenge their landlords' discriminatory

80. *Id.* at 374 (quoting Kovacevich v. Kent State University, 224 F.3d 806, 830 (6th Cir. 2000)).

81. *Id.* at 373; *see also* Arthur v. City of Toledo, Ohio, 782 F.2d 565, 575 (6th Cir. 1986) (discussing the relevant framework for disparate impact claims under the FHA against a governmental defendant).

82. *Graoch*, 508 F.3d at 377–378.

83. *Id.* at 378.

84. Austin K. Hampton, *Vouchers as Veils*, 1 U. CHI. LEGAL F. 503, 503–506 (2009) (discussing the negative effects of the *Knapp*, *Salute*, and *Graoch* decisions in a pre-*Inclusive Communities* context). Hampton primarily focuses on the courts' failure to distinguish between landlord withdrawal and nonparticipation, and argues that by penalizing withdrawal from the HCV program, lawmakers and courts incentivize landlords not to participate in the first place. *Id.*

housing practices in state courts on the basis of state antidiscrimination laws.[85] This practice, along with the rise of state and local source of income statutes, has created a jurisdictional checkerboard of remedies that leaves the most vulnerable members of society — who often reside in the most segregated communities, where source of income protection laws do not exist — remediless.[86]

For example, before the passage of New York City's Lawful Source of Income Law, which explicitly includes Section Eight recipients,[87] HCV vouchers were regularly denied housing by landlords.[88] One survey indicated that of 122 available studios and one-bedroom apartments with listed rents below $1,200, only sixteen advertisers were willing to accept HCVs.[89]

In Austin, Texas, where the *Inclusive Communities* lawsuit originated, HCV holders are regularly denied housing by landlords. Some of these landlords, who own multiple units throughout the city, rent to HCV holders in low-income neighborhoods but not in high-income neighborhoods.[90] As a result, HCV holders are steered toward unsafe neighborhoods with elevated poverty and crime rates.[91]

In St. Louis, Missouri, 40% of the HCVs issued to family were returned unused because families could not locate a landlord to rent to them.[92] In St. Louis County this number climbed to 50%. HCV recipients usually only have sixty days to find an apartment, and if that time expires before the voucher holder can find a willing landlord, they give up their vouchers and are placed back on the end of the waiting list, which can span for years.[93]

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85. *See e.g.* Feemster v. BSA Ltd. Partnership, 548 F.3d 1063 (D.C. Cir. 2008) (finding a facial violation of the District of Columbia Human Rights Act for a lessor to discriminate on the basis of Section 8 renter's source of income).

86. *See infra* notes 185–192 and accompanying text.

87. FAIR HOUSING NYC, *Lawful Source of Income*, http://www1.nyc.gov/site/fairhousing/renters/lawful-source-of-income.page [https://perma.cc/T7W4-CZYP] (last visited Jan. 22, 2018).

88. Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES (Oct. 30, 2007), https://www.nytimes.com/2007/10/30/nyregion/30section.html [https://perma.cc/HYL4-TJP4].

89. *Id.*

90. Alana Semuels, *How Housing Policy Is Failing America's Poor*, THE ATLANTIC (Jun. 24, 2015), https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650/ [https://perma.cc/6HHG-KNCV].

91. *Id.*

92. John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS UNIV. PUB. L. REV. 309, 322 (2000).

93. *Id.*

Households eligible for and participating in the HCV program disproportionately include members of protected classes. Nationally, 28% of HCV recipient households include at least one member with a disability.[94] 45% of HCV recipient households identify as Black, 16% as Hispanic, and 35% as White.[95] According to the Census Bureau, 12% of the population of the United States identifies as Black, 17% as Hispanic or Latino, and 77% as White.[96] Thus, households made up of people of color, and households in which at least one person is disabled, are disproportionately likely to be HCV recipients relative to White non-disabled households. When landlords refuse to accept HCVs, disabled, Hispanic, and Black persons are disproportionately affected.[97] By curtailing these tenants' ability to challenge landlords' discriminatory behavior, the *Knapp* and *Salute* decisions left members of protected classes who have faced such discrimination remediless, undermined the success of the Section Eight HCV program, and contributed to the continuation of racial subordination in modern America.[98]

IV. THE SECOND AND SEVENTH CIRCUITS' FLAWED LOGIC, AND A FEDERAL SOLUTION

The version of disparate impact applied in *Knapp* and *Salute* substantially deviates from that later endorsed by the Supreme Court in *Inclusive Communities*. The *Knapp* and *Salute* courts' central argument — that the disparate impact theory of liability is "not appropriate" in the HCV context because of the voluntary nature of landlord participation in the Federal Section Eight

94. NAT'L LOW INCOME HOUS. COAL., *Who Lives in Federally Assisted Housing?*, 2 HOUSING SPOTLIGHT 2, 2 tbl. 2 (2012).

95. *Id.* at 3 fig. 2.

96. U.S. CENSUS BUREAU, *QuickFacts*, https://www.census.gov/quickfacts/ [https://perma.cc/E3RX-J4FY] (last visited Feb. 15, 2017).

97. Furthermore, since Black (29%) and Hispanic (25.9%) adults are more likely to have a disability than white adults (20.6%), the number of Black and Hispanic households participating in the HCV program is even greater relative to White households than the race-based statistics indicate. *See* Press Release, CDC, 53 million adults in the US live with a disability (Jul. 30, 2015), https://www.cdc.gov/media/releases/2015/p0730-US-disability.html [https://perma.cc/7ZXC-MPZP].

98. *See* Semuels, *supra* note 90; *see* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1998) ("Residential segregation is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination.").

HCV program — lacks any grounding in Title VII doctrine or the FHA, and directly contravenes the Supreme Court's interpretation of these statutes in *Inclusive Communities*. The notion that a business practice cannot result in impermissible disparate impact simply because the practice itself is not illegal, or is voluntary in nature, conflicts directly with the FHA disparate impact governing standards articulated in *Inclusive Communities*.[99] Furthermore, the reading of a "voluntariness" exception to liability into the FHA violates the *expressio unius* doctrine of statutory construction and undermines the central purpose of the FHA.

A. *INCLUSIVE COMMUNITIES* AND DISPARATE IMPACT LITIGATION UNDER THE FHA

Despite the FHA's lack of an explicit disparate impact cause of action, federal courts have generally permitted plaintiffs to litigate their claims of housing discrimination under a disparate impact theory of liability. Prior to 2015, the Courts of Appeals that considered this issue had unanimously held that the "otherwise make unavailable" language of § 3604 of the FHA created a disparate impact cause of action, but — as made apparent by *Knapp*, *Salute*, and *Graoch* — each circuit applied its own tests and procedures for determining the validity of such a claim.[100]

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99. *See infra* Part IV.A.

100. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935–936 (2d Cir. 1988) ("Confusion concerning the content of a prima facie disparate impact case under Title VIII has been engendered by a tendency of some courts to consider factors normally advanced as part of a defendant's justification for its challenged action in assessing whether the plaintiff has established a prima facie case.") ; Hanson v. Veterans Administration, 800 F.2d 1381, 1386 (5th Cir. 1986) (holding that "the government need only establish that race was a consideration and played a role in the real estate transaction" in a disparate impact case.); Arthur v. Toledo, 782 F.2d 565, 574–575 (6th Cir. 1986) (requiring a showing that a referendum barring a local housing authority from constructing sewer extensions to public housing was motivated primarily discriminatory intent); Smith v. Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982) (applying the *Arlington Heights* four-factor test); Halet v. Wend Investment Co., 672 F.2d 1305, 1311 (9th Cir. 1982) ("the circuits have applied different standards in determining how important a discriminatory effect is in proving a [FHA] violation."); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977) ("plaintiffs have established a prima facie case . . . by proving that the agencies' acts had a discriminatory effect and that the agencies have ailed to justify the discriminatory results of their actions."); Metropolitan Housing Development Corp. v. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (Formulating a four-factor test (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington v. Davis ; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for

Under this fragmented approach, disparate impact remained an important yet often unreliable tool for fair housing advocates. In disparate impact cases prior to 2015, plaintiffs obtained positive outcomes in only 20% of their FHA disparate impact claims considered on appeal.[101] Furthermore, plaintiffs' successful FHA disparate impact outcomes were only affirmed 33.3% of the time, compared with defendants' successful outcomes, which were affirmed 83.8% of the time.[102] In response to the lack of clarity regarding disparate impact claims under the FHA, the Department of Housing and Urban Development (HUD) promulgated rules creating a standardized framework for such claims.[103] Under HUD's Discriminatory Effect Guidance a plaintiff bringing a disparate impact claim must first prove a prima facie case of discrimination by showing that a challenged practice causes a discriminatory effect.[104] Once a prima facie case is established, the defendant must prove "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[105] If the defendant discharges its burden, the plaintiff must then demonstrate that the defendant's interests "could be served by another practice that has a less discriminatory effect."[106]

In 2015, in *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court conclusively held that the FHA provides a disparate impact cause of action and outlined the framework under which such a claim

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members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing); United States v. Black Jack, 508 F.2d 1179, 1184–1185 (8th Cir. 1974).

101. Stacy E. Seicshnaydre, *Is Disparate Impact Having any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L.R. 357, 357–358 (2013). Plaintiffs have seen a sharp decline in positive outcomes on appeal for disparate impact FHA claims since the 1980s. *Id.* at 394. "Positive outcomes" include the appellate court affirming a bench trial decision for plaintiffs, reversing a negative bench trial decision against the plaintiff, reversing the dismissal of a FHA disparate impact claim at the pleading stage, remanding a case after delineating the disparate impact standard to applied, and reversing a dismissal of FHA disparate impact claims on summary judgment. *Id.* at 394–395.

102. *Id.* at 357.

103. Discriminatory Effect Prohibited, 24 C.F.R. § 100.500 (2017).

104. *See id.* §§ 100.500(a), 100.500(c)(1); *see also* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. and Cmty. Aff., No. 3:08-CV-0546-D, 2016 WL 4494322, at *4 (N.D. Tex. Aug. 26, 2016); Borum v. Brentwood Village, 218 F. Supp. 3d 1, 22 (D.D.C. 2016).

105. 24 C.F.R. § 100.500(c)(2); *see also supra* note 36 and accompanying text.

106. 24 C.F.R. § 100.500(c)(3); *see also supra* note 36 and accompanying text.

should be analyzed.[107] Though the Court declined to directly apply HUD's Discriminatory Effect Guidance and instead relied on its own precedent, reading *Griggs v. Duke Power* and *Smith v. City of Jackson* to conclude that disparate impact causes of action are cognizable under the FHA, the practical differences between HUD's guidance and the burden-shifting framework applied by the Court are minimal.[108]

The Supreme Court relied on its past interpretations of other federal antidiscrimination statutes to conclude that the FHA authorized a disparate impact cause of action. In *Griggs*, a Title VII case involving a challenge to an employer's policy of requiring workers to have a high school diploma and passing scores on intelligence tests, the Court interpreted Section 703(a) of Title VII as creating a disparate impact cause of action. Section 703(a) made it an unlawful practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[109] The Court determined that Congress's intent in drafting Section 703(a) was to target "the consequences of employment practices, not simply the motivation," and that therefore Title VII must be interpreted to allow disparate impact claims.[110] Similarly, the plurality of the Court in *Smith v. City of Jackson* found that there was a disparate impact cause of action under the Age Discrimination in Employment Act of 1967 (ADEA). In particular, the *Smith* plurality determined that Sec-

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107. *See* Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

108. Some have opined that *Inclusive Communities* set forth a framework that is more favorable to defendants than the HUD regulations were. This conclusion is based on the difference between the Court's and HUD's description of the defendant's burden at the second step of the burden-shifting framework. The Court stated that the defendant must prove that its challenged policy is "necessary to achieve a valid interest," while the HUD regulation required the policy to be "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." However, it is unclear what the practicable difference is between these articulations of a "necessity" showing. Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 121 (2015). On remand, the district court interpreted the Supreme Court's decision as an affirmance of the proof regimen set forth in the HUD regulations. *Inclusive Cmtys.*, 2016 WL 449432236, at *4.

109. Griggs v. Duke Power Co., 401 U.S. 424, 426 n.1 (1971); 42 U.S.C. § 2000e-2(a) (2012).

110. *Griggs*, 401 U.S. at 432.

tion 4(a)(2) of the ADEA was written with a focus "on the effects of the action on the employee rather than the motivation for the action of the employer," and therefore necessitated recognition of a disparate impact theory of liability under the statute.[111] In *Inclusive Communities*, the Court found that Congress's use of the phrase "otherwise make unavailable" in the FHA similarly referred to "the consequences of an action rather than the actor's intent" and that the results-oriented language of the statute favored the recognition of disparate impact liability.[112]

The *Inclusive Communities* Court additionally reasoned that the 1988 Fair Housing Amendments Act indicated Congress's belief that the FHA did and should encompass disparate impact claims.[113] At the time of the Amendments, the courts of appeals had already overwhelmingly held that the disparate impact theory of liability existed under the FHA, and Congress was aware of this precedent.[114] The Court noted that instead of legislatively overruling the courts, Congress instead added "exemptions from liability that assume the existence of disparate-impact claims."[115] The Court found that Congress's implicit approval of the disparate impact theory of liability further supported the conclusion that recognition of disparate impact claims is consistent with and furthers the FHA's central purpose.[116]

