TEARING DOWN "NO SECTION 8" SIGNS: THE DISPARATE RACIAL IMPACT OF SOURCE-OF-INCOME DISCRIMINATION AND THE VALIDITY OF LOUISVILLE'S NEW LAW AGAINST IT

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I. INTRODUCTION

In his typically acrid and frustrated journalistic manner, Louisville native Hunter S. Thompson once documented his hometown's segregationist tendencies in the housing market.[1] Observing that these ills persisted even after integration was advertised as being well-underway in Louisville, Thompson lambasted the optimism of city officials who touted Louisville's superficial gains as curing generations of ugly and deliberate discrimination against black renters and homeowners.[2] The city's progress could only be described, according to Thompson, as a transition from government-imposed racial segregation to "segregation's second front, where the problems are not mobs and unjust laws but customs and traditions."[3] In other words, "[t]he white power structure ha[d] given way in the public sector, only to entrench itself more firmly in the private."[4]

The United States' landmark civil rights victories of the 1960s would provide only momentary relief as new barriers rose from the ashes of the newly abolished *de jure* segregation, that which is imposed by the government to the perpetual force of *de facto* segregation, that which is imposed by private citizens.[5] The Supreme Court has since shrugged off the

* J.D. Candidate, May 2022, University of Louisville Brandeis School of Law. There are too many people to thank, and I should confess that I have received more than my fair share of good fortune on the warpath to publishing this Note. My work would never have sniffed the ink of a printing press if not for the good graces of Professor Dan Canon, the indomitable advocates at the Legal Aid Society, and all of the loved ones in my life—most of all my parents—who tolerate my loud typing and frustrated ranting over midnight oil. This Note stands for the proposition that no ill condition, no fact of poverty and suffering, no matter how deeply engrained or hideously enforced, exists without a solution rooted in human solidarity, however imperfect that beautiful force may seem. "There is a crack in everything, that's how the light gets in." – Leonard Cohen

[1] Hunter S. Thompson, *A Southern City with Northern Problems*, THE REPORTER, Dec. 19, 1963 at 26.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Elise C. Boddie, *The Muddled Distinction Between De Jure and De Facto Segregation*, *in* THE OXFORD HANDBOOK OF U.S. EDUC. L. 260-2 (2020); *see also* JAMES ANDERSON & DARA N. BYRNE, THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION 55 (Wiley, 1st ed. 2004) ("The Court's distinction between de jure and de facto school segregation—involving schools that were not segregated by laws, which Brown struck down, but were, in fact, segregated—provided the means by which to

latter form as a bridge-too-far for affirmative remedy.[6] Yet in Louisville, as elsewhere, a new evil took root in the form of a private, impenetrable trend of white homeowners refusing to rent or sell to black residents. This was not on account of outwardly admitted racial prejudice, "but out of concern for property values . . . [i]n other words, almost nobody has anything against [black residents], but everybody's neighbor does."[7] A far less confrontable—yet operatively indistinguishable—successor had emanated from the naked, violently enforced modes of yesteryear's segregation.[8] Seeing this, Thompson ultimately asserted that while "simple racism is an easy thing to confront . . . a mixture of guilty prejudice, economic worries and threatened social standing is much harder to fight."[9]

Indeed, the promise of the Fair Housing Act of 1968 (FHA)[10] belies an evolving legacy of underenforcement and failed goals since "many cities have evaded and flat-out rejected their responsibility to 'affirmatively' advance integration and the Fair Housing Act's other goals."[11] A 2018 report from the National Low Income Housing Coalition detailed the lack of progress:

> Though we have made some progress, many challenges to fair housing remain. There are still extreme racial disparities in homeownership and wealth. In 1968, 65.9% of white families owned their homes, a rate that was 25% higher than the 41.1% of black families that owned their homes. Today [in 2018], the black homeownership rate has not changed, while the rate of white homeownership has increased five percentage points to 71.1%. These homeownership disparities contribute to the shocking racial wealth gap in America. In 2017, the typical white family held ten times the amount of wealth as the typical black family ($171,000 for whites to $17,409 for blacks, on average). These numbers have worsened since 1968 and point to the fact that housing discrimination continues to determine life outcomes.[12]

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dismantle the efforts at integration.").

[6] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (*quoting* Freeman v. Pitts, 503 U.S. 467, 495 (1992) (holding that a Louisville school district cannot use remedial measures where segregation "is a product not of state action but of private choices.")); *see also* Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cnty., Okla. v. Dowell, 498 U.S. 237, 249–51 (1991) (representing the Court's seminal shift towards limiting affirmative measures to remediate historic patterns of segregation).

[7] Thompson, *supra* note 1, at 28.

[8] *Id*.

[9] *Id*.

[10] Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (1968).

[11] Janell Ross, *A rundown of just how badly the Fair Housing Act has failed*, WASH. POST (July 10, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/10/a-look-at-just-how-badly-the-fair-housing-act-has-failed/ [https://perma.cc/2X27-GQPK]; *see also* Brian Patrick Larkin, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1625 (2007).

[12] *Fair Housing Act Overview and Challenges*, NAT'L. LOW INCOME HOUS. COAL. (Oct. 23, 2018), https://nlihc.org/resource/fair-housing-act-overview-and-challenges [https://perma.cc/TE2V-BWQ6].

Landlord refusal to accept housing assistance vouchers, a practice commonly referred to as "source-of-income discrimination,"[13] represents one widely reported practice that has obstructed the FHA's objectives, keeping historically redlined neighborhoods segregated due to its disparate racial impact.[14] Many cities and states have met the challenges of this practice by introducing appropriate anti-discrimination laws.[15] Still, the unfortunate reality is that "only 34 percent of households with housing vouchers live in jurisdictions with protections against discrimination by landlords, despite the growing body of evidence indicating that such laws substantially increased the [FHA's] effectiveness."[16]

Historically, Louisville was among the municipalities lacking in protection for voucher holders.[17] However, in November 2020 the Louisville Metro Council unanimously passed the Amended Fair Housing Ordinance, outlawing discrimination against renters based on "lawful source of income."[18] These new, long-overdue protections took effect on March 1, 2021.[19] Part II of this note explores the history of housing discrimination in Louisville as one vestige of a nationwide sin, as well as the lack of federal judicial relief that necessitated the new ordinance's passage. Part III examines the Amended Fair Housing Ordinance in light of legal challenges brought by landlords in other jurisdictions that have passed comparable laws prohibiting source-of-income discrimination. The "lawful source of income" protections in the Amended Fair Housing Ordinance may have to weather the storm of such battles in Kentucky state courts. Thus, some solace may be found in other jurisdictions where courts have ubiquitously approved of such

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[13] Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573, 575–76 (2020).

[14] *See* Abby Vesoulis, *'A Mask for Racial Discrimination.' How Housing Voucher Programs Can Hurt the Low-Income Families They're Designed to Help*, TIME (Feb. 20, 2020), https://time.com/5783945/housing-vouchers-discrimination/ [https://perma.cc/76VJ-SJUF]; *see also* Maia Hutt, *This House Is Not Your Home: Litigating Landlord Rejections of Housing Choice Vouchers Under the Fair Housing Act*, 51 COLUM. J. L. & SOC. PROBS. 391, 393 (2018).

[15] *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program: APPENDIX B: State, Local, and Federal Laws Barring Source-of-Income Discrimination*, POVERTY & RACE RES. ACTION COUNCIL 2–6 (Nov. 2020), https://prrac.org/pdf/AppendixB.pdf [https://perma.cc/US26-P6GU].

[16] Alison Bell, et al., *Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results*, CTR. ON BUDGET AND POL'Y PRIORITIES 1, 3 (Dec. 20, 2018), https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf [https://perma.cc/S3FA-NKXD]; Peter Bergman, et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice*, NAT'L. BUREAU OF ECON. RES. 1, 9–10 (Aug. 2019) *rev'd* (Mar. 2020), https://www.nber.org/system/files/working_papers/w26164/w26164.pdf [https://perma.cc/G4VZ-S5QP] (acknowledging that the availability of higher voucher rents and the state's SOI law were key to the success of the housing voucher program).

[17] Amina Elahi, *Changes In Fair Housing Law Could Help More Louisville Residents Choose Where They Live*, WFPL NEWS (Nov. 25, 2020), https://wfpl.org/changes-in-fair-housing-law-could-help-more-louisville-residents-choose-where-they-live/ [https://perma.cc/3NYT-UECH].

[18] Louisville, Ky., O-395-19 V.2 (2020).

[19] *Id*. § VI.

legislation and denied relief to landlords attempting to absolve themselves from it.[20] This consistent precedent gives cause for optimism that the Amended Fair Housing Ordinance can survive potential legal challenges and provide an enforceable means for cities like Louisville—a city rife with the open veins of historic redlining and discrimination[21]—to advance the FHA's goals of housing mobility and equality promised many years ago.

II. BACKGROUND

A. Racial Segregation in Housing and Its Perpetuation

The origins of racial segregation and black oppression in housing markets across the American urban landscape are well-documented.[22] If one were to isolate a single tool of generational oppression—income suppression, for example—meant to degrade the housing conditions of black renters, anecdotal evidence abounds:

> Langston Hughes described how, when his family lived in Cleveland in the 1910s, landlords could get as much as three times the rent from African Americans that they could get from whites, because so few homes were available to black families outside a few integrated urban neighborhoods. Landlords, Hughes remembered, subdivided apartments divided for a single family into five or six units, and still African Americans' incomes had to be

[20] Fletcher Props., Inc. v. Minneapolis, 947 N.W.2d 1, 6 (Minn. 2020) (upholding Minneapolis ordinance upon rational basis review for due process and equal protection claims brought by landlords seeking to have the statute invalidated); *see also* DeLiddo v. Oxford St. Realty, Inc., 876 N.E.2d 421, 429 (Mass. 2007) (holding that the legislature sufficiently balanced Section 8's administrative burdens and the public interest in securing an available market of affordable housing); Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 248, 250 (Conn. 1999) (permitting an exception based on program requirements would thwart purpose and constitute an unstated exception to a remedial statute); Feemster v. BSA Ltd P'ship, 548 F.3d 1063, 1070–71 (D.C. Cir. 2008) (permitting owner to refuse vouchers based on program requirements would vitiate intended safeguards); Montgomery Cty v. Glenmont Hills Assocs., 936 A.2d 325, 340–41 (Md. App. 2007) ("Most of the courts that have addressed an administrative burden defense have rejected it."); Franklin Tower One v. N.M., 725 A.2d 1104, 1114 (N.J. 1997) (permitting a landlord to decline participation in the voucher program to avoid "bureaucracy" would leave no Section 8 housing available).

[21] *See* Jacob Ryan & Ashley Lopez, *Inside Louisville's Decades-Long Problem With Housing Segregation*, WFPL News (June 8, 2016), http://nextlouisville.wfpl.org/2016/06/08/inside-louisvilles-decades-long-problem-with-housing-segregation/ [https://perma.cc/7AXB-AWRB].

