



## ARTICLES

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# Leveraging State and Local Antidiscrimination Laws to Prohibit Discrimination Against Recipients of Federal Rental Assistance

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**Introduction**

When Lysette Johnson<sup>1</sup> received her Section 8 housing voucher, she thought that she finally had an opportunity to turn her life around. Ms. Johnson had struggled with mental illness and spent several years in and out of treatment programs. After successfully completing a program, she was ready to live independently. Obtaining housing was her first priority because it was a prerequisite for her to find stable work and to spend time with her children. But she could not afford stable housing immediately, so she applied to the Section 8 voucher program through

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1. Lysette Johnson is a pseudonym for a Section 8 voucher recipient in Minnesota. I learned about Ms. Johnson’s story from her case manager, Heidi Crees. Ms. Crees works with clients with mental health diagnoses in Hennepin County, Minnesota. She helps clients transition to stable housing and has assisted many clients with Section 8 voucher applications. Telephone Interview with Heidi Crees, MSW, LGSW, Targeted Case Manager, Touchstone Mental Health (Dec. 12, 2017).

her Housing and Redevelopment Authority (HRA).<sup>2</sup> She had spent years on the waitlist but was finally lucky enough to receive a voucher. However, she soon found that few landlords would accept her voucher. Vouchers must be used soon after being awarded, so she needed to request time extensions from the HRA to keep her voucher during her housing search.<sup>3</sup> While trying to find a landlord who would accept vouchers, she received temporary housing through a county social service program, lived with friends, and was homeless.<sup>4</sup> During this time, she was also separated from her children because she could not provide them with a home. After over a year of searching, she finally found a landlord willing to accept her voucher in Anoka County, Minnesota. But her family, health care providers, and social services were located in Hennepin County, Minnesota.<sup>5</sup> Faced with the choice of remaining homeless or losing her county-based services, she chose to lose the services and take the apartment in Anoka County.<sup>6</sup> The services she received had been critical to her transition to independent living, but she decided that it was more important to have stable housing.

Of the lucky few who receive a Section 8 voucher, many have stories like Ms. Johnson's. Section 8 vouchers are in high demand, but are of little use to renters when landlords refuse to accept them. In 2015, for example, Ms. Johnson competed with over 36,000 people for 2,000 available spots on her HRA's waitlist.<sup>7</sup> While some landlords prefer tenants with vouchers because it provides a steady revenue stream, many do not accept vouchers.<sup>8</sup> Landlords often cite burdensome administrative requirements and bad tenants as reasons to refuse vouchers.<sup>9</sup> These arguments often

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2. HRAs administer federal Section 8 housing vouchers, *see infra* Part I.A. Ms. Johnson applied through Minnesota's Metropolitan Council, which operates the HRA for Anoka, Carver, Hennepin, and Ramsey Counties, excluding the areas of Hennepin and Ramsey Counties controlled by another housing authority. *See Metro HRA Rental Assistance*, METROPOLITAN COUNCIL, <https://metro council.org/Housing/Services/Metro-HRA-Rental-Assistance.aspx> (last visited Mar. 3, 2018).

3. Telephone Interview with Heidi Crees, MSW, LGSW, Targeted Case Manager, Touchstone Mental Health (Dec. 12, 2017).

4. *Id.*

5. *Id.*

6. *Id.*

7. Riham Feshir, *36K Apply for 2,000 Spots on Metro-Wide Section 8 Wait List*, MPR NEWS, Feb. 27, 2015, <https://www.mprnews.org/story/2015/02/27/section-8>.

8. *See* LANCE FREEMAN, THE IMPACT OF SOURCE OF INCOME LAWS ON VOUCHER UTILIZATION AND LOCATIONAL OUTCOMES 2–3 (2011) (describing research that demonstrates that landlords often discriminate against voucher holders).

9. *See* Armen H. Merjian, *Attempted Nullification: The Administrative Burden Defense in Source of Income Discrimination Cases*, 22 GEO. J. POVERTY L. & POL'Y 211, 212 (2012) (noting that landlords almost invariably argue that accepting vouchers imposes burdens such as form-leases, inspection requirements, and payment delays);

have little or no basis in evidence.<sup>10</sup> The Section 8 program offers extensive landlord protections so that “Section 8 tenants cost landlords no more money than unsubsidized tenants.”<sup>11</sup> Further, Section 8 tenants provide landlords with a steady and guaranteed income.<sup>12</sup>

Landlord policies that exclude Section 8 tenants are one reason that Ms. Johnson and other low-income people bear the brunt of the nation’s affordable housing crisis. A lack of affordable housing plagues every county in the United States,<sup>13</sup> but is especially severe in urban counties.<sup>14</sup> Minnesota is no exception.<sup>15</sup> With a highly competitive market and a vacancy rate of two-and-a-half percent,<sup>16</sup> property managers in the Twin Cities can discriminate against low-income renters and still rent every unit. Landlords commonly engage in practices that disadvantage low-income

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Rebecca Tracy Rotem, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal from the Section 8 Voucher Program*, 78 *FORDHAM L. REV.* 1971, 1983 (2010) (describing the main reasons landlords reject voucher recipients).

10. Many states and cities have heard landlords argue that the Section 8 program is too administratively burdensome. Notably, however, all have rejected these arguments and chosen not to allow landlords to opt out of public housing programs strictly for administrative burden reasons. See Merijan, *supra* note 9, at 246.

11. Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier*, 31 *HARV. C.R. C.L. L. REV.* 155, 171 (1996).

12. See Kim Johnson-Spratt, Note, *Housing Discrimination and Source of Income: A Tenant’s Losing Battle*, 32 *IND. L. REV.* 457, 460 (1999) (“When a landlord enters a lease with a tenant that receives Section 8 assistance . . . the tenant has a reliable and steady source of income to fund rent payments. One would think that a landlord would want a steady flow of cash rather than an unpredictable one in which tenants might default on their rent, especially if no formal lease agreement exists.”).

13. Tanvi Misra, *Every U.S. County Has an Affordable Housing Crisis*, CITYLAB, Apr. 27, 2017, <https://www.citylab.com/equity/2017/04/every-us-county-has-an-affordable-housing-crisis/524628/>.

14. LIZA GETSINGER ET AL., *THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS* 9, URBAN INST. (2017), [https://www.urban.org/sites/default/files/publication/89921/gap\\_map\\_report.pdf](https://www.urban.org/sites/default/files/publication/89921/gap_map_report.pdf).

15. See Greta Kaul, *Is There—or Is There Not—an Affordable Housing Crisis in the Twin Cities?*, MINNPOST, Oct. 4, 2017, <https://www.minnpost.com/politics-policy/2017/10/there-or-there-not-affordable-housing-crisis-twin-cities>; Bob Shaw, *Twin Cities Housing Is Drying Up—Especially in the Suburbs*, PIONEER PRESS, June 6, 2015, <http://www.twincities.com/2015/06/06/twin-cities-low-cost-housing-is-drying-up-especially-in-suburbs>; see also *Minneapolis Candidates for Mayor Spar on Housing Issues*, MPR NEWS, Oct. 30, 2017, <https://www.mprnews.org/story/2017/10/30/minneapolis-mayor-debate-frey-hodges-dehn-hoch-levy-pounds> (describing how affordable housing was a central topic for Minneapolis mayoral candidates at a debate in 2017).

16. See Jim Buchta, *Twin Cities Apartment Market Stays Hot, Driving Up Rents*, STAR TRIB., Aug. 26, 2017, <http://www.startribune.com/twin-cities-apartment-market-stays-hot/441768723/>.

people by imposing high minimum income requirements,<sup>17</sup> dramatically increasing rent for current tenants,<sup>18</sup> running strict credit checks,<sup>19</sup> and refusing to accept housing vouchers.<sup>20</sup> And those low-income people lucky enough to receive rental assistance through the Section 8 voucher program face discrimination when searching for housing.

Limiting discrimination by landlords against voucher holders will give renters more housing options without adding costs for taxpayers or landlords. Ending discrimination in the voucher system will improve voucher utilization rates and can help decrease segregation. States with antidiscrimination laws that prevent landlords from discriminating against voucher holders had voucher utilization rates around six percent higher than states without these laws.<sup>21</sup> Additionally, these laws help voucher holders access higher opportunity neighborhoods.<sup>22</sup> A study commissioned by HUD to assess the impact of antidiscrimination laws on voucher holders found that these laws correlate with accessing higher opportunity neighborhoods.<sup>23</sup>

This Article argues that state and local housing antidiscrimination laws should be used to prohibit landlords from categorically excluding Section 8 recipients. Using Minnesota's antidiscrimination law as an example, this Article explains why these laws prohibit landlords from turning away

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17. See *Housing Tip: Dealing with Low Income*, HOUSINGLINK, <https://www.housinglink.org/HousingResources/housingtips/LowIncome> (last visited Mar. 3, 2018).

18. See, e.g., Peter Callaghan, *New Documentary Captures the Human Cost of the Twin Cities' Affordable Housing Problem*, MINNPOST, June 9, 2017, <https://www.minnpost.com/politics-policy/2017/06/new-documentary-captures-human-cost-twin-cities-affordable-housing-problem> (describing how an affordable housing complex in Richfield, formerly known as Crossroads, was sold to another owner who dramatically increased the rent); Randy Furst, *Family of Five is Evicted As Affordable Housing Crisis Worsens in Minneapolis*, STAR TRIB., Aug. 3, 2017, <http://www.startribune.com/a-family-of-five-is-evicted-as-the-affordable-housing-crisis-worsens-in-minneapolis/438321663/#1> (describing how the landlord of a Minneapolis apartment building increased the rent by three hundred dollars and evicted current tenants).

19. See *Housing Tip: Dealing with Bad Credit*, HOUSINGLINK, <https://www.housinglink.org/HousingResources/housingtips/BadCredit> (last visited Mar. 3, 2018).

20. See, e.g., Peter Callaghan, *Minneapolis Ordinance Barring Section 8 Discrimination Approved by Joint Committee*, MINNPOST, Mar. 22, 2017, <https://www.minnpost.com/politics-policy/2017/03/minneapolis-ordinance-barring-section-8-discrimination-approved-joint-commit>.