Having concluded that the FHA does encompass disparate impact liability, the Court outlined the limitations of a disparate impact cause of action and described how a plaintiff could successfully make out such a claim.[117] The Court first emphasized that the plaintiff must "allege facts at the pleading stage and

111. Smith v. City of Jackson, 544 U.S. 228, 236 (2005).

112. *Inclusive Cmtys.* 135 S. Ct. at 2519; *see also* United States v. Giles, 300 U.S. 41, 48–49 (1937) ("The word 'make' has many meanings, among them 'To cause to exist, appear or occur'. . . . To hold the statute broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows gives to the words employed their fair meaning and is in accord with the evident intent of Congress."). *But see Inclusive Cmtys.*, 135 S. Ct. at 2534 (Alito, J., dissenting) (stating that the majority cannot reach its conclusion without "torturing the English language"). Justice Thomas argued that *Griggs* itself improperly construed Title VII and that even if the Court owes deference as a matter of *stare decisis*, such deference is confined to the Title VII context and should not be incorporated into the FHA. *Id.* at 2526–2532 (Thomas, J., dissenting).

113. *See Inclusive Communities*, 135 S. Ct. at 2519–2520.

114. *Id.*; *see also* H.R. REP. NO. 110-711, at. 21 n.52 (1988); 134 CONG. REC. 23,711 (1988) (statement of Sen. Kennedy).

115. *Inclusive Cmtys.*, 135 S. Ct. at 2520; *see supra* Part II.B.

116. *Inclusive Cmtys.*, 135 S. Ct. at 2521; *see supra* Part II.B.

117. *Inclusive Cmtys.*, 135 S. Ct. at 2523–24.

produce statistical evidence demonstrating a causal connection" in order to make out a prima facie case of disparate impact.[118] It further warned that the FHA must be used solely to "remove . . . artificial, arbitrary, and unnecessary barriers" in housing and not to displace valid governmental and private priorities.[119] Once the plaintiff has made out a prima facie case, the Court explained, the burden shifts to the defendant to "explain the valid interest served by their policies."[120] If a housing authority or private developer is to maintain a policy despite a plaintiff's showing that it causes a disparate impact, they must "prove it is necessary to achieve a valid interest."[121] The Court analogized this step to the business necessity standard under Title VII employment discrimination jurisprudence, under which entities are liable for "disparate impact discrimination if the challenged practices were not job related and consistent with business necessity."[122] If the defendant demonstrates that the policy causing a disparate impact serves a valid interest, the plaintiff must show that there is an "available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs"[123] in order to prevail.

Finally, in a nod to its affirmative action jurisprudence, the Court, in discussing remedies, noted that "race may be considered in certain circumstances and in a proper fashion."[124] The Court alluded to its practice of applying a less exacting standard to review of employers' affirmative efforts to ensure diversity and fairness of opportunity in schools and in the workplace, suggesting that "local housing authorities may choose to foster diversity and [diminish] racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."[125]

Despite a long history of disparate impact litigation under the FHA, the Supreme Court only recently concluded that the Act supports a disparate impact cause of action. In doing so, the

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118. *Id.* at 2523.
119. *Id.* at 2524 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (2015)).
120. *Id.* at 2522.
121. *Id.* at 2523.
122. *Inclusive Cmtys.*, 135 S. Ct. at 2523 (quoting Ricci v. DeStefano, 557 U.S. 557, 585 (2009)); *see infra* Part IV.B for a discussion of "business necessity."
123. *Id.* at 2523 (quoting *Ricci*, 557 U.S. at 578).
124. *Id.* at 2525.
125. *Id.*; *see Ricci*, 557 U.S. at 585; *see also* Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

Court imported the Title VII framework for evaluating disparate impact claims, which requires: (1) the plaintiff to make out a prima facie case alleging injury and a causal connection between the defendant's practice and said injury; (2) the defendant to prove that this practice is necessary to achieve a valid business interest; and (3) the plaintiff to articulate a less discriminatory practice that achieves the valid business interest.[126] The Supreme Court's framework applies prospectively to all FHA disparate impact case, save those that fall into the FHA's enumerated exceptions.

B. THE *KNAPP* AND *SALUTE* DECISIONS ARE ABROGATED BY *INCLUSIVE COMMUNITIES*

The conclusion that a business practice cannot result in impermissible disparate impact simply because the landlord has the choice of determining whether or not to engage in the practice directly conflicts with the FHA disparate impact standards articulated in *Inclusive Communities*. The *Knapp* and *Salute* holdings, and their focus on "voluntariness" as a means of limiting the application of disparate impact, are irreconcilable with *Inclusive Communities*' adoption of the Title VII burden-shifting framework into the FHA context.

The *Knapp* and *Salute* courts' truncated version of the disparate impact burden-shifting framework does not conform with the governing standards set out in *Inclusive Communities*, and therefore the opinions lack precedential value going forward. As held in *Inclusive Communities*, once a plaintiff makes out a *prima facie* case, the burden shifts to the defendant to demonstrate that the practice in question is necessary to achieve a valid business interest.[127] If the defendant successfully demonstrates that its practice is necessary to achieve a legitimate interest, the burden shifts back to the plaintiff to articulate a less discriminatory housing practice the defendant could implement in order to achieve the articulated legitimate interest, and demonstrate that the defendant has failed to consider or implement this alternative practice.[128] The *Knapp* and *Salute* courts' approach skips the second and third steps of the burden-shifting framework adopted in

126. *See Inclusive Cmtys.*, 135 S. Ct. at 2517–18, 2523.
127. *See supra* Part IV.A.
128. *See supra* Part IV.A.

Inclusive Communities by declining to shift the burden to the defendant to articulate a "valid business interest." As Judge Calabresi illustrated in his dissenting opinion in *Salute*, because the "plaintiffs have successfully demonstrated that the defendants' policy of refusing to lease apartments to Section Eight certificate holders has a disproportionate adverse effect . . . the burden . . . [should shift] to the defendants to prove that 'their actions furthered . . . a legitimate . . . interest . . . .'"[129] Instead, the *Knapp* and *Salute* majorities, in what is at best a cursory nod to the discredited "simple justification" affirmative defense, and at worst a total departure from the burden-shifting framework, declined to examine the validity of the defendants' justification.[130]

The courts' focus on "voluntariness" also conflicts substantively with *Inclusive Communities* and FHA and Title VII disparate impact jurisprudence. *Knapp* and *Salute* both held that disparate impact analysis and the associated burden-shifting framework did not apply to landlord denials of HCVs.[131] They concluded that because

> owner participation in the Section Eight program is voluntary and non-participating owners routinely reject Section Eight voucher holders . . . we assume that their non-participation constitutes a legitimate reason for their refusal to accept Section Eight tenants and we therefore cannot hold them liable for racial discrimination under the disparate impact theory.[132]

Nothing in the FHA or its application to disparate impact cases as articulated in *Inclusive Communities* suggests that courts may dismiss disparate impact causes of action simply because the housing practices being challenged are "voluntary" in nature.