[22] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Jane Kim, *Black Reparations for Twentieth Century Federal Housing Discrimination: The Construction of White Wealth and the Effects of Denied Black Homeownership*, 29 B.U. PUB. INT. L.J. 135, 140–59 (2019); Prottoy A. Akbar, et al., *Racial Segregation in Housing Markets and the Erosion of Black Wealth*, NAT'L BUREAU ECON. RES. 1, 2–9 (2019), https://www.nber.org/system/files/working_papers/w25805/w25805.pdf [https://perma.cc/U8WS-TSEF].

disproportionately devoted to rent.[23]

Such conditions carried well into the mid-twentieth century.[24] In 1954, it was estimated that black renters were overcrowded at four times the rate of their white counterparts because of the excessive rents thrust upon them by private markets supported by the government's tacit consent.[25] The United States government exacerbated this inequity for decades by depressing the incomes of black citizens by denying them equal participation in New Deal era programs and G.I. Bill benefits,[26] levying higher property taxes on black homeowners,[27] empowering unions to refuse the admission of black workers,[28] and forging other tools to deny black citizens the financial means to participate in a city's white housing market.[29] This reality, coupled with the fact that government-imposed restrictions of black homeownership led to inflated prices, cemented the current conditions of segregation and housing immobility that afflict housing markets today.[30]

These realities were present in virtually every American city, but Louisville's discriminatory past presents an especially poignant history.[31] In 1914, the city of Louisville passed an ordinance requiring residents to separate residential blocks by race under the guise of "prevent[ing] conflict and ill-feeling between white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare."[32] After the highest court in Kentucky upheld the ordinance as a valid measure, the case made its way to the Supreme Court of the United States where the Court reversed Kentucky's ruling and declared the ordinance to be a violation of the Due Process Clause of the Fourteenth Amendment.[33] Moving up through the 1930s, the federal government established the now-infamous, nationwide practice of redlining through appraisal methods that "amount[ed] to a form of residential apartheid" and "create[d] unearned wealth for whites in those

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[23] ROTHSTEIN, *supra* note 22 at 172–173.

[24] *Id*.

[25] *Id*. at 173; *see also* Joshua Poe, *Redlining Louisville: Racial Capitalism and Real Estate*, ROOT CAUSE RES. CTR. (2017), https://www.arcgis.com/apps/MapSeries/index.html ?appid=a73ce5ba85ce4c3f80d365ab1ff89010 [https://perma.cc/3F2C-SGFA] (describing overcrowding in the modern context: "[a]t this point in time, over 50% of the Black population in Louisville lives on less than 5% of the land.").

[26] Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 589 (2014).

[27] ROTHSTEIN, *supra* note 22, at 171.

[28] *See* Jake Rosenfield & Meredith Kleykamp, *Organized Labor and Racial Wage Inequality in the United States*, 117(5) AM. J. SOC. 1460, 1461–1502 (2012).

[29] ROTHSTEIN, *supra* note 22, at 153.

[30] *Id*. at 175.

[31] *See* ROTHSTEIN, *supra* note 22; *see also* Buchanan v. Warley, 245 U.S. 60 (1917).

[32] Buchanan, 245 U.S. at 70.

[33] *Id*. at 82 (holding the ordinance to be invalid, primarily out of concern for "freedom of contract") (*quoting* ROTHSTEIN, *supra* note 23, at 45).

areas based on nothing more than the ability to live where black people could not."[34] As Joshua Poe identifies, "[s]uburban sprawl, redlining, and white wealth creation are all directly contingent upon Black exclusion."[35] The effects of these practices persist into 2021, especially amid the COVID-19 pandemic as the same low-income and minority communities "suffer not only from reduced wealth and greater poverty, but from lower life expectancy and higher incidence of chronic diseases that are risk factors for poor outcomes from COVID-19."[36]

Although initially facilitated by the government, these segregationist practices later entrenched themselves in the private market, as detailed by historian Kenneth T. Jackson:

> The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities. More seriously, Washington actions were later picked up by private interests, so that banks and saving-and-loan institutions institutionalized the practice of denying mortgages solely because of the geographical location of the property.[37]

The Louisville real estate market's continuing appetite for neighborhood segregation persisted in the private market with tacit approval from city authorities, as exemplified in the *Braden-Wade* case arising nearly forty years after the invidious 1914 ordinance was struck down.[38] Andrew Wade, a black electrician who had managed to secure enough income to move with his pregnant wife and two-year-old daughter to the suburbs, "was turned down by a succession of white real estate agents, who refused to cross the illegal but still highly observed line of segregation."[39] Carl and Anne Braden, two white acquaintances who were vocal advocates against Louisville's housing

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[34] Poe, *supra* note 25.

[35] *Id.*

[36] Jason Richardson, et al., *Redlining and Neighborhood Health: There is a higher prevalence of COVID-19 risk factors in historically "redlined" neighborhoods*, NAT'L COMTY. REINVESTMENT COAL. (2020), https://ncrc.org/holc-health/ [https://perma.cc/TX4Y-SP36]; *see also* Maria Godoy, *In U.S. Cities, The Health Effects Of Past Housing Discrimination Are Plain To See*, NPR NEWS (Nov. 19, 2020), https://www.npr.org/sections/health-shots/2020/11/19/911909187/in-u-s-cities-the-health-effects-of-past-housing-discrimination-are-plain-to-see [https://perma.cc/2JNR-HHZV]; *see also* Emily A. Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URBAN HEALTH 1, https://link.springer.com/content/pdf/10.1007%2Fs11524-020-00502-1.pdf [https://perma.cc/MJL5-T6H4].

[37] KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 217 (1st ed. 1985).

[38] Rick Howlett, *Remembering the Wades, the Bradens and the Struggle for Racial Integration in Louisville*, WFPL NEWS (Dec. 1, 2014), https://wfpl.org/remembering-wades-bradens-struggle-racial-integration-louisville/ [https://perma.cc/K5Z9-D2HE].

[39] *Id.*

segregation laws, volunteered to help.[40] The couple purchased a home in the all-white Shively suburb on behalf of the Wade family and transferred it to them in the summer of 1954.[41]

Outrage ensued, from both citizens and authorities alike, as the Wades experienced cross-burnings, repeated instances of gunfire, and ultimately, a dynamite attack that destroyed the Wade home while the family was away.[42] The perpetrator, who was known to the Louisville police but never indicted,[43] had placed the explosives beneath the bedroom of the Wades' two-year-old daughter.[44] Louisville police officers watched each of these horrific events unfold with indifference, claiming to have seen nothing.[45] The only effective indictment stemming from this rash of violence and harassment bore the name of activist Carl Braden, who was convicted of sedition after refusing to answer questions from a subcommittee probing for "Communist infiltration into basic southern industry."[46] Braden's conviction and sentence were later affirmed by the Fifth Circuit[47] and the United States Supreme Court.[48] Braden ultimately spent eight months in prison.[49]

The bombing of the Wade family home would not be the last incident of violent backlash to neighborhood integration in Louisville.[50] In 1985, white reactionists perpetrated a pair of fire-bombings against Robert and Martha Marshall, one of which occurred mere hours before a Ku Klux Klan meeting where a speaker crowed that no black residents would be permitted to live in Sylvania, a Louisville suburb that was all-white until the Marshall family arrived.[51] In connection with the case, a Louisville police officer testified that "about half of the forty Klan members known to him were also in the police department and that his superiors condoned officers' Klan membership."[52] These events demonstrate that city authorities were, at minimum, permissive of the private market's enforcement of racial segregation by any means, including violence.

While the horrific violence experienced by the Wades and the Marshalls in response to their desires to integrate into middle-class neighborhoods may seem like a cruel artifact of history, the private market has continued to

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] ROTHSTEIN, *supra* note 22, at 150 ("Although the [police] chief acknowledged that both the dynamiter and the cross burner had confessed, the perpetrators were not indicted.").

[44] Howlett, *supra* note 38.

[45] ROTHSTEIN, *supra* note 22, at 150.

[46] Braden v. United States, 365 U.S. 431, 433 (1961).

[47] Braden v. United States, 272 F.2d 653, 663 (5th Cir. 1959), *aff'd*, 365 U.S. 431 (1961).

[48] *Braden*, 365 U.S. at 433.

[49] Howlett, *supra* note 38.

[50] ROTHSTEIN, *supra* note 22, at 150.

[51] *Id.*

[52] *Id.*

deprive black families of housing mobility in Louisville through less overtly militant seemingly race-neutral means.[53] A 2015 study placed Louisville among the top ten American cities with the highest levels of neighborhood segregation and black concentration of poverty.[54] A contributing factor to this still-concrete reality remains the inadequacy of current fair housing laws and the historic absence of prohibitions against forms of discrimination that are known to serve as a pretext for racial discrimination, such as discrimination based on source-of-income.[55]

B. Source-of-Income Discrimination

The majority of extremely low-income renters, including 70.9% of low-income black renters, are rent-burdened meaning that they pay more than half their incomes for housing.[56] Essential to ameliorating that problem is the provision of housing subsidies through programs like Section 8 Housing Choice Voucher Program (HCV)[57] which provides monthly assistance to over 2.3 million low-income families in need of affordable housing units, making it the largest federal housing subsidy program for low-income families in the United States.[58] The HCV program is federally funded and administered by local housing authorities that provide assistance once voucher holders have located an appropriate rental unit for which to utilize their voucher.[59] Once an HCV participant's unit and tenancy have been approved, the housing authority arranges with the landlord-owner to make rent subsidy payments on behalf of the voucher holder.[60] Voucher holders must contribute 30% of their income towards the cost of rent, with the rest of the rental payments subsidized by the government so long as the rental unit meets program housing quality standards.[61]

Unfortunately, only a fraction of eligible families—as little as 23%—actually receive *any* form of housing assistance, HCV or otherwise.[62] Further,

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[53] The Amended Fair Housing Ordinance, *supra* note 18, at § II(b).

[54] Paul Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, THE CENTURY FOUND. (Aug. 7, 2015), https://tcf.org/content/report/architecture-of-segregation/?agreed=1&agreed=1 [https://perma.cc/KT4R-GL9R].

[55] Vesoulis, *supra* note 14.

[56] Andrew Aurand, et al., *The Gap: A Shortage of Affordable Homes*, NAT'L LOW INCOME HOUS. COAL. 14 (Mar. 2020), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2020.pdf [https://perma.cc/JN52-8WA9].

[57] 42 U.S.C. § 1437f(o) (2016) (detailing the housing voucher program).

[58] *Tenant-Based Rental Assistance: 2020 Summary of Resources*, DEPT. OF HOUS. & URB. DEV., OFF. OF PUB. & INDIAN HOUS. 1 (2020), https://www.hud.gov/sites/dfiles/CFO/documents/6_FY21CJ_Program_TBRA.pdf [https://perma.cc/XZ2X-XZ42].

[59] *Id.*

[60] *See* 24 C.F.R. § 982.1(a) (2018).

[61] *See id.*; 42 U.S.C. § 1437(o)(2)(A) (2018).

[62] Erika C. Poethig, *One in four: American's housing assistance lottery*, THE URB. INST. (May 28, 2014), https://www.urban.org/urban-wire/one-four-americas-housing-assistance-lottery [https://perma.cc/NB4

after emerging from the desert of underfunded housing programs with a voucher in hand, those lucky few renters must then face a second obstacle: discrimination by private landlords who refuse to accept the voucher.[63] Although "[t]enant-based housing vouchers offer greater efficiency and superior choices for the housing assistance recipients" compared to projects-based housing assistance, one United States Department of Housing and Urban Development (HUD) report mitigated these positive findings identifying that "[t]he superiority of these vouchers, however, is predicated on voucher recipients being able to find landlords willing to accept their vouchers."[64] Federal law does not mandate landlord participation in the Section 8 program as part of the FHA's statutory construction.[65] Accordingly, a low-income tenant who manages to obtain an HCV must rely on the good will of the private market to get into a real home.[66] For a host of reasons—ranging from general "negative stereotypes,"[67] to pretextual racial discrimination[68] and administrative bellyaching[69]—landlords across the nation have instituted source-of-income discrimination since the inception of the HCV program.[70] The result is a market where it can be extremely difficult to find a landlord who accepts housing vouchers, with one HUD-sponsored study revealing rejection rates as high as 78% in some cities.[71]

The resulting conditions generated by these practices are clear: Source-of-income discrimination "contributes to the perpetuation of racially segregated communities and neighborhoods with concentrated poverty."[72] Voucher holders are disproportionately people of color and individuals with

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[63] *See* Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1569 (2012).

