

PRIVATE RIGHTS UNDER THE HOUSING ACT: PRESERVING RENTAL ASSISTANCE FOR SECTION 8 TENANTS

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Abstract: The Housing Choice Voucher Program provides low-income families with federally funded rental assistance. In order to receive rental assistance, tenants and landlords must maintain units in compliance with the Housing Quality Standards promulgated by the United States Housing Act. A failure by either party to comply with the Housing Quality Standards results in a termination of the federal funding. Unfortunately for voucher recipients, this means that they can be stripped of their rental assistance through no fault of their own. To remedy this situation, many tenants have tried to bring an action against their landlord, alleging a violation of the Housing Quality Standards under the United States Housing Act. Courts have routinely dismissed such claims, however, ruling that there is no private right of action under the Housing Act to enforce the Housing Quality Standards. This Note focuses on the factors that support a private right of action for voucher participants under the Housing Act, and suggests that the statutory language should be amended to expressly provide for such a right.

INTRODUCTION

On April 2, 2010, a portion of the concrete ceiling of Ana Reyes-Garay's rented apartment detached and fell on top of her.¹ Reyes-Garay, then 71 years old, suffered severe injuries to her right leg, which required several surgeries and a lengthy stay in the hospital.² At the time of her injury, Reyes-Garay and her husband, José Rosa-Rivera, had lived at 207 Luna Street, Apartment 1-E in Old San Juan, Puerto Rico for more than twenty years.³ Reyes-Garay and Rosa-Rivera received rental assistance from the United States Department of Housing and Urban Development's ("HUD") Section 8 Housing Choice Voucher Program ("HCVP").⁴

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¹ Reyes-Garay v. Integrand Assurance Co., 818 F. Supp. 2d 414, 417 (D.P.R. 2011).

² *Id.*

³ *Id.*

⁴ *Id.* Commonly known as Section 8 vouchers, the HCVP is part of the United States Housing Act's comprehensive low-income assistance plan. United States Housing Act, 42

Section 8 vouchers provide low-income families with rent subsidies to help them obtain decent, safe, and sanitary housing.⁵ Under this program, tenants awarded Section 8 vouchers select a housing unit that must be approved by the local public housing authority.⁶ The tenant and the landlord then execute a lease agreement, while the housing authority and the landlord complete a HUD-mandated Housing Assistance Payment (“HAP”) contract.⁷

Two days after Reyes-Garay’s accident, the Puerto Rico Housing Finance Authority (“the housing authority”) inspected the apartment.⁸ The housing authority discovered several issues that the landlord needed to address before Reyes-Garay and Rosa-Rivera could return to the unit.⁹ The landlord subsequently informed the couple that the housing authority had suspended their rental assistance for the unit until he completed the repairs.¹⁰

Despite several attempts to coordinate with the landlord to make the necessary repairs, the housing authority terminated Reyes-Garay and Rosa-Rivera’s rental assistance for Apartment 1-E on July 6, 2010.¹¹ The landlord gave them until August 25, 2010 to remove their belongings.¹²

In response, Reyes-Garay and Rosa-Rivera brought an action against the landlord and the housing authority in the United States District

U.S.C. § 1437f(a), (o) (2006); see *Reyes-Garay*, 818 F. Supp. 2d at 417. The purpose of Section 8 is to “aid[] low-income families in obtaining a decent place to live and [to] promote[] economically mixed housing” 42 U.S.C. § 1437f(a).

⁵ 42 U.S.C. § 1437f(a), (o).

⁶ *Id.* § 1437f(o) (8); *Reyes-Garay*, 818 F. Supp. 2d at 417 n.1. Prior to approval, the housing authority will inspect a unit to determine whether it complies with the Housing Quality Standards and the landlord has been approved to participate in the program. 24 C.F.R. §§ 982.305–.306 (2012).

⁷ 42 U.S.C. § 1437f(o) (7); *Reyes-Garay*, 818 F. Supp. 2d at 417 n.2. A Housing Assistance Payment contract is a written agreement between a housing authority and the landlord of a unit participating in the voucher program. *Housing Choice Voucher Guidebook*, U.S. DEP’T OF HOUS. AND URBAN DEV. 1-1, 11-1 (2001), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook [hereinafter *Voucher Guidebook*]. Under the contract, the housing authority agrees to make payments directly to the landlord on behalf of the voucher recipients. *Id.*

⁸ See *Reyes-Garay*, 818 F. Supp. 2d at 417.

⁹ *Id.* The landlord offered Reyes-Garay and Rosa-Rivera a unit on the third floor of the apartment building while the repairs to their first floor apartment were tended to. *Id.* Unfortunately, Reyes-Garay was unable to stay in the new unit because her various ailments prevented her from climbing the stairs to the third floor. *Id.* at 417–18.

¹⁰ *Id.* at 418.

¹¹ *Id.*

¹² *Id.* at 419. Without rental assistance, the couple could not afford to pay the entire rent amount. See *id.*

Court, District of Puerto Rico.¹³ They alleged that the defendants violated their rights as Section 8 tenants under the United States Housing Act of 1937 (“Housing Act”) for failure to comply with HUD’s Housing Quality Standards.¹⁴ Reyes-Garay and Rosa-Rivera argued that the landlord, as a Section 8 program participant, was obligated to maintain their apartment in compliance with the Housing Quality Standards and failed to do so.¹⁵ They also argued that the housing authority is required to “take prompt and vigorous action to enforce the owner obligations.”¹⁶ The landlord and the housing authority filed motions to dismiss on all counts, which Judge Daniel R. Dominguez granted to each defendant.¹⁷

In granting the motions to dismiss, the court held that Reyes-Garay and Rosa-Rivera did not have a private right of action to enforce the Housing Quality Standards under the Housing Act.¹⁸ Relying on “a long line of courts,” the court reasoned that there is neither an express nor implied right of action available to participants of the Housing Act’s subsidy programs to enforce the Housing Quality Standards.¹⁹ Judge Dominguez further stated that, while low-income families are the intended beneficiaries of the Housing Act, the Act’s provisions only provide broad housing policy that is not intended to give individuals a right of action.²⁰

The court’s decision to deny a private right of action reflects Supreme Court precedent that limits the circumstances in which courts should imply private remedies in regulatory statutes.²¹ Following the Court’s test articulated in *Cort v. Ash*, plaintiffs must overcome a pre-

¹³ *Id.* at 414, 417.

¹⁴ *Id.* at 429; *see* United States Housing Act, 42 U.S.C. § 1437f(o)(8) (2006); 24 C.F.R. § 982.401 (2012). Reyes-Garay and Rosa-Rivera also alleged violations under 42 U.S.C. § 1983 and the Fair Housing Act. *Reyes-Garay*, 818 F. Supp. 2d at 417; *see* 42 U.S.C. § 1983 (2006); Fair Housing Act, 42 U.S.C. § 3601 (2006).

¹⁵ *Reyes-Garay*, 818 F. Supp. 2d at 429 (citing 24 C.F.R. § 982.404(a)(2)); *see* 42 U.S.C. § 1437f(o)(8).

¹⁶ *Reyes-Garay*, 818 F. Supp. 2d at 429 (quoting 24 C.F.R. § 982.404(a)(2)).

¹⁷ *Id.* at 414, 439.

¹⁸ *Id.* at 429, 431.

¹⁹ *Id.* at 429–30.

²⁰ *Id.* at 430.

²¹ *Id.* (“[T]he Supreme Court has come to view the implication of private remedies in regulatory statutes with increasing disfavor.” (quoting *Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 618 (2d Cir. 2002))); *see also* *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (ruling that language in a regulation cannot create a private right of action that has not been authorized by Congress and that “[a]gencies may play the sorcerer’s apprentice but not the sorcerer himself”).

sumption against the implication of a private right.²² Although it is not dispositive, most courts focus mainly on the legislative intent to determine if there is an implied right of action in a statute.²³

Courts have, however, found a private right of action for other provisions of the Housing Act.²⁴ The Supreme Court first found an implied private right of action for rent and utility control violations in *Wright v. City of Roanoke Redevelopment and Housing Authority*.²⁵ The Court reasoned that the Housing Act provisions regarding rent and utility control directly benefit low-income tenants.²⁶ Consequently, courts have allowed Section 8 tenants to bring private claims alleging over-

²² See *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521–22 (5th Cir. 2002) (“A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute.”); see also Paul E. Harner, Note, *Implied Private Rights of Action Under the United States Housing Act of 1937*, 1987 DUKE L.J. 915, 917 (discussing the four-part test articulated in *Cort*).

²³ See *Banks v. Dall. Hous. Auth.*, 271 F.3d 605, 611 (5th Cir. 2001); *Perry v. Hous. Auth. of Charleston*, 664 F.2d 1210, 1213 (4th Cir. 1981); *Gilchrist v. Bakshi*, 2009 WL 4909439, at *3 (D. Md. 2009). For § 1983 claims, courts apply the test articulated in *Blessing v. Freestone*.

(1) Congress must have intended that the provision in question benefit the private plaintiff; (2) the right assertedly protected by the statute must not be so “vague and amorphous” that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the states, with the asserted right couched in mandatory rather than precatory terms.

Johnson v. Hous. Auth. of Jefferson Parish, 442 F.3d 356, 360 (5th Cir. 2006) (citing *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997)). Private individuals can bring § 1983 claims against state actors to enforce rights created by federal statutes. *Id.* at 359 (noting that the analysis is essentially the same as the test for implied private rights of action).

²⁴ See, e.g., *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 432 (1987); *Johnson*, 442 F.3d at 367; *Howard v. Pierce*, 738 F.2d 722, 725–30 (6th Cir. 1984). Although not all of these cases involve plaintiffs participating in the HCVP, courts have found the programs to be similar enough in kind that all provide an implied private right of action for rent and utility control. See *Johnson*, 442 F.3d at 360–61 (explaining that despite differences between the statutory provision in *Wright* and the one here, “in adopting the voucher program, Congress intended to create enforceable rights in participating tenants to the same extent as it did in enacting the statute implicated in *Wright*”).

²⁵ See *Wright*, 479 U.S. at 425–32; United States Housing Act, 42 U.S.C. § 1437a (2006); Harner, *supra* note 22, at 932. Although the Supreme Court in *Wright* only ruled that there was an implied § 1983 cause of action, the lower courts have subsequently found that there is an implied private right of action in other contexts as well. See *Howard*, 738 F.2d at 725–30; *Gonzalez v. St. Margaret’s House Hous. Dev. Fund Corp.*, 620 F. Supp. 806, 809 (S.D.N.Y. 1985).

²⁶ *Wright*, 479 U.S. at 430. The court also reasoned that a lack of adequate enforcement methods provided by the Housing Act supported a finding of an implied private right. See *id.* at 425, 427, 432; *Howard*, 738 F.2d at 729.

charges on rent or utilities.²⁷ Despite the Court's ruling in *Wright*, there is still a strong reluctance to expand a private right to other parts of the Housing Act.²⁸

In comparison, courts have implied a private right of action under the Fair Housing Act ("FHA").²⁹ Not only are instances of intentional housing discrimination a violation of the FHA, but the circuit courts have extended the Supreme Court ruling in *Griggs v. Duke Power Co.* to also find an implied private right for disparate impact claims brought under the FHA.³⁰ In *Griggs*, the Court ruled that the language of Title VII, which relates to employment discrimination, implicitly applied to conduct that had a disparate impact.³¹ Finding the statutory language in the FHA to be comparable to the Title VII provisions, courts have concluded that disparate impact claims are also permissible under the FHA.³²

²⁷ See *Wright*, 479 U.S. at 430, 432; *Johnson*, 442 F.3d at 362, 367; *Howard*, 738 F.2d at 730.

²⁸ See, e.g., *Wright*, 479 U.S. at 432; *Anderson v. Jackson*, 556 F.3d 351, 357–59 (5th Cir. 2009); *Banks*, 271 F.3d at 611; *Edwards v. District of Columbia*, 628 F. Supp. 333, 339–40 (D.C. Cir. 1985). Courts have recently begun to allow § 1983 claims for provisions regarding hearing procedures. See *Stevenson v. Willis*, 579 F. Supp. 2d 913, 921–23 (N.D. Ohio 2008); *Fields v. Omaha Hous. Auth.*, 2006 WL 176629, at *2, 3 (D. Neb. 2006). In *McNeill v. New York City Housing Authority*, the court did allow a housing quality claim based on the theory that the plaintiffs were third-party beneficiaries of the HAP contract between the housing authority and the landlord. 719 F. Supp. 233, 249 (S.D.N.Y. 1989); see also *Holbrook v. Pitt*, 643 F.2d 1261, 1271–73 (7th Cir. 1981) (finding that Section 8 tenants are third-party beneficiaries because housing assistance contracts are designed to give them rental assistance).