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129. Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 312 (2d Cir. 1998) (Calabresi, J., dissenting) (quoting Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

130. The *Knapp* and *Salute* approach to burden-shifting could alternatively be understood as reducing the second step to a "simple justification" requirement, a standard which was rejected by *Inclusive Communities. Inclusive Cmtys.*, 135 S. Ct. at 511; *but see* Langlois v. Abington Hous. Auth., 207 F.3d 43 (1st Cir. 2000); *cf. supra* note 123. Regardless of whether the *Knapp* and *Salute* courts skipped step two of the burden-shifting framework or reduced it to a "simple justification," neither approach conforms with the governing standards set forth by *Inclusive Communities*.

131. Knapp v. Eagle Prop. Mgmt. Co., 54 F.3d 1272, 1280 (7th Cir. 1995); *Salute*, 136 F.3d at 301.

132. *Knapp*, 54 F.3d at 1280.

Under disparate impact jurisprudence, a defendant may still be liable even though the underlying behavior that caused the disparate impact is itself legal, or as the Second and Seventh Circuit called it, "voluntary." Landlords always have the power to decide whether to rent their property and to whom to rent it — but when their decision is motivated by discriminatory intent, or their decisions result in a disparate impact on a protected class, they are nevertheless liable under the FHA.[133] In fact, cases recognized to be "at the heartland of disparate-impact liability,"[134] such as *Town of Huntington v. N.A.A.C.P.*, demonstrate that even otherwise lawful actions like a town's zoning practices are subject to disparate impact liability if they "significantly perpetuated segregation. . . ." Though the Town of Huntington's zoning practices were not on their face illegal, they did cause a disparate impact on a protected class.[135] Courts have also found an impermissible disparate impact as a result of business transactions such as homeowner insurance valuations, in which defendant insurance companies engaged in "redlining" to deny homeowners insurance in majority-minority areas.[136] Valuing a property at a low rate, or applying a particular formula in order to determine a property's value, is not illegal — but when that practice is demonstrated to disproportionately negatively impact a protected class, the challenged practice may be illegal under the FHA. If a town's discretionary zoning practices and homeowner insurers' risk assessments, two fundamentally otherwise legal practices, can be subject to disparate impact liability, there is no plausible doctrinal justification for a landlord's decisions regarding tenant source of income requirements not to be.[137]

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133. Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

134. *Id.* at 2511.

135. Town of Huntington, N.Y. v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988) (quoting Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935–936 (2d Cir. 1988)).

136. Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of America, 208 F. Supp.2d 46, 58–60 (D.D.C. 2002).

137. Defendants engaging in a number of other discriminatory housing practices that could be classified as voluntary were still required to articulate a legitimate, valid, reason for engaging in such practices beyond simply exercising their discretion. Charleston Hous. Auth. v. U.S. Dep't. of Agric., 419 F.3d 729 (8th Cir. 2005) (finding that a housing authority failed to demonstrate that its decision to vacate and demolish a low-income apartment complex, which had a disparate impact on African-Americans, was justified by a legitimate and substantial goal, and therefore violated the FHA); *see also* Mount. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011) (vacating

Title VII disparate impact jurisprudence provides additional examples of cases where a defendant's practices were deemed to cause an impermissible disparate impact despite being voluntary or discretionary in nature. In *Griggs* itself, the practices under scrutiny were the defendant's new hiring criteria, which mandated that employees have a high school degree and pass an intelligence test.[138] Employers generally choose when and how to hire employees — the decision to hire an employee is inherently discretionary. But when hiring practices result in a disparate impact, the employer must demonstrate "business relatedness" to avoid liability.[139] An employer may not "escape liability simply by articulating a vague, inoffensive sounding subjective criteria."[140] In *Griggs*, the employer was unable to demonstrate that its new hiring requirements had any relationship to employee success or other business necessity, and was therefore held liable under Title VII.[141] Though Title VII's language of "business necessity" does not map onto the FHA perfectly, the Supreme Court found in *Inclusive Communities* that the differences in phrasing between the FHA and Title VII's disparate impact provisions were purely grammatical, concluding the provisions "serve the same purpose and bear the same meaning."[142] Therefore, the rejection of the "otherwise lawful" or "voluntary" defense in Title VII jurisprudence provides additional compelling evidence that the defense should be unavailing in the FHA context.

Inclusive Communities, in holding that disparate impact claims are cognizable under the FHA, implicitly overrules *Knapp*'s assertion that "disparate impact analysis is not appropriate in certain contexts."[143] After the Supreme Court's deter-

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and remanding the district court's dismissal of a disparate impact claim filed against a township for undertaking a redevelopment plan that eliminated homes of low income households of color).

138. Griggs v. Duke Power Co., 401 U.S., 424, 426–428 (1971).

139. *Id.* at 431.

140. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1009 (1989) (Blackmun, J., concurring). Congress later adopted the *Fort Worth* concurrence's point of view and passed the Civil Rights Act of 1991 specifically to clarify that an employer must show both job relatedness and business necessity in order to make out an affirmative defense to a prima facie showing of disparate impact. 42 U.S.C. § 2000e-2(k) (2012).

141. *Griggs*, 401 U.S. at 431–436.

142. Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519 (2015).

143. Knapp v. Eagle Prop. Mgmt. Co., 54 F.3d 1272, 1280 (7th Cir. 1995); *see also* NAACP v. American Family Mutual Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. de-*

mination in *Inclusive Communities* that disparate impact liability does exist under the FHA and that the Title VII burden-shifting framework is appropriate for analyzing disparate impact claims,[144] *Knapp* and *Salute*'s conclusion that the disparate impact burden-shifting framework is selectively applicable and linked to the concept of "voluntariness" is no longer good law.

C. THE FHA DOES NOT PERMIT A "VOLUNTARINESS" DEFENSE

Under the canon of *expressio unius est exclusio alterius* ("*expressio unius*"), "if [a] statute specified one exception to a general rule . . . other exceptions . . . are excluded."[145] An "ancient maxim," *expressio unius* has been applied by the U.S. Supreme Court and lower courts to limit litigants' attempts to expand or contract remedies beyond the scope of the statutory source of such remedies.[146] The *expressio unius* doctrine generally controls unless there is "persuasive evidence" that excluding unmentioned exceptions would be contrary to the legislature's intent.[147]

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nied, 434 U.S. 1025 (1978). The case from which *Knapp* draws this premise, *NAACP v. American Family Mutual Ins. Co.*, explicitly notes that the Supreme Court's silence on the issue of disparate impact claims' cognizability under the FHA allowed the Seventh Circuit to determine that "courts must use their discretion" in determining whether disparate impact analysis is appropriate in a given FHA case.