[64] Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization and Locational Outcomes*, U.S. DEP'T OF HOUS. & URB. DEV. 23 (Feb. 2011), https://www.huduser.gov/publications/pdf/freeman_impactlaws_assistedhousingrcr06.pdf [https://perma.cc/5772-3HWQ].

[65] Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 296 (2d Cir. 1998); *see also* Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1280 (7th Cir. 1995).

[66] Freeman, *supra* note 64, at 23 ("The advantages of vouchers over project-based housing assistance depend on the ability of voucher recipients to locate a landlord who will accept the voucher.").

[67] *Id*.

[68] Vesoulis, *supra* note 14.

[69] *See* Armen H. Merjian, *Attempted Nullification: The Administrative Burden Defense in Source of Income Discrimination Cases*, 22 GEO. J. ON POVERTY L. & POL'Y 211, 232 (2015).

[70] Ocen, *supra* note 63, at 1569.

[71] Mary K. Cunningham, et al., *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers*, HUD OFFICE OF POL'Y DEV. & RES. 13 (Aug. 20, 2018), https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf [https://perma.cc/PV8T-YC2V] ("Denial rates were highest in Fort Worth (78 percent) and Los Angeles (76 percent) and only somewhat lower in Philadelphia (67 percent).").

[72] Anontia K. Fasanelli & Philip Tegeler, *Your Money's No Good Here: Combatting Source of Income Discrimination in Housing*, AMERICAN BAR ASS'N HUMAN RIGHTS MAGAZINE (Nov. 30, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/ your-money-s-no-good-here--combatting-source-of-income-discrimin/ [https://perma.cc/VZ48-4J7B] (explaining further that source-of-income discrimination may "serve as a pretext for a prohibited form of discrimination and disproportionately affects renters of color, women, and persons with disabilities.").

disabilities,[73] meaning that although "[s]ource of income is not a protected category under federal law . . . 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."[74] Embodying a modern *de facto* scheme of segregation, source-of-income discrimination is readily found in the brusque lettering of "NO Section 8" scrawled across online rental listings like those found in Louisville.[75] Each of the cited listings appeared after the March 1, 2021 effective date[76] of the Amended Fair Housing Ordinance's prohibition against such advertisements, meaning that they are currently unlawful.[77] Moreover, voucher holders not only experience frustration when confronted with the barriers "prevent[ing them] from moving into more affluent neighborhoods by landlords who refuse to participate in the HCV, either because they stigmatize assisted families or have little financial incentive to participate," but they are also "actively recruited into disadvantaged neighborhoods by landlords who specialize in renting to voucher holders."[78]

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[73] Maia Hutt states as follows:

Nationally, 28% of HCV recipient households include at least one member with a disability. 45% of HCV recipient households identify as Black, 16% as Hispanic, and 35% as White. 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. 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.

Hutt, *supra* note 14, at 407 (citations omitted).

[74] *Id*. at 392; *see also* Lisa M. Krzewinski, *Section 8's Failure to Integrate: The Interaction of Class-Based and Racial Discrimination*, 21 B.C. THIRD WORLD L. J. 315, 327 (2001) ("[L]andlords can generally use bias against Section 8 holders as a pretext for racial discrimination.").

[75] *E.g. 2210 Steier Ln Condo*, FORRENT.COM (Mar. 3, 2021), https://www.forrent.com/ky/louisville/2210-steier-ln-unit-3/nqq93nn [https://perma.cc/XH8E-6AAH] (listing "NO Section 8"); *8828 Moody Rd Unit #201 Condo*, FORRENT.COM (Mar. 4, 2021), https://www.forrent.com/ky/louisville/8828-moody-rd-unit-201/vbgx8cg [https://perma.cc/379F-4D5H] (listing "NO Section 8 accepted."); *2137 Rowan St Rental*, FORRENT.COM (Mar. 4, 2021), https://www.forrent.com/ky/louisville/2137-rowan-st/pm5306t [https://perma.cc/PBA4-LY7B] (listing "No Section 8."); *10421 Leven Blvd*, FORRENT.COM (Mar. 3, 2021), https://www.forrent.com/ky/louisville/10421-leven-blvd/hkvg6s0 [https://perma.cc/XW6B-SKJ8] ("No section 8."); *2 br, 1 bath House - 127 S. ARBOR PARK Rental*, FORRENT.COM (Mar. 4, 2021), https://www.forrent.com/ky/louisville/2-br-1-bath-house-127-s-arbor-park/0y9c1d1 [https://perma.cc/ENC4-GKZY] (listing "No Section 8 . . . No prior eviction . . . No Criminal History.").

[76] The Amended Fair Housing Ordinance, *supra* note 17.

[77] *Id.* § II(E) (stating that it shall be unlawful practice for a landlord to "[r]epresent to a person that any housing accommodation is not available for inspection, sale, purchase, exchange, rental, or lease when in fact it is available, or to refuse to permit a person to inspect any housing accommodation because of . . . lawful source of income.").

[78] Matthew Desmond & Kristin L. Perkins, *Are Landlords Overcharging Housing Voucher Holders?*, 15 CITY & CMTY. 137, 140 (2016).

Landlords often cite freedom of contract and bemoan the "administrative burden"[79] of providing housing to voucher holders.[80] In reality, HUD requires two forms: A two-page approval form requiring basic information and a twelve-page contract that includes instructions.[81] A pair of Harvard researchers argued that the trouble in filling out these documents is surely offset by the fact that the program provides landlords with "free advertising and, most important, a virtually guaranteed rental income stream."[82] Refusals by landlords to accept housing vouchers occur frequently across the nation, for reasons that are difficult to comprehend:

> Despite evidence that subsidized housing residents cause no more problems than market-rate tenants; that the units rented to HCV tenants are certified as being up to code and located in and near other market-rate units and developments; and that overall, there is little to distinguish properties that rent to HCV recipients besides a willingness on the part of the landlord to do so, there is considerable evidence of discrimination against voucher holders.[83]

Predicating discrimination on "economic reasons" is not a novel excuse in the grand scheme of fair housing law as landlords historically offered such arguments to justify discrimination against families with young children.[84]

Regardless of the intent behind the refusal by some landlords to accept Section 8 vouchers, the program's goals have been severely hamstrung by a narrow market of willing landlords who overcharge voucher holders[85] or exclude them from the market altogether.[86] The impacts are devastating:

> [T]he effects of [source of income] discrimination go well beyond the geographical details of where they sleep at night. Where a child grows up is directly related to where he or she can go to school, and living in a low-

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[79] The "administrative burden" defense harkens back to the limp, faux-pragmatic defenses of those who refused to sell or lease property to black citizens in the 60s after *de jure* segregation reached its end. *See* Thompson, *supra* note 1.

[80] *See* Merjian, *supra* note 69, at 232.

[81] Desmond & Perkins, *supra* note 78, at 156.

[82] *Id*.

[83] J. Rosie Tighe, et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3, 9–10 (2016).

[84] Charles McMathias Jr., *The Fair Housing Amendments Act*, 15 REAL EST. L. J. 353, 360 (1987) ("Some claim that renting to families results in decreased property values, and increased costs for maintenance, operations, and liability insurance. These claims are unsubstantiated. No direct correlation has been made between any of these factors and the presence of children."); *see also* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 119 (Cal. 1982) (reversing a lower court that upheld a landlord's discrimination on familial status based on the trial court's erroneous finding that the "exclusion of children . . . proceeds from a reasonable economic motive to promote a quiet and peaceful environment free from noise and damage caused by children.").

[85] Desmond & Perkins, *supra* note 78, at 155 ("[W]e found that voucher holders were charged significantly more rent . . . between $51 and $68 more each month in rent, compared to unassisted renters.").

[86] *See* Vesoulis, *supra* note 14.

> income, racially segregated neighborhood with underfunded public schools can be a significant barrier to racial and economic integration for that family.[87]

Due to the realities of this disparate-impact, the continued allowance for landlords to discriminate against voucher holders—regardless of whether it is based on genuine economic grievances or if that argument is offered as a pretext for racial discrimination—functionally carries similar effects as permitting discrimination on other bases.[88] Put simply, "[i]ncome-based discrimination that fosters residential segregation and limits educational and economic opportunities for low-income families is just as harmful when driven by business reasons as when motivated by fear or animosity."[89] Author and civil rights leader James Baldwin identified a similar reality in a 1969 interview while describing racial oppression as a function of systematic outputs, setting aside personal antagonism as tangential:

> I don't know what most white people in this country *feel*, but I can only include what they feel from the state of their institutions . . . . I don't know whether the labor unions and their bosses really hate me. That doesn't matter, but I know I'm not in their unions. I don't know if the real estate lobby has anything against Black people, but I know the real estate lobbies keep me in the ghetto. I don't know if the Board of Education hates Black people, but I know the textbooks they give to my children to read, and the schools that we have to go to. Now, this is the evidence.[90]

C. Federal Indifference

In 2015, the United States Supreme Court recognized a disparate-impact cause of action against government entities where source of income discrimination touches on a federally protected class like race.[91] Justice Kennedy analogized the FHA's disparate-impact liability to that asserted under Title VII and the ADEA:

> Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract

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[87] Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201, 208 (2011).

[88] *Id.* at 247–48.

[89] Brief for Housing Justice Center, Nat'l. Hous. L. Project, and the Poverty & Race Res. Action Council as Amici Curiae Supporting Appellant at 14, Fletcher Properties, Inc. v. Minneapolis, 947 N.W.2d 1 (Minn. 2020) (No. A18-1271), 2020 WL 1503415.

[90] I AM NOT YOUR NEGRO (Velvet Film 2016) (including an excerpt from the film which portrays an ABC television broadcast of *The Dick Cavett Show* featuring Baldwin as a guest that aired May 16, 1969).

[91] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534 (2015) [hereinafter *Inclusive Communities*].

> unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.[92]

However, Kennedy further wrote that statistical evidence alone is not sufficient for a disparate-impact claim; the plaintiff must be able to "point to a defendant's policy or policies causing that disparity."[93] He reasoned that "[a] robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate-impact' and thus protects defendants from being held liable for racial disparities they did not create."[94] In addition to the tight causal requirements stemming from *Inclusive Communities*, the Supreme Court has made no showing of an intent to extend disparate-impact liability to private landlords since successful claims seem tailored to violations stemming from government allocation of vouchers, not a private landlord's refusal to accept them.[95]

The various circuits of the United States Court of Appeals have yielded few genuine solutions on this issue.[96] The Second and Seventh Circuits have foreclosed any cause of action for source-of-income discrimination under the rationale that "a landlord's decision to reject HCVs was categorically exempt from disparate-impact liability under the FHA."[97] A glimmer of hope arose from the Sixth Circuit, as the court split from the Second and Seventh Circuits by holding 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 8."[98]

However, the Sixth Circuit proceeds to categorically dismiss every case rising on appeal which seeks a remedy under the rationale that the factual bases are insufficient, as exemplified by *Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, where the Sixth Circuit acknowledged**,** "[e]ighteen families receiving Section 8 assistance lived at [the rental property in question] when *Graoch* announced that it was withdrawing from the Section 8 program[,] [and] [s]eventeen of those families were black."[99] Yet, the court held there to be no disparate-impact liability.[100] Further vexation with the *Graoch* opinion arose as the

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[92] *Id*. at 540.