21. See FREEMAN, *supra* note 8, at vii.

22. See *id.* at 22.

23. Although the study cautioned that this correlation is modest, any legal changes that could improve voucher holders' access to opportunity areas in the Twin Cities are worth pursuing. See *id.*

Section 8 voucher recipients. For affordable housing advocates seeking to defend similar antidiscrimination laws in other states, Minnesota's legal history on this issue provides a useful example. Part I describes the federal laws governing the housing choice voucher program and state law approaches to voucher-based discrimination. It catalogs state antidiscrimination laws in all states with source of income laws and explains their similarities and differences. Part II focuses on laws used to combat voucher-based discrimination in Minnesota. By considering the Minnesota Court of Appeals decision that permitted landlords to refuse voucher-recipients,<sup>24</sup> this Part argues that permitting such discrimination contradicts the plain meaning of Minnesota's source of income law. In response to the statewide decision that permits voucher-based discrimination, Minneapolis has adopted its own ordinance prohibiting discrimination against voucher holders. Part II concludes by arguing that Minneapolis's ordinance is permissible. Part III explains how the lessons learned from these legal battles in Minnesota are applicable to other states.

## I. Federal and State Voucher Laws

### A. Federal Law and Housing Vouchers

Congress enacted the Section 8 program through the Housing and Community Redevelopment Act of 1974 to help low-income people obtain housing.<sup>25</sup> The program funds both project-based housing, which subsidizes low-income housing in specific buildings,<sup>26</sup> and voucher-based housing, which awards funds to low-income people who can then rent any unit that meets the program's criteria.<sup>27</sup> The Housing Choice Voucher (HCV) program subsidizes the cost of rent by paying money directly to the program participant's landlord.<sup>28</sup> To qualify for a voucher, the recipient's income must not exceed fifty percent of the area median income.<sup>29</sup> By law, a housing authority must provide seventy-five percent of its vouchers to applicants whose income is below thirty percent of the area median income.<sup>30</sup> The voucher only covers a portion of the recipient's rent. The rest is paid by the recipient.<sup>31</sup> Local housing authorities admin-

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24. *Edwards v. Hopkins Plaza*, 783 N.W.2d 171, 182 (Minn. Ct. App. 2010).

25. 42 U.S.C. § 1437f(a) (2016); *see also* Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II § 201(a), 88 Stat. 633, 662.

26. *See Project Based Section 8*, HOUSINGLINK, <https://www.housinglink.org/SubsidizedHousing/ProjectBased> (last visited Mar. 3, 2018).

27. *See Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUSING & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited Mar. 3, 2018).

28. *Id.*

29. *Id.*

30. *Id.*

31. The exact amount varies between housing authorities. *Id.* For example, in Minnesota, renters receiving HCVs must pay between thirty percent and forty per-

ister the Section 8 program as either a public housing authority (PHA) or a housing and redevelopment authority (HRA).<sup>32</sup>

Federal law does not require landlords to participate in the Section 8 program. The statute, which provides that “the selection of tenants shall be the function of the [property] owner,” suggests that landlords may choose not to participate in the program.<sup>33</sup> Every federal court that has considered the issue has found that federal law does not require universal participation in the HCV program.<sup>34</sup> HUD regulations support this view.<sup>35</sup> However, HUD regulations specifically note that they do not preempt “[s]tate and local laws that prohibit discrimination against a Section 8 voucher holder because of status as a Section 8 voucher holder.”<sup>36</sup> Federal courts have generally supported this position, noting that federal law does not prohibit states from requiring participation in Section 8.<sup>37</sup>

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cent of their adjusted gross income. *See Section 8 Vouchers*, HOUSINGLINK, <https://www.housinglink.org/SubsidizedHousing/Section8Voucher> (last visited Mar. 3, 2018).

32. *See Housing Choice Vouchers Fact Sheet*, *supra* note 27.

33. 42 U.S.C. § 1437f(d)(1)(A) (2016).

34. *See, e.g., Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 296 (2d Cir. 1998) (“Participation by landlords is voluntary; they lawfully may refuse to accept applications from Section 8 beneficiaries.”); *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1282 (7th Cir. 1995) (“Participation by landlords is voluntary; they lawfully may refuse to accept applications from Section 8 beneficiaries.”). *But cf. Graoch Assocs. v. Louisville/Jefferson Cty. Metro Human Relations Comm’n*, 508 F.3d 366, 376 (6th Cir. 2007) (finding that withdrawal from the Section program could, but would not necessarily, subject a landlord to disparate impact liability under the Fair Housing Act).

35. *See* 24 C.F.R. § 302(b) (2017) (noting that an owner must be willing to lease a unit under the Section 8 program for a voucher recipient to use the voucher there); *see also id.* § 482.452(b)(1) (granting landlords the discretion to determine whether a voucher holder is a suitable tenant).

36. 24 C.F.R. § 982.53(d) (2017).

37. *See, e.g., Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88 (D.D.C. 2008) (holding that because a local law may offer greater protections than a federal law, federal law did not preempt Washington D.C.’s Human Rights Act, which requires landlords not to discriminate because of a tenant’s Section 8 voucher status); *see also Montgomery Cty. v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Centre*, 936 A.2d 325, 336 (Md. 2007); *Comm’n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 243 (Conn. 1999) (holding that federal law does not preempt a state law requiring landlords to accept Section 8 vouchers). *But see Knapp*, 54 F.3d at 1282 (“It seems questionable, however, to allow a state to make a voluntary federal program mandatory.”); *but cf. Mother Zion Tenant Ass’n v. Donovan*, 865 N.Y.S.2d 64, 65–67 (N.Y. Sup. Ct. 2008) (holding that because Section 8 is voluntary, federal law preempted a New York City ordinance requiring owners who participated in Section 8 to provide a one-year notice before selling a building).

### B. State Antidiscrimination Laws and Voucher-Based Discrimination

Although federal law does not prohibit discrimination against housing voucher recipients, several states have laws that prohibit discrimination on the basis of an individual's source of income or status with regard to public assistance.<sup>38</sup> Some states use these antidiscrimination statutes to prevent landlords from evicting tenants or turning away otherwise eligible renters because they receive Section 8 vouchers. However, courts in several states have created exceptions from these laws for housing vouchers, reasoning that because the program is voluntary, landlords should not be compelled to participate. In other states, legislatures have created express exemptions for housing vouchers in their antidiscrimination laws. This Section surveys these state-level approaches in all states that have source of income laws.

#### 1. States with Judicially Created Housing Voucher Exemptions from Source of Income Laws

##### a. Minnesota

The Minnesota Human Rights Acts (MHRA)<sup>39</sup> prohibits any person "having the right to sell, rent, or lease any real property" from refusing to "sell, rent, or lease" the property to any person because of that person's "status with regard to public assistance."<sup>40</sup> The statute defines "status with regard to public assistance" as "the condition of being a recipient of federal, state, or local assistance, including medical assistance, or of being a tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements."<sup>41</sup> The statute also contains a few exemptions related to housing, including an exemption from the statute for owners or occupiers of single-family residences.<sup>42</sup> The legislature clarified the overall purpose of the statute, declaring that "[i]t is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in housing and real property because of . . . status with regard to public assistance."<sup>43</sup>

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38. For a recently updated and comprehensive list of state and local laws that bar source of income discrimination, see LaKeeshia Fox, Poverty & Race Research Action Council, Appendix B, *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program* (2018), <http://www.prrac.org/pdf/AppendixB.pdf>; see also FREEMAN, *supra* note 8, at 29–30 (listing states and jurisdictions with source of income laws).

39. MINN. STAT. § 363A (2017).

40. *Id.* § 363A.09, subdiv. 1.

41. *Id.* § 363A.03, subdiv. 47.

42. See *id.* § 363A.21, subdiv. 1(2). This exemption is analogous to the "Mrs. Murphy" exemption in the federal Fair Housing Act. See 42 U.S.C. § 2000a(b)(1) (2012); see also James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R. C.L. L. REV. 605, 605 n.3 (1999) (explaining the origins of the Mrs. Murphy exemption).

43. MINN. STAT. § 363A.02, subdiv. 1 (2017).



Further, “[t]he opportunity to obtain . . . housing . . . without such discrimination as is prohibited by this chapter is hereby recognized as and declared to be a civil right.”<sup>44</sup> To support this overall purpose, the statute must “be construed liberally.”<sup>45</sup>

Despite the statutory language that suggests the MHRA prohibits discrimination against voucher recipients, the Minnesota Court of Appeals held that the MHRA does not require landlords to accept Section 8 vouchers.<sup>46</sup> In *Edwards v. Hopkins Plaza Ltd. Partnership*, the court held that because the Section 8 program is voluntary, landlords cannot be held liable under the MHRA for ending participation in the Section 8 housing program.<sup>47</sup> The plaintiff, Jimmie Edwards, rented an apartment from Hopkins Plaza for five years on a renewable annual lease.<sup>48</sup> During that time, the housing authority paid about a third of Edwards’s total rent cost to Hopkins Plaza.<sup>49</sup> Hopkins Plaza qualified for a lower property tax assessment because it participated in the Section 8 program.<sup>50</sup> However, in 2004, the state legislature repealed the property tax benefits.<sup>51</sup> As a result, Hopkins Plaza discontinued its participation in the Section 8 program and, in 2006, it refused to renew Edwards’s lease.<sup>52</sup>

The Court of Appeals reached its holding in *Edwards* by focusing on the language of relevant Minnesota statutes, non-binding administrative decisions, and the purpose of the federal Section 8 program. The court found that the legislature did not require property owners to participate in Section 8 because another statutory provision required project-based rental housing owners to give a one-year notice of their intent to terminate a Section 8 contract.<sup>53</sup> Further, “[i]f participation in Section 8 programs were not voluntary, there would have been no reason for the state to provide incentives for property owner participation.”<sup>54</sup> Although the court recognized that it was not bound by state agency decisions when interpreting state statutes, it agreed with an administrative decision by the state’s Department of Human Rights (the agency charged with enforcing the

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44. *Id.* § 363A.02, subdiv. 2.

45. *Id.* § 363A.04.

46. See *Edwards v. Hopkins Plaza Ltd. P’ship*, 783 N.W.2d 171, 182 (Minn. Ct. App. 2010).

47. *Id.* at 177.

48. *Id.* at 174.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 176.

54. *Id.*

MHRA)<sup>55</sup> and a statement on the Metropolitan Council's website.<sup>56</sup> According to the court, both determined that participation in the Section 8 program was not mandatory.<sup>57</sup> Finally, the court cited federal regulations that suggest the program is voluntary,<sup>58</sup> notwithstanding the provision that allows states to prohibit discrimination against voucher holders.<sup>59</sup> By relying on non-binding authority, the *Edwards* court excluded voucher-based discrimination from the MHRA.