²⁹ See, e.g., *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 381 (3d Cir. 2011); *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1205, 1217 (11th Cir. 2008); *Cnty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005). The FHA explicitly permits private claims for intentional housing discrimination based on race, religion, sex, disability, and national origin. See Fair Housing Act, 42 U.S.C. §§ 3601–3606 (2006).

³⁰ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) (citing the similarities between the FHA and Title VII as reason to imply a private right to bring disparate impact claims); *United States v. City of Black Jack*, 508 F.2d 1179, 1185, 1185 n.2 (8th Cir. 1974). Title VII of the Civil Rights Act of 1964 prohibits discriminatory employment practices. 42 U.S.C. § 2000e-2 (2006). Although the Supreme Court ruled on *Cort* after *Griggs*, the lower courts have continued to follow *Griggs* with regards to the FHA and discriminatory or disparate impact claims. See *Cort*, 422 U.S. at 78; *Griggs*, 401 U.S. at 428; *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Smith*, 682 F.2d at 1065; *Black Jack*, 508 F.2d at 1185 n.2.

³¹ See *Griggs*, 401 U.S. at 431.

³² See *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990); *Smith*, 682 F.2d at 1065; *Black Jack*, 508 F.2d at 1185 n.2. Both statutes prohibit action based on factors that included race, color, national origin, religion, or sex. 42 U.S.C. §§ 2000e-2, 3604.

Both the Housing Act and the FHA focus on remedying concerns associated with access to housing in the United States.³³ Despite similar policies, the rights afforded to tenants under each act are vastly different.³⁴ Under the Housing Act, the couple had no right of action to contest the housing authority's decision.³⁵ In comparison, had Ana Reyes-Garay and José Rosa-Rivera been able to prove that the landlord's refusal to maintain their apartment had a discriminatory effect, they may have been able to bring a potential claim under the FHA.³⁶ In the absence of any evidence of housing discrimination, however, the couple lost their funding without any opportunity to contest the termination.³⁷ The differences in statutory interpretation create the risk that Section 8 participants will unilaterally lose their housing assistance due to landlord noncompliance.³⁸

This Note focuses on how Section 8 tenants are affected by a lack of enforcement mechanisms.³⁹ Parts I and II of this Note examine the differences between the enforcement of the Housing Act and FHA's statutory requirements. Part III discusses the practical effect that the lack of a private right has on Section 8 participants. Part IV of this note argues that Congress should amend the Housing Act to permit a private right of action that will further the purposes behind the Act. Ulti-

³³ See United States Housing Act, 42 U.S.C. § 1437f (2006) ("For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section."); 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

³⁴ See *Smith*, 682 F.2d at 1065; *Perry*, 664 F.2d at 1213–17 (asserting that "[t]here is clearly no indication in the legislation or in its history that Congress intended to create in public housing tenants a federal right of action against their municipal landlords.").

³⁵ See *Reyes-Garay*, 818 F. Supp. 2d at 429–30.

³⁶ See *Cnty. Servs., Inc.*, 421 F.3d at 176; *Reyes-Garay*, 818 F. Supp. 2d at 429–30.

³⁷ See *Reyes-Garay*, 818 F. Supp. 2d at 418.

³⁸ See *id.*; 24 C.F.R. § 982.406 (2012); Stefanie DeLuca et al., *Why Don't Vouchers Do a Better Job of Deconcentrating Poverty? Insights from Fieldwork with Poor Families*, POVERTY & RACE (Poverty & Race Res. Action Council, Washington, D.C.), Sept./Oct. 2012, at 1, 1–2, 9–11, available at <http://prrac.org/newsletters/sepoct2012.pdf> (examining the issues Section 8 tenants have with funding termination and the subsequent search for new housing); Kristine L. Zeabart, Note, *Requiring a True Choice in Housing Choice Voucher Programs*, 79 IND. L.J. 767, 782–87 (2004) (discussing the difficulties low-income families face when searching for housing).

³⁹ See United States Housing Act, 42 U.S.C. § 1437f(o) (2006); Fair Housing Act, 42 U.S.C. § 3613 (2006); *Reyes-Garay*, 818 F. Supp. at 417–19, 431; *Stevenson*, 579 F. Supp. 2d at 923 ("Just as tenants can challenge a rent calculation, they should also be able to challenge procedures for termination of the subsidy altogether."); DeLuca et al., *supra* note 38, at 1–2, 9–11.

mately, this Note advocates for granting Section 8 tenants the right to ensure the Housing Quality Standards are upheld and a tenant's rental assistance is not unilaterally terminated.

I. SECTION 8 VOUCHER PROGRAM

Recognizing the hardships that many families face in obtaining quality housing, Congress passed the Housing Act in 1937.⁴⁰ The statute empowers the Secretary of HUD to distribute federal housing funds to state and local public housing authorities.⁴¹ One of the Act's subsidy programs is the Housing Choice Voucher Program.⁴² Under the HCVP, eligible families are provided with housing vouchers that subsidize a portion of their rent.⁴³ Along with the eligibility requirements, a selected residence must also meet the necessary Housing Quality Standards.⁴⁴ If a landlord fails to meet the Housing Quality Standards, funding, in the form of rent to the landlord, is terminated and tenants are prohibited from taking any action against the landlord or the housing authority.⁴⁵

⁴⁰ See United States Housing Act, Pub. L. No. 75-412, 50 Stat. 888, 888 (1937) (codified at 42 U.S.C. § 1437 (2006)); *Powell v. Hous. Auth. of Pittsburgh*, 812 A.2d 1201, 1203 (Pa. 2002) ("Congress declared that it is this Nation's policy to employ its funds to 'remedy the unsafe housing conditions and the acute shortage of decent, safe and affordable dwellings for low income families'" (quoting United States Housing Act, 42 U.S.C. § 1437(a)(1)(A)–(C) (2006))); *Voucher Guidebook*, *supra* note 7, at 1-1.

⁴¹ See 42 U.S.C. § 1437 (a)(1)(A)–(C). Congress formally authorized the voucher program as part of the Housing and Community Development Act of 1987. Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815, 1819 (1988) (codified as amended at 42 U.S.C. § 1437). Congress passed further legislation in 1998 to merge separate assistance programs into one voucher program. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, 2596 (1998) (codified as amended at 42 U.S.C. § 1437). HUD followed suit and merged the programs into the Housing Choice Voucher Program. Section 8 Tenant-Based Assistance; Statutory Merger of Section 8 Certificate and Voucher Programs, 64 Fed. Reg. 26,632 (May 14, 1999) (codified at 24 C.F.R. § 982); see also *Voucher Guidebook*, *supra* note 7, at 1-4 (providing an overview of the HCVP).

⁴² 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.1 (2012).

⁴³ 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.1.

⁴⁴ 42 U.S.C. § 1437f(o)(8); 24 C.F.R. § 982.401.

⁴⁵ See *Perry v. Hous. Auth.*, 664 F.2d 1210, 1216 (4th Cir. 1981); *Reyes-Garay v. Integrand Assurance Co.*, 818 F. Supp. 2d 414, 429–30 (D.P.R. 2011); 24 C.F.R. §§ 982.401, .404, .406.

A. Renting Under the Housing Choice Voucher Program

After legislation was passed granting HUD more authority to create housing assistance programs, HUD established the HCVP in 1998.⁴⁶ The HCVP's purpose is to "aid[] low-income families in obtaining a decent place to live and [to] promote[] economically mixed housing"⁴⁷ Currently HUD's largest housing program, the HCVP provides rental assistance to low-income families.⁴⁸ A combination of federal and local administration, HUD allocates funding for the program to local public housing authorities.⁴⁹ The housing authorities are responsible for distributing the HUD funding in the form of rent payments to landlords based on HUD's regulatory guidelines.⁵⁰

To begin the funding process, the housing authorities issue vouchers to eligible families who meet a set low-income requirement.⁵¹ Voucher recipients are responsible for finding their own suitable housing.⁵² The program is voluntary, meaning that a landlord must agree to rent to voucher holders.⁵³ If the unit passes the housing quality inspection, the housing authority pays the landlord directly, and the family is responsible solely for their portion of the rent.⁵⁴ While the housing authority determines how much it will pay based on its own rent valuations, a family is not restricted by that rent standard.⁵⁵ For units that

⁴⁶ 112 Stat. at 2596; 24 C.F.R. § 982.1.

⁴⁷ 42 U.S.C. § 1437f(a) (2006).

⁴⁸ 24 C.F.R. § 982.1 (2012); see DeLuca et al., *supra* note 38, at 1. The HCVP subsidizes over 2.2 million households. DeLuca et al., *supra* note 38, at 1.

⁴⁹ 24 C.F.R. § 982.1(a) (1).

⁵⁰ *Id.* §§ 982.101–104.

⁵¹ 42 U.S.C. § 1437f(o) (4); 24 C.F.R. § 982.201(b); *Voucher Guidebook*, *supra* note 7, at 4-1. A family is considered low-income if its annual income does not exceed 80% of the median average in that geographic area. 24 C.F.R. § 5.603 (2012); see 42 U.S.C. § 1437f(o) (4); 24 C.F.R. § 982.201(b). HUD also defines a "very low income" family as one that earns less than 50% of the area median income and an "extremely low income" family as one that earns less than 30% of the area median. 24 C.F.R. § 5.603; see 42 U.S.C. § 1437f(o) (4); 24 C.F.R. § 982.201(b). Recognizing the threat of homelessness that extremely low-income families face, HUD designates that they must receive at least 75% of the vouchers given out over the course of a year. 24 C.F.R. § 982.201(b). Due to the high demand for housing assistance, eligible families are generally placed on a waiting list until funding becomes available. See *Voucher Guidebook*, *supra* note 7, at 4-1.

⁵² See 24 C.F.R. § 982.1(a) (2).

⁵³ See *id.*; *Voucher Guidebook*, *supra* note 7, at 8-15.

⁵⁴ See *Voucher Guidebook*, *supra* note 7, at 1-3. The housing authority must inspect the housing unit to ensure that it meets the minimum standards. See 24 C.F.R. §§ 982.401, .405 (2012).

⁵⁵ See 42 U.S.C. § 1437f(o) (2) (B) (2006); 24 C.F.R. §§ 982.505–.508; *Voucher Guidebook*, *supra* note 7, at 1-4. Housing authorities set the payment standard between 90 and 110% of

exceed HUD's rent standard, the housing authority will contribute its portion of the rent and the family is charged with paying the excess.⁵⁶ Housing authorities will not fund a unit, however, if families have to devote more than forty percent of their income to their share of the rent.⁵⁷

HCVP's main advantage is that when families select their own homes, the amount of affordable, available housing increases.⁵⁸ Families can search for housing in areas that they would not be able to afford without the rental assistance, providing them with more options than they normally would have.⁵⁹ Furthermore, because vouchers are attached to families, not housing units, the program also allows families with changing needs to move without losing their government funding.⁶⁰ Therefore, if a Section 8 tenant's federal funding is terminated, the voucher is not immediately terminated along with it.⁶¹

B. *Housing Quality Standards & the Termination of Funding*

Once a family and a landlord agree to rent under the voucher program, the housing authority must inspect the unit to make sure that it complies with the Housing Quality Standards.⁶² If the unit passes the initial inspection, the family and landlord enter into their own lease agreement.⁶³ The lease must include HUD's tenancy addendum stating the Housing Assistance Payment requirements.⁶⁴ These provisions pre-

the fair market rental value for that area. 24 C.F.R. § 982.503; *Voucher Guidebook*, *supra* note 7, at 1-6.

⁵⁶ 42 U.S.C. § 1437f(o)(2)(B); 24 C.F.R. §§ 982.505–.508. The family's share is the greater of 30% of adjusted income, 10% of gross income, the welfare rent, or the minimum rent mandated by the housing authority. 24 C.F.R. § 982.505; *Voucher Guidebook*, *supra* note 7, at 1-6.

⁵⁷ 24 C.F.R. § 982.508; *Voucher Guidebook*, *supra* note 7, at 1-6.

⁵⁸ See 24 C.F.R. § 982.1(a)(2); *Voucher Guidebook*, *supra* note 7, at 1-3; DeLuca et al., *supra* note 38, at 1.

⁵⁹ See 24 C.F.R. § 982.1(a)(2); *Voucher Guidebook*, *supra* note 7, at 1-3; DeLuca et al., *supra* note 38, at 1.

⁶⁰ See 24 C.F.R. § 982.314 (2012).

⁶¹ See *id.* §§ 982.303, .314.

⁶² See *id.* § 982.401; *Voucher Guidebook*, *supra* note 7, at 10-1. The Housing Quality Standards include: sanitary facilities, food preparation and refuse disposal, space and security, thermal environment, illumination and electricity, structure and materials, interior air quality, water supply, lead-based paint, access, site and neighborhood, sanitary condition, and smoke detectors. *Id.*

⁶³ *Id.* § 982.308; *Voucher Guidebook*, *supra* note 7, at 8-21.