[93] *Id*. at 521.

[94] *Id*. at 542.

[95] *Id*.

[96] *See* Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 296 (2d Cir. 1998); Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1280 (7th Cir. 1995); Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Hum. Rel. Comm'n, 508 F.3d 366, 369 (6th Cir. 2007).

[97] Hutt, *supra* note 14, at 401; *see also Salute*, 136 F.3d at 296; *see also Knapp*, 54 F.3d at 1280.

[98] *Graoch*, 508 F.3d at 369.

[99] *Id*. at 370.

[100] *Id*. at 369.

Sixth Circuit subsequently alluded to its lack of controlling authority because of the conflicting frameworks proposed by the judges:

> *Graoch Associates* produced separate opinions by each of the three judges on that panel, and none of those opinions garnered the support of two judges. Judges Boggs and Moore each proposed competing versions of a burden-shifting framework to be used in FHA disparate-impact cases, and in his short opinion concurring in the judgment Judge Merritt simply concluded that the plaintiff could not establish a prima facie case. We do not purport to resolve the questions left open by *Graoch Associates*; it is sufficient to note that none of the separate opinions in that case used the *McDonnell Douglas* intent-divining test to assess the validity of the plaintiff's disparate-impact claim.[101]

The federal cause of action campaign here appears to currently be at a stall. The circuits have either denied a cause of action[102] or, as the Sixth Circuit demonstrated, balked on following through with meaningful relief.[103]

One promising signal, albeit limited to the executive branch, came at the dawn of the Biden administration as the new president reinstated the 2013 federal codification of disparate impact housing discrimination,[104] a provision whose burden-shifting test was amended by the Trump administration[105] following the *Inclusive Communities* case to establish a heightened pleading standard for renters alleging discrimination.[106] However,

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[101] Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 545 n.3 (6th Cir. 2014).

[102] *See, e.g.*, *Salute*, 136 F.3d at 295; *see also Knapp*, 54 F.3d at 1275.

[103] *Graoch*, 508 F.3d at 369.

[104] Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 29, 2021); *see also* Cleve R. Wootson, Jr. & Tracy Jan, *Biden to sign executive actions on equity*, THE WASH. POST (Jan. 26, 2021), https://www.washingtonpost.com/politics/biden-to-sign-executive-actions-on-equity/2021/01/26/3ffbcff6-5f8e-11eb-9430-e7c77b5b0297_story.html [https://perma.cc/US7E-7BBD]; *see also* Brian Naylor, *Biden Aims To Advance Racial Equity With Executive Actions*, NPR NEWS (Jan. 26, 2021), https://www.npr.org/sections/president-biden-takes-office/2021/01/26/960725707/biden-aims-to-advance-racial-equity-with-executive-actions [https://perma.cc/U4CK-XR3X] (reporting that "Biden will sign executive actions that will . . . direct the Department of Housing and Urban Development 'to take steps necessary to redress racially discriminatory federal housing policies.").

[105] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,332 (Sept. 24, 2020) (revising 24 C.F.R. § 100.500).

[106] The federal implementation of the standard from *Inclusive Communities* resulted in a heightened pleading standard:

> [A] plaintiff or charging party . . . must sufficiently plead facts to support each of the following elements: (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law; (2) That the challenged policy or practice has a disproportionately adverse effect on members of a protected class; (3) That there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect; (4) That the alleged disparity caused by the policy or practice is significant; and (5) That there is a direct relation between the injury asserted and the injurious conduct alleged.

Id. at 60,332.

this executive action does little to remedy the issues perpetuated by the federal judiciary. Fair housing advocates now point to state and local legislatures as a more viable pathway for advancing the goals of housing mobility and neighborhood integration promised by the HCV program.[107]

III. EVALUATING LOUISVILLE'S NEW ANTI-DISCRIMINATION ORDINANCE IN LIGHT OF CHALLENGES ELSEWHERE

A. Lessons from Fletcher Properties and Other State-Level Case Law

The lack of a federal prohibition on source-of-income discrimination has left states and local municipalities, like Louisville, to resolve the gap in low-income tenant protections.[108] Some jurisdictions have picked up the slack by enacting legislation that bars source-of-income discrimination, including eighteen states[109] and nearly a hundred cities and counties.[110] These statutes and ordinances have been upheld in state courts when faced with challenges based on various constitutional issues,[111] "undue hardship" and administrative burden complaints,[112] as well as claims of federal preemption.[113] Most recently, the Minnesota Supreme Court upheld a Minneapolis ordinance outlawing source-of-income discrimination.[114]

Fletcher, the Minnesota case, represents the most recent and salient state court opinion on this issue.[115] After nearly two years of developing a proposed law based on thorough research and discussions with stakeholders,[116] the City of Minneapolis passed an amended ordinance that outlawed housing discrimination based on "status with regard to a public assistance program, or any requirement of which a public assistance program

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[107] Miriam Elnemr Rofael, *Improving the Housing Choice Voucher Program through Source of Income Discrimination Laws*, 107 CALIF. L. REV. 1635, 1652 (arguing "a better approach for improving the success of the HCV program is through SOI discrimination laws."); Tighe, *supra* note 83, at 9.

[108] *See Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program: APPENDIX B: State, Local, and Federal Laws Barring Source-of-Income Discrimination*, POVERTY & RACE RES. ACTION COUNCIL, *supra* note 15, at 69–70.

[109] California, Connecticut, Delaware, Maryland, Massachusetts, Maine, Minnesota, New Jersey, New York, North Dakota, Oklahoma, Oregon, Utah, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia.

[110] *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program: APPENDIX B: State, Local, and Federal Laws Barring Source-of-Income Discrimination*, POVERTY & RACE RES. ACTION COUNCIL, *see supra* note 15, at 2–6.

[111] *See, e.g.*, Fletcher Props. v. Minneapolis, 947 N.W.2d 1, 13 (Minn. 2020).

[112] Merjian, *supra* note 69, at 232.

[113] Jenna Bernstein, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1408 (2010).

[114] *See* Fletcher Properties, 947 N.W.2d at 6; MINNEAPOLIS, MINN., CODE OF ORD., tit. 7 § 139 (2021).

[115] *Fletcher Properties*, 947 N.W.2d at 6.

[116] *Id.* at 7.

is a motivating factor."[117] The HCV Program fits neatly within the ordinance's definition of a public assistance program.[118] The Minneapolis ordinance, and even housing advocates, generously enumerated other ways landlords can still refuse to rent for "non-discriminatory" criteria such as credit or rental history.[119] The ordinance also allowed landlords to raise an affirmative defense of undue hardship based on a four-factor test to be evaluated on a case-by-case basis. [120] Further, consistent with federal exemptions for smaller property lessors, several categories of landlords who lease owner-occupied homesteads or single-family dwellings were exempted wholesale from the statute. [121]

The Minneapolis legislators made their initial proposal of the ordinance in June 2015, followed by nearly two years of research and public commentary before initially passing the statute in March 2017 and subsequently putting its enforcement on hold until amendments were instituted in December 2017.[122] The ordinance finally went into effect in May 2018.[123] The Minnesota Supreme Court would eventually cite the process as congruent with the principle that "a law is not arbitrary or capricious when it emerged from a reasoned, deliberative process, rather than as a result of legislative chance, whim, or impulse."[124]

Seeing this new development on the fair housing front, a platoon of fifty-four multi-tenant real estate companies filed suit against the City alleging: (1) the ordinance was preempted by Minnesota law; (2) the ordinance violated substantive due process; (3) the ordinance deprived the plaintiffs of equal protection under the law; (4) the ordinance constituted an unlawful regulatory taking; and (5) the ordinance deprived Fletcher of its right to

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[117] MINNEAPOLIS, MN. CODE OF ORD., tit. 7, § 139.40(e) (2021).

[118] *Id*. at § 139.20 (defining "[p]ublic assistance program" to include any "tenant-based federal, state or local subsidies, including, but not limited to . . . housing choice vouchers.").

[119] *Id*. at §§ 139(c)(1)–(3); Brief for Housing Justice Center, s*upra* note 89, at 12–13 ("[T]o prohibit 'discrimination' based on voucher use means only to ensure that voucher holders are not turned down because of their voucher use alone—meaning a landlord could still deny a voucher tenant if some other valid reason for denial exists.").

[120] *Id*. at § 139.40 (providing three factors to be included in the "undue hardship" analysis are: (1) the nature and net cost of complying with any requirement of a public assistance program, taking into consideration existing property management processes; (2) the overall financial resources of the landlord, taking into consideration the overall size of the business with respect to the number of its employees, and the number, type, and location of its housing stock; and (3) the impact of complying with any requirement of a public assistance program upon the business and dwelling).

[121] *Id*. at § 139.30(b); *see also* 42 U.S.C. § 3603(b)(2) (gaining recognition as the "Mrs. Murphy" exemption).

[122] Fletcher Props. v. Minneapolis, 947 N.W.2d 1, 7–8 (Minn. 2020) (discussing the amendments to the statute, which changed the language from outlawing discrimination "because of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity, disability, marital status, *status with regard to public assistance or familiar status*" to "because of . . . *any requirement of a public assistance program*" instead); *see* MINNEAPOLIS, MN. CODE OF ORD., tit. 7, § 139.40(e) (2016); *see also* MINNEAPOLIS, MN. CODE OF ORD, tit. 7, § 139.40(e) (2017).

[123] *Fletcher Properties*, 947 N.W.2d at 7–8.

[124] *Id*. at 10.

freedom of contract.[125] Claims (2) and (3) presented the main thrust of the petitioners' challenge,[126] and were ultimately the only two addressed by the district court and subsequent appellate courts.[127]

The district court applied rational basis review and struck down the ordinance as unconstitutional on grounds of due process and equal protection.[128] For the latter issue, the trial court explained, "[t]he assertions established by the City, then, while indisputable and important, do not resurrect the rationality of deeming all non-participating landlords, now and forever and with no chance for rebuttal, to be acting out of unfair discrimination and prejudice."[129] This view espoused by the district court reflects a fundamental misunderstanding of what anti-discrimination laws mean for those who must adhere to them. Neither the Minneapolis ordinance nor any other known source-of-income discrimination law requires a finding of prejudicial intent, and federal law outlaws such a practice based on disparate impact, which is wholly distinct from animus. [130] These laws exist to stop discrimination regardless of motive or purpose. Congruously, *Black's Law Dictionary* defines the term discrimination as "[t]he *effect* of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class."[131]

The City argued that the goal of the amendment was to "increase[e] affordable housing options for voucher holdings" and to address the discriminatory effects of housing denials in light of "the undisputed fact that some landlords reject voucher holders because the landlords want to avoid the perceived burdens of participating in the housing choice voucher program."[132] The Minnesota Supreme Court held:

> [T]he Owners' irrebuttable-presumption argument is a nonstarter because proof of prejudicial intent simply is not required under the provision prohibiting landlords from refusing to rent to avoid compliance with housing choice voucher program requirements. Accordingly, there is no need or reason to presume prejudicial intent.
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> Like innumerable statutes and ordinances, the provision establishes a substantive rule of law that prohibits conduct regardless of the actor's intent.