*b. Wisconsin*

Wisconsin's Open Housing law prohibits landlord discrimination against tenants based on "lawful source of income."<sup>60</sup> State regulations define "lawful source of income" to include "public assistance" and "any negotiable draft, coupon or voucher representing monetary value such as food stamps."<sup>61</sup> Despite this clear statutory and regulatory language, the Seventh Circuit has carved out an exception from this statute for housing voucher-based discrimination.<sup>62</sup> It reasoned that vouchers, unlike food stamps, "do not have a monetary value independent of the voucher holder and the apartment sought."<sup>63</sup> This analysis disregarded the regulatory definition that simply describes "public assistance" as a lawful source of income. It noted that "it seems questionable . . . to allow a state to make a voluntary federal program mandatory."<sup>64</sup> It further opined that even if it

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55. See Report and Order of the Hearing Examiner, *State by Wilson v. High View N. Apartments*, State of Minn. Office of Hearing Exam'rs for Dep't of Human Rights, File No. H0420 (May 2, 1979) (available in Minnesota Historical Society archives and on file with author). In *State by Wilson*, the hearing officer found that because the plaintiff was not yet receiving subsidies when she filed the lawsuit, she did not meet the definition of "status with regard to public assistance" in the MHRA. In this case, the plaintiff's landlord increased the rent, which the plaintiff could not afford without housing subsidies. She requested that the landlord approve her voucher application so that she could continue living there and he refused. The hearing officer's reading of the statute would protect only tenants who were already receiving housing subsidies.

56. *Edwards*, 783 N.W.2d at 176.

57. *Id.* at 177. When deciding that the Metropolitan Council's HRA claimed the Section 8 program was voluntary, the court cited its website, which simply read "[y]our decision to join other rental property colleagues in the . . . HCV . . . Program will make a difference in providing affordable housing in the Twin Cities' region." *Id.* This statement appears not to establish a legal principle, but simply thanks landlords for participating in the program.

58. *Id.* at 176 (citing 24 C.F.R. § 982.302(b)).

59. *Id.* (citing 24 C.F.R. § 982.53(d)).

60. WIS. STAT. § 106.50(1) (2017).

61. WIS. ADMIN. CODE DWD § 220.02(8).

62. *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1282-83 (7th Cir. 1995).

63. *Id.* at 1282.

64. *Id.*

determined that lawful source of income includes vouchers, landlords could still refuse to accept vouchers by citing a legitimate business reason, such as non-participation in the Section 8 program.<sup>65</sup>

*c. California*

California's housing discrimination law prohibits discrimination on the basis of a tenant's source of income,<sup>66</sup> but the state's Court of Appeal found that housing vouchers do not satisfy the statute's definition of "source of income."<sup>67</sup> The California Government Code defines "source of income" as "lawful verifiable income paid directly to a tenant or paid to a representative of a tenant [and] a landlord is not considered a representative of a tenant."<sup>68</sup> Because Section 8 vouchers are paid to landlords by a local housing authority, the tenant never receives direct payment under the program.<sup>69</sup> Therefore, Section 8 payments are not considered a "source of income" under California law.<sup>70</sup> The court also noted that the state legislature never intended to make participation in Section 8 mandatory.<sup>71</sup>

2. States with Source of Income Laws That Exclude Housing Vouchers

*a. Delaware*

Delaware prohibits housing discrimination because of a tenant's source of income,<sup>72</sup> but allows landlords to choose not to accept housing vouchers.<sup>73</sup> Landlords are "not required to participate in any government-sponsored rental assistance program, voucher, or certificate system." Additionally, "[a] landlord's nonparticipation . . . may not serve as a basis for any administrative or judicial proceeding" under the state's antidiscrimination laws.<sup>74</sup>

*b. Maine*

Maine's antidiscrimination law does not contain a clear exemption for landlords like the one contained in Delaware's law. Instead, the Maine Human Rights Act allows landlords to raise a business necessity defense if they refuse to rent to voucher holders for legitimate business reasons.<sup>75</sup> Maine's statute includes a provision that prevents anything in it from being interpreted to prohibit landlords from renting according to practices

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65. *Id.* at 1283.

66. CAL. GOV'T CODE § 12955 (West 2012).

67. *Sabi v. Sterling*, 107 Cal. Rptr. 3d 805 (Cal. Ct. App. 2010).

68. CAL. GOV. CODE § 12955(p)(1) (West 2012).

69. *Sabi*, 107 Cal. Rptr. 3d at 818–19.

70. *Id.* at 819.

71. *Id.* at 826.

72. DEL. CODE ANN. tit. 6, §§ 4602–03 (West 2016).

73. *Id.* § 4607(j).

74. *Id.*

75. ME. REV. STAT. § 4581-A(4) (2017).

“that are consistent with business necessity and are not based on . . . the receipt of public assistance payments.”<sup>76</sup> A landlord in Maine can avoid liability by showing it made the decision not to rent to a voucher holder because of business necessity and not for discriminatory reasons.<sup>77</sup>

### 3. States with Source of Income Laws That Include Housing Vouchers

#### a. Oregon

Oregon prohibits discrimination on the basis of a prospective tenant’s source of income when renting or leasing property.<sup>78</sup> “Source of income” includes Section 8 voucher payments and “any other local, state, or federal housing assistance.”<sup>79</sup> The legislature added this definition in 2014 to address discrimination against voucher holders in the state.<sup>80</sup>

#### b. Connecticut

Connecticut prohibits rental discrimination because of a person’s “lawful source of income,”<sup>81</sup> and the Connecticut Supreme Court applied this law to landlords that refused to accept Section 8.<sup>82</sup> The defendant landlord argued that federal law preempted the state’s law, but the court disagreed.<sup>83</sup> The court found that the legislature had the authority to make landlord participation in the Section 8 program mandatory.<sup>84</sup> It noted that the Connecticut law furthers the objectives of the federal law,<sup>85</sup>

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76. *Id.*; *Dussault v. RRE Coach Lantern Holdings*, 86 A.3d 52, 59 (Me. 2014) (noting that the statute allows a landlord to refuse to rent to a recipient of public assistance if she can demonstrate a business necessity).

77. For example, in *Dussault*, the defendant argued that it was still willing to rent the apartment to the plaintiff, but that it simply was unwilling to accept vouchers. *Dussault*, 186 A.3d at 57. The court took this as evidence that the defendant was not discriminating. *Id.* at 59. The local housing authority required a lease addendum for Section 8 landlords and the landlord was not willing to agree to the terms of that addendum. *Id.* at 57. In responding to the plaintiff’s case worker, the defendant was careful to say that it “is not refusing to rent to [plaintiff] primarily because she is a recipient of public assistance.” *Id.* Therefore, the court reasoned, the landlord established the affirmative defense by pointing to legitimate business reasons for rejecting the tenant. *Id.*

78. OR. REV. STAT. § 659A.421 (2017)

79. *Id.* § 659A.421(d)(A).

80. Brad Schmidt, *Oregon Anti-Discrimination Law Means Landlords Can No Longer Advertise ‘No Section 8’*, OREGONIAN, July 3, 2014, [http://www.oregonlive.com/portland/index.ssf/2014/07/oregon\\_anti-discrimination\\_law.html](http://www.oregonlive.com/portland/index.ssf/2014/07/oregon_anti-discrimination_law.html).

81. CONN. GEN. STAT. § 46a-64c(a) (2017).

82. *See Comm’n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238 (Conn. 1999).

83. *Id.* at 245.

84. *Id.* at 246.

85. *Id.*

which was passed “for the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.”<sup>86</sup>

*c. Massachusetts*

Massachusetts prohibits discrimination in rental housing on the basis of a tenant’s receipt of public assistance or “local housing subsidies, including rental assistance or rental supplements.”<sup>87</sup> Additionally, discrimination is prohibited “because of any requirement of such public assistance, rental assistance, or housing subsidy program.”<sup>88</sup> In *DiLiddo v. Oxford Street Realty, Inc.*, Massachusetts’s highest court held that this law prohibited landlords from rejecting applicants who received Section 8.<sup>89</sup> It rejected the landlord’s argument that the statute should apply only to landlords who exhibit discriminatory animus, not to those who are simply making a “legitimate, non-discriminatory” decision.<sup>90</sup> Because the statute contained no language adding this exception, the court refused to add an exception to the statute’s plain meaning.<sup>91</sup>

*d. New Jersey*

New Jersey’s statute prohibits discrimination by landlords against tenants because of the “source of any lawful rent payment to be paid for the house or apartment.”<sup>92</sup> In *Franklin Tower One, LLC v. N.M.*, the New Jersey Supreme Court held that a landlord’s refusal to accept a Section 8 voucher violated this statute.<sup>93</sup> The court found that the state’s statute was not preempted by federal law.<sup>94</sup> Although federal law made the program voluntary, the voluntary nature of the program was “not at the heart of the federal scheme.”<sup>95</sup> The court also dismissed the landlord defendant’s policy argument that the program imposed substantial burdens on landlords, finding nothing in the record that supported that assertion.<sup>96</sup>

4. States with Source of Income Laws That Have Not Been Litigated

*a. North Dakota*

North Dakota prohibits housing discrimination because of a tenant’s status with regard to public assistance,<sup>97</sup> which is defined as “the condition of

86. 42 U.S.C. § 1437f(a) (2012).

87. MASS. GEN. LAWS ch. 151B, § 4(10) (2017).

88. *Id.*

89. 876 N.E.2d 421, 422 (Mass. 2007).

90. *Id.* at 429.

91. *Id.*

92. N.J. STAT. ANN. § 10:5-12g(4) (West 2017) (previously codified at § 2A:42-100).

93. *Franklin Tower One, LLC v. N.M.*, 725 A.2d 1104, 1112 (N.J. 1999).

94. *Id.* at 1113.

95. *Id.*

96. *Id.* at 1113–14.

97. N.D. CENT. CODE § 14-02.5-02 (2017).

being a recipient of federal, state, or local assistance . . . or of being a tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements.”<sup>98</sup> The statute resembles the Minnesota antidiscrimination law, but courts have not issued decisions interpreting how the language might apply to discrimination against Section 8 voucher holders.

*b. Oklahoma*

Oklahoma’s housing discrimination law makes it unlawful for a landlord “[t]o refuse to consider as a valid source of income any public assistance . . . when that source can be verified as to its amount, length of time received, regularity, or receipt because of race, color, religion, gender, national origin, age, familial status, or disability.”<sup>99</sup> This provision seems to suggest that it is only discriminatory to refuse public assistance because of the recipient’s “race, color, religion, gender, national origin, age, familial status, or disability.” No court has interpreted this provision, so it is unclear whether this statute prohibits all voucher-based discrimination or only source of income discrimination in conjunction with discrimination because of race, religion, gender, national origin, age, familial status, or disability.