144. The 1991 Civil Rights Act, from which the *Inclusive Communities* adopted its burden-shifting framework mandates that if the plaintiff: "[1] demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and [2] the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or . . . [3] the complaining party makes a demonstration . . . with respect to an alternative employment practice. . . . in accordance to the law as it existed on June 4, 1989 . . . and the respondent refuses to adopt such alternative employment practice" the respondent employer is liable. 42 U.S.C. § 2000e-2(k) (2012).

145. *Expressio Unius*, Black's Law Dictionary (5th Ed. 1979).

146. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *see also* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); Transamerica Mortg. Advisors v. Lewis, 444 U.S. 11, 20 (1979); *see also* Custis v. United States, 511 U.S. 485, 491–492 (1994) ("Congress' passage of other related statutes that expressly permit repeat offenders to challenge prior convictions for enhancement purposes supports this negative implication . . . shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so."); Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929).

147. *Transamerica Mortg. Advisors*, 444 U.S. at 20.

Inclusive Communities recognized that disparate impact claims under the FHA are generally valid.[148] The FHA of 1968 includes two exemptions from liability: one for religious organizations, and one for private clubs.[149] The 1988 Amendments to the FHA specified that three practices were exempt from liability under the Act: government mandated occupancy standards; exclusionary housing practices aimed at individuals with drug convictions; and age restrictions in senior housing.[150] The Supreme Court has interpreted the 1988 exemptions as barring the imposition of disparate impact liability for certain practices, while recognizing the validity of disparate impact claims under the FHA generally.[151] The presence of these enumerated exceptions to disparate impact liability indicates that courts "must be chary of reading other [exceptions] into [the statute]."[152] As such, in the absence of "persuasive evidence of a contrary legislative intent," a "voluntariness" exemption to disparate impact liability may not be read into the FHA.[153]

The FHA's purpose — to reverse segregated housing patterns and provide for fair housing throughout the United States[154] — is not well served by reading additional exemptions from liability into the statute. "The Act was designed primarily to prohibit discrimination . . . and to provide federal enforcement procedures for remedying such discrimination."[155] The amendments to the FHA have similar legislative histories, indicating that the overarching purpose of the Act is to provide protections and remedies to members of protected classes who have been subject to discrimination in housing.[156] Therefore, the legislative history of the

148. Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507. 2519 (2015); *but see* Remarks on Signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 2 (Sep. 13, 1988).

149. 42 U.S.C. § 3607 (2012).

150. Pub. L. No. 100-430, 102 Stat. 1619 § 805 (1988); *see also* 42 U.S.C. § 3607.

151. *Inclusive Communities*, 135 S. Ct. at 2520–521.

152. *Transamerica Mortg. Advisors*, 444 U.S. at 20.

153. Guardians Assoc. v. Civil Serv. Comm. of the City of N.Y., 463 U.S. 582, 599 (1983) (quoting *Transamerica Mortg. Advisors*, 444 U.S. at 20) ("[L]ike all rules of statutory construction, [this] presumption must 'yield . . . to persuasive evidence of contrary legislative intent.'"). In searching for evidence of "contrary legislative intent" courts look to the explicit text of an Act, similar laws that preceded the Act in question, companion legislation, early drafts of the bill, and the language of committee prints. *See e.g., Transamerica Mortg. Advisors*, 444 U.S. at 14–25.

154. *See supra* Part II.B.

155. Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973).

156. Remarks on Signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 2 (Sep. 13, 1988).

FHA militates in favor of construing its exemptions narrowly.[157] Furthermore, the courts have, as a rule, read the FHA broadly and generously so as to extend the Act's protections, and reading exemptions into the Act that curtail the FHA's protections directly conflicts with such precedent.[158] Therefore, unless the "voluntariness" exception can be grounded in a specifically enumerated exemption to the FHA, legislative history and judicial precedent indicate that such an exception cannot and should not be relied upon by courts.

None of the enumerated exemptions to disparate impact liability under the FHA can be understood to support a general "voluntariness" exemption. The first exemption in the 1968 FHA is for religious organizations and their organs.[159] This provision mandates that "nothing in this subchapter shall prohibit a religion organization, association, societies, nonprofit institution, or organization supervised or controlled by or in conjunction with a religious organization" from limiting or giving preference to persons of the same religion in sale, rental, and occupancy of the dwellings it owns.[160] The only circumstance under which such organizations may be liable under the FHA is if membership in the religion itself is restricted on account of race, color, or national origin.[161] Though this exemption is more likely to apply in disparate treatment rather than disparate impact cases, one can imagine a situation where a practice of excluding persons from other religions may have a disparate impact as well. This exemption to disparate treatment and disparate impact liability is meant to reconcile the FHA with the First Amendment's guarantee of religious freedom.[162] The *Knapp* and *Salute* defendants were private landlords, unaffiliated with any religious group. Furthermore, the defendants' denial of housing to HCVs holders

157. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731–32 (1995); *see also* Commissioner v. Clark, 489 U.S. 726, 739 (1989) (holding that an exception to "a general statement of policy" is best read "narrowly in order to preserve the primary operation of the policy").

158. *Otero*, 484 F.2d at 1133.

159. 42 U.S.C. § 3607(a) (2012).

160. *Id.*

161. *Id.*

162. *See* Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries Inc., 717 F. Supp.2d 1101, 1119 (D. Idaho 2010) (holding that a religious organization's operating of a homeless shelter and residential alcohol recovery program were protected by the Free Exercise Clause of the First Amendment).

was not premised on any religious convictions.[163] Therefore, the religious exemption to FHA liability is inapplicable to the issue of disparate impact liability in cases involving landlord denials of housing to HCV recipients and does not evince any evidence of legislative intent to curtail disparate impact liability in cases not involving religious liberty. The 1968 FHA also includes an exemption from liability for "private clubs not open to the public" who provide lodging to their members.[164] This exemption is clearly inapplicable to landlords who rent out their property to tenants.