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[125] *Id*. at 9.

[126] Complaint at 4, Fletcher Props., Inc. v. Minneapolis, 947 N.W.2d 1 (2020) (No. 27-CV-17-9410), 2018 WL 9364052.

[127] *Fletcher Properties*, 947 N.W.2d at 9.

[128] Complaint at 12, Fletcher Props., Inc. v. Minneapolis, 947 N.W.2d 1 (2020) (No. 27-CV-17-9410), 2018 WL 9364052.

[129] *Id*. at 19.

[130] *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program: APPENDIX B: State, Local, and Federal Laws Barring Source-of-Income Discrimination*, *supra* note 15, at 21.

[131] *Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added) (including no mention of "intent" in other definitions listed here).

[132] *Fletcher Properties*, 947 N.W.2d at 11–12.

> The unlawful conduct prohibited by the ordinance is the refusal of a landlord to rent or lease a property because the landlord wants to avoid complying with the requirements of the housing choice voucher program—plain and simple. Nothing in the specific prohibition at issue here makes an intent to discriminate against a voucher holder an element of the violation.[133]

The court rejected Fletcher's "vigorously contend[ed]" argument that the landlords' discrimination was based not on prejudice but economic reasons, ultimately holding that "such prejudice is one reason among several that some subsets of landlords in Minneapolis do not rent to voucher holders."[134] In later applying the rational basis standard for the due process claim, the court cited precedent that allows the legislature to "sweep in and burden more people than absolutely required to achieve the legislative purpose."[135] Such "overinclusive rules have consistently been upheld against due process challenges because they are rationally connected to the legislative purpose."[136]

In holding that no fundamental right was implicated, the Minnesota Court of Appeals distinguished the present case from those cited by the petitioners that involved laws impacting property rights.[137] The court declined to extend Minnesota precedent regarding "the right to occupy a home" because it was not "the right to rent one's property."[138] Fletcher cited no Minnesota case law nor any other state or federal case law to support the notion that the right to rent property to others as a landlord is a fundamental right.[139] The lower appellate court also pointed to federal law from the Eastern District of Kentucky in holding that "there is no uniform and continuing acceptance across the nation for treating the right to rent property as a fundamental right."[140] Such a right simply has not received recognition as one "deeply rooted in this Nation's history and tradition,[141] and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," as enunciated by the U.S. Supreme Court, and there appears to

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[133] *Id*. at 14.

[134] *Id*. at 13.

[135] *Id.*

[136] *Id*. (*citing* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 591–92 (1979)); Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 377–78 (1973)).

[137] Thiede v. Town of Scandinavia Valley, 14 N.W.2d 400, 405 (Minn. 1944) ("A man's right to occupy his own home is inviolable, irrespective of the meagerness or abundance of his wealth.").

[138] Fletcher Properties, Inc. v. Minneapolis, 931 N.W.2d 410, 419 (Minn. Ct. App. 2019), *aff'd*, 947 N.W.2d 1 (Minn. 2020).

[139] *Id*.

[140] *Id*. (*citing* Hills Dev., Inc. v. Florence, Kentucky, No. 15-175-DLB-CJS, 2017 WL 1027586, at *7 (E.D. Ky. Mar. 16, 2017) (finding "no support for the proposition that a citizen has a fundamental right or liberty interest in renting their property" and further declaring "there is no recognized fundamental right to use your property however you wish or rent your property.")).

[141] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (*citing* Snyder v. Mass., 291 U.S. 97, 105 (1934)).

be little existing precedent to provide for such a classification.[142] The Sixth Circuit has acknowledged that the list of fundamental rights "is short, and the Supreme Court has expressed very little interest in expanding it."[143] The fundamental right analysis became a non-issue by the time the case reached the Minnesota Supreme Court as both parties had stipulated on appeal that "no fundamental rights are at stake and the less demanding rational basis standard applies."[144] Accordingly, in the absence of a fundamental right being affected, source-of-income discrimination laws and other forms of regulation to protect low-income renters will be subject to rational basis review for the foreseeable future.[145]

Ultimately, by applying rational basis the Minnesota high court found that "the City had before it evidence that low participation by landlords in the Section 8 housing choice voucher program contributed to the concentration of voucher holders in poorer, more segregated neighborhoods."[146] The court then concluded that the Minneapolis legislators could rationally decide that prohibiting refusal to participate in the voucher program "would increase the number of landlords who participate in the voucher program . . . and, consequently, open up housing opportunities in neighborhoods with lower concentrations of voucher holders."[147] The court further cited federal precedent in finding that "based on evidence in the record, the City's conclusion that the ordinance will increase housing opportunities for voucher holders is 'at least debatable,'" so as to survive rational basis.[148] Finally, although "the reasonableness of the provision is enhanced by the undue hardship exemption," the court seemed to reference it as an aside that functioned as mere evidence of a reasonable statute.[149] While it may have helped the political viability of the ordinance, the Minnesota Supreme Court did not seem reliant upon that section of the statute for passing the rational basis analysis.[150]

In applying rational basis analysis to the landlords' equal protection claims that the exempted classes of landlords were arbitrary, Supreme Court of Minnesota found the test to be satisfied, holding, "[t]he general rule is that

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[142] *Id.* (*citing* Palko v. State of Connecticut, 302 U.S. 319, 325–26 (1937)); *see also* Yee v. Escondido, 503 U.S. 519 (1992) (holding that a rent control ordinance did not constitute a physical taking of the mobile home park owners' property and declined to address the substantive due process claim because the issue was not raised in state courts); *see also* Sylvia Landfield Trust v. Los Angeles, 729 F.3d 1189, 1193 (9th Cir. 2019) ("[A]pply rational basis review because landlords are not a protected class, and they have no fundamental right to rent uninhabitable housing.").

[143] Seal v. Morgan, 229 F.3d 567, 574–75 (6th Cir. 2000).

[144] Fletcher Props., Inc. v. Minneapolis, 947 N.W.2d 1, 10 n.5 ("Here, the parties agree that no fundamental rights are at stake and the less demanding rational basis standard applies.").

[145] *See Id.* at 19.

[146] *Id*. at 12.

[147] *Id*.

[148] *Id.* (*citing* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981)).

[149] *Id*. at 14.

[150] *Id.*

the legislature is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[151] There was "'some fit' with the legislative policy goals" sufficient to justify excluding some landlords, particularly those leasing owner-occupied units, because those classes would likely have qualified for undue hardship anyway and the legislature need not be perfect in creating a classification scheme.[152] Federal precedent exists for the latter principle too.[153] When business-minded landlords decry that the law has conflated them with those who practice pure discriminatory animus, one must recall the language of the U.S. Supreme Court in explaining:

> The question is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the [legislative] concern reflected in the statute . . . Nor is the question whether the provision filters out a substantial part of the class which caused [legislative] concern, or whether it filters out more members of the class than nonmembers. The question is whether [the legislative body], its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of [the rule in question].[154]

Further, the Minnesota Supreme Court's holding that no showing of malicious intent was required for the city to enforce the anti-discrimination ordinance likewise finds matching support in federal precedent.[155] Federal regulations provide, "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory *effect* . . . even if the practice was not motivated by a discriminatory intent."[156]

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[151] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (providing an even more forgiving standard, as a classification can be upheld against an equal protection claim if the challenged classification "rationally further[s] some legitimate government interest other than those specifically stated in the congressional 'declaration of policy.'").

[152] *Fletcher Properties, Inc.*, 947 N.W.2d at 20 (*citing* Back v. State, 902 N.W.2d 23, 29 (Minn. 2017) (imposing the burden on the party challenging the statute to prove that the reason for treating one class of people differently from another was illegitimate)); *see also* Westling v. Cnty. of Mille Lacs, 581 N.W.2d 815, 822 (Minn. 1998) (upholding a statute in light of equal protection challenge even where the classification scheme was imperfectly related to the legislative objectives because "imperfection is not a constitutional defect.").

[153] Weinberger v. Salfi, 422 U.S. 749, 777 (1975).

[154] *Id.*

[155] Comm. Servs, Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 177 (3d Cir. 2005) (noting that the "discriminatory purpose need not be malicious or invidious, nor need it figure in 'solely, primarily, or even predominantly' into the motivation behind the challenged action.").

[156] 24 C.F.R. § 100.500(a) (2020) (emphasis added) (articulating a results-minded federal definition: "A practice has a discriminatory effect where it actually or predictably results in disparate-impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.").

This fair housing victory out of Minnesota represents the latest in a long line of state court holdings.[157] In Massachusetts, the highest state court similarly held that a landlord may be held liable for source-of-income discrimination under the state's relevant statute,[158] even in the absence of a showing that the discrimination was motivated by animus.[159] With respect to the popularly raised "administrative burden defense," Maryland rejected such arguments offered by landlords after identifying that "[m]ost of the courts that have addressed an administrative burden defense have rejected it."[160] Similarly, the Supreme Court of New Jersey decided in the late 1990s that landlords' fears of generalized "bureaucracy" did not supply a sufficient justification to violate the state anti-discrimination statute,[161] thus refusal to participate in the voucher program was not justified, especially given the dearth of available Section 8 housing that would naturally follow such a holding.[162] On separate grounds, the court rejected the petitioner's argument that the absence of any mandatory participation language in the FHA preempted the New Jersey statute.[163] The preemption theory has been discarded elsewhere as courts rejected "voluntariness" defenses,[164] though some argue the invalidity of such dismissals,[165] as state courts have relied upon federal Supreme Court precedent allowing for states to adopt more expansive means of advancing a particular issue beyond the requirements of

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[157] *Comms. Servs, Inc.*, 421 F.3d at 177.

[158] MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 2021) (outlawing discrimination against renters where "the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.").

[159] DeLiddo v. Oxford St. Realty, Inc., 876 N.E.2d 421, 428–29 (Mass. 2007).

[160] Montgomery Cnty. v. Glenmont Hills Assocs., 936 A.2d 325, 340–41 (Md. App. 2007).

[161] N.J. STAT. ANN. § 2A:42-100 (West 2021) (repealed 2002); *see also* N.J. STAT. ANN. § 10:5-12(g)(1) (West 2021) (making it unlawful to refuse to rent or lease to an individual based on "source of lawful income used for rental or mortgage payments.").

[162] Franklin Tower One v. N.M., 725 A.2d 1104, 1114 (N.J. 1997).

[163] *Id*. at 1112.

[164] *See, e.g.*, Rosario v. Diagonal Realty, L.L.C., 803 N.Y.S.2d 343, 350 (N.Y. Sup. Ct. 2005), *aff'd*, 821 N.Y.S.2d 71 (2006), *aff'd*, 872 N.E.2d 860 (2007) (identifying that "courts in New York and other jurisdictions, including the highest courts in Connecticut, New Jersey and Massachusetts, have held that the Federal Section 8 legislative scheme does not preempt State tenant protection laws."); Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 238 (Conn. 1999) (holding that state prohibition against source-of-income discrimination is not preempted based on the FHA's voluntariness language and further concluding that permitting an exception based on program requirements would thwart purpose and constitute an unstated exception to a remedial statute); Glenmont Hills, 936 A.2d at 327; Hutt, *supra* note 14, at 419 (discussing that courts' broad reading of the FHA "generally operates to extend the Act's protections" and that "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."); Feemster v. BSA Ltd P'ship, 548 F.3d 1063, 1070–71 (D.C. Cir. 2008) (permitting owner to refuse vouchers based on program requirements would render the intended protections toothless).