*c. Utah*

Utah’s Fair Housing Act<sup>100</sup> prohibits refusing to rent to a tenant because of her “source of income.”<sup>101</sup> The statute defines “source of income” as “the verifiable condition of being a recipient of federal, state, or local assistance . . . or of being a tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements.”<sup>102</sup> The act also prohibits landlords from publishing a notice that “directly or indirectly expresses any preference, limitation, or discrimination based on . . . source of income.”<sup>103</sup> Although courts have not interpreted this provision, in 2016, some state legislators attempted to amend the statute to specify that a landlord’s refusal to accept Section 8 vouchers was not discrimination.<sup>104</sup> However, the amendment failed so the current law remains in effect.

*d. Vermont*

Vermont’s fair housing law prohibits discrimination against a tenant because she is a recipient of public assistance.<sup>105</sup> “Public assistance” is de-

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98. *Id.* § 14-02.4-02(19).

99. OKLA. STAT. tit. 25, § 1452(A)(8) (2017).

100. UTAH CODE ANN. § 57-21-5 (2016).

101. *Id.*

102. *Id.* § 57-21-2(24).

103. *Id.* § 57-21-5(2).

104. *From the Field: Utah Advocates Defend Protections Against Source of Income Discrimination, Achieve Other Victories*, NAT’L LOW INCOME HOUS. COAL., Mar. 21, 2016, <http://nlihc.org/article/field-utah-advocates-defend-protections-against-source-income-discrimination-achieve-other>.

105. VT. STAT. tit. 9, § 4503 (2017).

fined in the statute as “any assistance provided by federal, state, or local government, including medical and housing assistance.”<sup>106</sup> The definition’s specific inclusion of housing suggests that the legislature intended the law to prohibit voucher-based discrimination. However, the law also contains an exemption for landlords: it does not apply to “limit a landlord’s right to establish and enforce legitimate business practices necessary to protect and manage the rental property, such as the use of references.”<sup>107</sup> The law has not yet been challenged in court, so it is unclear how a court would interpret this language.

## II. Voucher-Based Discrimination in Minnesota: A Case Study

This Part examines Minnesota’s antidiscrimination law and assesses two strategies for reducing discrimination against voucher holders in the Twin Cities: challenging the wrongly decided *Edwards* decision and implementing local ordinances that prevent voucher discrimination. By focusing on how a court wrongly undermined Minnesota’s antidiscrimination law, this Part provides an example of legal arguments that can be used to defend source of income laws in other states. Because courts have not considered this issue in many states with source of income laws, fair housing advocates in those states should anticipate that their laws will be challenged as Minnesota’s was.

### A. State-Wide Protections for Voucher Holders: Overturning *Edwards*

The Minnesota Court of Appeals wrongly decided the *Edwards* decision. First, it relied on improper authority, using a state statute preempted by federal law and a repealed state statute. Second, it failed to follow the basic principles of statutory interpretation by disregarding the plain text of the statute. Third, it gave deference to the landlord’s proffered reasons for discrimination, an approach that should only be used when a plaintiff relies on indirect evidence. Fourth, it inappropriately distinguished the MHRRA from nearly identical statutes in other states. Given these substantial errors made by the court, future litigants have a strong case to reconsider the issue.

#### 1. Improper Authority

The Court of Appeals relied on a state statute preempted by federal law, claiming that it proves the legislature intended the Section 8 program to be voluntary.<sup>108</sup> The statute required landlords who operated federally subsidized rental housing to give a one-year notice if they planned to stop offering rental housing.<sup>109</sup> As a preliminary matter, this statute only ap-

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106. *Id.* § 4501(6).

107. *Id.* § 4504(4).

108. *Edwards*, 783 N.W.2d at 176; see MINN. STAT. § 504B.255 (2017).

109. See MINN. STAT. § 504B.255.

plies to landlords receiving project-based Section 8 subsidies, not Section 8 vouchers,<sup>110</sup> a fact the Court of Appeals recognized in *Edwards*.<sup>111</sup> In 2003, the Eight Circuit held that federal law expressly and impliedly preempted this entire statute because it interfered with the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRA).<sup>112</sup> LIHPRA contains an express preemption provision that prohibits states from interfering with federally backed mortgages.<sup>113</sup> The state statute prevented owners of subsidized housing from terminating their contracts with the federal government unless tenants were notified one year before the termination.<sup>114</sup> The Eight Circuit found that the state statute required landlords and the federal government to maintain a relationship even after the federal government had decided to terminate a contract.<sup>115</sup> Therefore, federal law preempted the entire statute.<sup>116</sup>

This preempted statute was central to the analysis in *Edwards*. The court reasoned that because the statute assumed that Section 8 was a voluntary program, the MHRA must not require landlords to participate in it.<sup>117</sup> If the court had recognized that this statute was no longer effective, it would have lost the linchpin of this legal argument. Surprisingly, neither the plaintiff nor any of the amici brought this point to the court's attention in briefing.<sup>118</sup>

The court cited only one other statute to support the proposition that the legislature intended the Section 8 program to be mandatory, and that statute was repealed at the time of the decision.<sup>119</sup> This statute created a tax incentive for property owners that made a minimum portion of units in their buildings available to voucher holders.<sup>120</sup> If participation in Section 8 were mandatory, reasoned the court, "there would have been no reason for the state to provide incentives for property owner participa-

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110. See *Ochino v. Grover*, 640 N.W.2d 357, 362 (Minn. Ct. App. 2002).

111. *Edwards*, 783 N.W.2d at 176.

112. *Forest Park II v. Hadley*, 336 F.3d 724, 732 (8th Cir. 2003).

113. See Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. § 4122(a)(1) (2012); *Forest Park II*, 336 F.3d at 731.

114. *Id.*

115. *Id.* at 731–32.

116. *Id.* at 731.

117. *Edwards*, 783 N.W.2d at 176; see MINN. STAT. § 273.126 (1999).

118. See Appellant's Brief at 25–28, *Edwards*, 783 N.W.2d 171 (No. A09-1616) (discussing the preempted statute, MINN. STAT. § 504B.255, but failing to mention that the statute was preempted in *Forest Park II*); Appellant's Reply Brief, *Edwards*, 783 N.W.2d 171 (No. A09-1616) (failing to address the statute); Brief of The Housing Advocates as Amici Curiae Supporting Appellants, *Edwards*, 783 N.W.2d 171 (No. A09-1616) (failing to address the statute); Brief of National Fair Housing Alliance as Amici Curiae Supporting Appellants, *Edwards*, 783 N.W.2d 171 (No. A09-1616) (failing to address the statute).

119. *Edwards*, 783 N.W.2d at 176.

120. See MINN. STAT. § 273.126 (1999).



tion.”<sup>121</sup> Thus, the only two statutes cited to support the central premise of its decision were either preempted or repealed.

## 2. Statutory Interpretation

A central principle of statutory interpretation is adhering to the plain text of the statute unless there is an ambiguity.<sup>122</sup> Instead of relying on two dead statutes to divine the legislature’s intent, the court should have adhered to the plain text of the MHRA, which prevents landlords from discriminating on the basis of a voucher holder’s status as a recipient of public assistance. The statute prohibits property owners from “refus[ing] to sell, rent, or lease, or otherwise deny to or withhold from any person or group of persons because of . . . status with regard to public assistance.”<sup>123</sup> Receiving a housing choice voucher fits clearly within the statute’s definition of “status with regard to public assistance”: “the condition of being a recipient of federal, state, or local assistance, including medical assistance, or of being a *tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements.*”<sup>124</sup> Section 8 vouchers are indisputably rental assistance. The statute’s “because of” language also requires causation. In the *Edwards* case, the property manager stated that it refused to renew Edwards’s lease because he received Section 8 vouchers: “[d]ue to changes in the Section 8 program we are unable to renew your lease.”<sup>125</sup> Refusing to rent to a voucher holder because of his status as a voucher holder unambiguously violates the MHRA’s plain meaning.

Although the plain text of the statute controls, the history of the MHRA suggests that the legislature contemplated Section 8 subsidies when drafting the amendment. The express inclusion of rental assistance or rent supplements in the definition of “status with regard to public assistance” demonstrates that the legislature intended the MHRA to protect recipients of federal rental assistance. The legislature amended the MHRA to include “status with regard to public assistance” as a ground protected from discrimination in real property in 1973.<sup>126</sup> The legislature also drafted a definition of the phrase that included tenants receiving rental assistance.<sup>127</sup> Although this amendment passed a year before the Section 8 voucher program, the federal government had already enacted a housing subsidy pro-

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121. *Edwards*, 783 N.W.2d at 176.

122. *See, e.g.*, *Gilbertson v. Williams Dingmann, LLC*, 894 N.W.2d 148, 151 (Minn. 2017) (“If a statute is unambiguous, then we must apply the statute’s plain meaning.”).

123. MINN. STAT. § 363A.09, subdiv. 1(1) (2017).

124. MINN. STAT. § 363A.03, subdiv. 47 (emphasis added).

125. *Edwards*, 783 N.W.2d at 174.

126. 1973 Minn. Laws 2162–63.

127. *Id.* at 2159.

gram in 1965.<sup>128</sup> This program established PHAs that paid rents for low-income people directly to property managers.<sup>129</sup> The tenants paid the PHA a minimum rent, and the federal government subsidized the rest of the cost.<sup>130</sup> Therefore, the legislature was already aware of federal housing subsidies and would have considered that program when amending the MHRA in 1973.

### 3. The Wrong Standard for Direct Evidence

Although Edwards alleged direct evidence of discrimination under the MHRA, the Court of Appeals gave significant weight to the landlord's "legitimate business reasons" for not renewing Edwards's lease.<sup>131</sup> However, this factor should enter the analysis of an MHRA claim only if the plaintiff relies on indirect evidence of discriminatory intent. Courts analyze MHRA claims without direct evidence under the three-stage *McDonnell Douglas* framework,<sup>132</sup> which allows a plaintiff to allege a prima facie case that gives rise to an inference of discrimination.<sup>133</sup> The defendant can then proffer a legitimate nondiscriminatory reason for its allegedly discriminatory conduct.<sup>134</sup> At the final stage, the plaintiff must prove that the allegedly nondiscriminatory reason was false and was pretext for discrimination.<sup>135</sup> In *Edwards*, the court notes numerous times that the defendant chose not to accept Section 8 vouchers for business reasons.<sup>136</sup> In the analysis, the court seems to assume that business reasons and discrimination are mutually exclusive.