The 1988 Amendments Act contains several exemptions from the general rule that disparate impact claims are cognizable under the FHA.[165] The first exemption is for exclusionary practices aimed at individuals with convictions for "illegal manufacture or distribution of a controlled substance."[166] This exemption anticipates and heads off disparate impact lawsuits based on statistics indicating that certain drug-related convictions are correlated with race and/or sex.[167] The exemption is meant to ensure that landlords are not forced to rent "to an individual who would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."[168] The *Knapp* and *Salute* defendants did not make any allegations concerning the plaintiffs' use of controlled substances, and did not articulate any public safety concerns associated with accepting HCV recipients. Therefore, the "voluntariness" defense articulated by the *Knapp* and *Salute* courts does not resemble the controlled substances conviction exemption, and does not implicate public safety concerns.

The Amendments Act of 1988 also clarifies that the FHA may not be applied to limit the applicability of "reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[169] This exemption allows states and localities to impose maximum occupancy standards for public

163. Knapp v. Eagle Prop. Mgmt. Co., 54 F.3d 1272, 1275–76 (7th Cir. 1995).
164. 42 U.S.C. § 3607.
165. *See supra* note 125.
166. 42 U.S.C. § 3607(4); Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2520 (2015).
167. *Id.* at 2521 (citing Kimbrough v. United States, 552 U.S. 85, 98 (2007)).
168. *See* H.R. REP. NO. 100-711 pt. 71, at 2189 (1988); *cf.* Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994).
169. 42 U.S.C. § 3607(b)(1)–(2).

safety purposes without incurring liability if those standards place a disproportionate burden upon persons who are members of protected classes. Similarly to the controlled substance conviction exemption, the legislature's goal in eliminating liability in this context was to alleviate public safety concerns.[170] This exemption applies to state and local government seeking to implement occupancy standards, and is therefore inapplicable to the *Knapp* and *Salute* defendants, who were private landlords.

Finally, the Act prohibits the addition of the familial status protected category from being applied to housing designated for older persons.[171] This provision was created for the purpose of exempting retirement communities and state and federal programs aimed at assisting the elderly in obtaining housing from liability.[172] The exemption reconciles a potential conflict between Congress's desire to protect families with children while "fully protect[ing] the rights of senior citizens who live in retirement communities . . . ."[173] *Knapp* and *Salute* were not based on a familial status disparate impact claim and the defendants were not engaged in any federal or state housing program aimed at assisting the elderly; therefore, the exemption does not apply.

The FHA authorizes a cause of action based on disparate impact liability.[174] To the extent that Congress has elected to curtail disparate impact liability, it has been very specific in delineating exceptions to the general rule that disparate impact causes of action are cognizable under the FHA. These exceptions to the general rule are primarily aimed at maintaining safety in housing and ensuring that the threat of disparate liability does not conflict with constitutional constraints or the FHA's goal of furthering fair housing. The doctrine of *expressio unius* dictates that when a statute enumerates specific exceptions to a general rule

170. 134 CONG. REC. 19,892 (1988) (statement of Sen. Domenici) ("A person removes himself or herself from protection under the act if objective evidence can be presented to show that this person 'would pose a threat to the safety of others.'"); *see also* Tim Iglesias, *Clarifying the Federal Fair Housing Act's Exemption for Reasonable Occupancy Restriction*, 31 FORDHAM URB. L.J. 1211, 1222–1225 (2004).

171. 42 U.S.C. § 3607(b)(1).

172. H.R. REP. NO. 100-711 pt. 80, at 2192 (1988); 134 CONG. REC. 20,918 (1988) (statement of Rep. Fish) ("[M]any Members of this House were concerned about the potential adverse impact that the coverage of families with children could have on senior citizens' retirement communities.").

173. 134 CONG. REC. 15,661 (1988) (statement of Rep. Pepper); *see also* Taylor v. Rancho Santa Barbara, 206 F.3d 932, 935–936 (9th Cir. 2000).

174. Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507. 2525 (2015).

all other potential exceptions are excluded; since the "voluntariness/otherwise lawful" exemption proposed by *Knapp* and *Salute* is not enumerated in the FHA, it does not exist. Furthermore, there is no legislative history indicating that the presumption of *expressio unius* is inappropriate in this context — in contrast, the fair housing goals of the FHA[175] are best served by limiting the instances in which a landlord acting in a discriminatory fashion may escape liability. Therefore, the "voluntariness" exception to disparate impact liability articulated in *Knapp* and *Salute* is not a valid interpretation of the FHA.

D. APPLYING *INCLUSIVE COMMUNITIES*

In lieu of the abrogated *Knapp* and *Salute* holdings, courts should apply the *Inclusive Communities* burden-shifting framework to cases involving disparate impact claims in which landlords have denied housing to HCV participants. Under the burden-shifting approach, once plaintiffs have shown that the practice of denying housing to HCV holders created a disparate impact, a landlord must offer a "valid business reason" justifying that practice.[176] Simply stating that they do not wish to participate in the Section Eight Program is not likely to constitute a "legitimate" reason under this framework,[177] but a landlord would be permitted to raise other possible reasons for refusing to accept HCVs. Landlords frequently cite unwillingness or inability to conform with the Section Eight Program's housing quality standards, stereotypes about HCV holders behaviors as tenants, and concerns that higher income tenants will be "driven away" as their reasons for denying housing to HCV holders.[178] The legitimacy, or illegitimacy, of such justifications would be a matter of law for the reviewing court to determine as part of step two of the

175. *See* 42 U.S.C. § 3601 (2012) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); H.R. Rep. 100-711 at 2180 (1988) ("[T]he federal government made a commitment to provide a decent home and suitable living environment for every American family.").

176. *See supra* Part IV.A.

177. *See supra* Part IV.B.

178. *See* Press Release, Austin Apartment Association, Austin Department Association Lawsuit Says Austin's Source of Income Ordinance Violates State and Federal Law (Dec. 12, 2014), [https://perma.cc/rz9l-jx4v]; *see* Semuels, *supra* note 90; *see* Fernandez, *supra* note 88.

disparate impact burden-shifting framework.[179] If a court were to find that a defendant's policy of refusing to accept HCVs was premised on a legitimate nondiscriminatory reason and served a valid interest, the burden would shift back to the plaintiff to articulate a less-discriminatory means through which the defendant could achieve that interest.

V. WORKING WITH STATES

A. STATE AND LOCAL SOURCE OF INCOME PROTECTION LAWS UNDERMINE *KNAPP* AND *SALUTE*

The Second and Seventh Circuits' holdings concerning the lawfulness of landlord refusals to accept housing vouchers are circumscribed by a variety of state, county, and municipal source of income protection laws. This conflict is apparent in *Knapp*, where the court is forced to contort itself into reading Wisconsin's source of income protection law to exclude HCVs in order to justify its conclusion that "non-participation [in the HCV program] constitutes a legitimate reason for [landlords'] refusal to accept Section Eight tenants and . . . we therefore cannot hold them liable for . . . discrimination under the disparate impact theory."[180] Further, the *Salute* court's reasoning — that because "participation [in the Federal HCV program] is voluntary . . . [the defendant] lawfully may refuse to accept applications from Section Eight beneficiaries"[181] — crumbles when state or local laws mandate landlord participation in the HCV program.[182] It is well established that federal courts must take judicial notice of state statutes.[183] Therefore, the passage of state and local source of

179. Decisions based on stereotypes are not a "legitimate reason" in Title VII jurisprudence, and are unlikely to be legitimate in the FHA context. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 255–256 (1989) (plurality opinion).

180. Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1280 (7th Cir. 1995); *see* Tamica H. Daniel, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L.J. 769, 779 (2010).

181. Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 296–302 (2d Cir. 1998).

182. *Cf.* Viens v. America Empire Surplus Lines Ins. Co., 113 F. Supp 3d 555, 572 (D. Conn. 2015) ("*Knapp* and *Salute* are premised on the notion that participation in the Section Eight program by landlords is voluntary, and that logic does not necessarily extend to a landlord's insurer." (internal citation omitted)).

183. Lamar v. Micou, 114 U.S. 218, 223 (1885); Getty Petroleum Mktg., Inc. v. Capital Terminal Co., 391 F.3d 312, 320 (1st Cir. 2004). But this rule does not apply to municipal ordinances, which must be pleaded, like any other fact. *Id.* at 321; *see* Robinson v. Denver

income laws — which have become extremely common[184] — has undermined the foundation of the Second and Seventh Circuits' holdings barring disparate impact claims based on a landlord's refusal to accept HCVs in states or jurisdictions that have such laws.

This conflict has been thoroughly explored by state Supreme Courts, four of which have held that "the Federal Section Eight legislative scheme does not preempt State tenant protection law."[185] The state courts relied heavily on *California Federal Savings & Loan Ass'n v. Guerra*, in which the United States Supreme Court, stating "preemption is not to be lightly presumed," held that States are permitted to impose greater restrictions than those imposed by federal law.[186] In 2008, landlords petitioned the Supreme Court to grant certiorari on the question: "whether a local ordinance that fundamentally changes federal law by making a voluntary federal program mandatory is preempted by federal law?"[187] The petition for certiorari was denied.[188]

Due to the lack of direct judicial resolution, potential litigants in states that have not conclusively ruled on this issue are in a state of flux regarding the constitutionality of their state and lo-

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City Tramway Co., 164 F.174 (8th Cir. 1908); JOHN STRONG, MCCORMICK ON EVIDENCE § 335 (5th ed. 1999).

184. Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization and Locational Outcomes*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH at 37, fig. 1A (2011) (mapping states with source of income discrimination laws: Oregon, Utah, North Dakota, Minnesota, Wisconsin, Oklahoma, Maine, Vermont, Massachusetts, Connecticut, New Jersey, and DC.); *id.* at 38, fig, A2 (mapping jurisdictions with source of income discrimination laws: Seattle, WA; King County, WA; Bellevue, WA; Corte Madera, CA; East Palo Alto, CA; Los Angeles, CA; Cambridge, MA; Quincy, MA; Revere, MA; Boston, MA; New York City, NY; Nassau County, NY; Buffalo, NY; State College; PA; Wilmington, DE; Philadelphia, PA; Frederick, MD; Howard County, MD; Montgomery County, MD; Prince George's County, MD; Memphis, TN; Saint Louis, MO; Champagne, IL; Urbana, IL; Ann Arbor, MI; etc.).

185. Rosario v. Diagonal Realty, LLC, 803 N.Y.S.2d 343, 350 (N.Y. 2005); *see* Franklin Tower One, L.L.C. v. N.M., 157 N.H. 602 (N.H. 1999); Comm'n on Human Rights and Opportunities v. Sullivan Associates, 739 A.2d 238, 246 (Conn. 1999); Montgomery Cty v. Glenmont Hills Associates Privacy World at Glenmont Metro Centre, 402 Md. 250 (Md. 2007); Attorney Gen. v. Brown, 400 Mass. 826 (Mass. 1987); *but see* Jenna Bernstein, Note, *Section Eight, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407 (2010) (arguing that state source of income laws are preempted by the Federal Section Eight program).

186. California Fed.Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (holding that the Federal Pregnancy Discrimination Act of 1978 functions as a "floor not a ceiling," and therefore is not preempted by a more protective state law).

187. Petition for Writ of Certiorari, Glenmont Hills Associates Privacy World at Glenmont Metro Centre v. Montgomery Cty, 554 U.S. 939 (No. 07-1373).

188. *Id.*

cal source of income protection law, and have no guidance on whether these laws — which render the acceptance of HCVs mandatory — undermine the Second and Seventh Circuits' holdings barring FHA disparate impact claims on the basis of landlord denials of applicants with HCVs.[189] Given the millions of tenants that participate in the HCV program, and the trillions of dollars in revenue that HCVs generate for landlords,[190] this lack of clarity could have a significant impact on the nation's housing market. Furthermore, patchwork source of income protection laws, though extremely effective in improving HCV utilization rates within their jurisdictions, are often not present in places where residential segregation is most pronounced.[191] The continuing lack of clarity as to whether landlords may lawfully deny housing to individuals paying with HCVs leaves the most vulnerable individuals in the most segregated communities continue to be pushed into segregated housing patterns.[192]

B. RESOLVING THE TENSION

The tension between state and local source of income protection laws, state supreme court rulings, and the federal Section Eight Housing Voucher Program can be resolved by integrating state source of income laws into the disparate impact framework endorsed in *Inclusive Communities*. Whereas the *Knapp* and *Salute* courts' logic is fundamentally undermined by state and local source of income protection laws, the burden-shifting approach to disparate impact liability adopted in *Inclusive Communities* can be applied on a case-by-case basis to determine if a landlord's reason for denying housing to HCV holders is legitimate. The absence of a *per se* bar to liability for landlord denials of HCVs resolves the manufactured tension between state and local source of income protection laws and the existence of the federal Section Eight program.

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189. *See* Daniel, *supra* note 180.

190. *See supra* Part III.

191. *See* Freeman, *supra* note 184.

192. *Id.*; Will Livesley-O'Neill, *Anti-source of income protection legislation signed into law*, TEXAS HOUSERS (June 22, 2015), https://texashousers.net/2015/06/22/anti-source-of-income-protection-legislation-signed-into-law/ [https://perma.cc/T7LA-UXXQ] (discussing the advent of source of income protection legislation in Texas); *see also* DOUGLAS MASSEY & NANCY DENTON. AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1–16 (1998).

