Vouchers as Veils

Austin K. Hampton
Austin.Hampton@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Hampton, Austin K. ( ) "Vouchers as Veils," University of Chicago Legal Forum: Vol. 2009: Iss. 1, Article 14.
Available at: http://chicagounbound.uchicago.edu/uclf/vol2009/iss1/14

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Vouchers as Veils

Austin K. Hampton†

I. INTRODUCTION

In the last several decades, federal, state, and local governments have moved away from housing projects and toward programs that seek to provide homes to low-income families and to integrate low-income families into higher-income neighborhoods.¹ The Section 8 Housing Choice Voucher Program ("HCV program"), administered by the Department of Housing and Urban Development and local public housing authorities, is one of the primary federal methods of providing low-income families access to affordable housing.² Local public-housing agencies receive federal funds to administer the program.³ These agencies issue housing choice vouchers to families who then independently find suitable rental housing provided by private owners voluntarily participating in the program.⁴ The local housing agency pays the housing subsidy directly to the landlord. Participation in the HCV program places legal duties on owners related to the safety, sanitation, and lease-terms of the rental housing they provide.⁵

Discriminatory behavior in the sale and rental of homes and apartments limits the ability of low-income workers and their families to obtain affordable housing, and the program is not free from bias and discrimination. While some state and local laws prohibit discrimination against tenants based upon source of in-

† BS 2006, Georgia Institute of Technology; JD Candidate 2010, University of Chicago.


³ 42 USC § 1437f(b)(1).

⁴ Id § 1437f(o)(6)(B).

⁵ Id § 1437f(d); id § 1437f(o)(7)–(8).
come or housing choice voucher-holder status, federal law does not require private landlords to participate in the voucher program. Thus, it is not surprising that some landlords use the voluntary nature of the program to give effect to their discriminatory intentions. Some landlords may choose to effectuate discriminatory intentions by never participating in the program (non-participation), and others may do so by withdrawing from the program after participation for a time (withdrawal). Regarding withdrawal, for example, a landlord may decide to enter the HCV program hoping to lure one group of tenants, only to withdraw from the program upon realizing he has attracted a less favored group of tenants. Citing the right to choose whether to participate in the program, discriminatory landlords very well may get away with these acts. There exists, then, the troubling idea that landlords are able to use the HCV program as a veil behind which to hide their true discriminatory intentions. Such misuse of the HCV program undermines the purpose for which the program was enacted.

The Fair Housing Act ("FHA") prohibits discriminatory practices by anyone providing housing, and plaintiffs generally may establish a prima facie case either via a disparate treatment claim or a disparate impact claim. Part II of this Comment briefly examines disparate treatment claims, in which establishing discriminatory intent is crucial. Generally, evidence of discriminatory intent may be gleaned from a landlord's overt statements or acts, or inferred from a landlord's practices. In the context of nonparticipation and withdrawal from the HCV program, the courts have yet to hear a disparate treatment claim. Part II argues, however, that where evidence establishes discriminatory intent, there is little doubt that a nonparticipating or withdrawing landlord would be held liable for violating the FHA, notwithstanding the voluntary nature of the HCV program.

---

6 See, for example, Godinez v Sullivan-Lackey, 352 Ill App 3d 87, 93–94 (1st Dist 2004) (holding that a landlord violated Chicago's fair housing ordinance by discriminating against a potential tenant based on her Section 8 voucher as a source of income); Feemster v BSA Ltd Partnership, 548 F3d 1063 (DC Cir 2008) (finding a facial violation of the District of Columbia Human Rights Act by a lessor who refused to accept Section 8 vouchers as discrimination on the basis of Section 8 renter's source of income).


8 See, for example, Manny Fernandez, Bias Is Seen as Landlords Bar Vouchers, NY Times A1 (Oct 30, 2007) ("Supporters of [a local bill that prohibits voucher discrimination] claim that landlords often deny Section 8 applicants as a way to mask broader discrimination against single mothers and black and Hispanic tenants.").
Establishing discriminatory intent, however, often proves to be close to impossible, and so the courts have developed the disparate impact doctrine, which does not require a showing of discriminatory intent. Part III gives a brief description of disparate impact analysis, which can address the problem of hidden intent. If nonparticipating and withdrawing landlords may be held liable where there is evidence of discriminatory intent, and if the disparate impact doctrine can function to address hidden intent, then plaintiffs should be allowed to bring disparate impact claims against such landlords. So far, courts have presided over disparate impact claims with respect to landlord withdrawal, but not with respect to nonparticipation. In the context of withdrawal, the courts are currently split over whether disparate impact claims are allowed. Part III continues by examining the circuit split that has arisen over this issue. Two courts of appeals have held that landlords withdrawing from the HCV program cannot be held liable under a disparate impact theory, while a third has held that landlords may be held liable under a disparate impact theory.

All three courts involved in the split assumed (incorrectly) that nonparticipation in the HCV program was not actionable, and then evaluated whether the disparate impact doctrine was capable of separating nonparticipating landlords from withdrawing landlords. This incorrect approach lies at the heart of the circuit split. Part IV of this Comment shows that the courts approached the issue incorrectly by (1) assuming that nonparticipation is not actionable, and (2) failing to correctly apply the disparate impact doctrine such that the problem of hidden intent is addressed. Part IV suggests resolving the issue by using the disparate impact doctrine not to separate nonparticipating landlords from withdrawing landlords, but to separate honest landlords (those who choose, for legitimate reasons, not to partici-

---

9 It should be noted that to make out a constitutional violation, some showing of motivation is required following the Supreme Court's promulgation of its "disparate-impact plus" standard. See Washington v Davis, 426 US 229 (1976). The Supreme Court, however, also "has noted the need to construe [legislative enactments] broadly so as to end discrimination." Resident Advisory Board v Rizzo, 564 F2d 126 (3d Cir 1977). Thus, where there is a statutory mandate prohibiting a disparate impact, as there is here, no showing of motivation is required. See Griggs v Duke Power Co, 401 US 424 (1971); Rizzo, 564 F2d at 146–147 (discussing the differences between the disparate impact standard in a constitutional context and the standard in the context of Title VII and Title VIII claims).

pate in the HCV program) from devious landlords (those who give effect to discriminatory intentions by refusing to accept housing choice vouchers). Part IV A applies the resolution to the circuit split. Part IV B explains that the disparate impact doctrine is capable of separating honest landlords from devious landlords, and also discusses liability for nonparticipating landlords.