⁶⁴ 24 C.F.R. § 982.308(2); *Voucher Guidebook*, *supra* note 7, at 8-21. For example, the addendum stipulates how the rental payments are to be administered and the conduct that the tenants must adhere to while occupying the unit. See generally TENANCY ADDENDUM,

empt any other portion of the lease that may be in conflict with the addendum.⁶⁵ Finally, the landlord and the housing authority also enter into a HAP contract that runs for the same length as the lease.⁶⁶

It is the responsibility of both the landlord and the family to ensure that the housing unit continues to meet the Housing Quality Standards throughout the family's occupancy.⁶⁷ If a unit fails to meet the standards, the landlord must correct the issue and have the repairs verified by the housing authority in order for assistance to continue.⁶⁸ If the landlord does not make the corrections within the housing authority's required time period, the housing authority is required to terminate, suspend, or reduce the subsidy payments and terminate the HAP contract with the landlord.⁶⁹ The termination of a HAP contract does not take away a family's voucher, but it falls on the family to find another residence that meets the program's standards.⁷⁰ Families that do not find new housing within sixty days lose their voucher eligibility and must re-apply to the program.⁷¹

Program participants who wish to challenge housing authority decisions have the opportunity to be heard at an informal hearing.⁷² The list of decisions that *must* be given an opportunity for a hearing, however, is quite limited.⁷³ Absent from the list is a housing authority's decision to terminate funding because a landlord has failed to comply with the Housing Quality Standards.⁷⁴ For instance, this means a tenant may not challenge a landlord's failure to fix a ceiling that has caved in.⁷⁵ HUD explicitly states in the HCVP regulations that housing authorities

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *available at* <http://www.hud.gov/offices/adm/hudclips/forms/files/52641-a.pdf>.

⁶⁵ See 24 C.F.R. § 982.308; *Voucher Guidebook*, *supra* note 7, at 8-21.

⁶⁶ 24 C.F.R. § 982.309 (2012).

⁶⁷ *Id.* § 982.404. Housing authorities conduct initial, annual, and special inspections. *Id.* § 982.405.

⁶⁸ *Id.* § 982.404.

⁶⁹ *Id.* Funding automatically terminates if the housing authority does not make a payment for 180 days. *Id.* § 982.455.

⁷⁰ See *id.* §§ 982.303, .314; *Voucher Guidebook*, *supra* note 7, at 15-3; see DeLuca et al., *supra* note 38, at 1, 9.

⁷¹ See 24 C.F.R. § 982.303; DeLuca et al., *supra* note 38, at 2.

⁷² 24 C.F.R. § 982.555 (2012); see *Voucher Guidebook*, *supra* note 7, at 16-1 to -3.

⁷³ See 24 C.F.R. § 982.555; *Voucher Guidebook*, *supra* note 7, at 16-2. Housing authority determinations that require an opportunity for an informal hearing include, among other decisions, determinations of a family's annual or adjusted income, calculations of tenant rent payment, and terminations of assistance due to tenant action or inaction. 24 C.F.R. § 982.555; *Voucher Guidebook*, *supra* note 7, at 16-2.

⁷⁴ See 24 C.F.R. § 982.555; see *Voucher Guidebook*, *supra* note 7, at 16-2.

⁷⁵ See *Reyes-Garay*, 818 F. Supp. 2d at 417; 24 C.F.R. § 982.555.

do not need to provide tenants with an opportunity to be heard with respect to this matter.⁷⁶ Furthermore, HUD expressly states that the regulations do not provide tenants with a right to seek judicial review of a housing authority decision regarding the Housing Quality Standards.⁷⁷ HUD's denial of a private right of action within the regulatory scheme reflects a consensus view among the courts rejecting private claims seeking to enforce the Housing Quality Standards.⁷⁸

C. *No Federal Right to Quality Housing*

The Housing Act does not explicitly provide Section 8 voucher participants with a private right of action to contest housing standard violations.⁷⁹ Therefore, it has fallen upon the courts to decide if there is an implied right of action under the Housing Act.⁸⁰ Generally, there is a strong presumption against an implied right of action.⁸¹ In the limited circumstances where courts have recognized a private right, the focus has largely been on congressional intent.⁸² Still, when the intended beneficiary is a special class, the courts have been more willing to ensure that the class's rights are adequately protected.⁸³ For exam-

⁷⁶ 24 C.F.R. § 982.555(b)(6).

⁷⁷ *Id.* § 982.406 (“Part 982 does not create any right of the family, or any party other than HUD or the [public housing authority], to require enforcement of the [housing quality standards] requirements by HUD or the [public housing authority], or to assert any claim against HUD or the [public housing authority], for damages, injunction or other relief, for alleged failure to enforce the [Housing Quality Standards].”).

⁷⁸ See *Banks v. Dall. Hous. Auth.*, 271 F.3d 605, 611 (5th Cir. 2001); *Perry*, 664 F.2d at 1215; *Gilchrist v. Bakshi*, 2009 WL 4909439, at *2 (D. Md. 2010); 24 C.F.R. § 982.406 (2012).

⁷⁹ See United States Housing Act, 42 U.S.C. § 1437a (2006); 24 C.F.R. § 982.406.

⁸⁰ See *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 432 (1987); *Banks*, 271 F.3d at 611; *Perry*, 664 F.2d at 1213–17; *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 620 F. Supp. 806, 809 (S.D.N.Y. 1985).

⁸¹ See *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 730–31 (1979) (Powell, J., dissenting) (reasoning that courts are hesitant to assume a legislative role and create remedies for private citizens); see also Susan Gluck Mezey, *Judicial Interpretation of Legislative Intent: The Role of the Supreme Court in the Implication of Private Rights of Action*, 36 RUTGERS L. REV. 53, 76 (1983) (“The history of the implication analysis . . . has clearly demonstrated the Court's determination to stand fast against the onslaught of cases asserting a private right of action.”).

⁸² See, e.g., *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 812 n.9 (1986) (“Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress.” (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981))); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 535–36 (1984) (“In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question.”); *Perry*, 664 F.2d at 1212 (reasoning that the sole issue is Congress's intent).

⁸³ See *Wright*, 479 U.S. at 430; *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 363 (5th Cir. 2006); *Gonzalez*, 620 F. Supp. at 809.

ple, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Supreme Court found that low-income tenants are undoubtedly the intended beneficiaries of the Housing Act.⁸⁴

To determine an implied right of action, courts follow the four-factor test first established by the Supreme Court in *Cort v. Ash*.⁸⁵ First, the plaintiff must be part of the "special" class for which the statute was enacted.⁸⁶ When addressing the first factor, courts consider whether the statute confers a federal right to a special class.⁸⁷ Second, legislative intent, if it exists, must reflect Congress's intention to grant such a remedy.⁸⁸ There are competing views over the meaning of congressional silence.⁸⁹ Some have concluded that silence demonstrates Congress' desire to prohibit a private right.⁹⁰ Others have relied solely on silence as an indication to preclude a private right.⁹¹ Third, a private right must be "consistent with the underlying purposes of the legislative scheme"⁹² The courts have considered whether a private remedy would interfere with the discretionary actions of an administrative agency, such as HUD, as well as whether the enforcement procedures promulgated by the agency are sufficient.⁹³ Finally, the cause of action must not be "traditionally relegated to state law."⁹⁴

Employing the *Cort* test, the majority of courts have ruled that the Housing Act does not have an implied private right to action.⁹⁵ This reflects the Supreme Court's strong reluctance to read private rights of action into federal statutes.⁹⁶ A narrow interpretation of the Housing Act, however, has led courts to generally find an implied private right of action for rent control violations.⁹⁷

⁸⁴ *Wright*, 479 U.S. at 430.

⁸⁵ See *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Howard v. Pierce*, 738 F.2d 722, 724 (6th Cir. 1984).

⁸⁶ See *Cort*, 422 U.S. at 78; *Howard*, 738 F.2d at 726.

⁸⁷ See *Cort*, 422 U.S. at 78; *Howard*, 738 F.2d at 726; Harner, *supra* note 22, at 917.

⁸⁸ See *Cort*, 422 U.S. at 78.

⁸⁹ See *Perry*, 664 F.2d at 1213, *Edwards v. District of Columbia*, 628 F. Supp. 333, 339-40 (D.C. Cir. 1985) (demonstrating the various interpretations of congressional silence).

⁹⁰ *Perry*, 664 F.2d at 1213.

⁹¹ *Edwards*, 628 F. Supp. at 340.

⁹² *Id.* at 339 (quoting *Cort*, 422 U.S. at 78).

⁹³ See *Johnson*, 442 F.3d at 366; *Edwards*, 628 F. Supp. at 339.

⁹⁴ *Edwards*, 628 F. Supp. at 339 (quoting *Cort*, 422 U.S. at 78); see *Perry*, 664 F.2d at 1216 (reasoning that landlord-tenant disputes are matters of state law); *Samuels v. District of Columbia*, 770 F.2d 184, 201 n.14 (D.C. Cir. 1985).

⁹⁵ See, e.g., *Perry*, 664 F.2d at 1211-12, 1217; *Edwards*, 628 F. Supp. at 340.

⁹⁶ See *Alexander*, 532 U.S. at 291; Mezey, *supra* note 81, at 76.

⁹⁷ See *Wright*, 479 U.S. at 425; *Johnson*, 446 F.3d at 362-63; *Howard*, 738 F.2d at 730.

1. No Tenant Enforcement of the Housing Quality Standards

In applying the *Cort* test to the Housing Act, most courts have ruled that there is no implied right of action for tenants to enforce the Housing Quality Standards.⁹⁸ Courts note that the language of the statute directs the regulating agency to ensure quality standards and does not focus on protecting the class of individuals the statute is directed towards.⁹⁹ The courts have reasoned that although a housing authority is required to ensure that landlords comply with the Housing Quality Standards, neither “[t]he statute nor the regulations nor any court has burdened a Section 8 tenant with this responsibility or bestowed a Section 8 tenant with [the right to enforce the Housing Quality Standards].”¹⁰⁰ For instance, in *Edwards v. District of Columbia*, the court ruled that the fact that low-income families are the intended beneficiaries of the Housing Act is not enough to infer a private right of action.¹⁰¹ Without any evidence of legislative intent, general policy statements do not convey a private right.¹⁰² The court also reasoned that the fact there is no constitutional right to low-income housing supports the denial of an implied private right.¹⁰³

Along with precluding a private right, most courts have also ruled that Section 8 tenants cannot allege a Section 1983 violation.¹⁰⁴ While the Supreme Court in *Blessing v. Freestone* articulated a slightly different test for Section 1983 claims than the one in *Cort*, the analysis still focuses on congressional intent and the workability of the legislative

⁹⁸ See *Anderson v. Jackson*, 556 F.3d 351, 358 (5th Cir. 2009) (citing *Alexander*, 532 U.S. at 289); *Banks*, 271 F.3d at 611 (“Congress does not intend to create a private right of action where a statute is ‘phrased as a directive to federal agencies engaged in the distribution of federal funds.’” (quoting *Univ. Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981))).

⁹⁹ See *Anderson*, 556 F.3d at 358; *Banks*, 271 F.3d at 611.

¹⁰⁰ *Reyes-Garay*, 818 F. Supp. 2d at 429; see 24 C.F.R. §§ 982.404(a)(2), .406 (2012).

¹⁰¹ *Edwards*, 628 F. Supp. at 340.

¹⁰² *Id.*

¹⁰³ *Id.* at 342; see *Hernandez v. Pierce*, 512 F. Supp. 1154, 1159 (S.D.N.Y. 1981); Harner, *supra* note 22, at 940–41.

¹⁰⁴ See, e.g., *Anderson*, 556 F.3d at 358 (ruling that the Housing Act provision at issue focused on the person regulated, not residents of housing developments); *Edwards*, 628 F. Supp. at 342 (“[P]laintiffs have no constitutional right to housing of a particular quality.”). A § 1983 claim provides relief to individuals whose constitutional rights have been violated by persons acting under the authority of state law. See 42 U.S.C. § 1983 (2006). The test to find an implied right of action under § 1983 is different than the *Cort* analysis. Compare *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (articulating the test for a § 1983 claim), with *Cort*, 422 U.S. at 78 (stating the test for a private right of action).

scheme to imply a federal right.¹⁰⁵ Applying *Blessing*, the courts have reasoned that there is no federal right to housing that a state entity could possibly violate.¹⁰⁶ Moreover, the congressional intent behind the Housing Act does not imply a statutory right to housing.¹⁰⁷

Furthermore, the Fifth Circuit Court of Appeals in *Banks v. Dallas Housing Authority* asserted that the language of the Housing Quality Standards provision is too “vague and amorphous” to be judicially enforceable.¹⁰⁸ The court also reasoned that the provision of the Housing Act in question does not impose a binding obligation on a state actor to maintain decent housing conditions.¹⁰⁹ Instead, the court said the provision merely requires that a residency must be in proper condition or it will not receive Section 8 funding.¹¹⁰

Courts are reluctant to imply a private right because the statutory language is not directed at the program participants.¹¹¹ The courts reason that the “text must be phrased in terms of the persons benefitted” to establish the congressional intent to create a private right.¹¹² On the other hand, courts have interpreted the statutory language of the rent control provisions to be indicative of Congress’s intent to convey a private right.¹¹³

2. The Implied Private Right to Rent Control

While Housing Act claims are generally dismissed, some courts have narrowly interpreted the statute to permit rent and utility control

¹⁰⁵ See *Blessing*, 520 U.S. at 340–41; *Caswell v. Detroit Hous. Comm’n*, 418 F.3d 615, 619 (6th Cir. 2005) (“But the inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*.” (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002))); *Stevenson v. Willis*, 579 F. Supp. 2d 913, 921 (N.D. Ohio 2008); *Harner*, *supra* note 22, at 938.