[165] *See* Bernstein, *supra* note 113, at 1408 (arguing that while "a voluntary federal housing voucher program has significant drawbacks and may not be an effective means of increasing the availability of affordable housing in the United States, a flawed federal program is not a license for states and municipalities to enact legislation that conflicts with the federal law.").

federal law.[166] Specifically, with respect to fair housing, the Ninth Circuit has interpreted congressional intent behind the FHA as "desir[ing] to maintain a uniform federal floor below which protections for tenants could not drop, not a ceiling above which they would not rise."[167]

The Maryland petitioners in the *Glenmont Hills* case petitioned the U.S. Supreme Court for *certiorari* in 2008, posing the question: "[W]hether a local ordinance that fundamentally changes federal law by making a voluntary federal program mandatory is preempted by federal law?"[168] The Supreme Court denied the landlords' petition.[169] Accordingly, the question remains exclusively in the purview of unanimous state authorities allowing for such ordinances, albeit without a present possibility of federal ossification.[170] The resounding and ubiquitous support from state courts in upholding these anti-discrimination laws provides some assurance that voucher holders are protected, at least facially,[171] from discrimination based on their receipt of government assistance.

B. The Louisville Metro Code of Ordinances (LMCO) Fair Housing Amendment

In November 2020, the Louisville Metro Council passed a new anti-discrimination ordinance expanding the city's fair housing provisions to include "lawful source of income" as an added basis of protection against discrimination.[172] The Amended Fair Housing Ordinance and accompanying

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[166] *Id*. at 1112 (*citing* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (explaining that "pre-emotion is not to be lightly presumed," as a state may impose preferential treatment for pregnant women beyond the protections afforded by the Pregnancy Discrimination Act of 1978 because "the fact that Congress did not require preferential treatment does not demonstrate that Congress intended to prohibit such action.")).

[167] Barrientos v. 1801-1925 Morton L.L.C., 583 F.3d 1197, 1209 (9th Cir. 2009).

[168] Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr. v. Montgomery Cnty., Md., 554 U.S. 939 (2008) (denying petition for rehearing).

[169] *Id.*

[170] *Id.*

[171] Pretextual phoenixes may yet arise from the ashes of the landlords' "NO SECTION 8" signs. As the aforementioned amicus brief in *Fletcher* acknowledged, "to prohibit 'discrimination' based on voucher use means only to ensure that voucher holders are not turned down because of their voucher use alone—meaning a landlord could still deny a voucher tenant if some other valid reason for denial exists." Brief for Housing Justice Center, *supra*, note 89, at 12–13.

[172] LOUISVILLE, KY., CODE OF ORD. § 92.03 (2020) (amended by Louisville Metro Ord. No. 146-2020, titled "AN ORDINANCE AMENDING SECTIONS 92.02, 92.03 AND 93.04 OF THE LOUISVILLE METRO CODE OF ORDINANCES ("LMCO") AMENDING THE DISCRIMINATION ORDINANCE PROVIDING FOR MORE FAIR ACCESS TO RENTAL HOUSING"), https://louisville.legistar.com/View.ashx?M=F&ID=9015294&GUID=F55BCA09-DD5A-4C3B-A26F-31FD889417FA [https://perma.cc/NG4U-ER8G] (defining "discrimination" as "[a]ny direct or indirect act or practice of exclusion, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter," as well as expanding upon the original protected classes which included race, color, religion, national origin, familial status, disability, sex,

rationale were first proposed in December 2019, followed by nearly a year of deliberation and ultimate passage in November 2020 with all protections taking effect upon passage "except with regard to the references to 'Lawful Source of Income,' which shall become effective on March 1, 2021."[173] The ordinance's stated objectives included securing freedom from discrimination based on lawful source of income and other newly added protected classes, as well as "furthering fair housing efforts by promoting fair and equal housing opportunities for its residents."[174] The legislative language expressed an intent to achieve these goals, in part, by "eliminat[ing] barriers and increas[ing] housing options for tenants that receive rental assistance or financial aid from any federal, state, local, or nonprofit-administered benefit or subsidy program."[175] As part of the effort to eliminate barriers to housing, the Amended Fair Housing Ordinance made it illegal to reject or otherwise discriminate against a prospective tenant based on their use of a lawful source of income, which includes housing assistance like Section 8 vouchers.[176]

The exceptions created by the Amended Fair Housing Ordinance mostly related to the leasing of property to persons with arrest and conviction histories.[177] However, the new law incorporated federal language prohibiting Section 8-based assistance to individuals who are currently engaging in or "ha[ve] engaged in during a reasonable time before admission" drug-related activity, violent criminal activity, or any other criminal activity deemed threatening to the health and safety of other residents, owners, or property management staff.[178] Landlords still maintain the right to "choose the most qualified and appropriate candidate from among applicants for housing[,]" because the ordinance does not "require a housing provider to give preference to anyone to rent to an unqualified tenant."[179] Landlords are still permitted to utilize screening procedures to vet for insufficient income amount (not source), eviction history, credit scores, and other parameters not prohibited by the statute.[180] Unlike other jurisdictions, Louisville's new fair housing

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gender identity, and sexual orientation and adding protections for lawful source of income, conviction history or arrest history, prior military service, or homeless status).

[173] Cathy Hinke, *Adding Source of Income to Fair Housing Laws*, METRO. HOUS. COAL. (Dec. 4, 2019), https://louisville.legistar.com/View.ashx?M=F&ID=8931975&GUID=43ABC4BC-1B3A-478D-B3C7-10EA718C7EF3 [https://perma.cc/3G55-C9M4]; *see also id*.

[174] LOUISVILLE, KY., CODE OF ORD. § 92.03 (2020)

[175] LOUISVILLE, KY., CODE OF ORD. § 92.02 (2020) (defining "lawful source of income" as including "child support, alimony, foster care subsidies, income derived from social security, grants, pension, or any form of federal, state, or local public assistance or housing assistance including, but not limited to, section 8 vouchers, or any other form of housing assistance payment or credit whether or not such income or credit is paid or attributed directly to a landlord, and any other forms of lawful income.").

[176] *Id.*; LOUISVILLE, KY., CODE OF ORD. § 92.03 (2020).

[177] *Id.*

[178] *Id.* (*citing* 24 C.F.R. § 5.855(a); 24 C.F.R. § 982.553(a)(2)(ii)).

[179] *Id.*

[180] Practically speaking, the distinction between "source" and "amount" means that a landlord must include the financial assistance provided by the Section 8 voucher in the calculation of a prospective

code provides no exception for "undue hardship" or owner-occupied rental properties.[181]

As part of the rollout of this ordinance, the Louisville Metro Housing Authority (LMHA) syndicated a landlord incentive letter enumerating the financial benefits available for landlords who participate in the Section 8 program, which include a $500 one-time payment to newly participating landlords, financial protections to cover potential damages to the rental unit, and vacancy loss payments to offset the risk of tenants leaving before the end of a lease term.[182] Such efforts seemingly anticipate the inevitable claims of administrative burden and undue hardship that materialize following the passage of similar statutes.[183] In anticipating challenges brought in other jurisdictions, the Amended Fair Housing Ordinance's validity must be assessed in light of the applicable Kentucky law.

IV. RESOLUTION

A. Running Louisville's Ordinance Through the Kentucky Law Gauntlet

Kentucky state law extends legislative authority to first-class cities to "govern themselves to the full extent required by local government and not in conflict with the Constitution or laws of this state or by the United States."[184] Since Louisville is a first-class city, the local government possesses the authority to pass appropriate laws so long as they are not preempted by those crafted in the state legislature.[185] To determine when such deviations have occurred, courts must review the construction and application of Kentucky ordinances *de novo*.[186] Kentucky's general test for the validity and legality of a city ordinance is set out in *City of Bowling Green v. Gasoline Marketers*, where Kentucky's highest court held:

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tenant's income. While a landlord can reject a tenant whose total income—including the amount covered by the voucher—is insufficient to afford the apartment, the landlord must accept all legal forms of income when screening the tenant's financial means to rent the unit in question. In short, the law requires that the Section 8 voucher be treated like any other form of income such as job wages. *See id.*

[181] *Id.*

[182] Mark E. Roseberry, *Special Incentives for New Units*, LOUISVILLE METRO HOUS. AUTH. 1 (Aug. 26, 2020), file:///C:/Users/ndog6/Downloads/LMHA%20HCV%20Landlord%20Incentive%20letter%20Aug%202020.pdf [https://perma.cc/M3FL-P58Y].

[183] Merjian, *supra* note 69, at 232.

[184] KY. REV. STAT. ANN. § 83.410(1) (West 2021); *see also* City of Harlan v. Scott, 162 S.W.2d 8, 9 (Ky. 1942) ("An ordinance may cover an authorized field of local laws not occupied by general laws but cannot forbid what a statute expressly permits and may not run counter to the public policy of the state as declared by the Legislature.").

[185] Kentucky Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't, 501 S.W.3d 425, 432 (Ky. 2016).

[186] Com. v. Jameson, 215 S.W.3d 9, 15 (Ky. 2006) (*citing* Bob Hook Chevrolet Isuzu, Inc. v. Com., Transp. Cabinet, 983 S.W.2d 488, 490 (Ky.1998)).

> Courts have no control over a city council as long as it acts within the scope of its express or necessarily implied powers, but if the council enacts ordinances without authority or contrary to the controlling laws in such matters or they are unreasonable, arbitrary, or oppressive, the courts may declare such ordinances invalid.[187]

1. Preemption

Concerning preemption by state laws, "[t]he rule well established in Kentucky is that when an ordinance is in direct conflict with a statute upon the same subject, the ordinance must yield."[188] However, the Kentucky Supreme Court has asserted that "[t]he mere fact that the State has made certain regulations does not prohibit local government from establishing additional requirements as long as there is no conflict between them," especially where "cooperative authority is extremely valuable and in the best interests of the public."[189] For example, no such interference was found when the City of Louisville passed an anti-discrimination ordinance prohibiting places of public accommodation from refusing to serve black patrons.[190] As the Kentucky Court of Appeals[191] proclaimed:

> Louisville had adequate police power . . . to enact a penal anti-discrimination ordinance, even after the state had already created a Commission on Human Rights. The mere fact that the state legislature chose not to give enforcement powers to the Commission does not amount to a declaration of policy against the concept of compulsory integration. At the most it means that the state was not of a mind at that particular time to enact a penal anti-discrimination statute.[192]

On the issue of fair housing regulations, the Civil Rights chapter of the Kentucky Revised Statutes enumerates unlawful housing practices that includes discrimination against a person "because of race, color, religion, sex, familial status, disability, or national origin."[193] Additionally, the Kentucky General Assembly's fair housing law exempts owner-occupied properties

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[187] Bowling Green v. Gasoline Marketers, Inc., 539 S.W.2d 281, 284 (Ky. 1976); KY. CONST. § 2 (including similar language that "absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority.").

[188] Rottinghaus v. Bd. of Comm'rs of Covington, 603 S.W.2d 487, 489 (Ky. Ct. App. 1979) (*citing* Reed v. Hostetler, 245 S.W.2d 953 (Ky. 1952)).