The current state of the law is not only incapable of preventing discrimination in the housing context, but may in fact foster discrimination by allowing the HCV program to be used as a veil for discrimination. Furthermore, attempting to distinguish withdrawal from nonparticipation—as the courts involved in the split have done—creates the risk of discouraging landlords from participating in the HCV program. That is, if withdrawal is given more scrutiny than nonparticipation, landlords deciding whether to participate in the program are more likely to simply opt out of participation altogether. Resolving the circuit split as suggested by this Comment will prevent landlords from using withdrawal from the program as a vehicle for discrimination. Moreover, the suggested resolution has the added benefit of applying in the context of nonparticipating landlords. Until such a resolution is adopted, however, Congress has enacted a program that subjects to discrimination those families most in need.

II. DISPARATE TREATMENT CLAIMS UNDER THE FAIR HOUSING ACT

Title VIII and Title XI of the Civil Rights Act of 1968, commonly known as the Fair Housing Act ("FHA"), aim to prevent discriminatory practices in the buying, selling, and renting of housing property.\textsuperscript{11} Specifically, Section 3604 of the FHA prohibits discrimination because of race, color, religion, sex, familial status, national origin, or handicap in the sale or rental of housing.\textsuperscript{12} Even more specifically, actions prohibited on the basis of these factors include (1) refusing to rent or make available any dwelling; (2) offering discriminatory "terms, conditions, or privileges" of rental; (3) making, printing or publishing "any notice, statement, or advertisement" indicating a preference, limitation, or discrimination; and (4) representing to any person that "any dwelling is not available for... rental when such dwelling is in

\textsuperscript{11} See 42 USC §§ 3601 et seq (2006).
\textsuperscript{12} Id § 3604(a)–(d) and (f) (2006).
VOUCHERS AS VEILS

fact so available."13 Plaintiffs may establish a prima facie case of discrimination under the FHA by showing either that the act or practice complained of was motivated by a discriminatory purpose ("disparate treatment"), or that it has a discriminatory impact on a protected class ("disparate impact").14

To establish a prima facie case for a disparate treatment claim, it must be shown that "(1) plaintiff's rights are protected under the FHA; and (2) as a result of the defendant's discriminatory conduct, plaintiff has suffered a distinct and palpable injury."15 Furthermore, in a disparate treatment claim, proof of discriminatory intent is crucial.16 Establishing intent is simple in cases where the evidence includes overt racially discriminatory actions or statements incident to the denial of housing. For example, in *Harris v Itzhaki*,17 the court held that a tenant established a prima facie case where an agent of the landlord stated that "[t]he owners don't want to rent to Blacks," and a white prospective tenant was treated favorably compared to a black prospective tenant.18 Similarly, in *Hamilton v Svatik*,19 the court ruled that a black woman established a prima facie case where the landlord, upon seeing her, refused to rent the apartment and stated that it was his prerogative to be prejudiced.20 When such overt behavior is lacking, discriminatory intent may be inferred from practices resulting in a difference in treatment, such as where there is a pattern of differential treatment, where a landlord provides unequal prices, or where there is evidence of racial steering.21 For example, in *Wilson v Souchet*,22 the court concluded that the question of the landlord's intent to discriminate precluded summary judgment where three black callers were

13 Id.
14 *Betsey v Turtle Creek Assocs*, 736 F2d 983, 986 (4th Cir 1984).
15 *Harris v Itzhaki*, 183 F3d 1043, 1051 (9th Cir 1999).
16 See, for example, *Smith & Lee Assocs, Inc v City of Taylor*, 102 F3d 781 (6th Cir 1996).
17 183 F3d 1043 (9th Cir 1999).
18 Id at 1048-49.
19 779 F2d 383 (7th Cir 1985).
20 Id at 386.
21 See, for example, *Hobson v George Humphreys, Inc*, 563 F Supp 344, 352 (W D Tenn 1982) ("[Defendant's] failure to discuss a counter-offer with the owner, the differing terms offered to white persons, and countering plaintiffs' offer with higher terms coupled with [his] history of never having sold a home to or for a black person inescapably leads to a strong inference of racial animus.").
told someone placed a deposit on the apartment, while three non-black callers were given appointments to see the apartment.\textsuperscript{23}

Housing choice voucher holders are no less susceptible to the discriminatory actions of devious landlords and certainly may bring challenges alleging housing discrimination under the FHA.\textsuperscript{24} In fact, voucher holders may be more susceptible to discrimination due to the voluntary nature of the HCV program coupled with the fact that most voucher holders are racial minorities.\textsuperscript{25} That is, a landlord driven by a dislike of these groups could intentionally discriminate against minorities by refusing to ever accept housing choice vouchers (nonparticipation), or by refusing to accept any further vouchers (withdrawal). Permitting such behavior would allow the refusal of vouchers to be used as a veil behind which landlords hide their discriminatory motives and remove from the FHA’s protection a group of persons—low-income individuals—very susceptible to discrimination. These two results clearly run contrary to the purposes of the HCV program and the FHA: providing low-income families access to housing and preventing discrimination. Thus, while Congress’s intent to make participation in the HCV program voluntary is clear, liability should follow from nonparticipation or withdrawal where the real reason is, for example, race. Although no federal case has yet been heard involving a disparate treatment claim against a private landlord,\textsuperscript{26} the following discussion confirms the availability of disparate treatment claims for such veiled instances of discrimination.

The viability of a disparate treatment claim in a case of withdrawal or nonparticipation can hardly be contested where evidence establishes a discriminatory motive for a landlord’s refusal to accept housing choice vouchers. Nonparticipating and withdrawing landlords, choosing to fall outside the scope of the HCV program, still fall within the ambit of the FHA. Thus, while

\textsuperscript{23} Id at 864.

\textsuperscript{24} See, for example, Graoch, 508 F3d 366; Salute, 136 F3d 293; Knapp, 54 F3d 1272.