¹⁰⁶ See e.g., *Banks*, 271 F.3d at 610–11; *Perry*, 664 F.2d at 1217; *Edwards*, 628 F. Supp. at 342.

¹⁰⁷ See e.g., *Banks*, 271 F.3d at 610–11; *Perry*, 664 F.2d at 1213; *Edwards*, 628 F. Supp. at 340.

¹⁰⁸ *Banks*, 271 F.3d at 609–11 (quoting *Blessing*, 520 U.S. at 340–41).

¹⁰⁹ *Id.* at 610.

¹¹⁰ *Id.*

¹¹¹ See United States Housing Act, 42 U.S.C. § 1437f(o) (2006); *Banks*, 271 F.3d at 610–11; *Perry*, 664 F.2d at 1217. The courts reason that the statutory language of the Housing Act directs HUD to provide assistance to housing authorities. See *Banks*, 271 F.3d at 610–11; *Perry*, 664 F.2d at 1217.

¹¹² *Caswell*, 418 F.3d at 619 (quoting *Gonzaga*, 536 U.S. at 283); see *Banks*, 271 F.3d at 610; *Perry*, 664 F.2d at 1217; *Edwards*, 628 F. Supp. at 341.

¹¹³ See 42 U.S.C. § 1437a; *Wright*, 479 U.S. at 430; *Johnson*, 442 F.3d at 363; *Howard*, 738 F.2d at 726; *Gonzalez*, 620 F. Supp. at 809.

claims.¹¹⁴ Using the *Cort* test, the Sixth Circuit Court of Appeals in *Howard v. Pierce* found that the plaintiff did have a private right to enforce the amount of rent the defendant could charge under the Housing Act.¹¹⁵ In its analysis, the court reasoned that the plaintiff, a low-income housing tenant, was clearly the intended beneficiary of the Housing Act and therefore satisfied the first prong of the *Cort* test.¹¹⁶

With regards to the second prong of the *Cort* test, courts have found little evidence indicating that Congress intended to create a private right for rent enforcement.¹¹⁷ Some courts have relied heavily on congressional silence to reject an implied private right to action.¹¹⁸ Other courts, however, such as the *Howard* court, have reasoned that the lack of legislative intent merely means that “no further conclusions” can be made until the other factors are considered.¹¹⁹

In assessing the third *Cort* factor, determining the legislative scheme, the court in *Howard* stated that a private remedy would not interfere with the Housing Act’s underlying purpose.¹²⁰ Rather, a private remedy would assist in providing “decent, safe, sanitary and affordable housing” to low-income families.¹²¹ The court also noted that the lack of private enforcement mechanisms throughout the statute support an implied right.¹²² Thus, the court ruled that there was an

¹¹⁴ See *Wright*, 479 U.S. at 431–32; *Johnson*, 442 F.3d at 362–63; *Howard*, 738 F.2d at 730; *Gonzalez*, 620 F. Supp. at 809. Congress enacted the Brooke Amendment in 1969 to limit the amount of rent low-income families could be charged in public housing projects. Pub. L. No. 91-152, 83 Stat. 379, 389 (1969) (codified as amended at 42 U.S.C. § 1437). Although the Brooke Amendment does not apply to the HCVP, the Fifth Circuit Court of Appeals in *Johnson* found that Congress intended to create the same enforceable rights for tenants participating in all of the Housing Act’s assistance programs. See 442 F.3d at 361. For the HCVP, the pertinent provisions of the Housing Act still impose a rent ceiling for families that do not exceed the payment standard calculated by the housing authority. 42 U.S.C. 1437f(o)(2)(A). The only difference is that families who exceed the payment standard have to pay the difference. *Id.* § 1437f(o)(2)(B). The court in *Johnson* categorized this as a “classic distinction without a difference.” 442 F.3d at 362. In *McNeill v. New York Housing Authority*, the court did allow a housing quality claim based on the theory that the plaintiffs were third-party beneficiaries of the HAP contract between the housing authority and the landlord. 719 F. Supp. 233, 249 (S.D.N.Y. 1989); see also *Holbrook v. Pitt*, 643 F.2d 1261, 1271–73 (7th Cir. 1981) (finding that Section 8 tenants are third-party beneficiaries because HAP contracts are intended to provide them with rental assistance).

¹¹⁵ *Howard*, 738 F.2d at 725–30; see 42 U.S.C. § 1437a.

¹¹⁶ *Howard*, 738 F.2d at 726.

¹¹⁷ See *Banks*, 271 F.3d at 611; *Howard*, 738 F.2d at 727–28; *Edwards*, 628 F. Supp. at 340.

¹¹⁸ See *Perry*, 664 F.2d at 1213; *Edwards*, 628 F. Supp. at 340.

¹¹⁹ See *Howard*, 738 F.2d at 727–28; Harner, *supra* note 22, at 927.

¹²⁰ *Howard*, 738 F.2d at 728.

¹²¹ *Id.* at 730.

¹²² *Id.* at 729 (“We do not believe that Congress established the goal of providing decent housing only to allow the goal to be frustrated by statutory violations.”). If select pro-

implied private right of action under the rent and utility control provisions of the Act.¹²³

Following Supreme Court precedent, courts have also held that low-income housing tenants have an implied right to bring Section 1983 claims under the Housing Act.¹²⁴ For example, in *Wright*, the Supreme Court considered the lack of recourse provided by HUD for alleged housing authority violations to be a strong reason to infer a Section 1983 right of action.¹²⁵

Still, courts that identify an implied private right under the Housing Act limit the implication to the rent control provisions.¹²⁶ Courts that have denied an implied private right with regards to the Housing Quality Standards reason that the lack of congressional intent precludes such a finding.¹²⁷ Consequently, Section 8 tenants do not have any way of contesting a termination of their funding that was caused by a landlord's noncompliance with the Housing Quality Standards.¹²⁸

The lack of judicial activism to imply a private right to enforce the Housing Quality Standards necessitates Congress taking action and explicitly providing Section 8 tenants with a means of challenging these terminations.¹²⁹ In comparison, the courts have taken a very expansive

visions had explicitly permitted a private cause of action, then the court would have concluded that silence indicates a congressional intent to preclude a private right. *See id.*

¹²³ *Id.* at 730. Although some courts have argued that an alleged Housing Act violation should be left to traditional landlord-tenant law, not all violations involve lease disputes, and the Housing Act policy suggests that low-income housing is a federal issue. *See* United States Housing Act, 42 U.S.C. § 1437 (2006). *Compare* *Howard*, 738 F.2d at 730 n.15 (ruling that the issue of a rent ceiling is a federal concern that goes beyond landlord-tenant law), *with* *Samuels*, 770 F.2d at 201 n.14 (finding that Congress did not intend to create a federal right to every aspect of landlord-tenant disputes), *and* *Perry*, 664 F.2d at 1216 (reasoning that landlord-tenant disputes are exclusively state law matters).

¹²⁴ *See* *Wright*, 479 U.S. at 432; *Johnson*, 442 F.3d at 367.

¹²⁵ *Wright*, 479 U.S. at 427.

¹²⁶ *Compare id.* at 430 (implying a private cause of action for a § 1983 rent control violation), *and* *Johnson*, 442 F.3d at 367 (finding that there is an implied private right for voucher participants with regards to rent control), *with* *Banks*, 271 F.3d at 611 (ruling that there is no private right to enforce the Housing Quality Standards).

¹²⁷ *See* *Banks*, 271 F.3d at 611; *Perry*, 664 F.2d at 1213; *Edwards*, 628 F. Supp. at 340.

¹²⁸ *See* *Banks*, 271 F.3d at 611; *Reyes-Garay*, 818 F. Supp. 2d at 431; 24 C.F.R. §§ 982.406, .555 (2012); *see also* DeLuca et al., *supra* note 38, at 10 (chronicling the difficulties Section 8 tenants have with the Housing Quality Standards).

¹²⁹ *See* *Johnson*, 442 F.3d at 366 (finding that "[t]here simply is no comprehensive federal remedial scheme provided for the voucher program" to demonstrate Congress's intent to preclude a private right); *Stevenson*, 579 F. Supp. 2d at 923 ("Just as tenants can challenge a rent calculation, they should also be able to challenge procedures for termination of the subsidy altogether."); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778, 787 (Mass. Ct. App. 2008) (discussing the high stakes that are involved when a housing authority terminates funding).

approach to implied rights under the FHA.¹³⁰ Recent federal circuit decisions considering a disparate impact claim under the FHA have found that the Act provides an implied private right for such claims.¹³¹

II. HOUSING DISCRIMINATION UNDER THE FAIR HOUSING ACT

Similar to the Housing Act, Congress enacted The Fair Housing Act of 1968 to “provide . . . for fair housing throughout the United States.”¹³² Under the FHA, it is unlawful “[to] refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹³³ The FHA provides for two remedies.¹³⁴ Individuals may have their complaints heard during an administrative hearing or may bring a private action in either state or federal court.¹³⁵ Along with the private causes of action explicitly permitted under the FHA, courts have also taken a very expansive approach to implied rights of action, including disparate impact claims.¹³⁶ Courts’ interpretations of the FHA are so

¹³⁰ See, e.g., *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 381 (3d Cir. 2011); *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1217 (11th Cir. 2008); *Cnty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005).

¹³¹ See, e.g., *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Larkin v. State of Mich. Dep’t of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996); *Keith v. Volpe*, 858 F.2d 467, 482–84 (9th Cir. 1988); see also Ann B. Lever & Todd Espinosa, *A Tale of Two Fair Housing Disparate-Impact Cases*, 15 J. AFFORDABLE HOUS. & CMTY. DEV. LAW 257, 258 (2006) (stating that “[a]lthough the Supreme Court has yet to rule definitely on the issue, every federal circuit that has considered the issue has agreed that a plaintiff need not prove discriminatory intent on the part of a defendant” to be successful on an FHA claim).

¹³² Fair Housing Act, 42 U.S.C. § 3601 (2006); Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81 (1968) (codified at 42 U.S.C. §§ 3601–3619).

¹³³ 42 U.S.C. § 3604(a). In 1988, the FHA was amended to add handicapped persons and families with children to the list of classes protected under the Act. Fair Housing Act Amendments Act, Pub. L. No. 100-430, 102 Stat. 1619, 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601, 3602, 3604, 3606).

¹³⁴ 42 U.S.C. §§ 3610, 3613.

¹³⁵ *Id.* The Attorney General can also bring a federal suit. *Id.* § 3614. In order to have standing to bring a claim under the FHA, an individual must fall under the statute’s “aggrieved person” definition and reside in a “dwelling.” See *id.* §§ 3603(a), 3613(a)(1)(A). The statute defines an aggrieved person as someone who “claims to have been injured by a discriminatory housing practice.” *Id.* § 3602(i). A dwelling is defined as any building occupied or intended to be occupied as a residence and any vacant land sold or leased for the construction of such building. *Id.* § 3602(b).

¹³⁶ See, e.g., *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (“A plaintiff can establish a FHA discrimination claim under a theory of disparate treatment or disparate impact.”); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). In *Smith v. Town of Clarkton*, the court found that the similarities between the FHA and Title VII made it permissible to allow a disparate impact claim. 682 F.2d at 1065. In *Griggs v. Duke Power Co.*, the

broad that the Sixth Circuit has recognized that Section 8 tenants also have a claim under the FHA.¹³⁷ Even with this narrow interpretation of the FHA, however, the majority of Section 8 tenants are still left without any recourse when it comes to enforcing the Housing Quality Standards.¹³⁸ This is in stark contrast to the different types of potential discrimination claims that tenants can bring under the FHA.¹³⁹

A. Disparate Treatment Claims

Under the FHA, it is unlawful to discriminate against a person because of their race, color, religion, sex, handicap, familial status, or national origin.¹⁴⁰ Courts have interpreted the statutory language, especially the phrase “otherwise make unavailable or deny,” to provide for a large spectrum of activity that may be considered discriminatory.¹⁴¹ An individual can bring an action “whether or not [the individual is] the target of the discrimination.”¹⁴² Some courts have interpreted the FHA’s broad language to reflect Congress’s intention that the FHA covers virtually any type of activity related to housing.¹⁴³ The Supreme

Supreme Court had previously ruled that proof of a disparate impact is sufficient to prove a Title VII violation. 401 U.S. 424, 430–31 (1971); *see* 42 U.S.C. § 2000e-2 (2006); *Smith*, 682 F.2d at 1065; *see also* *Lever & Espinosa*, *supra* note 131, at 258 (discussing disparate impact FHA claims).