[189] Commonwealth v. Do, Inc., 674 S.W.2d 519, 522 (Ky. 1984).

[190] Commonwealth v. Beasy, 386 S.W.2d 444, 447 (Ky. 1965).

[191] At the time, the Court of Appeals was the highest court in Kentucky. The Kentucky Supreme Court came into existence via constitutional amendment in 1975. *See* KY. CONST. § 109.

[192] *Beasy*, 386 S.W.2d at 447 (rejecting one argument that consisted of an "[a]ttack . . . on a provision of the ordinance prohibiting a business proprietor from displaying or circulating any notice, sign or advertisement to the effect that the patronage of any person is unwelcome, objectionable, or not acceptable, desired or solicited on account of his race or religion.").

[193] KY. REV. STAT. ANN. § 344.360(1) (West 2021).

from its fair housing provisions, an exemption similar to the Minneapolis statute described previously.[194]

Here, while the new Louisville ordinance differs from the state-level regulations by adding more protected classes,[195] the ordinance would survive a preemption challenge comfortably. As of December 2019, sixteen cities in Kentucky have opted to expand the General Assembly's enumerated protected classes to include sexual orientation; all of these expansions have gone unchallenged and would also likely withstand a preemption claim.[196] While Louisville is the first to add "lawful source of income" and other protections to its fair housing regulations, these supplemental provisions do not constitute a "direct conflict" with a statute like that described by *Rottinghaus v. Board of Commissions of the City of Covington*. The facts here are analogous to *Commonwealth v. Beasy*, where the Court allowed the City of Louisville to expand its enforcement of existing Kentucky anti-discrimination efforts where the absence of such measures from state doctrine "[did] not amount to a declaration of a policy against [them]."[197] The mere existence of KRS § 344.360 does not bar Louisville from adding a protected class in light of the strong public interest advanced by the ordinance's combatting housing discrimination.[198] Finally, while the absence of an owner-occupied exception does not render Louisville's fair housing provisions facially invalid (given the absence of a "direct conflict"), the ordinance's actual enforcement against landlords who reside on the site of the alleged discrimination may present some issues when considering the state law's exemption of such individuals.

2. Substantive Due Process

The next challenge that arrives is likely a substantive due process claim made by an affected landlord based on a claimed liberty interest in rejecting certain sources of income, like Section 8 vouchers, balanced against Louisville Metro Council's interests advanced in the ordinance.[199] Consistent

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[194] KY. REV. STAT. ANN. §§ 344.365(1)(a)–(b) (West 2021).

[195] KY. REV. STAT. ANN. § 344.360 (West 2021).

[196] Cities that have adopted some form of the aforementioned provisions include Bellevue, Covington, Danville, Dayton, Frankfort, Georgetown, Henderson, Highland Heights, Lexington, Louisville, Maysville, Midway, Morehead, Paducah, Versailles, and Vicco. *See 2019 Analysis of Impediments to Fair Housing Choice*, KY. HOUS. CORP. 36 (April 2020), https://www.kyhousing.org/Legal/Pages/Fair-Housing.aspx#:~:text=The%20Kentucky%20General%20Assembly%20later,Louisville%2C%20Morehead%2C%20and%20Vicco./ [https://perma.cc/R8JC-8LPG].

[197] *Beasy*, 386 S.W.2d at 447.

[198] KY. REV. STAT. ANN. § 344.360 (West 2021).

[199] Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J. L. & PUB. POL'Y 401, 403 (2016) ("All equal protection and substantive due process claims require a balancing of the government's interests and individual rights, whether that is the right to be free from discrimination (when it is an equal protection claim) or a claimed liberty or property interest (when it is a substantive due

with precedent in the federal arena, Kentucky laws that "merely affect social or economic policy" in the absence of a fundamental right are subject only to a "rational basis" analysis that requires the measure to be rationally related to a legitimate state objective.[200] This manifests a highly deferential standard to the legislatures, as Kentucky case law articulates: "[I]f possible we should construe the ordinance as constituting a valid exercise of the local legislative power."[201] Because legislative action is presumed constitutional, "[t]he burden is on the person who challenges the action of the legislative body as being unreasonable and arbitrary to sustain that position where it does not appear on the face of the ordinance."[202]

On top of this, Kentucky courts afford wider latitude where an ordinance serves the purpose of promoting public health.[203] For instance, when the City of Lexington enacted restrictions on consumption of tobacco in public spaces, an association of restaurants challenged the ordinance as "invalid because it infringes on the right of business owners to conduct their business without impermissible interference from government" and further "dictates the character of their business under the guise of promoting public health and that certain businesses which attract large numbers of smokers may suffer economic harm and may be forced to close."[204] The Kentucky Supreme Court rejected these arguments, holding that, "among the police powers of the government, the power to promote and safeguard public health ranks at the top," before proclaiming that "when the right of an individual runs afoul of the exercise of this power, the right of the individual must yield."[205] Essentially, "insofar as public health is concerned, private property

process claim).").

[200] Steven Lee Enterprises v. Varney, 36 S.W.3d 391, 394–95 (Ky. 2000) (*citing* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)); *see also* Stephens v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 624, 627 (Ky. 1995) ("When economic and business rights are involved, rather than fundamental rights, substantive due process requires that a statute be rationally related to a legitimate state objective."); *see also* Reynolds Enterprises, Inc. v. Kentucky Bd. of Embalmers & Funeral Dirs., 382 S.W.3d 47, 50 (Ky. App. 2012) ("The deferential rational basis standard applies to substantive due process claims involving an economic or business-related right because such rights are not considered fundamental."); *see also* Holbrook v. Lexmark Int'l Group, Inc., 65 S.W.3d 908, 914 (Ky. 2001), *as modified on denial of reh'g* (Feb. 21, 2002) (stating laws "involving the regulation of economic matters or matters of social welfare complies with both due process and equal protection requirements if it is rationally related to a legitimate state objective."); *see also* D.F. v. Codell, 127 S.W.3d 571, 575–76 (Ky. 2003) (explaining the three levels of scrutiny exercised by federal courts and mirrored by those in Kentucky).

[201] Trivette v. Mullins, 215 S.W.2d 860, 861 (1948).

[202] Conrad v. Lexington-Fayette Urban Cnty. Gov't, 659 S.W.2d 190, 194–96 (Ky. 1983) (*citing* Folks v. Barren Cnty., 232 S.W.2d 1010 (Ky. 1950); Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Joseph E. Seagram & Sons, 211 S.W.2d 122 (Ky. 1948)); *see also* Paducah v. Johnson Bonding Co., 512 S.W.2d 481, 486 (Ky. 1974) ("The law raises a presumption in favor of the validity of an ordinance and the burden is on the person attacking it to show its invalidity.").

[203] Lexington Fayette Cnty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cnty. Gov't, 131 S.W.3d 745, 752 (Ky. 2004).

[204] *Id.*

[205] *Id.* (*citing* Frederick v. Air Pollution Control Dist., 783 S.W.2d 391 (Ky. 1990); Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); Sanitation District No. 1 of Jefferson Cnty. v. Campbell, 249 S.W.2d 767 (Ky. 1952); Tolliver v. Blizzard, 137 S.W. 509 (Ky. 1911)).

may become of public interest and the constitutional limitations upon the exercise of that power of regulation come down to a question of 'reasonability.'"[206] The Court concluded that, in light of the city government's evidence on the negative health effects of using tobacco products and second-hand smoke, and the lack of any empirical indication that the petitioners' businesses would actually suffer adverse economic effects, "[t]he smoking ordinance is not an improper infringement upon property rights."[207]

Examining the legitimacy of a city government's methodology of arriving at a legislative solution, the Kentucky Supreme Court has acknowledged that a city is not required "to conduct new studies or produce evidence independent of that already generated by other cities" before enacting an ordinance. [208] The process of constructing and enacting an ordinance may even "rely, in part, on appeals to common sense."[209] A forgiving standard prevails alongside the rational basis inquiry: "Should reasonable minds differ as to whether the ordinance has a substantial relation to the public health, morals, safety or general welfare, the ordinance must stand as a valid exercise of police power."[210]

Specifically in the context of zoning ordinances (although distinct from anti-discrimination provisions in the housing sector), Kentucky law provides that such determinations "will not be disturbed in the absence of a showing that its action was arbitrary or an irrational exercise of power having no substantial relation to the public health, morals, safety or general welfare."[211] With respect to laws that conflict with the archaic "freedom of contract" theories espoused by landlords in other jurisdictions, "[t]he due process clause does not restrict the state's reasonable exercise of its police power in furtherance of the public interest, even though such laws may interfere with contractual relations and commercial freedoms of private parties."[212] In fact, Kentucky law has long recognized a city's power to "validly infringe on the right to contract" in service of "the general welfare of the community."[213] Furthermore, it is not enough that the statute or ordinance merely affects the

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[206] *Id.* (*citing* Adams v. Louisville & Jefferson Cnty. Bd. of Health, 439 S.W.2d 586 (Ky. 1969)).

[207] *Id.*

[208] Commonwealth v. Jameson, 215 S.W.3d 9, 31 (Ky. 1986) (*citing* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986)).

[209] *Id.* (*citing* Heideman v. South Salt Lake City, 348 F.3d 1182, 1186 (10th Cir. 2003)).

[210] Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 888, 890 (Ky. 1954) (*citing* Schloemer v. Louisville, 182 S.W.2d 782, 783 (Ky. 1944); Dallas v. Lively, 161 S.W.2d 895 (Tex. Civ. App. 1942)).

[211] *Id.* (*citing* Fowler v. Obier, 7 S.W.2d 219 (Ky. 1928)).

[212] Kentucky Cent. Life Ins. Co. v. Stephens, 897 S.W.2d 583, 590 (Ky. 1995) (citation omitted); *see also* Nebbia v. New York, 291 U.S. 502, 523 (1934) ("[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.").

[213] Zuckerman v. Bevin, 565 S.W.3d 580, 604 (Ky. 2018) (*citing* Covington v. Sanitation Dist. No. 1, 301 S.W.2d 885, 888 (Ky. 1957)).

challenger's property rights.[214] Rather, the challenger must show that the law does so arbitrarily without relation to a legitimate legislative interest.[215]

For the anti-discrimination ordinance at hand, Kentucky courts would apply the rational basis analysis just like the courts elsewhere have done.[216] Although a heightened scrutiny would arise in the presence of a fundamental right, no such right exists where the petitioner alleges the violation of a mere economic right to rent out property uninhibited by government regulation.[217] The legislators in Louisville espoused a clear and legitimate objective: To promote fair and equal housing by outlawing a form of discrimination, especially one that carries a disparate impact against black renters.[218] Moreover, this goal is inextricably linked with the public health and welfare of many Louisville residents given the well-documented link between housing insecurity and healthcare inequity, especially amidst the persistent COVID-19 pandemic.[219] This legitimate interest served by the ordinance prevails over a landlord's right to contract, and certainly over any right to reject housing assistance vouchers with impunity amid a market starved of available affordable housing.[220]

3. Equal Protection

Similarly to substantive due process, an equal protection challenge to a piece of legislation requires that the "[l]egislative distinctions between persons must bear a rational relationship to a legitimate state end."[221] Where "no fundamental right is at stake and no 'suspect class' is implicated," statutory exemptions are "analyzed for equal protection purposes only to determine if there is a rational basis for the classification;" such classification survives an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[222] Put differently, the constitutionality of a statutory classification will be upheld so

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[214] Stephens, 897 S.W.2d at 590.