\textsuperscript{25} According to data collected in 2000, out of the approximately 1.5 million households then receiving housing choice vouchers, about 60 percent were minority households. Specifically, 39.6 percent were White non-Hispanic, 40.9 percent were Black non-Hispanic, 16.3 percent were Hispanic, and 3.2 percent were other non-Hispanic. See US Department of Housing and Urban Development, \textit{Housing Choice Voucher Location Patterns: Implications for Participant and Neighborhood Welfare}, 89 (2003), available at \texttt{<http://www.huduser.org/Publications/pdf/Location_Paper.pdf>} (last visited May 17, 2009).

\textsuperscript{26} Disparate impact cases, however, have been heard. See Graoch, 508 F3d 366; Salute, 136 F2d 293; Knapp, 54 F3d 1272.
participation in the HCV program is voluntary, the duty to refrain from discriminatory practices is not.

For example, consider the facts of the Hamilton case, where the landlord, upon seeing the black prospective tenant, refused to rent the apartment and stated it was his prerogative to be prejudiced. Now, consider a similar situation in which the landlord refuses to accept housing choice vouchers, again stating that it is his prerogative to be prejudiced. Is the landlord's refusal to accept housing choice vouchers—thereby refusing to rent to the prospective tenant—permissible in this situation merely because participation by the landlord in the HCV program is voluntary? Probably not. In this situation, just as in Hamilton, the landlord refused to rent to the prospective tenant and evidence of a discriminatory intent in doing so is clear. Thus, there can be little doubt that a court would hold that this landlord violated the FHA.

Furthermore, there is no reason to believe that Congress's decision to make the HCV program voluntary should carry any weight when a court is confronted with evidence of a discriminatory purpose. For example, in United States v City of Parma, a district court held a municipality liable where its practices, including its complete lack of participation in the HCV program, showed discriminatory intent and effect. Even though the court noted that the actions the city could have taken were "all voluntary," and that "[t]here is no need for a metropolitan housing authority to be involved directly with the Section 8 program," the lack of participation still weighed heavily against the municipality. It is often difficult to compare a municipality with a private defendant, but it is important to note that here the voluntary

27 779 F2d at 386.
29 City of Parma, 494 F Supp at 1101.
30 Id at 1071.
31 See id at 1100 ("[T]he actions of the City of Parma in consistently opposing all forms of public or low-income housing and in making construction of such housing economically infeasible, have denied to blacks, needy residents of Parma, and Parma residents generally rights granted by Section 804(a) of the Fair Housing Act.").
32 Comparing cases involving governmental bodies as defendants to cases involving landlords as defendants is often difficult because in many cases the alleged discriminatory actions of governmental bodies involve the enactment of municipal or zoning ordinances and do not have clear business motivations. See, for example, Dr Gertrude A Barber Center, Inc v Peters Township, 273 F Supp 2d 643 (W D Pa 2003) (holding that a municipal ordinance requiring that single family residences contain no more than three unrelated persons had disparate impact on mentally retarded persons, and its enforcement
nature of the HCV program provided little, if any, comfort to the court.

Moreover, in the context of a withdrawing landlord, the few federal cases wrestling with the issue of the availability of disparate impact claims, as opposed to disparate treatment claims, seem to suggest that disparate treatment claims are available. In Graoch Associates v Louisville/Jefferson County Metro Human Relations Commission, the court noted that “[n]othing in the language of Section 8 indicates that, in making the program voluntary, Congress intended to do more than give landlords the option not to participate. . . . [I]t did not include language indicating that Section 8 landlords should be exempt from any FHA requirements.” And in Green v Sunpointe Associates, Ltd, the court agreed with the plaintiff that, while “participation in the Section 8 program is voluntary[,] . . . the FHA does not include any exceptions that permit those participating in the Section 8 program to discriminate.” These statements are consistent with the earlier assertion that, although participation in the HCV program is voluntary, landlords are still subject to liability for discrimination under the FHA. Additionally, the fact that at least three courts of appeals and a district court have entertained the idea of disparate impact liability suggests that disparate treatment claims are available. The courts’ reservations over disparate impact claims, which do not require a showing of discriminatory intent, stemmed from the concern that landlords withdrawing for legitimate reasons could also be held liable. This concern, however, does not arise in disparate treatment claims, which require the establishment of a discriminatory intent.

In the context of withdrawal and nonparticipation, then, the disparate treatment doctrine is a tool available to plaintiffs to combat discriminatory treatment by landlords. The problem with bringing disparate treatment claims, however, is the requirement of showing discriminatory intent. Consider again the hypo-

would result in disability discrimination in violation of the FHA); Support Ministries for Persons With AIDS, Inc v Village of Waterford, 808 F Supp 120 (N D NY 1992) (holding that a zoning ordinance had a disparate impact on people with disabilities).

33 508 F3d at 376 n 5.
34 1997 WL 1526484 (W D Wash).
35 Id at *3.
36 See, for example, Knapp, 54 F3d at 1280 (“The actions of both non-participating and participating owners have the same impact on minorities and to hold only the latter liable for racial discrimination for that conduct would deter them from joining or remaining involved in the program.”).
VOUCHERS AS VEILS

Theoretical set forth above where the landlord refuses housing choice vouchers, stating that it is his prerogative to be prejudiced. Now consider a situation in which the landlord again refuses to accept vouchers with the same intent of discriminating against minorities, but this time the landlord is careful not to make his prejudice public. This landlord has caused the same harm, but absent any evidence of the landlord’s discriminatory intentions, the plaintiff could not prevail under the disparate treatment doctrine and the landlord’s actions go unpunished. The lack of federal cases involving disparate treatment claims against private landlords may suggest that the problem of proving discriminatory intent has thus far precluded the use of disparate treatment claims in the context of withdrawal and nonparticipation. Of course, it is possible that the availability to housing choice voucher holders of disparate treatment claims has effectively deterred discriminatory practices by landlords. But the more likely explanation is that the disparate treatment doctrine has provided a roadmap for landlords with discriminatory intentions to hide their discriminatory actions. Because disparate treatment claims require evidence of discriminatory intent, landlords can escape liability simply by silently and carefully effectuating their discriminatory intentions through seemingly legitimate actions. Even worse, the voluntary nature of the HCV program seems to provide a vehicle by which landlords can effectuate their discriminatory intentions in a way that they could not have done prior to the program’s existence. Accordingly, there is a need for an effective doctrine that can unveil the discriminatory intentions of prejudiced landlords.

III. DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT AND THE CIRCUIT SPLIT

Landlords with discriminatory intentions are rarely so haphazard as to allow their actions or statements to display those discriminatory intentions. This characteristic does much to render a disparate treatment claim useless to a plaintiff. Accordingly, courts have recognized that requiring a plaintiff to “prove discriminatory intent . . . is often a burden that is impossible to satisfy.”37 Courts have further recognized that a “strict focus on intent permits racial discrimination to go unpunished in the ab-

sence of evidence of overt bigotry.” In *Metropolitan Housing Development Corp v Village of Arlington Heights*, the court rejected the idea that “Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.” Partially for these reasons, the courts have developed the doctrine of disparate impact liability to root out veiled instances of discrimination. The doctrine of disparate impact liability may be considered as “an evidentiary variant of the disparate treatment doctrine...permit[ting] purely statistical evidence to be used in a manner that is probative of intent.”

“[V]irtually every jurisdiction has held that the ‘disparate impact’ discrimination analysis is appropriate in FHA cases.” To show a disparate impact, a “plaintiff must demonstrate that a facially neutral policy or practice has the effect of discriminating against a protected class of which the plaintiff is a member.”

The exact analysis for disparate impact claims varies among the circuits, but the different analyses fall within a similar framework. Because the courts generally “evaluate claims under the FHA by analogizing them to comparable claims under Title VII,” the disparate impact analysis under Title VII is instructive.

First, to state a prima facie case, a plaintiff must identify and challenge a specific practice, and then show an adverse effect by offering statistical evidence. Note that this first step permits a prima facie case to be established against landlords whose ac-

---

38 Id.
39 558 F2d 1283, 1290 (7th Cir 1977).
40 Id.
41 See *United States v City of Black Jack*, 508 F2d 1179, 1185 (8th Cir 1974) (“Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because ‘whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme,’” quoting *Hobson v Hansen*, 269 F Supp 401, 497 (D DC 1967), affd en banc as *Smuck v Hobson*, 408 F2d 175 (DC Cir 1969)).
44 *Grooch*, 508 F3d at 371.
45 Id at 372. Title VII prohibits certain employers from discriminating against any individual on the basis of race, color, religion, sex, or national origin. See 42 USC § 2000e-2.
46 Id.
tions have a disparate impact even if those landlords do not have a discriminatory intent. It is the remainder of the analysis that allows the disparate impact doctrine to reveal hidden discriminatory intent. At the second step, the defendant must present a "legitimate business reason" for the challenged practice. This step effectively liberates landlords acting without discriminatory intent. Third, the plaintiff has the opportunity to show that the defendant's response is either a pretext for discrimination, or that there exists an alternative practice that accomplishes the same result with less discriminatory impact. This step acts to prevent discriminatory landlords from couching their motives in terms of a legitimate reason. The disparate impact doctrine thus takes a seemingly neutral business practice and, through statistical analysis, draws to the surface the sinister motives.

The "facially neutral practices" challenged in disparate impact claims vary widely and hardly evince a discriminatory purpose. Indeed, the facial neutrality of these practices is the impetus for disparate impact claims. Similarly, a landlord's decision to withdraw from the HCV program, thereby refusing to accept any further housing choice vouchers, may also be a facially neutral practice. If the real reason for refusing to accept housing choice vouchers is, for example, race, then that practice violates the FHA. Evidence permitting, a plaintiff may prevail with a disparate treatment claim. But where a prudent landlord has masked his devious action, why should the landlord be allowed to escape from the grasp of the disparate impact doctrine? As shown in Part II, the voluntary nature of the HCV program does not preclude disparate treatment liability, and if the disparate impact doctrine truly functions to reveal hidden discriminatory intent, then there is no reason why disparate impact liability should be precluded. Yet, this issue has led to a split between three courts of appeals.

47 Id.
48 Graoch, 508 F3d at 372.
49 See, for example, Charleston Hous Auth v US Dep't of Agric, 419 F3d 729 (8th Cir 2005) (challenging local housing authority's decision to vacate and demolish low-income housing); Khalil v Farash Corp, 260 F Supp 2d 582 (W D NY 2003) (holding that former tenants presented a prima facie case where a rule prohibited children from congregating near an apartment complex); Betsey v Turtle Creek Assocs, 736 F2d 983 (4th Cir 1984) (holding that evidence that all-adult conversion policy for one building had a substantially greater adverse impact on minority tenants established prima facie case of discriminatory impact).
50 Compare Graoch, 508 F3d at 374; with Salute, 136 F3d at 302; and Knapp, 54 F3d at 1280.
In *Knapp v Eagle Property Management Corp*, a landlord refused to accept housing choice vouchers from the plaintiff, a black woman, as part of the landlord's larger scheme to withdraw from the HCV program by refusing to accept any new HCV tenants.\(^5\) At the time, the landlord's HCV tenants were all white.\(^5\) The Seventh Circuit held that disparate impact analysis is not appropriate for a landlord's withdrawal from the HCV program.\(^5\)

Although the court had "previously applied disparate impact analysis to a claim under the [FHA],"\(^5\) the court had since "recognized that disparate impact analysis is not appropriate in certain contexts."\(^5\) In disallowing disparate impact claims for withdrawal, the court reasoned that because "[o]wner participation in the section 8 program is voluntary...non-participation constitutes a legitimate reason for their refusal to accept section 8 tenants," and therefore, nonparticipating landlords cannot be held liable for racial discrimination under the disparate impact theory.\(^5\) The court concluded that because "no principled way exists to distinguish" nonparticipating landlords from withdrawing landlords, the latter also cannot be held liable for racial discrimination under a disparate impact theory.\(^5\) It is worth noting that the court did not correctly apply the disparate impact doctrine here; nonparticipation is an *action* landlords may opt to take, not a legitimate *reason* for refusing vouchers, as the court states. The voluntary nature of the HCV program suggests that there exist legitimate reasons for nonparticipation, but courts cannot categorically assume from the mere fact of nonparticipation that the landlord has such legitimate reasons. The court perpetuated its error by applying the same logic to withdrawing landlords.