¹³⁷ *See* *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 369 (6th Cir. 2007); *see also* Evan Forrest Anderson, Note, *Vouching for Landlords: Withdrawing from the Section 8 Housing Choice Voucher Program and Resulting Disparate Impact Claims*—*Graoch Assocs. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F.3d 366 (6th Cir. 2007), 78 U. CIN. L. REV. 371, 380–83 (2009) (analyzing disparate impact claims involving Section 8 tenants); Rebecca Tracy Rotem, Note, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal from the Section 8 Voucher Program*, 78 FORDHAM L. REV. 1971, 1995 (2010) (discussing Section 8 disparate impact claims).

¹³⁸ *See* *Graoch Assocs. #33*, 508 F.3d at 369; *Reyes-Garay v. Integrand Assurance Co.*, 818 F. Supp. 2d 414, 435 (D.P.R. 2011); *Rotem*, *supra* note 137, at 1995.

¹³⁹ *See, e.g., Harris*, 183 F.3d at 1051; *Smith*, 682 F.2d at 1065.

¹⁴⁰ 42 U.S.C. §§ 3604, 3606, 3617 (2006).

¹⁴¹ *See id.* § 3604(a); *see, e.g., United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716, 726 (S.D. Ala. 1980); *Dunn v. Midwestern Indem. Mid-American Fire & Cas. Co.*, 472 F. Supp. 1106, 1108 (S.D. Ohio 1979); *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975).

¹⁴² *Harris*, 183 F.3d at 1050 (emphasis omitted) (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring)).

¹⁴³ *See* 42 U.S.C. § 3604(a); *Hous. Auth. of Chickasaw*, 504 F. Supp. at 726; *Dunn*, 472 F. Supp. at 1108; *Hughes Mem’l Home*, 396 F. Supp. at 549. The statute also mandates that it is illegal “[t]o discriminate . . . in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith.” 42 U.S.C. § 3604(b).

Court has held that this language should be interpreted “as broadly as is permitted by Article III of the Constitution.”¹⁴⁴

FHA claims include cases of intentional housing discrimination known as disparate treatment claims.¹⁴⁵ The plaintiff must provide evidence demonstrating that “some discriminatory purpose was a ‘motivating factor’ behind the challenged action.”¹⁴⁶ The motivation does not need to be malicious or invidious.¹⁴⁷ Rather, the plaintiff only has to prove that a protected characteristic somehow affected the defendant’s conduct.¹⁴⁸ In turn, if the defendant cannot prove that they would have acted the same way regardless of the alleged discrimination, the FHA is violated.¹⁴⁹ For example, in *United States v. Big D Enterprises, Inc.*, the court found a disparate treatment violation based on evidence that the defendant personally instructed his apartment managers not to rent to black applicants.¹⁵⁰ The court there rejected the defendant’s assertion that minorities were rebuffed due to “application deficiencies” as a legitimate nondiscriminatory motive.¹⁵¹

Disparate treatment claims also include “mixed motive” cases—instances where the alleged discriminatory conduct was motivated by both legitimate and prohibited reasons.¹⁵² Although the Supreme Court has never ruled on a “mixed motive” FHA claim, the lower courts have adopted the Supreme Court’s reasoning regarding employment discrimination in *Price Waterhouse v. Hopkins*, holding that a claimant need only establish that the contested housing conduct was motivated in part by some illegal intent.¹⁵³ The burden then shifts to the defen-

¹⁴⁴ See *Trafficante*, 409 U.S. at 209 (quoting *Hackett v. McGuire Bros.*, 445 F.2d 442, 446 (3d Cir. 1971)) (internal quotation marks omitted).

¹⁴⁵ See *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1283 (11th Cir. 2006); *Cnty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176–77 (3d Cir. 2005).

¹⁴⁶ *Cnty. Servs., Inc.*, 421 F.3d at 177; see *Kormoczy v. Sec’y, U.S. Dep’t of Hous. & Urban Dev. ex. rel. Briggs*, 53 F.3d 821, 824 (7th Cir. 1995). For plaintiffs relying on indirect rather than direct evidence, the plaintiff’s burden of proof is different. *Kormoczy*, 53 F.3d at 823–24; see *Lindsay v. Yates*, 498 F.3d 434, 438–39 (6th Cir. 2007); *Cnty. House, Inc. v. Boise*, 490 F.3d 1041, 1053 (9th Cir. 2007).

¹⁴⁷ *Cnty. Servs., Inc.*, 421 F.3d at 177 (quoting *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995)).

¹⁴⁸ *Id.*

¹⁴⁹ See *United States v. Big D Enters.*, 184 F.3d 924, 932 (8th Cir. 1999); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 235–36 (8th Cir. 1976).

¹⁵⁰ *Big D Enters.*, 184 F.3d at 929, 934, 936.

¹⁵¹ *Id.* at 932.

¹⁵² See *id.* at 931; *Bachman v. St. Monica’s Congregation*, 902 F.2d 1259, 1262 (7th Cir. 1990).

¹⁵³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 258 (1989). The Civil Rights Act of 1991 superseded the Court’s ruling regarding a plaintiff’s remedies, but not the actual test

dant to prove, by a preponderance of the evidence, that they would have taken the same action regardless of the alleged discriminatory motive.¹⁵⁴

Despite any explicit statutory language, the circuit courts have generally concluded that intent is not required for an FHA violation.¹⁵⁵ The courts have analogized the Supreme Court's ruling on employment discrimination in *Griggs v. Duke Power Co.*¹⁵⁶ Comparing the similarities between the language in each statute, the courts have implied a private right of action for claims that lack intent, yet still have a disparate impact.¹⁵⁷

B. Disparate Impact Theory

A disparate impact violation involves instances where a policy affects a class of persons protected under the FHA greater than it affects non-protected classes, regardless of whether there is discriminatorily motivated intent behind the action.¹⁵⁸ The crucial component of a disparate impact case is the statistical evidence demonstrating that the defendant's conduct has a greater impact on an FHA-protected class than it does on others.¹⁵⁹ An early case to find a disparate impact claim un-

for finding liability in a mixed motive case. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071 (codified as amended at 42 U.S.C. § 1981 (2006)); *Price Waterhouse*, 490 U.S. at 258; Giles, *supra* note 151, at 821.

¹⁵⁴ *Price Waterhouse*, 490 U.S. at 258.

¹⁵⁵ See, e.g., *Hallmark Developers, Inc.*, 466 F.3d at 1286; *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215, 1223 (4th Cir. 1989); *Huntington Branch, N.A.A.C.P. v. Huntington*, 844 F.2d 926, 937 (2d Cir. 1988); see also Anderson, *supra* note 137, at 376, 378–79 (discussing disparate impact under the FHA); Rotem, *supra* note 137, at 1987–89 (summarizing FHA disparate impact cases).

¹⁵⁶ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Smith*, 682 F.2d at 1065; *United States v. City of Black Jack*, 508 F.2d 1179, 1185, n.2 (8th Cir. 1974).

¹⁵⁷ See *Griggs*, 401 U.S. at 428; *Langlois*, 207 F.3d at 49–50; *Smith*, 682 F.2d at 1065; *Black Jack*, 508 F.2d at 1185, n.2.

¹⁵⁸ *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745 (9th Cir. 1996); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). The other type of disparate impact claims involve instances where a policy "perpetuates segregation and thereby prevents interracial association." *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290; see *Huntington Branch, N.A.A.C.P.*, 844 F.2d at 937. Defendants of such a claim have the opportunity to present a justification for continuing the practice. See *Bangerter*, 46 F.3d at 1503; *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984).

¹⁵⁹ See *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 382–85 (3d Cir. 2011); *White Oak Prop. Dev., LLC v. Washington Twp., Ohio*, 606 F.3d 842, 851 (6th Cir. 2010); *Betsey*, 736 F.2d at 988.

der the FHA was *Betsey v. Turtle Creek Associates*.¹⁶⁰ There, the Fourth Circuit Court of Appeals held that a landlord's policy of evicting families with children disproportionately affected the building's minority tenants.¹⁶¹ Using statistical evidence, the court found that the landlord's new policy resulted in the evictions of 74.9% of the non-white tenants.¹⁶² Only 26.4% of white residents were evicted.¹⁶³ Considering these figures, the court reasoned that the landlord's policy disparately impacted an FHA-protected class.¹⁶⁴

In response to the increasing number of disparate impact claims under the FHA, HUD recently implemented a regulation explicitly providing for such causes of action under the Act.¹⁶⁵ Under the regulation, the plaintiff carries the initial burden of establishing that the challenged conduct had a disparate impact on a protected class.¹⁶⁶ The defendant would then have the opportunity to offer a legitimate, nondiscriminatory reason justifying the practice.¹⁶⁷ Finally, the plaintiff could still succeed by proving that another, less discriminatory method could accomplish the same goals.¹⁶⁸ Although courts have already acknowledged disparate impact claims, there is a circuit split over whether Section 8 tenants can rely on the disparate impact theory.¹⁶⁹

¹⁶⁰ See *Betsey*, 736 F.2d at 988.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. § 100.500); *HUD Proposes Rules Establishing Standards for Disparate Impact Claims*, NAT'L MULTI HOUS. COUNCIL, available at <http://www.nmhc.org/Content.cfm?ItemNumber=55671> (last visited Jan. 13, 2014).

¹⁶⁶ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,460; *HUD Proposes Rules Establishing Standards for Disparate Impact Claims*, *supra* note 165.

¹⁶⁷ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,460; *HUD Proposes Rules Establishing Standards for Disparate Impact Claims*, *supra* note 165.

¹⁶⁸ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,460; *HUD Proposes Rules Establishing Standards for Disparate Impact Claims*, *supra* note 165.

¹⁶⁹ See *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 382 ("Typically, 'a disparate impact is shown by statistics.'" (quoting *Hallmark Developers, Inc.*, 466 F.3d at 1286)). Compare *Graoch Assocs. #33*, 508 F.3d at 369 (implying a Section 8 tenant's right to bring a disparate impact claim under the FHA), with *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998) (dismissing a Section 8 tenant's disparate impact claim), and *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995) (ruling that there is no disparate impact relief for Section 8 tenants under the FHA).

C. *The Disparate Impact on Section 8 Tenants*

Discrimination against Section 8 voucher holders in the private housing market is a modern dilemma.¹⁷⁰ Discrimination due to a family's Section 8 status limits the number of viable living areas for program participants.¹⁷¹ For example, a study conducted in the Chicago area concluded that voucher holders are precluded from as much as seventy percent of available housing.¹⁷² In response, Section 8 program participants have tried to bring disparate impact claims under the FHA.¹⁷³ While voucher holders are not a protected class, plaintiffs have argued that a landlord's withdrawal from the program or refusal to rent has a disparate impact on one of the FHA's protected classes.¹⁷⁴

Currently, circuits split on whether the disparate impact theory applies to Section 8 withdrawal cases.¹⁷⁵ In the Seventh Circuit, the court rejected a disparate impact claim based on the precedent that not "every action which produces discriminatory effects is illegal."¹⁷⁶ Rather, the court reasoned that it is a matter of court discretion to determine whether the facts of a case merit a disparate impact analysis.¹⁷⁷ Moreover, the court stressed the voluntary nature of Section 8 programs as a reason why disparate impact claims should not apply to Section 8 landlords.¹⁷⁸ The court reasoned that allowing disparate impact claims would only deter landlords from participating in the program and further decrease the availability of housing.¹⁷⁹

In comparison, the Sixth Circuit has allowed a Section 8 plaintiff to bring a disparate impact claim based on a landlord's withdrawal

¹⁷⁰ See DeLuca et al., *supra* note 38, at 2, 9; Rotem, *supra* note 137, at 1980–81; Zeabart, *supra* note 38, at 782–87.

¹⁷¹ See Rotem, *supra* note 137, at 982; see Elizabeth Kneebone, et al., *The Re-Emergence of Concentrated Poverty: Metropolitan Trends in the 2000s*, BROOKINGS 1 (2011), http://www.brookings.edu/~media/research/files/papers/2011/11/03%20poverty%20kneebone%20nadeau%20berube/1103_poverty_kneebone_nadeau_berube.