[215] *Id.* (*citing* Golden Pacific Bancorp v. U.S., 15 F.3d 1066 (Fed. Cir. 1994)).

[216] *See, e.g.*, Fletcher Props. v. Minneapolis, 947 N.W.2d 1, 12 (Minn. 2020).

[217] Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[218] LOUISVILLE, KY., CODE OF ORD. § 92.01 (2020).

[219] Richardson, *supra* note 36; Godoy, *supra* note 36; Benfer, *supra* note 36.

[220] Kentucky Cent. Life Ins. Co. v. Stephens, 897 S.W.2d 583, 590 (Ky. 1995).

[221] D.F. v. Codell, 127 S.W.3d 571, 575 (Ky. 2003) (*quoting* Chapman v. Gorman, 839 S.W.2d 232, 239 (Ky. 1992)).

[222] Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet, 133 S.W.3d 456, 466–67 (Ky. 2004) (*citing* Preston v. Johnson County Fiscal Court, 27 S.W.3d 790, 795 (Ky. 2000)), *as modified* (June 3, 2004); Commonwealth v. Howard, 969 S.W.2d 700, 703 (Ky. 1998); *see also* Stephens v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 624, 627 (Ky. 1995) (*citing* Alcoholic Beverage Control Bd. v. Taylor Drug Stores, Inc., 635 S.W.2d 319 (Ky. 1982)) (holding that Kentucky courts hold such distinctions to be "legitimate if there is any reasonable basis for legislation that treats one class of people or their business differently from another, and the courts should uphold the legislative choice.").

long as it is not arbitrary.[223] Especially "in the area of economic legislation, the Legislature does not violate equal protection or due process because the classifications made by its statutes are imperfect."[224] Furthermore, Kentucky law has gone as far as to say that "a party seeking to have a statute declared unconstitutional [based on violative classifications] is faced with the burden of demonstrating that there is *no conceivable basis* to justify the legislation."[225]

In the case of Louisville's ordinance, the equal protection issue is a nonstarter for purposes of this Note because it provides no distinctions between landlords.[226] Instead, the exceptions presented in the language of the ordinance weigh solely against renters with criminal records of a heightened severity,[227] a classification for which federal and state law provides ample support as a rational distinction with a conceivable basis.[228]

4. Other Claims

If property owners in Louisville—like those in *Fletcher*, although the claim went unaddressed by the courts[229]—attempt to argue that the new ordinance amounts to a taking by the government, the petitioners would need to demonstrate that they "[have] been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave [their] property economically idle. . ."[230] The denial of the most profitable use of one's land is insufficient to constitute a taking.[231] Accordingly, "[a] party challenging governmental action as amounting to an unconstitutional taking bears a rather hefty burden . . .[t]he alleged 'violation of the Constitution must be clear, complete and unmistakable' in order to

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[223] Wynn v. Ibold, Inc., 969 S.W.2d 695, 696 (Ky. 1998).

[224] Stephens, 894 S.W.2d at 628.

[225] Holbrook v. Lexmark Int'l Grp., 65 S.W.3d 908, 915 (Ky. 2001) (*citing* Buford v. Commonwealth, 942 S.W.2d 909 (Ky. Ct. App. 1997)) (emphasis added); *see also* Zuckerman v. Bevin, 565 S.W.3d 580, 597 (Ky. 2018) (holding "[t]he legislature has a great freedom of classification and the presumption of validity can be overcome only by the most explicit demonstration that it is hostile and oppressive against particular persons and classes.") (*quoting* Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet, 689 S.W.2d 14, 18 (Ky. 1985)).

[226] LOUISVILLE, KY., CODE OF ORD. § 92.04 (2020) (as amended by Louisville Metro Ord. No. 146-2020, titled "AN ORDINANCE AMENDING SECTIONS 92.02, 92.03 AND 93.04 OF THE LOUISVILLE METRO CODE OF ORDINANCES ("LMCO") AMENDING THE DISCRIMINATION ORDINANCE PROVIDING FOR MORE FAIR ACCESS TO RENTAL HOUSING").

[227] *Id.*

[228] *See 2019 Analysis of Impediments to Fair Housing Choice*, KY. HOUS. CORP. 36 (April 2020), https://www.kyhousing.org/Legal/Pages/Fair-Housing.aspx#:~:text=The%20Kentucky%20General%20Assembly%20later,Louisville%2C%20Morehead%2C%20and%20Vicco./ [https://perma.cc/R8JC-8LPG].

[229] *See* Fletcher Props., Inc. v. Minneapolis, 931 N.W.2d 410, 429 (Minn. Ct. App. 2019), *aff'd*, 947 N.W.2d 1 (Minn. 2020).

[230] Bobbie Preece Facility v. Commonwealth, Dep't of Charitable Gaming, 71 S.W.3d 99, 103 (Ky. Ct. App. 2001) (*citing* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

[231] Siding Sales, Inc. v. Warren Cnty. Water Dist., 984 S.W.2d 490, 494 (Ky. App. 1998).

succeed on a claim that the law is unconstitutional."[232] In the most extreme sense, the Kentucky Supreme Court has acknowledged that both "federal and state courts have determined numerous times that where public interest is involved it is to be preferred over property interests even to the extent of destruction if necessary."[233] Here, when considering the financial stability of Section 8 voucher payments to landlords distributed by LMHA, along with the various incentives being offered alongside the new prohibition against source of income discrimination, the new LMCO section would easily survive a takings challenge because it does not render the landlords' property "economically idle."[234]

On the issue of whether an anti-discrimination ordinance imposes an irrebuttable presumption of prejudice or animus—for which, in part, the district court in *Fletcher Properties* initially struck down the Minneapolis statute[235]—Kentucky law again seems dispositive: "Racial discrimination may be shown by proof of *either* discriminatory purpose *or discriminatory effect*."[236] The Court of Appeals has explained, "[a]ctual intent or malevolent motive would be difficult to prove in any civil rights action, and they need not be proven," before declaring that "practices and procedures which tend to perpetuate segregation in public housing are unlawful."[237] Such precedent supplies a basis for disparate impact claims in tort and perhaps provides some indication that deference may be afforded to statutes outlawing certain practices predicated upon their disparate racial impacts. There is no requirement in the LMCO amendment of intent or animus on the part of the landlord for a finding of discrimination to be made, nor does the language of the ordinance impose any implication of such motives on landlords held in violation.[238]

Finally, in the event that the courts do find an element of Louisville's new anti-discrimination ordinance to be invalid, that part of the ordinance may be severable where the item in question is "not so essentially and inseparably connected with and dependent upon the invalid part, or so incomplete and incapable of standing alone, as to destroy the intent of the

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[232] *Bobbie Preece Facility*, 71 S.W.3d at 102–03 (*quoting* Kentucky Indus. Util. Customers, Inc. v. Kentucky Util. Co., 983 S.W.2d 493, 499 (Ky. 1998)).

[233] Lexington Fayette Cnty. Food & Beverage Ass'n, 131 S.W.3d at 752 (*citing* Mansbach Scrap Iron Co. v. Ashland, 30 S.W.2d 968 (Ky. 1930); Miller v. Schoene, 276 U.S. 272 (1928)).

[234] LOUISVILLE, KY., CODE OF ORD. § 92.04 (2020) (as amended by Louisville Metro Ord. No. 146-2020, titled "AN ORDINANCE AMENDING SECTIONS 92.02, 92.03 AND 93.04 OF THE LOUISVILLE METRO CODE OF ORDINANCES ("LMCO") AMENDING THE DISCRIMINATION ORDINANCE PROVIDING FOR MORE FAIR ACCESS TO RENTAL HOUSING"); Roseberry, *supra* note 182, at 1.

[235] Fletcher Props., Inc. v. Minneapolis, 931 N.W.2d 410, 424–26 (Minn. Ct. App. 2019), *aff'd*, 947 N.W.2d 1 (Minn. 2020).

[236] Middlesboro Hous. Auth. v. Ky. Comm'n on Human Rights, 553 S.W.2d 57, 62 (Ky. Ct. App. 1977) (emphasis added).

[237] *Id*.

[238] LOUISVILLE, KY., CODE OF ORD. § 92.03 (2020).

body enacting the ordinance."[239] Additionally, the drafting of a given statute may "readily lend[] itself to severability" where "[t]he purpose and the policy behind the order are set apart as are the procedures for implementation of the order."[240] The severability of the ordinance at hand largely depends on the section or individual protection struck.[241] Louisville Metro Council clearly articulated a purpose in the preamble to the ordinance's provisions[242] and the courts will appropriately rely upon the intent implicit within those statements if deciding the issue of severability.

V. CONCLUSION

The presence of signs reading "NO Section 8" affixed to rental listings in Louisville and other cities across the nation reveal a continuous streak between the present and the 1960s when Hunter S. Thompson identified legal racism's deeply entrenched successor: Bashful, economics-minded concerns by private actors that carry the functional impact of keeping segregation in place.[243] But, given how financially advantageous it has become to participate in the Section 8 program, especially in Louisville,[244] one experiences difficulty attempting to decipher any sincere economic reason for a landlord to reject Section 8 vouchers. The main reason seems to stem from prejudice against the people who hold them. However, regardless of motive—even if the landlord still somehow claims a business-minded decision to exclude voucher holders—the new ordinance rightfully prohibits a landlord from refusing to accept a prospective tenant's voucher as a form of income, no matter what they claim their intent to be. This rationale falls neatly in line with the words of James Baldwin and the underlying philosophy of disparate impact:[245] It makes no functional difference to a voucher holder whether they are turned away for business reasons, hateful prejudice, or even happenstance. They simply want a roof over their head. And if the term "fair housing" is to have meaningful application, any obstructionist practice that

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[239] Puckett v. Miller, 821 S.W.2d 791, 796 (Ky. 1991); *see also* Lexington *Fayette Cnty. Food & Beverage Ass'n.,* 131 S.W.3d at 756 (holding that "[t]he invalidity of [one section], however, does not render the entire ordinance invalid because the code contains a severability provision . . . and it is clear that the remainder of the smoking ban ordinance is 'not so essentially and inseparably connected with and dependent upon [the invalid section] that the [council] would not have enacted the valid provisions without the invalid provisions.'").

[240] *Puckett*, 821 S.W.2d at 796.

[241] *See id.*

[242] *See* LOUISVILLE, KY., CODE OF ORD. § 92 (2020).

[243] Desmond & Perkins, *supra* note 78, at 156 (describing the financial advantage of accepting Section 8 tenants, including "free advertising and, most important, a virtually guaranteed rental income stream.").

[244] Roseberry, *supra* note 182, at 1 (outlining incentives including $500 stipends, vacancy loss payments, and damage loss payments for landlords who participate in the Section 8 HCV program).

[245] I AM NOT YOUR NEGRO, s*upra* note 90.

disparately impacts the ability of a protected class to obtain that shelter must be outlawed.

Based on the robust interests advanced by the ordinance, and the absence of any successful challenge yet launched elsewhere by legal opponents, Louisville's new fair housing law promises to be a provision that can withstand legal siege. From that defensible position, the ordinance represents a substantive promise to galvanize the interests of fair housing and tear down a form of widely instituted discrimination that has for far too long been permitted under the banner of financial and administrative concern.