The Seventh Circuit's approach has a surprising and troublesome result: even where the potential for discrimination—
clearly noted by the court—looms large, no liability follows due to Congress's intent to make the HCV program voluntary. Surely, though, Congress did not also intend to make voluntary the duty to refrain from discriminatory practices.

Notwithstanding this troubling result, in \textit{Salute v Stratford Greens Garden Apartments}, the Second Circuit seemingly adopted the reasoning of the \textit{Knapp} court and declined to apply the disparate impact doctrine.\textsuperscript{58} It is important to note, however, that the majority in \textit{Salute} viewed the landlord as a nonparticipating landlord rather than a withdrawing landlord. This is because the landlord had never accepted a tenant who, at the time of application, received housing choice vouchers, but on occasion the landlord agreed to accept housing choice vouchers on behalf of tenants already residing at the property.\textsuperscript{59} In dissent, Judge Calabresi noted this distinction and stated that these facts made the landlords “partial participants” rather than nonparticipants.\textsuperscript{60} Although the facts may suggest this was a case of withdrawal,\textsuperscript{61} because the majority considered the landlord a nonparticipant, the holding of the court only applies to nonparticipating landlords, as opposed to withdrawing landlords. Still, the Second Circuit seemed as unconcerned as the Seventh Circuit that discrimination could continue unfettered.

The idea that Congress did not intend to allow discrimination by the enactment of the HCV program, however, was not lost on the Sixth Circuit. In \textit{Graoch}, the Sixth Circuit expressly rejected the \textit{Knapp} holding and concluded that the disparate impact doctrine does apply to a landlord withdrawing from the HCV program.\textsuperscript{62} First, the court questioned the power of any court to create exceptions to liability for discrimination under the FHA, concluding that “[n]othing in the text of the FHA instructs

\textsuperscript{58} 136 F3d at 302.
\textsuperscript{59} Id at 296 (noting that in each case, the tenant became a Section 8 voucher holder during the tenancy, and the landlord decided to accept the vouchers rather than evict the tenants).
\textsuperscript{60} Id at 312 (Calabresi dissenting) (emphasis omitted).
\textsuperscript{61} This seems a strange set of facts for the majority to conclude that the landlord was not a participant in the HCV program. Because the landlord had chosen to accept housing choice vouchers from some of the current tenants, the landlord already had incurred the initial costs associated with entering into the HCV program, including learning about the program and becoming entangled with the government by entering into a contract with the local housing authority. It is difficult to think of any legitimate reason why the landlord would not then accept other HCV tenants, and it is even more difficult to think of a reason why this landlord should not be considered a participating landlord.
\textsuperscript{62} \textit{Graoch}, 508 F3d at 374 (“The Second Circuit... [has] created such a categorical exemption for Section 8 withdrawals. We decline to do so.”).
us to create practice-specific exceptions. Absent such instruction, we lack the authority to evaluate the pros and cons of allowing disparate-impact claims."\(^6\) The court did agree, however, that "categorical bars are justified when they result from a generalized application of the burden-shifting framework."\(^6\) The court then constructed a hypothetical to illustrate that (1) withdrawal could be a pretext for intentional discrimination, and (2) it is not "impossible for a disparate-impact challenge to a landlord's withdrawal from Section 8 to succeed under the burden-shifting framework."\(^6\)

Second, the court attacked the assertion in *Knapp* that no principled way exists to distinguish nonparticipating landlords from withdrawing landlords.\(^6\) For two reasons, the court concluded that "we do not think that withdrawal and nonparticipation are functionally identical."\(^6\) First, "[w]ithdrawal affects an identifiable group: tenants receiving Section 8 assistance. Non-participation could be said to have a theoretical impact on members of a protected class, but the size and composition of the affected group is indeterminate."\(^6\) Second, a "nonparticipating landlord presumptively can appeal to his interests in not wanting to spend time learning about the program and not wanting to become entangled in government bureaucracy, while a withdrawing landlord who fails to cite any reason why participation in Section 8 hurt his business cannot do so."\(^6\) Thus, the court says, a plaintiff's ultimate burden of persuasion "is harder to meet in a challenge to non-participation than in a challenge to withdrawal."\(^7\) At first glance, the Sixth Circuit seems to have made a strong case for disparate impact liability, but would these distinctions withstand an attack by another circuit?

IV. RESOLVING THE SPLIT

Neither of the two approaches relied on by the courts of appeals are correct. In fact, both approaches suffer from a mutual set of flaws arising from the unfounded assumption that nonpar-

\(^{63}\) Id at 375.  
\(^{64}\) Id at 376.  
\(^{65}\) Id.  
\(^{66}\) *Graoch*, 508 F3d at 377.  
\(^{67}\) Id.  
\(^{68}\) Id.  
\(^{69}\) Id.  
\(^{70}\) *Graoch*, 508 F3d at 377.
participating landlords cannot be held liable for discriminatory conduct under the disparate impact doctrine. By starting with this assumption, the courts are forced to distinguish withdrawing landlords from nonparticipating landlords if the disparate impact doctrine is to apply to the former. Because one court finds distinctions where the other two do not, a split results. But the courts are looking for distinctions in the wrong place. As discussed in Part II, both nonparticipation and withdrawal can be used as pretexts for intentional discrimination. Evidence of intentional discrimination, however, is hard to come by; it is thus the charge of the disparate impact doctrine to reveal hidden discriminatory intent through a statistical showing of a disparate impact. Accordingly, the correct place to look for distinctions is between honest landlords (those who choose, for legitimate reasons, not to participate in the HCV program) and devious landlords (those who give effect to discriminatory intentions by refusing to accept housing choice vouchers), and not between withdrawing landlords and nonparticipating landlords. That is, the correct question is whether the disparate impact doctrine can be applied in such a way that devious landlords are held liable for their discriminatory intentions, while honest landlords are free to choose whether to join the HCV program. Accordingly, this issue should be resolved by (1) using the disparate impact doctrine to reveal hidden discriminatory intent to distinguish between honest landlords and devious landlords, and (2) realizing that a landlord's choice to not participate in the HCV program does not grant immunity from disparate impact claims. That the disparate impact doctrine is capable of separating honest landlords from devious landlords is explained in Part IV B. First, this resolution is evaluated in the context of the split.