¹⁷² Rotem, *supra* note 137, at 1982.

¹⁷³ See *id.* at 1990–91; *Hallmark Developers, Inc.*, 466 F.3d at 1286.

¹⁷⁴ See *Graoch Assocs. #33*, 508 F.3d at 369; Rotem, *supra* note 137, at 1990–91.

¹⁷⁵ See Anderson, *supra* note 137, at 380–83 (discussing disparate impact claims involving Section 8 tenants). Compare *Graoch Assocs. #33*, 508 F.3d at 369 (allowing Section 8 tenants to bring a disparate impact claim under the FHA), with *Salute*, 136 F.3d at 302 (dismissing a Section 8 disparate impact claim), and *Knapp*, 54 F.3d at 1280 (ruling that Section 8 tenants do not have a right to bring a disparate impact claim under the FHA).

¹⁷⁶ *Knapp*, 54 F.3d at 1280; see *Salute*, 136 F.3d at 302; Rotem, *supra* note 137, at 1992–94.

¹⁷⁷ *Knapp*, 54 F.3d at 1280.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

from the Section 8 program.¹⁸⁰ In *Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, the landlord's decision to withdraw from the program affected eighteen families, seventeen of which were minorities.¹⁸¹ The court allowed the claim, rejecting a "categorical" bar excluding Section 8 landlords from disparate impact liability.¹⁸² It held that that courts may bar all claims that could never succeed under the burden-shifting analysis of the test.¹⁸³

Overall, the FHA provides individuals with several methods of protecting their right to equal housing opportunities.¹⁸⁴ Although the Housing Act has slightly different policy considerations, the availability of decent and affordable housing is also a crucial right that should be protected.¹⁸⁵ To help further this goal, individuals should be entitled to bring private suits enforcing the Housing Quality Standards of the Housing Act.¹⁸⁶

III. HOUSING ISSUES RESULTING FROM THE LACK OF ENFORCEMENT MECHANISMS

Courts generally reason that Section 8 tenants do not have an implied private right of action because there is no right to quality housing of any kind.¹⁸⁷ Yet protecting a right to quality housing is not the goal

¹⁸⁰ *Graoch Assocs. #33*, 508 F.3d at 369. In contrast to *Graoch Assocs. #33*, *Salute* and *Knapp* involved cases in which the landlords never participated in the Section 8 program. Anderson, *supra* note 137, at 380; *see Salute*, 136 F.3d at 296; *Knapp*, 54 F.3d at 1275.

¹⁸¹ *Graoch Assocs. #33*, 508 F.3d at 370.

¹⁸² *Id.* at 377. The court eventually dismissed the plaintiff's claim because he failed to state a prima facie case of disparate impact. *Id.* at 377–78.

¹⁸³ *Id.* at 375. The court used *NAACP v. American Family Mutual Insurance Company* as an example of a case where a court would not apply the disparate impact test. *Id.*; *see* 978 F.2d 287, 290 (7th Cir. 1992). There, the court ruled that an insurer's reasons for declining certain areas outweighed "any possible disparate impact the policy could have." *Graoch Assocs. #33*, 508 F.3d at 375 (citing *NAACP*, 978 F.2d at 290).

¹⁸⁴ *See* Fair Housing Act, 42 U.S.C. §§ 3604–3606, 3617 (2006); *see, e.g., Hallmark Developers, Inc.*, 466 F.3d at 1286; *Cnty. Servs., Inc.*, 421 F.3d at 177; *Hous. Auth. of Chickasaw*, 504 F. Supp. at 726.

¹⁸⁵ *See* United States Housing Act, 42 U.S.C. § 1437f (2006); *id.* § 3601; *Stevenson v. Willis*, 579 F. Supp. 2d 913, 923 (N.D. Ohio 2008); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778, 787 (Mass. App. Ct. 2008); Harner, *supra* note 22, at 943.

¹⁸⁶ *See* 42 U.S.C. § 1437f; *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 362 (5th Cir. 2006); *Stevenson*, 579 F. Supp. 2d at 923; *Carter*, 880 N.E.2d at 787; Harner, *supra* note 22, at 943.

¹⁸⁷ *See* United States Housing Act, 42 U.S.C. § 1437 (2006); *Banks v. Dall. Hous. Auth.*, 271 F.3d 605, 611 (5th Cir. 2001); *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1102 (6th Cir. 1985) (reasoning that there is no constitutional right to quality housing); *Reyes-Garay v. Integrand Assurance Co.*, 818 F. Supp. 2d 414, 435 (D.P.R. 2011) ("A section 8 tenant does not have the right to choose absolutely any housing unit . . ."); *Edwards v.*

of a private enforcement right of the Housing Quality Standards.¹⁸⁸ Instead, a private right would allow for challenges to the termination of program funding, which can have dire consequences for Section 8 families.¹⁸⁹ In a very competitive housing market, it is likely that termination of funding can lead to a loss of status as a participant in the HCVP.¹⁹⁰ Moreover, when a landlord withdraws from the Section 8 program, it is the tenants who are affected the most because they rely on the government funding.¹⁹¹ Additionally, there is the threat that landlords are using the voucher program status as a proxy for discriminatory housing practices.¹⁹² Without a private right, Section 8 tenants are left with only one option—to find housing on their own without any federal funding.¹⁹³

A. *The Realities of a Termination of Assistance*

When a local housing authority terminates a family's rent subsidy, the family is reverted back to voucher status.¹⁹⁴ This means that the family is still eligible to receive the subsidy, but it falls upon them to find a new housing unit that meets the Housing Act's standards.¹⁹⁵ Unfortunately, the high demand for affordable housing, the low supply of

District of Columbia, 628 F. Supp. 333, 342 (D.C. Cir. 1985) (finding that statutory provision invoked by plaintiffs did not create a federal right and that there is no "constitutional right to decent, safe, and sanitary housing").

¹⁸⁸ Cf. *Banks*, 271 F.3d at 611 (framing the issue as a right to protect quality housing); *Jaimes*, 758 F.2d at 1102; *Reyes-Garay*, 818 F. Supp. 2d at 435; *Edwards*, 628 F. Supp. at 342.

¹⁸⁹ See *Stevenson v. Willis*, 579 F. Supp. 2d 913, 923 (N.D. Ohio 2008) ("Just as tenants can challenge a rent calculation, they should also be able to challenge procedures for termination of the subsidy altogether."); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778, 787 (Mass. App. Ct. 2008) (discussing the high stakes that are involved when a housing authority terminates funding); see also *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 362, 367 (5th Cir. 2006) (using the entirety of the legislative enactment of the Housing Act to find an implied private right in different sections).

¹⁹⁰ See 24 C.F.R. § 982.303 (2012); DeLuca et al., *supra* note 38, at 2.

¹⁹¹ See DeLuca et al., *supra* note 38, at 10; Rotem, *supra* note 137, at 1995.

¹⁹² See Rotem, *supra* note 137, at 1980–82; Zeabart, *supra* note 38, at 786–87.

¹⁹³ See DeLuca et al., *supra* note 38, at 9–10; Margery Austin Turner & G. Thomas Kingsley, *Federal Programs for Addressing Low-Income Housing Needs: A Policy Primer*, URBAN INST., at 3 (2008), available at http://www.urban.org/UploadedPDF/411798_low-income_housing.pdf; Dan Nnamdi Mbulu, Note, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 387, 400–01 (2000).

¹⁹⁴ See 24 C.F.R. §§ 982.303, .314; DeLuca et al., *supra* note 38, at 10.

¹⁹⁵ See 24 C.F.R. §§ 982.302–.303, .314, .401; DeLuca et al., *supra* note 38, at 2, 10.

housing available, and poor access to housing information can make the housing search a daunting process.¹⁹⁶

In addition, a family has a very limited time to secure new housing before its voucher status is permanently revoked.¹⁹⁷ Voucher status is revoked after only sixty days.¹⁹⁸ At this point, the family must then re-apply to the program.¹⁹⁹ A substantial amount of Section 8 participants are faced with this pressing issue.²⁰⁰ For example, a study done by HUD in the early 2000s concluded that only sixty-nine percent of voucher holders were successful in finding housing.²⁰¹ The economic downturn and the housing market crash have likely made it even more difficult for a family to find a home within the sixty-day period.²⁰²

Low-income families who have no choice but to rent without any government funding face financial hardship.²⁰³ With a high portion of their income going towards rent, families must cut back on essential needs such as food and clothing.²⁰⁴ Furthermore, a lack of rental assistance limits the locations where families can afford housing.²⁰⁵ These areas usually have high concentrations of poverty.²⁰⁶ A study done by the American Community Surveys and Census 2000 concluded that the number of families living in neighborhoods where at least forty percent of households are under the poverty line increased by almost a third in the past decade.²⁰⁷ The lack of rental assistance also means low quality

¹⁹⁶ See *United States v. Westchester Cnty.*, 668 F. Supp. 2d 548, 556 (S.D.N.Y. 2009) (discussing the effects of a lack of affordable housing); Turner & Kingsley, *supra* note 193, at 3; Margery Austin Turner et al., *Section 8 Mobility and Neighborhood Health: Emerging Issues and Policy Challenges*, URBAN INST., at 31, 39 (2000), available at http://urban.org/uploadedPDF/sec8_mobility.pdf.

¹⁹⁷ See 24 C.F.R. §§ 982.303, .314 (2012); DeLuca et al., *supra* note 38, at 2.

¹⁹⁸ See 24 C.F.R. § 982.303; DeLuca et al., *supra* note 38, at 2.

¹⁹⁹ See 24 C.F.R. § 982.303; DeLuca et al., *supra* note 38, at 2.

²⁰⁰ See *Westchester Cnty.*, 668 F. Supp. 2d at 556; Turner & Kingsley, *supra* note 193, at 3; Rotem, *supra* note 137, at 1979–80.

²⁰¹ Meryl Finkel & Larry Buron, *Study on Section 8 Voucher Success Rates, Volume I Quantitative Study of Success Rates in Metropolitan Areas*, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, at i (2001), available at <http://www.huduser.org/publications/pdf/sec8success.pdf>.

²⁰² See 24 C.F.R. § 982.303; DeLuca et al., *supra* note 38, at 2; Kneebone, et al., *supra* note 171, at 1.

²⁰³ Douglas Rice & Barbara Sard, *Decade of Neglect Has Weakened Federal Low-Income Housing Programs: New Resources Required to Meet Growing Needs*, CTR. ON BUDGET AND POLICY PRIORITIES, at 1–2 (2009), available at <http://www.cbpp.org/files/2-24-09hou.pdf>; Turner & Kingsley, *supra* note 193, at 1.

²⁰⁴ Rice & Sard, *supra* note 203, at 1–2.

²⁰⁵ See Kneebone, et al., *supra* note 171, at 5–6; Rice & Sard, *supra* note 203, at 6–7.

²⁰⁶ See Kneebone, et al., *supra* note 171, at 5–6; Zeabart, *supra* note 38, at 782–83.

²⁰⁷ Kneebone, et al., *supra* note 171, at 5. The Study was done from 2005–2009. *Id.*

housing conditions.²⁰⁸ Many families live in overcrowded, unhealthy units where there are high crime rates and low-quality public education.²⁰⁹

Additionally, low-income families without rent assistance struggle to maintain a stable home environment.²¹⁰ A family may have to move very frequently due to inadequate housing conditions.²¹¹ Moreover, the poor conditions tend to remain the same from one place to the next.²¹² Many families often face issues such as poor plumbing and heating systems, broken windows, and cracking walls.²¹³

High-poverty neighborhoods contribute to the prevalence of housing segregation.²¹⁴ Low-income families are often unaware of the housing opportunities in other areas that the HCVP is meant to promote.²¹⁵ Moreover, little is done to expose families to the communities with higher quality housing.²¹⁶

B. *Lack of Support from HUD & Housing Authorities*

Whereas HUD and the housing authorities cannot be blamed for the community barriers, they do little to encourage voucher recipients to search for housing in better quality areas.²¹⁷ Families left to search on their own are less likely to find units that the Housing Act intends to promote.²¹⁸ HUD and the housing authorities also do little to ensure landlord compliance.²¹⁹ The voluntary nature of the program allows landlords to act in their own interests at the expense of Section 8 tenants.²²⁰

²⁰⁸ See Rice & Sard, *supra* note 203, at 6–7; Zeabart, *supra* note 38, at 771–72.

²⁰⁹ See Rice & Sard, *supra* note 203, at 6–7; Zeabart, *supra* note 38, at 771–72.

²¹⁰ DeLuca et al., *supra* note 38, at 9.

²¹¹ *Id.*

²¹² See *id.* at 9–10.

²¹³ *Id.*

²¹⁴ See Turner et al., *supra* note 196, at 39–41; Zeabart, *supra* note 38, at 784–85.