By deferring to the landlord's business judgment, the court impliedly considers the case through a *McDonnell Douglas* framework. Although the court does not explicitly follow *McDonnell Douglas*, it emphasizes that the defendant made its decision for "legitimate business reasons."<sup>137</sup> For example, the court frames the question as whether "a property owner's business decision to end participation in a Section 8" violates the MHRA.<sup>138</sup> This analysis is appropriate in cases without direct evidence of discrimina-

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128. See Housing and Urban Development Act of 1965, Pub. L. No. 89-117 (codified at 12 U.S.C. § 1701s (2016)); see also Tamica H. Daniel, Note, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L.J. 769, 773-74 (2010) (describing the history of federal affordable housing laws).

129. Daniel, *supra* note 128, at 773.

130. *Id.*

131. See, e.g., *Edwards*, 783 N.W.2d at 177 ("[R]efusal to participate in a voluntary program for a legitimate business reason does not constitute discrimination.").

132. *Goins v. West Grp.*, 635 N.W.2d 717, 722-23, 724 n.3 (Minn. 2001).

133. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-02 (1973).

134. *Id.* at 802.

135. *Id.* at 802-03.

136. See *Edwards*, 783 N.W.2d at 177-78, 182.

137. *Id.* at 177-78, 180.

138. *Id.* at 174.

tion.<sup>139</sup> Here, however, the defendant admits that the only reason it denied Edwards's lease was because he received Section 8 vouchers.<sup>140</sup> Therefore, rather than considering the question in light of the landlord's "legitimate business reasons," the court should have only considered whether refusing to accept vouchers violated the MHRA.

Framing the question in light of the landlord's explanation affects the legal analysis in *Edwards* by highlighting policy concerns irrelevant to the MHRA. The policy directive of the MHRA requires courts to construe the statute liberally to prevent discrimination in housing.<sup>141</sup> Further, the statute creates a civil right for Minnesotans to rent, free from discrimination based on their receipt of public rental assistance.<sup>142</sup> The statute does not contemplate the business decisions of landlords. By allowing the *McDonnell Douglas* framework to infect its analysis in *Edwards*, the court gives weight to policy concerns irrelevant to a MHRA claim with direct evidence.

The *Edwards* decision functionally amended the MHRA to include a business necessity defense for landlords facing claims of discrimination against voucher holders. Compare the court's decision with the Maine Human Rights Act, which expressly includes a business necessity defense.<sup>143</sup> The Maine Human Rights Act also prohibits rental discrimination because of a person's status with regard to public assistance,<sup>144</sup> but contains an exception for business necessity.<sup>145</sup> Unlike Maine, however, Minnesota's legislature did not include language that references "business necessity." Instead, it required the MHRA to be interpreted liberally to protect the rights of Minnesotans.<sup>146</sup>

#### 4. Comparing the MHRA to Similar Statutes in Other States

The *Edwards* court distinguished Minnesota's antidiscrimination law from statutes in New Jersey and Massachusetts, states that protect tenants from voucher-based discrimination.<sup>147</sup> New Jersey's statute prohibits discrimination by landlords against tenants because of the "source of any lawful rent payment to be paid for the house or apartment."<sup>148</sup> The Min-

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139. See *Goins*, 635 N.W.2d at 722–24 (Minn. 2001) (describing direct and circumstantial evidence in MHRA cases and applying the *McDonnell Douglas* framework where the plaintiff relied on circumstantial evidence).

140. *Edwards*, 783 N.W.2d at 175.

141. MINN. STAT. § 363A.04.

142. See *id.* § 363A.02.

143. See ME. STAT. tit. 5, §§ 4582–83 (2017).

144. *Id.* § 4581-A (2017).

145. Compare *id.* § 4583 with MINN. STAT. § 363A.03, subdiv. 47. See *supra* Part I. B.2.0.

146. See MINN. STAT. § 363A.04.

147. *Edwards*, 783 N.W.2d at 177–78.

148. N.J. STAT. ANN. § 10:5-12g(4) (West 2017).

nesota Court of Appeals distinguished Minnesota law from New Jersey's statute "[b]ecause Minnesota's statute is fundamentally different."<sup>149</sup> It similarly distinguished Massachusetts's statute, which makes it illegal for a landlord "to discriminate against any individual . . . who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient."<sup>150</sup> Unlike the Massachusetts law, reasoned the court, Minnesota's law was not specific to a rental assistance program.<sup>151</sup>

An interpretation of the MHRA that requires landlords to accept Section 8 vouchers would align with identical language in a Massachusetts statute. Both statutes prohibit discrimination by landlords against a tenant because that tenant is "receiving federal, state, or local housing subsidies, including rental assistance or rental supplements."<sup>152</sup> In fact, the Massachusetts legislature used this language in order to require landlords to accept Section 8 vouchers.<sup>153</sup> Despite the identical language in the two statutes, the Minnesota Court of Appeals found that the language in the MHRA was similar to an earlier version of the Massachusetts statute, which prohibited discrimination "solely because" the tenant received rental assistance.<sup>154</sup> However, the MHRA contained no "solely because" language. Additionally, the Court of Appeals inaccurately attributed a quote to the Massachusetts Supreme Court. It wrote that the old Massachusetts law allowed landlords to refuse Section 8 vouchers for a "legitimate business reason," citing *DiLiddo*.<sup>155</sup> However, that phrase appears nowhere in the *DiLiddo* opinion.<sup>156</sup> The Court of Appeals invented a "legitimate business reason" exception and then misattributed the concept to a Massachusetts law nearly identical to the relevant provision of the MHRA.

### 5. Re-Evaluating Edwards

The Court of Appeals made several legal errors in the *Edwards* decision and failed to enforce the textual meaning of the MHRA. The court relied on a statute preempted by federal law and a statute repealed by the legislature. It improperly compared the MHRA to a similar Massachusetts

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149. *Edwards*, 783 N.W.2d at 177–78.

150. MASS. GEN. LAWS ch. 151, § 4(10) (2017).

151. *Edwards*, 783 N.W.2d at 178.

152. Compare MINN. STAT. § 363A.03, subd. 47 with MASS. GEN. LAWS ch. 151, § 4(10) (containing identical language).

153. See *DiLiddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 421, 427–29 (Mass. 2007) (describing the legislative history and finding that the legislature amended the statute to prohibit discrimination by landlords against voucher holders).

154. See *Edwards*, 783 N.W.2d at 178 (citing MASS. GEN. LAWS ch. 151B § 4(10) (1984)).

155. *Id.* (quoting *DiLiddo*, 786 N.E.2d at 428–29).

156. See *DiLiddo*, 876 N.E.2d at 421–31.

statute by misquoting the Massachusetts Supreme Court. It decided the case by giving weight to the landlord's "business reasons." This concept had no basis in the statutory text or in the judicial framework for analyzing a MHRA claim with direct evidence. The court overstepped its authority by functionally adding a business necessity defense to the MHRA without the consent of the legislature. For these reasons, there is a strong case to challenge the *Edwards* decision and ask the Minnesota Supreme Court to overrule it.

Overturing the *Edwards* case would provide the best solution to the problems created by the decision. The *Edwards* court noted that the problem of voucher-based discrimination could be solved by the legislature through an amendment to the statute.<sup>157</sup> After going outside the text of the statute to reach its holding, the court found, ironically, that it could not solve that problem because it was "limited by the language in the statutes that the legislature has enacted."<sup>158</sup> Because the court made legal errors, not errors of policy judgment, the courts are suited to fix those mistakes. First, the plain text of the MHRA clearly prohibits voucher-based discrimination. Although the legislature has the power to clarify that the MHRA prohibits this discrimination, the courts are best suited to correct the error. Additionally, the court allowed a judicially created doctrine for discrimination cases with circumstantial evidence, *McDonnell Douglas*, to infect its analysis of a claim based on direct evidence of discrimination. By resolving this issue, the Minnesota Supreme Court could also clarify the proper role of *McDonnell Douglas* in housing discrimination litigation.

If the legislature amended the statute to include vouchers in the definition of public assistance, the amended statute could be interpreted more narrowly than the MHRA requires. By listing specific forms of public assistance that the MHRA includes, future litigants could argue that new forms of public assistance benefits should not be included in the definition. Under a traditional canon of statutory interpretation, the inclusion of specific terms impliedly excludes others.<sup>159</sup> Although this canon would not override the legislature's clear intent that the MHRA "be construed liberally,"<sup>160</sup> the canon demonstrates how an amendment to the MHRA could actually create further confusion, not clarity, about the meaning of the statute. Instead of relying on a legislative amendment, the errors in *Edwards* should be corrected by the Minnesota Supreme Court.

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157. *Edwards*, 783 N.W.2d at 179.

158. *Id.*

159. This canon is commonly known by its Latin name: *expressio unius est exclusio alterius*. See NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2017).

160. MINN. STAT. § 363A.04.

### B. Minneapolis's Local Ordinance Prohibiting Voucher Discrimination

Although only a handful of states have laws prohibiting Section 8 voucher discrimination, over seventy cities and counties have implemented these laws.<sup>161</sup> The Poverty and Race Research Action Council (PRRAC) maintains a list of these laws and tracks pending legislation.<sup>162</sup> In states where legislatures have not passed source of income laws or where courts have limited the application of those laws, local ordinances are a practical solution to voucher-based discrimination in cities and counties. This Section describes Minneapolis's voucher antidiscrimination ordinance and the state district court order that blocked it from going into effect. It also analyzes the district court's order and provides advice for cities considering implementing similar ordinances.

#### 1. Minneapolis's Amended Antidiscrimination Ordinance

In March 2017, Minneapolis's City Council passed an ordinance prohibiting discrimination by landlords against Section 8 holders.<sup>163</sup> Effective May 1, 2018, the ordinance updated the city's antidiscrimination law, which closely resembled the MHRA, by including Section 8 vouchers in the definition of a public assistance program.<sup>164</sup> The ordinance prohibits landlords from rejecting renters because they receive Section 8. It also declares that refusing to rent to someone when "any requirement of a public assistance program is a motivating factor" is "an unlawful discriminatory practice."<sup>165</sup> The ordinance includes an "undue hardship" provision that allows landlords to discriminate if they can show "significant difficulty or expense."<sup>166</sup> It defines three factors to be considered: the cost of complying with public assistance program requirements, the overall financial resources of the landlord, and the impact of complying with any public assistance program requirement.<sup>167</sup>

City landlords challenged the legality of this ordinance, arguing that state law mandates Section 8 to be a voluntary program.<sup>168</sup> The state dis-

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161. See Fox, *supra* note 38.