A. The Resolution Applied

In Knapp, the Seventh Circuit seems to believe that the disparate impact doctrine is incapable of distinguishing between honest landlords and devious landlords. This is suggested by its statement that "[w]e assume that [landlords'] non-participation constitutes a legitimate reason for their refusal to accept section 8 tenants and that we therefore cannot hold them liable for racial discrimination under the disparate impact theory." In this erroneous assumption, the court has noted the second step of the

71 54 F3d at 1280.
disparate impact analysis, providing a legitimate reason for the challenged practice, while omitting the third step, whereby the plaintiff has an opportunity to show that the defendant's response is either a pretext for discrimination, or that there exists an alternative practice that accomplishes the same result with less discriminatory impact. It is the second and third steps together that separate the honest landlords from the devious landlords. By skipping the third step, the court is forced to look for distinctions between withdrawing and nonparticipating landlords—a fruitless search, as it turns out. And even if the court were able to separate withdrawing landlords from nonparticipating landlords, the court's analysis would be contrary to the intent of Congress in enacting the HCV program. That is, separating withdrawing landlords from nonparticipating landlords and giving the latter a free pass from liability discourages landlords from participating in the HCV program in the first place. In misunderstanding the disparate impact doctrine, the Seventh Circuit green lights discrimination and undermines the purposes of the FHA and the HCV program, all while blaming the whole mess on Congress.

The suggested resolution to this split leads to a result consistent with the holding in *Graoch*, so the resolution should be reconciled with the rationale of the Sixth Circuit. The court starts out on the right foot by refusing to create a categorical exemption for HCV landlords.\(^{72}\) Furthermore, it is important to note that in its hypothetical, the court suggested that a landlord could claim that the HCV program cost him money, time, business opportunities, or other benefits; and, the plaintiff could respond by showing the claim to be a pretext or that an alternative existed.\(^{73}\) This shows the court's understanding that the disparate impact doctrine is capable of distinguishing between honest landlords and devious landlords. The court runs into problems, however, when it attempts to distinguish withdrawing landlords from nonparticipating landlords due to its assumption that "one cannot bring a disparate-impact challenge to Section 8 nonparticipation."\(^{74}\) The court has little trouble devising distinctions between withdrawing and nonparticipating landlords; the court's distinctions, however, are not convincing and with just a little pressure, they fall apart. Ultimately, the so-called "distinctions"

\(^{72}\) *Graoch*, 508 F3d at 376.

\(^{73}\) Id.

\(^{74}\) Id at 377.
actually suggest that the disparate impact doctrine should be applied to both nonparticipating and withdrawing landlords.

For the first distinction, the court notes that withdrawal affects an identifiable group, and adds, in an unsubstantiated assertion, that “[n]on-participation could be said to have a theoretical impact on members of a protected class, but the size and composition of the affected group is indeterminate.” It is not clear exactly how a landlord’s practice of refusing to accept housing choice vouchers is only a theoretical impact on those minorities in the local community who hold housing choice vouchers and are seeking out a home. A withdrawing landlord’s impact on his current HCV tenants may be more salient, but it is no more real.

In addition, the court’s belief that the composition of potential HCV tenants is indeterminate is simply false. In *Green v Sunpointe Associates*, the plaintiff provided detailed statistics of the prospective HCV households registered with the local housing authority. There, the court compared figures on registered HCV households with those of the general population as reported in a recent census, noting a “substantially higher” impact on the former. Clearly then, the composition of potential HCV tenants harmed by a landlord’s refusal to accept housing choice vouchers is not so indeterminate as to preclude a disparate impact claim. Furthermore, the notion that a nonparticipating landlord’s impact is more difficult to ascertain and less salient may suggest a greater need for disparate impact analysis in the case of nonparticipation, rather than suggesting that a disparate impact claim is precluded entirely.

Moreover, to prevent courts from further misconstruing the disparate impact doctrine, it is important to note that this first step in the disparate impact analysis (establishing a disparate impact through the use of statistics) is properly used only to determine whether a landlord’s actions have a disparate impact on a protected class; it establishes a prima facie case and not ultimate liability. Thus, this step should not be used to distinguish

---

75 Id (emphasis added).
76 1997 WL 1526484 at *4 (“With respect to prospective Section 8 households that are currently registered with the [local housing authority], plaintiff states that 49.3 percent are African-American, 84.8 percent are headed by females, and 81.1 percent have children.”).
77 Id (“These figures are substantially higher than the percentages for these classes of households in the general population of Renton and the Seattle metropolitan area as reported in the 1990 census.”).
honest landlords from devious landlords, or withdrawing landlords from nonparticipating landlords. Once a prima facie case is established, the second and third steps of the disparate impact analysis separate the honest landlords (those with a legitimate reason for their actions) from devious landlords (those without a legitimate reason, or whose reason is a pretext for discrimination).

For the second distinction, the court notes that the plaintiff must meet the ultimate burden of persuasion by showing either that the "legitimate business reason" set forth by the landlord is a pretext for discrimination or that an alternative practice serves the same goal with less discriminatory effect.\(^7\)\(^8\) The court asserts that that burden is harder to meet in the nonparticipation context because the landlord "presumptively can appeal to his interests in not wanting to spend time learning about the program and not wanting to become entangled in government bureaucracy."\(^7\)\(^9\) Why should this fact, even if true, affect the ability of a plaintiff to move forward with a prima facie case? That a plaintiff faces a "harder" burden is certainly no reason to preclude liability; the plaintiff simply has a tougher case to prove.

Furthermore, it is far from clear that a nonparticipating landlord's assertion that "I don't want to be entangled with bureaucracy" is a better reason for refusing vouchers than a withdrawing landlord's assertion that "I hated being entangled with bureaucracy." The withdrawing landlord has available the information about how much time, effort, and money the program required. Thus, the withdrawing landlord may be better able to substantiate his "legitimate business reason" to prevent rebuttal by the plaintiff. The nonparticipating landlord certainly faces a learning curve (unless the nonparticipating landlord participated in the HCV at some point in the past), but the nonparticipating landlord's naked assertion of entanglement, without any substantiation, looks more like a pretext for discrimination. The fact that either the nonparticipating landlord or the plaintiff could obtain information from other participating landlords further weakens the court's second "distinction."