The FHA and Section 8 do not preempt, but rather work in unity with, state and local source of income laws.[193] HUD regulations state as much: "nothing in part 982 is intended to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder."[194] The federal requirement that a defendant articulate a "valid interest" served by their policy of rejecting HCVs constitutes a "floor" imposed by federal law,[195] but does not prevent states from imposing more restrictive conditions on landlords.[196] This kind of interaction between federal and state housing law is not unprecedented. In *Barrientos v. 1801-1925 Morton LLC.*, the Ninth Circuit Court of Appeals held that the Los Angeles Rent Stabilization Ordinance (LARSO), which prohibits landlords from evicting tenants and withdrawing from the HCV program in order to lease apartments at a higher rate, was not preempted by Section 8 or HUD's Section 8 regulations.[197] The HUD regulations stated landlords could not evict tenants without "good cause," while LARSO restricted possible grounds for eviction to thirteen enumerated reasons, including violation of material terms of the lease, damage to property, or criminal activity.[198] The Ninth Circuit held that because neither Congress nor HUD indicated intent to abrogate state rent control laws, and state law did not present an obstacle to the full implementation of federal law, LARSO was not preempted.[199] State and local source of income protection laws, like LARSO, do not present an obstacle to the full implementation of federal law, and are explicitly preserved pursuant to HUD regulation.[200]

In jurisdictions which lack source of income protections, a defendant may avoid liability by proving that their practice of rejecting HCVs serves a "valid interest" that cannot be achieved in

193. *See supra* Part V.A.
194. 24 C.F.R. § 982.53(d) (2016).
195. *See supra* Part IV.A; *see also* Cal. Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280–85 (1987).
196. *See Guerra*, 479 U.S. at 280–285 (holding that PDA was "a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise"); *see* Barrientos v. 1801-1925 Morton LLC., 583 F.3d 1197, 1209 (9th Cir. 2009) (Congress and HUD "desired to maintain a uniform federal floor below which protections for tenants could not drop, not a ceiling above which they would not rise").
197. *Barrientos*, 583 F.3d at 1210–1213.
198. *Id.* at 1205.
199. *Id.* at 1210–1213.
200. *See supra* notes 121–122.

a less discriminatory manner.[201] But in a jurisdiction where a source of income protection statute or ordinance *is* in place, a defendant who refuses to accept HCVs and whose practice results in a disparate impact upon a protected class should be liable not only under the local law, but also under the disparate impact provisions of the FHA. The validity of the interest served by a landlord's decision not to accept HCVs may be subject to debate in a jurisdiction where there is no source of income protection statute. But if the landlord is subject to a law that requires him to accept HCVs, there can be no debate over whether or not his decision to violate that law or ordinance served a valid interest. The defendant is simply liable for engaging in an illegal business practice that also caused a disparate impact.

The presence of a source of income protection law may be dispositive, or simply meaningful, for courts assessing the legitimacy of a defendant's "valid interest" defense. For example, when a defendant is required to articulate a legitimate interest served by a practice that results in a discernible disparate impact, the legitimacy of that interest may be in part judged based on whether the jurisdiction in question has a source of income protection law. If there is no source of income protection law, perhaps the defendant has a stronger case that his or her practice serves a legal, valid purpose; but the plaintiff's claim is not *per se* invalid. In a jurisdiction where source of income protection laws are in effect, they may compel a finding that the landlord's practice does not serve a valid, legal interest. The burden-shifting framework is flexible enough to account for the myriad of factors that may influence a court in determining the validity of a FHA disparate impact claim; while avoiding the arbitrary dismissal of claims based on the poorly defined concept of "voluntariness."

VI. CONCLUSION

Inclusive Communities' adoption of the Title VII burden-shifting framework into the FHA context and creation of governing standards for disparate impact claims abrogates *Knapp* and *Salute* and allows HCV recipients to successfully bring disparate impact claims against landlords who refuse to accept vouchers. Whereas *Knapp* and *Salute* focused on the "voluntary" nature of

201. *See supra* Part IV.

participation in the Section Eight program to conclude that the disparate impact cause of action was not appropriate, the *Inclusive Communities*' burden-shifting framework requires a defendant whose practice of rejecting HCVs creates a disparate impact to articulate a "valid interest" served by the practice.

Landlord refusals to accept HCVs undermine the goals of the FHA and Section Eight program by contributing to underutilization of vouchers, decreased tenant mobility, and retrenchment of patterns of racial residential segregation. Furthermore, *Knapp* and *Salute*'s focus on "voluntariness" created a direct conflict between federal common law and state and local source of income laws, which prohibit landlords from discriminating based on source of income. In contrast, application of the *Inclusive Communities'* burden-shifting framework to disparate impact claims involving refusals to accept vouchers disincentives landlords from rejecting HCV recipients. Additionally, the burden-shifting approach dispels the notion that the voluntary nature of the federal Section Eight program inherently conflicts with state and local source of income protection laws. In fact, source of income protections and the *Inclusive Communities* burden-shifting framework can be integrated to afford heightened protections to HCV recipients in jurisdictions where state source of income laws exist, while maintaining a cause of action for HCV recipients who live outside the reach of source of income protection laws.

Given the persistence of racial segregation throughout the United States, President Trump's personal history of engaging in housing discrimination based on race,[202] and his Administration's efforts to dismantle HUD initiatives aimed at promoting fair housing,[203] responsibility falls upon the judicial branch to ensure that the FHA's purpose, to provide a federal cause of action for remedying housing discrimination, is not abandoned. Ensuring that households who have received HCVs can actually use the

202. Michael Kranish & Robert O'Harrow Jr., *Inside the government's racial bias case against Donald Trump's company, and how he fought it*, WASH. POST (Jan. 23, 2016), https://www.washingtonpost.com/politics/inside-the-governments-racial-bias-case-against-donald-trumps-company-and-how-he-fought-it/2016/01/23/fb90163e-bfbe-11e5-bcda-62a36b394160_story.html?utm_term=.422673a3b08f [https://perma.cc/84BA-XETC].

203. *See, e.g.* Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, N.Y. TIMES (Jan. 3, 2018), https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html [https://perma.cc/22X3-LZEP]; Coty Montag, *Fifty years on, HUD abandons King's vision of integrated communities*, THE HILL (Jan. 17, 2018), http://thehill.com/opinion/civil-rights/368859-fifty-years-on-hud-abandons-dr-kings-vision-of-integrated-communities [https://perma.cc/25GS-V9KY].

vouchers, and are not "condemned to remain in urban ghettos" as a result of landlords' discriminatory business practices, must be a priority.[204] Integrating the *Inclusive Communities* burden-shifting framework with state source of income protection laws can help improve residential mobility and increase residential integration, thereby realizing the FHA and Section Eight's commitments.

204. Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973).