162. See *id.*

163. City of Minneapolis, *City Council Approves Section 8 Antidiscrimination Ordinance*, MINNEAPOLISMN.GOV (Mar. 24, 2017), <http://www.ci.minneapolis.mn.us/news/WCMSP-196366>.

164. See MINNEAPOLIS, MINN. CODE OF ORDINANCES, tit. 7, § 139.20 (2017), [https://library.municode.com/mn/minneapolis/codes/code\\_of\\_ordinances?nodeId=COOR\\_TIT7CIRI](https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT7CIRI).

165. *Id.* § 139.40 (e).

166. *Id.* § 139.20.

167. *Id.*

168. See Eric Roper, *Landlords Sue Minneapolis over Section 8 Antidiscrimination Ordinance*, STAR TRIB., June 8, 2017, <http://www.startribune.com/landlords-sue-minneapolis-over-section-8-antidiscrimination-ordinance/431382773/>; *Complaint, Fletcher v. City of Minneapolis*, No. 27-CV-17-9410 (Minn. Dist. Ct. June 19, 2017).

tract court granted summary judgment in favor of the landlord plaintiffs,<sup>169</sup> but the city plans to appeal.

## 2. Fletcher v. City of Minneapolis

In *Fletcher v. City of Minneapolis*, the landlords alleged that the ordinance is preempted by state law, violates their substantive due process rights, denies them equal protection of the laws, constitutes a regulatory taking, and interferes with their right to contract.<sup>170</sup> The district court addressed only the due process and equal protection claims. This Subsection evaluates the court's analysis of these two claims. It also assesses the preemption argument because, if this issue is raised on appeal, it gives the state appellate courts an opportunity to reconsider the *Edwards* decision.

### a. Preemption

The landlords argued that the ordinance is preempted by the MHRA because “[c]ase law interpreting Minnesota statutes has specifically held that refusal to participate in the voluntary HCV program for legitimate business reasons does not constitute discrimination.”<sup>171</sup> This statement clearly refers to the *Edwards* case. The landlords claim the city ordinance is expressly preempted by the MHRA because the ordinance “forbids that which state statute expressly permits.”<sup>172</sup> Although the district court decided *Fletcher* on other grounds and did not reach a preemption argument,<sup>173</sup> this Subsection analyzes whether the ordinance is preempted by state law, as interpreted in *Edwards*.

Municipalities are generally considered “creatures of the state”<sup>174</sup> and have no inherent powers.<sup>175</sup> In “home rule” states like Minnesota,<sup>176</sup> cities may operate with greater independence from state governments and op-

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169. See Order Granting Pl.’s Mot. and Den. Def.’s Mot. for Summ. J., *Fletcher v. City of Minneapolis*, No. 27-CV-17-9410, at 44–45 (Minn. Dist. Ct. June 7, 2018), <http://stmedia.startribune.com/documents/Ruling+on+Section+8+ordinance.pdf>.

170. *Id.* ¶¶ 100–42.

171. Complaint, *Fletcher v. City of Minneapolis*, No. 27-CV-17-9410 ¶ 105 (Minn. Dist. Ct. June 19, 2017).

172. *Id.* ¶ 107.

173. See Order, *Fletcher*, 27-CV-17-9410, at 43.

174. *City of Eveleth v. Town of Fayal*, No. C2-00-1882, 2001 WL 605049, at \*3 (Minn. Ct. App. June 5, 2011); see also *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 365 (2009) (Breyer, J., concurring in part and dissenting in part) (“[T]he Court points out that the law ordinarily treats municipalities as creatures of the State.”).

175. See *Bicking v. City of Minneapolis*, 891 N.W.2d 304, 312–13 (Minn. 2017).

176. Minnesota’s Constitution allows municipalities to pass a home rule charter and many cities, including Minneapolis, have enacted a charter under the state’s constitution. MINN. CONST. art. XII, § 4. See MINNEAPOLIS, MINN. CHARTER, art. 1, § 1.2.

erate within “an area of autonomy immune from state control.”<sup>177</sup> Cities in home rule states may operate autonomously in areas that are local in nature, but they cannot violate state law.<sup>178</sup> For example, municipalities cannot enact ordinances that conflict with state law or enact ordinances when state law occupies a field of legislation.<sup>179</sup> On the other hand, “a city’s ordinance or resolution does not conflict with state law if it is ‘merely additional and complementary to’ a statute.”<sup>180</sup> An ordinance conflicts with state law where it permits what a statute forbids or where it forbids what the statute expressly permits.<sup>181</sup> A statute may also impliedly preempt local ordinances when the legislature has declared it to be an “area solely of state concern.”<sup>182</sup> If the legislature regulated the subject matter of the local ordinance, a court would consider whether the legislature intended it to be an area of state concern and what “unreasonably adverse effects” the ordinance would have on the state.<sup>183</sup>

The Minneapolis ordinance does not expressly conflict with state law because there is no statutory provision that requires the Section 8 program to be voluntary.<sup>184</sup> The ordinance simply adds “housing choice vouchers” to the definition of “public assistance program.”<sup>185</sup> The ordinance also prohibits landlords from refusing to rent to anyone because of that person’s “status with regard to a public assistance program” or because of “any requirement of a public assistance program.”<sup>186</sup> This language mirrors the MHRA, with only three minor differences.<sup>187</sup> First, the ordinance uses the language “public assistance program” instead of “public assistance.”<sup>188</sup> Second, the definition of “public assistance program” includes

177. GERALD FRUG ET AL., LOCAL GOVERNMENT LAW 174 (6th ed. 2015).

178. See Franklin R. Guenther, Note, *Reconsidering Home Rule and City-State Preemption in Abandoned Fields of Law*, 102 MINN. L. REV. 427, 443 (2017).

179. *Id.* at 313.

180. Lilly v. City of Minneapolis, 527 N.W.2d 107, 114 (Minn. Ct. App. 1995) (Schumacher, J. dissenting) (quoting Mangold Midwest Co. v. Vill. of Richfield, 143 N.W.2d 813, 817 (Minn. 1966)).

181. Mangold Midwest Co. v. Vill. of Richfield, 143 N.W.2d 813, 816–17 (Minn. 1966).

182. City of Morris v. Sax Invs., Inc., 749 N.W.2d 1, 6 (Minn. 2008) (quoting Mangold, 143 N.W.2d at 820).

183. *Id.* at 6–7.

184. See *supra* Part II.A.

185. MINNEAPOLIS, MINN. CODE OF ORDINANCES, tit. 7, § 139.20 (2017).

186. *Id.* at tit. 7, § 139.40 (e)(1).

187. Compare MINN. STAT. § 363A.09, subdiv. 1(1) (“It is an unfair discriminatory practice for an owner . . . to refuse to sell, rent, or lease . . . because of . . . status with regard to public assistance. . . .”) with MINNEAPOLIS, MINN. CODE OF ORDINANCES, tit. 7, § 139.40 (e)(1) (“[T]he following are declared to be unfair discriminatory acts . . . [t]o refuse to sell, rent, or lease . . . because of . . . status with regard to a public assistance program, or any requirement of a public assistance program.”).

188. *Id.*



housing choice vouchers.<sup>189</sup> Third, the ordinance contains language about any requirement of a public assistance program. The MHRA does not permit discrimination on the basis of housing choice vouchers,<sup>190</sup> so the ordinance is not expressly preempted. Additionally, the ordinance is predicted to affect only six percent of landlords in Minneapolis.<sup>191</sup> This hardly creates an “unreasonably adverse effect” on the entire state, so the ordinance is not impliedly preempted.<sup>192</sup> Rather, the ordinance complements the MHRA by clarifying that Section 8 voucher holders are recipients of public assistance.

*b. Due Process*

The court in *Fletcher* reached its decision primarily on substantive due process grounds.<sup>193</sup> The landlords argued that because the ordinance deprived them of the fundamental right to rent property, it should be subject to strict scrutiny.<sup>194</sup> Rejecting this argument, the court found that there is no fundamental right to rent property and instead applied the rational relation test. This standard requires that the law “promote a public purpose, that it not be an unreasonable, arbitrary, or capricious interference with a private interest, and that the means chosen bear a rational relation to the purpose served.”<sup>195</sup> This standard is highly deferential to the city because “[t]here is a presumption in favor of the constitutionality of the legislation and a party challenging constitutionality has the burden of demonstrating beyond a reasonable doubt a statute violates a provision of the constitution.”<sup>196</sup> In spite of this demanding standard, the court found that the ordinance was arbitrary and unreasonable because it could find no evidence that landlords were refusing to accept vouchers as the result of an unfair and prejudicial dislike of voucher holders.

When considering the rationality of the ordinance, the court also weighed the alleged administrative burdens of the Section 8 program. Concluding that participation in the Section 8 program requires a landlord to give up significant control of the unit,<sup>197</sup> the court found that the landlords had a legitimate business reason for choosing not to participate in

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189. MINNEAPOLIS, MINN. CODE OF ORDINANCES, tit. 7, § 139.20.

190. See MINN. STAT. § 363A.

191. City of Minneapolis, *supra* note 163.

192. City of Morris v. Sax Invs., Inc., 749 N.W.2d 1, 6 (Minn. 2008).

193. See Order, *Fletcher v. City of Minneapolis*, 27-CV-17-9410, at 44 (Minn. Dist. Ct. June 7, 2018).

194. *Id.* at 9.

195. *Id.* at 12.

196. *Id.* (quoting *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 106 (Minn. Ct. App. 1987)).

197. Specifically, the court found that the program requires a landlord to “give[] up varying degrees of control over the sale of the building, the amount and certainty of the income from the unit, the lease terms and the ability to terminate the lease for

the program. Because the ordinance declares that refusal to rent to a voucher holder is unlawful discrimination, the court weighed the purported evidence of an administrative burden against the evidence of discrimination against voucher holders.