²¹⁵ See United States Housing Act, 42 U.S.C. § 1437 (2006); Turner et al., *supra* note 196, at 31; Zeabart, *supra* note 38, at 782–83.

²¹⁶ See DeLuca et al., *supra* note 38, at 2, 9; Turner et al., *supra* note 196, at 39–41; Zeabart, *supra* note 38, at 791.

²¹⁷ See DeLuca et al., *supra* note 38, at 2, 9; Turner et al., *supra* note 196, at 39–41; Zeabart, *supra* note 38, at 791.

²¹⁸ See 42 U.S.C. § 1437(a); DeLuca et al., *supra* note 38, at 2, 9; Turner et al., *supra* note 196, at 39–41.

²¹⁹ See 24 C.F.R. §§ 982.404, .406 (2012); DeLuca et al., *supra* note 38, at 10; Zeabart, *supra* note 38, at 791.

²²⁰ See 24 C.F.R. §§ 982.302, .404, .406; DeLuca et al., *supra* note 38, at 10; Anderson, *supra* note 137, at 392; Zeabart, *supra* note 38, at 790.

1. Administrative Inefficiencies

Although HUD requires housing authorities to provide an informal hearing process for some issues, such as a determination of a family's income, they are not required to provide hearings for funding based on landlord noncompliance.²²¹ Moreover, the hearing procedures do not offer much of a chance of success for Section 8 tenants fortunate enough to be granted one.²²²

HUD delegates the hearing procedures to the housing authorities.²²³ This delegation has led to lax and inadequate procedural protection for tenants.²²⁴ For example, in *Carter v. Lynn Housing Authority*, the court found that the informal hearing regarding a tenant's violation of the Housing Quality Standards failed to adequately provide the tenant with an opportunity to be heard.²²⁵ The court reasoned that the hearing officer's failure to make any findings of fact was "contrary to our jurisprudence and [could not] be sanctioned."²²⁶ The inadequate hearing process in *Carter* represents the overall lack of enforcement mechanisms provided by the Housing Act.²²⁷ Moreover, even after a housing authority holds a hearing, it is not necessarily bound by the hearing officer's decision.²²⁸

In addition, families that lose their funding receive little help from housing authorities when they look to procure new Section 8 housing.²²⁹ The only support most families receive is a sheet of available

²²¹ See 24 C.F.R. § 982.555(b)(6). In contrast, participants are granted the right to an informal hearing for terminations based on tenant action or inaction. *Id.* § 982.555(a)(1)(v).

²²² See *Basco v. Machin*, 514 F.3d 1177, 1182–84 (11th Cir. 2008); *Carter*, 880 N.E.2d at 785–87; 24 C.F.R. § 982.555(e) (outlining the hearing procedures). Although the hearing procedures do not require housing authorities to provide hearings for funding termination based on landlord conduct, they do not explicitly preclude it either. See 24 C.F.R. § 982.555(b)(6). Theoretically, a housing authority could provide a Section 8 tenant with the opportunity for a hearing if it wished to do so. See *id.*

²²³ See 24 C.F.R. § 982.55(e)(1).

²²⁴ See *Basco*, 514 F.3d at 1182–84; *Carter*, 880 N.E.2d at 785–87.

²²⁵ See *Carter*, 880 N.E.2d at 785–87.

²²⁶ *Id.* at 787.

²²⁷ See *Johnson*, 442 F.3d at 366 (finding that "[t]here simply is no comprehensive federal remedial scheme provided for the voucher program" to demonstrate Congress's intent to preclude a private right); *Howard v. Pierce*, 738 F.2d 722, 729 (6th Cir. 1984); *Carter*, 880 N.E.2d at 785–87; see also *Basco*, 514 F.3d at 1182, 1183–84 (finding that the use of unauthenticated police reports alone was not sufficient evidence to find a violation of the tenant's housing responsibilities).

²²⁸ See 24 C.F.R. § 982.555(f) (2012). The regulatory language states that a housing authority "is not bound by a hearing decision . . . [c]oncerning a matter for which [it] is not required to provide an opportunity for an informal hearing." See *id.*

²²⁹ See DeLuca et al., *supra* note 38, at 9; Turner et al., *supra* note 196, at 39–41.

properties and participating landlords.²³⁰ These lists are out of date and do not provide a comprehensive overview of available housing.²³¹ Recently, a study done by the Poverty & Race Research Action Council revealed just how inadequate these lists are in providing assistance.²³² The fieldworkers took a voucher holder on an eight-hour search with the list provided by the Mobile Housing Authority.²³³ Despite the assistance, the voucher holder was unable to find any potential leads.²³⁴ In fact, most of the units already had long waitlists or unreceptive landlords.²³⁵

Housing authority briefings also fail to provide adequate assistance.²³⁶ These meetings are often poorly organized and focus mainly on advising program participants on the comprehensive HUD regulations.²³⁷ Housing authorities offer little to encourage families to search for housing beyond the areas in which they are comfortable.²³⁸ This not only exacerbates the limited housing problem, but also detracts from the program's policy of promoting economically mixed housing.²³⁹ Without any assistance, low-income families only search in the areas with which they are familiar; these are usually high-poverty, racially segregated communities.²⁴⁰ Not only does the administration struggle to promote the Housing Act's policies, but it also does not do enough to enforce its requirements.²⁴¹

²³⁰ See DeLuca et al., *supra* note 38, at 9; Turner et al., *supra* note 196, at 39–41.

²³¹ See DeLuca et al., *supra* note 38, at 9 (noting that most of the units on the list would not be available for several years). In fact, most participants do not even know that they can search for housing off the list. *Id.*

²³² *Id.* This study concentrated on Section 8 program participants in Mobile, Alabama. *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* The participant's voucher ultimately expired and she was living paycheck to paycheck without any Section 8 rental assistance. *Id.*

²³⁶ See Susan J. Popkin & Mary K. Cunningham, *Searching for Rental Housing with Section 8 in the Chicago Region*, URBAN INST., at 28 (2000), available at <http://www.urban.org/UploadedPDF/410314.pdf>; Turner et al., *supra* note 196, at 40–41.

²³⁷ See Popkin & Cunningham, *supra* note 236, at 28; Turner et al., *supra* note 196, at 41.

²³⁸ See DeLuca et al., *supra* note 38, at 9; Turner et al., *supra* note 196, at 41.

²³⁹ See United States Housing Act, 42 U.S.C. § 1437f (2006); DeLuca et al., *supra* note 38, at 9; Turner et al., *supra* note 196, at 40–41.

²⁴⁰ DeLuca et al., *supra* note 38, at 9; Turner et al., *supra* note 196, at 40–41.

²⁴¹ See *Reyes-Garay*, 818 F. Supp. 2d at 418–19; 24 C.F.R. § 982.404 (2012); DeLuca et al., *supra* note 38, at 10; Rotem, *supra* note 137, at 1981.

2. Landlord Noncompliance & the Permeation of Housing Segregation

The HCVP is a voluntary program.²⁴² Consequently, a landlord's decision to opt out of the program, even if it adversely affects Section 8 tenants, is met with little resistance from housing authorities.²⁴³ Given the high demand for housing, most landlords can find renters without participating in the program.²⁴⁴ Most landlords are also deterred by the negative preconceptions associated with the HCVP.²⁴⁵ For an increasing number of landlords, it is more convenient to rent without the program because they do not have to deal with the administrative responsibilities that come with the HCVP.²⁴⁶ Therefore, unless there is a shortage of tenants in an area, an increasing number of landlords are opting to stay out of the HCVP.²⁴⁷ Moreover, landlords who wish to withdraw from the program can simply neglect their regulatory responsibilities and the housing authority will terminate funding for failure to comply.²⁴⁸ These factors contribute to a landlord's discrimination against Section 8 tenants.²⁴⁹

Another issue is the resistance to rent to voucher holders because of the stigma associated with the program.²⁵⁰ Landlords are reluctant to rent to Section 8 participants because they believe that such families bring crime into areas, are less likely to pay their portion of the rent, and drive down property values.²⁵¹ Although the reality is that the existence of federal funding increases the likelihood that landlords will re-

²⁴² Anderson, *supra* note 137, at 380; see 24 C.F.R. § 982.302; Krista Sterken, Note, *A Different Type of Housing Crisis: Allocating Costs Fairly and Encouraging Landlord Participation in Section 8*, 43 COLUM. J.L. & SOC. PROBS. 215, 221–22 (2009).

²⁴³ See *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 369–70 (6th Cir. 2007); 24 C.F.R. § 982.302; Anderson, *supra* note 137, at 380; Sterken, *supra* note 242, at 221; Zeabart, *supra* note 38, at 790.

²⁴⁴ Turner et al., *supra* note 196, at 33; see Zeabart, *supra* note 38, at 790.

²⁴⁵ See Turner et al., *supra* note 196, at 33; Rotem, *supra* note 137, at 1982–84; Zeabart, *supra* note 38, at 790.

²⁴⁶ See Turner et al., *supra* note 196, at 33; Rotem, *supra* note 137, 1983–84.

²⁴⁷ See Turner et al., *supra* note 196, at 33; Zeabart, *supra* note 38, at 790.

²⁴⁸ See *Reyes-Garay*, 818 F. Supp. 2d at 418–19; DeLuca et al., *supra* note 38, at 10. For example, a landlord could refuse to make repairs to a unit so that it fails to meet the Housing Quality Standards. See 24 C.F.R. §§ 982.401, .404 (2012); DeLuca et al., *supra* note 38, at 10.

²⁴⁹ See Rotem, *supra* note 137, at 1981–84; Sterken, *supra* note 242, at 222; Zeabart, *supra* note 38, at 787.

²⁵⁰ See Rotem, *supra* note 137, at 1982–83; Zeabart, *supra* note 38, at 787–88.

²⁵¹ See Rotem, *supra* note 137, at 1982–83; Zeabart, *supra* note 38, at 788.

ceive rental payments, many landlords still worry about the effect Section 8 tenants have on a neighborhood.²⁵²

Despite the courts' and HUD's reluctance to allow enforcement of the Housing Quality Standards, Section 8 tenants need a way to preserve their rental assistance.²⁵³ An explicit private right would not only protect Section 8 tenants from inadequate landlords, but it would also help other low-income families by opening up more available housing options.²⁵⁴

IV. A PRIVATE RIGHT TO PRESERVE FUNDING

The HCVP's purpose is to "aid[] low-income families in obtaining a decent place to live and [to] promote[] economically mixed housing"²⁵⁵ Courts have interpreted this goal as a congressional intent to help fund housing costs, not to provide a right to housing of a certain caliber.²⁵⁶ Thus, per Supreme Court precedent, a private right to enforce the Housing Quality Standards does not further the Housing Act's policy concerns.²⁵⁷ HUD is in agreement, as it has expressly prohibited program participants from enforcing the Housing Quality Standards.²⁵⁸ The more pertinent purpose that the courts miss, however, is that the enforcement of the Housing Quality Standards protects a tenant's right to contest a unilateral termination of funding.²⁵⁹

²⁵² See Rotem, *supra* note 137, at 1980, 1983; Zeabart, *supra* note 38, at 786.

²⁵³ See *Reyes-Garay*, 818 F. Supp. 2d at 431; *Stevenson*, 579 F. Supp. 2d at 923; DeLuca et al., *supra* note 38, at 10.

²⁵⁴ See Turner et al., *supra* note 196, at 41; Anderson, *supra* note 137, at 392; Sterken, *supra* note 242, at 218.

²⁵⁵ United States Housing Act, 42 U.S.C. § 1437f(a) (2006).

²⁵⁶ See *Anderson v. Jackson*, 556 F.3d 351, 358 (5th Cir. 2009) ("The purpose of the language referencing the residents is to provide a clear directive to the Secretary, not to confer substantive rights upon individuals."); *Banks v. Dall. Hous. Auth.*, 271 F.3d 605, 609 (5th Cir. 2001) (reasoning that congressional intent focuses on "impos[ing] a condition upon a receipt of government monies" but not conferring a private right to program participants); *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1102 (6th Cir. 1985); *Perry v. Hous. Auth.*, 664 F.2d 1210, 1217 (4th Cir. 1981) (finding that the purpose of the legislation was to help the states); *Reyes-Garay v. Integrand Assurance Co.*, 818 F. Supp. 2d 414, 435 (D.P.R. 2011) ("A section 8 tenant does not have the right to choose absolutely any housing unit . . .").

²⁵⁷ See *Banks*, 271 F.3d at 611; *Perry*, 664 F.2d at 1213; see also 24 C.F.R. § 982.406 (2012) (preventing Section 8 tenants from enforcing the Housing Quality Standards).

²⁵⁸ See 24 C.F.R. § 982.406.