---

\(^7\) Graoch, 508 F3d at 377.

\(^8\) Id.

\(^9\) Id.
B. Nonparticipation Liability: Separating the Good from the Bad

One major result flowing from the resolution suggested by this Comment is that nonparticipating landlords should also be subject to liability under the disparate impact doctrine. This runs counter to the prevailing opinion of the courts, so it is important to determine which view is more consistent with the intent of Congress in enacting the FHA and the HCV program. It turns out that this determination depends on whether the disparate impact doctrine truly is probative of intent and thus able to distinguish honest landlords from devious landlords.

The FHA was enacted to end discrimination and foster integration; "the Supreme Court has held that [the FHA] must be construed expansively to implement that goal." Congress enacted the voluntary HCV program "[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing." Both enactments thus share the common purposes of fostering integration and ending discrimination in the provision of housing. Surely, when an issue involves both the FHA and the HCV program, courts should resolve that issue to uphold the purposes of both.

If the disparate impact doctrine is not capable of separating honest landlords from devious landlords, then nonparticipating landlords should not be subject to the disparate impact doctrine (contrary to the suggested resolution). Otherwise, all landlords who choose not to participate in the HCV program could become liable if their practices happen to have a disparate impact on a protected class. This result would be contrary to Congress's intentions in at least two ways. First, this result would decrease the housing available to low income families. Some landlords would face increased costs arising either from investing additional resources to ensure that no decisions result in a disparate impact, or by subjecting themselves to the possibility of litigation. Other landlords may simply choose another profession so that they do not fall within the ambit of the FHA. Second, liabili-

---

80 See, for example, Graoch, 508 F3d at 377 ("[O]ne cannot bring a disparate-impact challenge to Section 8 non-participation.").
82 42 USC § 1437ff(a).
ty for all nonparticipants borders on making the HCV program mandatory, contrary to Congress's intention. Thus, the courts' view that honest landlords cannot be separated from devious landlords in the context of nonparticipation leads to the conclusion that the disparate impact doctrine should not apply. While this conclusion may be the lesser of two evils, it does not promote the purposes of the FHA and the HCV program because it allows for discrimination, and discrimination increases the cost of housing available to low-income families.

On the other hand, if the disparate impact doctrine is capable of separating the honest from the devious, then nonparticipating landlords should be subject to the disparate impact doctrine. The HCV program would still be voluntary; only discrimination is outlawed. Liability in this situation should work to root out discrimination and remove it as a bar to housing. Ultimately such liability would lead to an increase in available housing and better integrated communities. Thus, this conclusion promotes the purposes of the FHA and the HCV program.

There may be some worry that landlords who choose not to participate in the HCV program for legitimate reasons will incur additional costs related to litigation and the potential for error. First, applying the disparate impact doctrine to nonparticipating landlords may subject landlords with legitimate reasons for not participating to frivolous suits. This risk, however, is likely to be small given the effort and time required to establish a prima facie case. In the case of a nonparticipating landlord, establishing a prima facie case requires compiling statistics on the local housing community, which probably takes sufficient time and effort to deter frivolous suits. But, when litigation involves a landlord's decision that affects a greater number of people or affects the community to a greater extent—and thus is not frivolous—compiling such data would probably not be too burdensome.

Second, some nonparticipating landlords acting without discriminatory intentions may be subjected to further litigation where the choice to not participate in the HCV program actually has a disparate impact. In this situation—where the plaintiff is able to establish a prima facie case—the additional cost of litigation may be justified by the disparate impact caused by the landlord's decision. If the landlord has a legitimate reason for nonparticipation, the landlord should not be held liable under the FHA, but the additional cost of litigation functions as a moral charge for taking an action that has a disparate impact on a protected class. Furthermore, such landlords subjected only to liti-
gation costs incur lower costs than landlords who are held liable under the FHA for choosing to not participate without the justification of a legitimate reason. Thus, nonparticipating landlords who lack a legitimate reason for not participating (presumably with discriminatory intentions) are at a competitive disadvantage relative to those landlords subject only to litigation costs. Over time, then, the discriminatory landlords should be driven out of the housing market. Finally, the litigation costs ultimately may be passed on to society in the form of higher rents, and this may be considered as a cost to eliminating discrimination in housing.

The ultimate question, then, is whether the disparate impact doctrine truly is probative of intent. More specifically, is the disparate impact doctrine as applied to nonparticipating landlords capable of distinguishing honest landlords (those who do not participate in the HCV program for legitimate reasons) from devious landlords (those who give effect to discriminatory intentions by refusing to accept housing choice vouchers)? Answering this question in the affirmative without qualification is likely impossible; any legal test employed as a proxy for one’s state of mind can only be an approximation. The better question, then, is whether the disparate impact doctrine can be applied in such a way that most, if not all, devious landlords are captured, while honest landlords escape untouched. The answer, finally, is yes. Using the lead Graoch opinion as a guide, the general disparate impact analysis can be tailored around the special issues raised by the voluntary nature of the HCV program, resulting in a useful test for disparate impact liability.

The first step in the disparate impact analysis is familiar: the plaintiff must make a prima facie case by identifying a specific housing practice and showing a disparate impact on a protected class through statistical evidence. It is important to remember that the plaintiff’s showing only establishes a prima facie case and not a violation of the FHA. This step casts a wide net by allowing a prima facie case where the nonparticipation by any landlord, honest or devious, results in a disparate impact. At this point, then, the test is admittedly over-inclusive because a plaintiff may establish a prima facie case against landlords who lack a discriminatory intent. The remainder of the test, however, is more probative of intent, and thus provides the honest landlords a solid opportunity to prevail.