In *Fletcher*, the court minimized evidence of discrimination because there was no evidence of animus. Despite acknowledging that over three-quarters of affordable rental properties categorically reject tenants with vouchers, the court determined that there must be evidence of animus, or “unfair prejudice,” against voucher holders to justify the ordinance.<sup>198</sup> The city accumulated evidence to justify the law, including testimony from voucher holders, statements from members of the city council, testimony from nonprofits representing the interests of low-income renters, and testimony from city administrative officials.<sup>199</sup> However, among all this evidence of landlords categorically refusing to accept vouchers, the court found no evidence of hateful prejudice against voucher holders. The court concluded that the ordinance makes an unreasonable factual presumption that all landlords who refuse to rent to Section 8 tenants are hateful discriminators.<sup>200</sup> Thus, the ordinance “automatically tar[s] all of [the landlords] with the brush of discrimination.”<sup>201</sup>

The court also found that the ordinance’s prohibition on rejecting a prospective tenant because of “any requirement of a public assistance program” is unlike “personal characteristics of person,” like race, religion, or gender.<sup>202</sup> However, this conclusion misreads the ordinance: “It is an unlawful discriminatory practice . . . [to refuse to rent because of a renter’s] status with regard to public assistance, or any requirement of a public assistance program.”<sup>203</sup> The ordinance should not be read to add “requirements of a public assistance program” as a separate protected class. Instead, the phrase “status with regard to” modifies both “public assistance” and “any requirement.” The ordinance prohibits refusing to rent to some because of their “status with regard to . . . any requirement of a public assistance program.” This reading of the ordinance makes sense in context because a person’s “status with regard to” a requirement is a personal characteristic, like the other characteristics in the ordinance.<sup>204</sup>

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violations, access to the unit and to its business records, and [the landlord] must comply with new reporting and inspection requirements.” *Id.* at 19.

198. *Id.* at 23.

199. *Id.* at 21–23.

200. *Id.* at 30.

201. *Id.* at 43–44.

202. *Id.* at 29.

203. MINNEAPOLIS, MINN. CODE OF ORDINANCES, tit. 7, § 139.40 (e)(1) (2017).

204. The ordinance adds “any requirement of a public assistance program” to a list that includes race, sex, gender identity, sexual orientation, disability, religion, and other characteristics. *Id.*

This distinction is critical because it prevents discriminating against a specific person because of that person's status with regard to the requirements of a public assistance program. Under the court's reading, any landlord who does not like any requirement of a public assistance program is automatically discriminating. The proper reading of the ordinance reveals that it is only discrimination when there is a specific individual who must follow requirements of a public assistance program. Although a person's status with regard to a program requirement is not as intuitive to understand as a person's race, it is a legitimate personal characteristic. For example, if a person receives HIV-related medical assistance, a requirement to qualify for that type of assistance is that the beneficiary have a diagnosis of HIV. Under this provision of the ordinance, a landlord could not refuse to rent because the tenant has HIV.<sup>205</sup> This reading of the ordinance also aligns with the practical realities of voucher-based discrimination because landlords cannot discriminate in the abstract if no voucher holder has attempted to rent from them. A landlord only discriminates once voucher holders apply to rent his property and he refuses to rent to them because they receive a public rental assistance.

In addition to misconstruing the ordinance, the court's analysis fundamentally misunderstands how discrimination works and fails to acknowledge that recipients of public assistance are a protected class as legitimate as other protected classes. By requiring the city to show animus to justify its ordinance, the court creates a high barrier for cities attempting to prevent discrimination. Discrimination includes treating one class of persons differently than another class—it does not require animus. As the Supreme Court has acknowledged, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."<sup>206</sup> If a plaintiff can successfully prove discrimination without evidence of animus but with evidence of a facially discriminatory policy, courts cannot require legislative bodies to produce evidence of animus to justify an antidiscrimination law. As the MHRA has established, recipients of public assistance are a protected class who cannot be excluded from housing on that basis alone and there does not need to be evidence of animus to prove a case based on this kind of discrimination. By misunderstanding antidiscrimination law, the court appears to

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205. Note that in this particular example, refusing to rent to someone with HIV would also constitute disability discrimination under most state laws and the Fair Housing Act. See 42 U.S.C. § 3602 (h) (defining "handicap"); 24 C.F.R. § 100.201 (2017) (defining "handicap" to include any physiological condition that affects major bodily functions); see also *Bragdon v. Abbott*, 524 U.S. 624, 655 (2008) (acknowledging that the Fair Housing Act, which is interpreted consistently with the Americans with Disabilities Act, prohibits discrimination because of a person's HIV status).

206. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

suggest that recipients of public assistance are not a legitimate protected class, contrary to the legislative directive of the MHRA.

In addition to denying the legitimacy of recipients of public assistance as a protected class, the court's due process analysis disregards the experiences of Section 8 voucher holders. Although it acknowledges the "poignant accounts of what it feels like for Section 8 voucher holders to encounter blanket refusals to rent to them," it finds these "feelings" to be an insufficient reason to pass the ordinance. Instead, the court takes the landlords at their word, sympathizing with their assertion that "their issue is not with the tenants, it is with the program."<sup>207</sup> When the city pointed out that one particular landlord refused to rent to Section 8 tenants because he thought they cause more damage than other renters, the court empathized with landlord. It found that he was simply speaking from personal experience and could not possibly have an unfair prejudice against voucher holders because he stated that he just did not want to deal with the administrative burdens of the program.<sup>208</sup> By taking the landlords at their word and writing off the "feelings" of Section 8 voucher holders, who experience the indignity of being told they are not accepted because of the public assistance they receive, the court gave legal weight to the landlord's testimony, but not to the testimony of Section 8 tenants.

By taking the landlords at their word, but requiring that the city prove some evidence of animus, the court also misapplied the rational relation standard. This standard is difficult for plaintiffs to meet because they must demonstrate that the facts that formed the basis of the city's decision "could not reasonably be conceived to be true by the governmental decision-maker."<sup>209</sup> In *Fletcher*, the court's analysis suggests that the only reasonable way the city could have determined that voucher-based discrimination occurred would be if it presented evidence that landlords who refuse to rent to voucher holder have irrational and hateful feelings toward voucher holders. Instead, the court simply needed to determine whether the city council's factual findings could not reasonably be conceived to be true. Given the abundance of direct evidence that landlords treated recipients of public assistance differently than other tenants, the city clearly satisfied the rational relation test.

### c. Equal Protection

The *Fletcher* court also found that the ordinance denies landlords equal protection of the laws because it contains exceptions for small renters, akin to the "Mrs. Murphy" exemptions in the Fair Housing Act and the MHRA.<sup>210</sup> The court found that because the purpose of ordinance is to

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207. See Order, *Fletcher*, 27-CV-17-9410, at 25 n.11.

208. *Id.* at 23–24.

209. *Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn. 1999) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)).

210. See *supra* note 42 for an explanation of this exemption.

prevent discrimination and that there was no evidence that landlords who meet the exemption are less likely to discriminate than other landlords, the ordinance treated classes of landlords unequally.<sup>211</sup> However, the court disregards the fact that the ordinance also provides landlords an opportunity to present an “undue hardship” defense.<sup>212</sup> This defense allows landlords an opportunity to provide actual evidence that the Section 8 program is overly burdensome. This defense demonstrates that a purpose of the ordinance was to prohibit discrimination only in situations where a landlord cannot prove an undue burden.

The court’s cursory analysis of the equal protection claim also fails to acknowledge that many civil rights laws contain similar exemptions. In fact, the MHRA has an entire section of exemptions, including those that allow private schools to discriminate on the basis of sex,<sup>213</sup> owners of single-family dwellings to discriminate against tenants,<sup>214</sup> and religious organizations to discriminate in their hiring practices on the basis of religion and sexual orientation.<sup>215</sup> Under the court’s reasoning, each of these distinctions would violate equal protection. Each of these exemptions permits discrimination even though there was no finding that the exempted organizations were less likely to discriminate. To the contrary, the entire purpose of these exemptions was to allow discrimination in specific areas where the legislature decided discrimination was socially permissible. Similarly, the Minneapolis ordinance establishes an exemption where discrimination will be tolerated in light of other interests.

### 3. Amending City Rental License Requirements

The *Fletcher* court suggests an alternate route for the city to solve the problems faced by voucher holders: amending the rental licensing requirements to require landlords to accept Section 8 tenants.<sup>216</sup> It notes that the shortage of rental housing available for voucher holders would provide a rational basis to modify the city’s rental requirements. This approach may offer Minneapolis and other cities an alternative method of reaching the same result for voucher holders. However, by classifying the requirement as a provision of civil rights law, Minneapolis affirmed that recipients of public assistance have a right to rent, free from discrimination.

If the city is unsuccessful on appeal, amending the rental license requirements provides another way for the city to meet its goals. Regardless of whether the city wins or loses on appeal, other municipalities in the Twin Cities could also use either antidiscrimination or rental licensing,

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211. See Order, *Fletcher*, 27-CV-17-9410, at 42.

212. See MINNEAPOLIS, MINN. CODE OF ORDINANCES, tit. 7, § 139.20 (2017).

213. MINN. STAT. § 363A.23, subdiv. 1.

214. *Id.* § 363A.21, subdiv. 1(2).

215. *Id.* § 363A.20, subdiv. 2.

216. See *Fletcher*, 27-CV-17-9410, at 37.

whichever is deemed permissible, to prohibit voucher-based discrimination. However, if only Minneapolis implements this ordinance, it may further concentrate low-income voucher holders in Minneapolis. If many other municipalities implemented ordinances like Minneapolis's, the ordinances would give voucher holders more rental options throughout the metropolitan area.

### III. Legal Strategies to Prohibit Voucher-Based Discrimination

The *Edwards* decision and Minneapolis's ordinance provide useful lessons for other states seeking to protect the rights of voucher recipients. In states without source of income laws, state legislators considering passing these kinds of protections should craft statutes that avoid the problems created by the Minnesota law. In states with source of income laws, advocates should prepare to defend the application of their state's law to voucher-based discrimination. This Part explains arguments that advocates should make to courts when defending source of income laws and to state legislatures considering passing these laws.

#### A. Plain Text

Source of income laws unambiguously prohibit discrimination against voucher holders. Although the language used by states and municipalities varies slightly, a purely textual reading of most of these statutes prohibits landlords from categorically rejecting all Section 8 recipients. Statutory interpretation begins with the plain text of the statute so courts only consider external evidence of legislative intent after a preliminary finding of ambiguity.<sup>217</sup> By focusing on the text of these statutes, litigants can persuade the court to enforce the plain meaning without needing to consider legislative history or other extrinsic sources.