---

83 Graoch, 508 F3d at 374.
The second step in the disparate impact analysis acts as an exit for those landlords not acting with discriminatory intent. Here, the landlord must offer a “legitimate business reason” for the challenged practice.\textsuperscript{84} The third step, in contrast, acts to prevent landlords with discriminatory intentions from escaping through the exit provided by the second step. Here, the plaintiff has the opportunity to demonstrate that the legitimate reason offered by the landlord is a pretext for discrimination.\textsuperscript{85} The opinion by Judge Moore in Graoch, concurring in part and dissenting in part, argues that (1) at the second step the landlord should be required to show that the practice constitutes a “business necessity” instead of merely a “legitimate reason,” and (2) that the third step should be removed from the disparate impact analysis, thus leaving the ultimate burden of persuasion on the defendant.\textsuperscript{86} Moore argues that requiring the landlord to show just a “legitimate reason” and allowing the plaintiff to show that reason as a pretext “both imports an intent-oriented principle . . . into the disparate-impact analysis and places the ultimate burden of persuasion on the plaintiff rather than on the defendant.”\textsuperscript{87} In the context of nonparticipation, however, importing these two elements into the disparate impact analysis facilitates compliance with Congress’s intent that participation in the HCV program be voluntary. Requiring the landlord to show that the practice constitutes a “business necessity” and placing the ultimate burden of persuasion on the landlord lessens the landlord’s ability to choose, for legitimate reasons, whether to participate. The lead opinion in Graoch also provides that the plaintiff can show at the third step that an alternative practice exists that would be less discriminatory.\textsuperscript{88} Allowing this showing at the third step also lessens the landlord’s ability to choose whether to participate in the HCV program, and thus should not be allowed in the nonparticipation context.

Lastly, in evaluating the plaintiff’s showing, the court considers “the strength of the plaintiff’s showing of discriminatory effect against the strength of the defendant’s interest in taking the challenged action.”\textsuperscript{89} This final inquiry acts “to distinguish

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} See id at 386–90 (Moore concurring in part and dissenting in part).
\textsuperscript{87} Graoch, 508 F3d at 386.
\textsuperscript{88} Id at 374 (Moore concurring in part and dissenting in part).
\textsuperscript{89} Id.
VOUCHERS AS VEILS

the artificial, arbitrary, and unnecessary barriers proscribed by
the FHA from valid policies and practices crafted to advance legiti-
mate interests.”

During this inquiry, the court should make
chief among its considerations the voluntary nature of the HCV
program. Over time, courts can develop guidelines to assist with
their inquiry; a few suggestions follow here.

First, a court should make itself aware of the costs and bene-
fits of the HCV program to landlords. There are two main bene-
fits provided to landlords through the HCV program. The first
benefit comes in the form of an increased pool of available te-
nants. The government subsidy provided by housing choice
vouchers enables voucher holders to pay market rent when they
were previously unable to do so. The second benefit comes in the
form of a guarantee of income to the landlord. Specifically, the
government provides to landlords a pre-determined portion of a
tenant’s market rent. The costs imposed on landlords stem from
complying with the requirements of the HCV program, such as
working with the local housing authority and ensuring units
meet certain safety and sanitation requirements. In this context,
the court should also consider the availability to nonparticipating
landlords of information related to such costs. The lack of infor-
mation, however, should not be typical because even if only a few
landlords in the local community are participants, the relevant
information should be available from those participating lan-
dlords or the local housing authority.

Against this backdrop, the court should consider the “legiti-
mate reason” set forth by the landlord, and the plaintiff’s show-
ing of a pretext. The set of legitimate reasons accepted by courts
should be consistent with the voluntary nature of the program,
and they should be consistent with the landlord’s desire to ad-
vance his business interests. Along these lines, it is important to
note here that liability should only follow where participation in
the HCV program is cost-justifiable. If participation is not cost-
justifiable, or if the uncertainty of gaining any profit from partic-
ipation is substantial, then the landlord likely has a legitimate
reason for not participating. For example, where a landlord is
readily able to acquire tenants without the aid of the HCV pro-
gram, that landlord probably has a legitimate reason for not par-
ticipating. On the other hand, where a landlord struggles to find
tenants, or where the landlord has constant problems with te-

90 Id at 374–75.
nants failing to pay rent, the set of legitimate reasons for non-participation narrows.

Finally, it is important to note that allowing liability for nonparticipating landlords due to discriminatory practices is not as big of a step as it may initially seem. Some states and other municipalities have already taken the much more drastic step of effectively mandating participation in the HCV program by prohibiting discrimination based on one's source of income. Prohibiting discrimination based on one's source of income expands the definition of a protected class and makes liable a landlord who refuses to accept tenants based on the use of a housing choice voucher as a source of income. So far, the federal government has declined to do the same. The resolution suggested in this Comment would only make actionable the practice of refusing housing choice vouchers for discriminating against a federally protected class. This ensures that the protected classes currently defined are not discriminated against under the veil of nonparticipation.

V. CONCLUSION

The current circuit split over liability for withdrawal from the HCV program results from courts on both sides of the split approaching the issue without a correct understanding of the disparate impact doctrine. Discrimination against a protected class is unlawful, no matter what device is used to carry it out. The disparate impact doctrine, with its ability to reveal hidden discriminatory intent, is capable of separating honest landlords from devious landlords. Thus, in the context of the split, courts should not apply the disparate impact doctrine to separate withdrawing landlords from nonparticipating landlords, but rather to separate those landlords who discriminate against protected classes from those landlords who have a legitimate reason for withdrawing from the HCV program. Furthermore, the disparate impact doctrine should also be used in the context of nonparticipation. A landlord's choice not to participate in the program can be a pretext for discrimination, and thus the disparate impact

91 See, for example, Godinez v Sullivan-Lackey, 352 Ill App 3d 87, 93–94 (1st Dist 2004) (holding that a landlord violated Chicago's fair housing ordinance by discriminating against a potential tenant based on her Section 8 voucher as a source of income); Feemster v BSA Ltd Partnership, 548 F3d 1063 (DC Cir 2008) (finding a facial violation of the District of Columbia Human Rights Act by a lessor who refused to accept Section 8 vouchers as discrimination on the basis of Section 8 renter's source of income).
doctrine should be used to separate landlords who choose not to participate for legitimate reasons from landlords who refuse vouchers for discriminatory reasons. Given the weaknesses inherent in disparate treatment claims, landlords will be able to discriminate against low-income families behind the veil provided by housing choice vouchers until the disparate impact doctrine is accepted by courts in the contexts of both withdrawal and non-participation.