The first category of source of income laws prevents discrimination because of a tenant's lawful source of income.<sup>218</sup> Many state laws define "lawful source of income" to include public assistance,<sup>219</sup> and some clarify that this includes rental assistance or housing subsidies.<sup>220</sup> A second category of these laws prohibits a landlord from refusing to rent because of

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217. See *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (internal quotations omitted) (explaining that if "the statute's language is plain, the sole function of the courts is to enforce it according to its terms").

218. The statutes in California, Connecticut, Delaware, New Jersey, Oregon, Oklahoma, Utah, and Wisconsin all contain some form of "source of income" language in their housing antidiscrimination laws. See *supra* Part I.B.

219. See, e.g., OKLA. STAT. tit. 25, § 1452(A)(8) (2017); OR. REV. STAT. § 659A.421(d)(A) (2017); UTAH CODE ANN. § 57-21-5 (2016); WIS. STAT. § 106.50(1) (2017).

220. See, e.g., MASS. GEN. LAWS ch. 151B, § 4(10) (2017); MINN. STAT. § 0363A.03, subdiv. 47 (2017); OR. REV. STAT. § 659A.421(d)(A); UTAH CODE ANN. § 57-21-5.

the applicant's status with regard to public assistance.<sup>221</sup> The language between these laws differs slightly, but refusing to rent to Section 8 voucher recipients because of their status as voucher holders falls squarely within the plain meaning of both types of laws.

Section 8 vouchers are unambiguously a form of public assistance and constitute a lawful source of income. Simply because the vouchers have procedural limitations—they may be used only for paying rent and the money is paid directly to the landlord—does not mean that vouchers do not constitute a source of income. Black's Law Dictionary defines income as "[t]he money or other form of payment that one receives, usually periodically, from employment, investments, royalties, gifts, and the like."<sup>222</sup> The voucher is a monthly benefit that subsidizes a participant's housing, which clearly fits in the ordinary meaning of "income."

The Section 8 voucher process supports this plain meaning analysis. Landlords have argued that a voucher is not technically "income" because it is paid directly to the landlord instead of the tenant.<sup>223</sup> However, a Section 8 voucher is not attached to the property—it belongs to the tenant. In contrast to project-based Section 8 subsidies, voucher-based subsidies travel with the tenant.<sup>224</sup> Additionally, the tenant must apply for a voucher before searching for a rental unit. After receiving the voucher, tenants must find a unit whose owner is willing to lease to them under the Section 8 program.<sup>225</sup> Then, the local housing authority must approve the arrangement.<sup>226</sup> This process demonstrates how the voucher belongs to tenants because they are entitled to the benefit only after being approved by the local housing authority but before finding a landlord. Therefore, under a textual reading of source of income laws, a landlord who rejects a voucher recipient because he is entitled to a voucher is refusing to rent because of the prospective tenant's lawful source of income.

### B. Direct Evidence

When analyzing housing discrimination cases, courts often use the *McDonnell Douglas* framework to uncover a discriminatory intent.<sup>227</sup> For

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221. The laws in Minnesota, Maine, North Dakota, and Vermont all contain "public assistance" language. See *supra* Part I.B.

222. *Income*, BLACK'S LAW DICTIONARY (10th ed. 2014).

223. E.g. Respondent's Brief, *Edwards v. Hopkin's Plaza*, 2009 WL 6599007, at \*28 (Minn. Ct. App. Oct. 9, 2009) (No. A09-1616).

224. See *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUSING & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited Dec. 2, 2017).

225. See 24 C.F.R. § 982.302 (2017).

226. *Id.* § 982.302(b).

227. Although originally conceived in the employment discrimination context in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the *McDonnell Douglas* framework is also applied to claims under the federal Fair Housing Act. See, e.g.,

example, the Minnesota Court of Appeals used the framework to determine that the property management company in *Edwards* had no discriminatory motive when it rejected Section 8 recipients.<sup>228</sup> However, the *McDonnell Douglas* framework is only appropriate when analyzing indirect evidence of discrimination.<sup>229</sup> The framework is inappropriate if the property manager affirmatively states that it is rejecting the applicant because it does not wish to participate in the Section 8 program. This constitutes direct evidence of discriminatory intent.

Some property manager litigants seem to confuse direct evidence of a discriminatory intent with animus.<sup>230</sup> Animus or hostility is not a required element of a source of income discrimination claim.<sup>231</sup> All that is necessary to prove discrimination is that a person's status as a Section 8 voucher holder was the reason for rejecting an applicant. If that is the case, litigants should frame that evidence as dispositive. Landlords often admit that they reject applicants because they do not want to participate in the Section 8 program. Many argue that they should not be compelled to accept vouchers because they do not want to participate in the program.

When arguing a source of income discrimination case, litigants should gather direct evidence of discrimination and frame it as dispositive. Types of direct evidence include advertisements that state "no Section 8" or statements from landlords that they have rejected prospective tenants with a Section 8 voucher. This kind of direct evidence gives a court sufficient evidence to deny summary judgment.<sup>232</sup>

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*Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990); *Selden Apartments v. HUD*, 785 F.2d 152, 159 (6th Cir. 1986); *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 927 (8th Cir. 1993); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980); *Asbury v. Broyham*, 866 F.2d 1276, 1279 (10th Cir. 1989).

228. *Edwards v. Hopkins Plaza Ltd. Partnership*, 783 N.W.2d 171, 175 (Minn. Ct. App. 2010) ("A plaintiff may show discrimination under the [Minnesota Human Rights Act] by using the *McDonnell Douglas* burden-shifting framework.").

229. See Robert A. Kearney, *The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303, 304 (2003) (explaining the origins of the "direct evidence" distinction and how it does not require the use of the *McDonnell Douglas* proof structure); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270–71 (1989) (O'Connor, J. concurring) (explaining that previous cases with direct evidence have not required the *McDonnell Douglas* proof structure).

230. See, e.g., Respondent's Brief, *Edwards v. Hopkin's Plaza*, 2009 WL 6599007, at \*30 (Minn. Ct. App. Oct. 9, 2009) (No. A09-1616).

231. See *supra* Part I.B for a survey of state source of income laws. None requires animus.

232. Under Title VII in the employment discrimination context, direct evidence of an employer's discriminatory motive has allowed courts to deny an employer's motion for summary judgment. See Kearney, *supra* note 229, at 304.



### C. *The Myth of Making a Voluntary Program Mandatory*

Landlords often argue successfully that the federal government made the Section 8 program voluntary so the state cannot make the program mandatory. To support this policy argument, landlords will cite federal statutes and regulations that explain how landlords may choose whether or not to participate in the program.<sup>233</sup> They argue that if the court were to rule in favor of the voucher-recipient, the effect would be to mandate that all landlords must participate in a burdensome and optional federal program. For example, writing as an amicus in support of the landlord in *Edwards v. Hopkins Plaza*,<sup>234</sup> the Minnesota Multi Housing Association described several outcomes it perceived as unfair and burdensome to landlords. It argued that a ruling for the tenants would force all landlords to contract with the federal government, add a lease addendum for Section 8 tenants, limit the security deposit to that of a “private market practice,” limit rent increases, and allow annual inspections.<sup>235</sup>

These arguments do not comport with the realities of the Section 8 program because landlords may still reject tenants for non-discriminatory reasons. Landlords could discern these reasons through methods commonly used to screen rental applicants. For example, many landlords run credit checks on applicants and will reject applicants with an unreliable credit history. Additionally, if a unit’s fair market value rent exceeds the area median, the property is too expensive for a Section 8 recipient and the landlord may not participate in the program. Some of these practices could be subject to scrutiny by courts if they are pretext for discrimination and the landlord merely adopts these measures to avoid renting to Section 8 recipients. As long as a landlord documents a neutral practice and applies it fairly to all applicants, a landlord should be able to demonstrate that it is not discriminating against applicants.

Litigants should frame source of income laws as prohibiting categorical exclusions of Section 8 tenants. Landlords prefer to frame this issue as mandating participation in a government program, but a prohibition on categorical exclusions is a more accurate characterization. The laws do not require landlords to accept Section 8 tenants. Instead, they require landlords to consider Section 8 recipients’ applications and determine whether they meet neutral rental criteria. Comparing source of income laws to other civil rights laws highlights this distinction. For example, Title VII prohibits discrimination on the basis of race, sex, religion, and na-

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233. See *supra* notes 33–35 and accompanying text for federal laws that suggest the Section 8 voucher program is voluntary.

234. Brief of Minnesota Multi Housing Association as Amicus Curiae in Support of Respondents at \*13–15, *Edwards v. Hopkins Plaza Ltd. P’ship*, 2009 WL 6599009 (Minn. Ct. App. Nov. 9, 2009) (No. A09-1616).

235. *Id.*

tional origin by employers.<sup>236</sup> Title VII does not require employers to hire racial minorities,<sup>237</sup> but it prohibits a categorical exclusion of employees on the basis of race, sex, religion, or national origin.<sup>238</sup> A racial exclusion policy would constitute a prima facie violation of Title VII. Source of income laws should work in exactly the same way. A policy that excludes all voucher holders constitutes a prima facie violation of the law, but that does not mean that landlords are required to accept every Section 8 applicant.

### Conclusion

State source of income laws can prohibit discrimination against Section 8 voucher recipients and provide them with more affordable housing choices. Although these laws will not solve the affordable housing crisis, they can make the Section 8 system work more efficiently and fairly. Without source of income laws, Section 8 recipients must find alternative housing while searching for a landlord who will accept their voucher and may lose their voucher if they cannot find a landlord in time. In states with source of income laws, fair housing advocates should be prepared to defend the laws from attempts to weaken them. While the specific arguments needed to support these laws will vary from state to state, the general strategy remains the same: focus on the plain meaning of the statute and frame a landlord's decision not to rent to voucher holders as direct evidence of discrimination.

At a time when affordable housing is scarce throughout the United States, fair housing advocates should use every tool available to make rental housing fair for low-income people. Although federal law does not prohibit discrimination against Section 8 voucher holders, the housing choice voucher program creates an opportunity for states to step in and protect the rights of their residents to rent, free from discrimination. Vouchers are a critical resource for very low-income renters, so states and municipalities should take steps to make the voucher system work efficiently and fairly. Rather than letting the federal dollars go to waste as recipients search for housing, states and municipalities can use source of income laws to ensure that voucher holders can quickly find a place to live and put their vouchers to use.

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236. 42 U.S.C. § 2000e-2(a)(1) (2012).

237. *Id.* § 2000e-2(j); *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) (“Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing.”).

238. 42 U.S.C. § 2000e-2(a)(1).