²⁵⁹ See *Stevenson v. Willis*, 579 F. Supp. 2d 913, 923 (N.D. Ohio 2008) (reasoning that the "right not to be arbitrarily terminated from participation in the Housing Choice Voucher Program is hardly less important" than a right to challenge rent control); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778, 787 (Mass. Ct. App. 2008) (discussing the high stakes that are involved when a housing authority terminates funding).

While program participants currently have a right to request an informal hearing over a termination due to tenant fault, there is no hearing requirement if the termination is based on the landlord's failure to comply with the Housing Quality Standards.²⁶⁰ Similar to the private right under the FHA, an explicit private right to enforce the Housing Quality Standards would provide Section 8 tenants with a means of contesting such termination.²⁶¹

A. An Amendment to the Housing Act

If Congress were to amend the Housing Act to explicitly permit a private right to enforce the Housing Quality Standards, courts would not have to struggle to determine if there is an implied right.²⁶² Although the four-point *Cort* test set the standard for identifying implied rights, the circuit courts do not uniformly apply the test.²⁶³ For instance, some courts have decided that the first two factors—identifying the class intended to benefit from the Act and the legislative intent—are more important than the legislative scheme inquiry.²⁶⁴

Neglecting the third and fourth factors of the *Cort* test, however, leads to an incomplete analysis.²⁶⁵ These factors demonstrate the practical effect that a lack of a private right has on Section 8 tenants.²⁶⁶ The

²⁶⁰ See 24 C.F.R. § 982.555; *Voucher Guidebook*, *supra* note 7, at 16-1 to -2. An example of a termination due to tenant fault is the failure to pay rent. 24 C.F.R. § 982.310(a)(1).

²⁶¹ See United States Housing Act, 42 U.S.C. § 1437f (2006); Fair Housing Act, 42 U.S.C. § 3613 (2006); *Stevenson*, 579 F. Supp. 2d at 923; DeLuca et al., *supra* note 38, at 10.

²⁶² See 42 U.S.C. § 1437f(o); *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997); *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 359 (5th Cir. 2006) (reasoning that a federal statute must “unambiguously” give rise to a private right of action); *Reyes-Garay*, 818 F. Supp. 2d at 429 (“The statute nor the regulations nor any court has burdened a Section 8 tenant with this responsibility or bestowed a Section 8 tenant with this right.”).

²⁶³ See *Howard v. Pierce*, 738 F.2d 722, 725–30 (6th Cir. 1984) (finding an implied private right of action under the Housing Act using all four factors of the *Cort* test); *Perry*, 664 F.2d at 1215 (“It is plain that the federal enactments sought to create neither rights in the tenants nor duties in the landlords.”); *Edwards v. District of Columbia*, 628 F. Supp. 333, 339–40 (D.C. Cir. 1985) (finding that “[t]he two first factors have been deemed to be the most important to” the *Cort* analysis).

²⁶⁴ See *Edwards*, 628 F. Supp. at 339–40; see also *Caswell v. Detroit Hous. Comm’n*, 418 F.3d 615, 619 (6th Cir. 2005) (assessing only legislative intent and not the other *Cort* factors).

²⁶⁵ See *Banks*, 271 F.3d at 611 (looking at only the first two *Cort* factors and finding no private right); *Edwards*, 628 F. Supp. at 339–40.

²⁶⁶ See *Johnson*, 442 F.3d at 366 (finding that “[t]here simply is no comprehensive federal remedial scheme provided for the voucher program” to demonstrate Congress’s intent to preclude a private right); *Howard*, 738 F.2d at 728–30 (reasoning that a private right will assist the legislative scheme without interfering with HUD’s discretionary responsibili-

adverse effects resulting from a lack of enforcement mechanisms show that a private right fits into the legislative scheme of the Housing Act.²⁶⁷ Therefore, the final two prongs of the *Cort* test need to be weighed just as heavily as the first two.²⁶⁸

Courts have also inconsistently found an implied private right for some provisions of the Housing Act, but not for others.²⁶⁹ Allowing rent control claims, but not claims enforcing the Housing Quality Standards, is inconsistent with the Act's goals.²⁷⁰ By distinguishing general policy from congressional intent to create a private right, the court fails to recognize the real issue.²⁷¹ All of the Housing Act provisions are intended to benefit low-income families by promoting "decent, safe, sanitary and affordable housing."²⁷² Therefore, the right to enforce the rent control provisions is no more important than a right to enforce the Housing Quality Standards.²⁷³

Furthermore, following *Graoch Associates #33*, it is unclear whether disparate impact claims will be an adequate substitute for an explicit private right.²⁷⁴ First, the burden of proof that Section 8 tenants have to

ties); see also DeLuca et al., *supra* note 38, at 10–11 (documenting the effects of a lack of a private right for Section 8 tenants).

²⁶⁷ See DeLuca et al., *supra* note 38, at 10–11; Rotem, *supra* note 137, at 1981–84; Sterken, *supra* note 242, at 221; Zeabart, *supra* note 38, at 787–89.

²⁶⁸ See *Johnson*, 442 F.3d at 366; *Howard*, 738 F.2d at 728–30; DeLuca et al., *supra* note 38, at 10–11; Rotem, *supra* note 137, at 1981–84.

²⁶⁹ Compare *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430, 432 (1987) (finding a private right for the rent control provisions), and *Johnson*, 442 F.3d at 367 (concluding that there is a private right under the rent control provisions for HCVP participants), with *Banks*, 271 F.3d at 611 (ruling that Section 8 tenants have no right to enforce the Housing Quality Standards), and *Edwards*, 628 F. Supp. at 339–40 (finding that there is no private right under the Housing Quality Standards provision).

²⁷⁰ See United States Housing Act, 42 U.S.C. § 1437f (2006); *Stevenson*, 579 F. Supp. 2d at 923 ("[The] right not to be arbitrarily terminated from participation in the [HCVP] is hardly less important than [the] right to contest rent and utility charges."); see also *Johnson*, 442 F.3d at 362 (reasoning that, "tak[ing] the entirety of the legislative enactment into account," demonstrates the same overall purpose behind different provisions).

²⁷¹ See *Wright*, 479 U.S. at 430 (concluding that the rent control provision's "intent to benefit tenants is undeniable"); *Banks*, 271 F.3d at 611 (reasoning that the Housing Act provision merely explains what housing authorities must do to receive subsidies); *Edwards*, 628 F. Supp. at 340 ("The courts have concluded that section 1437 represents a general statement of policy, 'too amorphous to create a cause of action.'" (quoting *Perry v. Hous. Auth.*, 486 F. Supp. 498, 502 (D.S.C. 1980), *aff'd*, 664 F.2d 1210 (4th Cir. 1981))).

²⁷² *Howard*, 738 F.2d at 730; see 42 U.S.C. § 1437; *Johnson*, 442 F.3d at 362; *Powell v. Hous. Auth. of Pittsburgh*, 812 A.2d 1201, 1203 (Pa. 2004).

²⁷³ See 42 U.S.C. §§ 1437a, 1437f(o) (8); *Stevenson*, 579 F. Supp. 2d at 923; see also *Carter*, 880 N.E.2d at 687 (recognizing the "exceptionally high" stakes involved with Section 8 benefits).

²⁷⁴ See *Green v. Sunpointe Assocs.*, 1997 WL 1526484, at *3 (W.D. Wash. 1997) ("[B]y statute and regulation it has been made clear that the Section 8 program is to be run in

meet is so high that it is unlikely to remedy the situation.²⁷⁵ Second, program participants that do not fall into one of the FHA's protected classes are still left without any recourse.²⁷⁶ This does not mean, however, that these families are not victims of biases held against the HCVP.²⁷⁷ The decision not to rent to a family based on income has the same adverse effect as a decision not to rent based on race or natural origin.²⁷⁸ It limits the availability of affordable housing, which in turn concentrates poverty into segregated areas.²⁷⁹

An explicit private right like that provided in the FHA would help remedy many of the issues courts face when addressing Section 8 claims.²⁸⁰ The courts would no longer have to parse through the Housing Act's statutory language to try and speculate as to Congress' intent.²⁸¹ This would provide courts with a more consistent framework to follow.²⁸² More importantly, an explicit private right would further the Housing Act's purpose of remedying "the acute shortage of decent and safe dwellings for low-income families."²⁸³

conformance with the requirements of the FHA."); Rotem, *supra* note 137, at 1990–99 (discussing disparate impact claims brought by Section 8 tenants). Compare *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 376 n.5 (6th Cir. 2007) ("[The Housing Act does] not include language indicating that Section 8 landlords should be exempt from any FHA requirements."), with *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1276, 1280 (7th Cir. 2005) (ruling that Section 8 tenants cannot bring disparate impact claims under the FHA).

²⁷⁵ See *Graoch Assocs. #33*, 508 F.3d at 377–79; *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (ruling that defendants can rebut a disparate impact challenge by providing evidence of a legitimate business purpose to justify the conduct).

²⁷⁶ See Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006); *Reyes-Garay*, 818 F. Supp. 2d at 437, 438 (finding that plaintiffs failed to establish a prima facie case for failure to accommodate under the FHA); Rotem, *supra* note 137, at 1991.

²⁷⁷ See Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 161–65 (1996); Rotem, *supra* note 137, at 1981–84; Zeabart, *supra* note 38, at 787–88.

²⁷⁸ See Beck, *supra* note 277, at 161–65; Rotem, *supra* note 137, at 1982–84; Zeabart, *supra* note 38, at 787–88.

²⁷⁹ See *United States v. Big D Enters.*, 184 F.3d 924, 929 (8th Cir. 1999); *Betsey*, 736 F.2d at 988; Turner et al., *supra* note 196, at 31; Rotem, *supra* note 137, at 1982–84.

²⁸⁰ See 42 U.S.C. § 3613; *Wright*, 479 U.S. at 430; *Graoch Assocs. #33*, 508 F.3d at 369, 377; *Knapp*, 54 F.3d at 1280; *Howard*, 738 F.2d at 728–30.

²⁸¹ See *Wright*, 479 U.S. at 430; *Johnson*, 442 F.3d at 362; *Banks*, 271 F.3d at 611; *Howard*, 738 F.2d at 726.

²⁸² See, e.g., *Wright*, 479 U.S. at 432; *Howard*, 738 F.2d at 726–30; *Edwards*, 628 F. Supp. at 339–40.

²⁸³ See *United States Housing Act*, 42 U.S.C. § 1437 (2006); *Howard*, 738 F.2d at 730 (concluding that a private right seeking only injunctive and declaratory relief will further the primary purpose of the Housing Act); DeLuca et al., *supra* note 38, at 10–11; Turner et al., *supra* note 196, at 31.

B. *How a Private Right Resolves Housing Issues*

An explicit private right would give program participants an opportunity to challenge a housing authority's termination of funding caused solely by a landlord's failure to comply with the regulatory standards.²⁸⁴ As a result, Section 8 tenants would not be jettisoned from their homes without a chance to plead their case.²⁸⁵ Instead, Section 8 tenants would be able to bring claims enjoining landlords to make repairs so their rental assistance is not terminated.²⁸⁶ This would mean that Ana Reyes-Garay and José Rosa-Rivera would have had a way to get their landlord to repair their ceiling so they could continue to live in their apartment and still receive their rental assistance.²⁸⁷

The ability to fight funding termination would save Section 8 tenants from searching for new housing with inadequate resources.²⁸⁸ They would not have to deal with the little support they currently receive from HUD and their local housing authorities.²⁸⁹ Furthermore, Section 8 tenants would not have to waste time on fruitless searches of low-quality homes.²⁹⁰ They also would not have to deal with the high likelihood of being denied a housing opportunity due to their Section 8 status and thus be forced to live in areas with large concentrations of poverty.²⁹¹

Moreover, with a private right to challenge this funding termination, it would be less likely that Section 8 families would need to re-enter the market full of landlords reluctant to rent to voucher holders.²⁹² In addition, landlords who already participate in the program would not be able to withdraw simply by neglecting their responsibili-

²⁸⁴ See *Reyes-Garay*, 818 F. Supp. 2d at 418–19; 24 C.F.R. §§ 982.401, .404 (2012) (stating a landlord's responsibilities for participating in the program); DeLuca et al., *supra* note 38, at 10.

²⁸⁵ See *Perry*, 664 F.2d at 1217; *Reyes-Garay*, 818 F. Supp. 2d at 431; 24 C.F.R. § 982.555; DeLuca et al., *supra* note 38, at 10.

²⁸⁶ See *Howard*, 738 F.2d at 730; *Reyes-Garay*, 818 F. Supp. 2d at 418; *Stevenson*, 579 F. Supp. 2d at 923; 24 C.F.R. § 982.404.

²⁸⁷ See *Reyes-Garay*, 818 F. Supp. 2d at 431.

²⁸⁸ See *Stevenson*, 579 F. Supp. 2d at 923; *Carter*, 880 N.E.2d at 787; DeLuca et al., *supra* note 38, at 2, 9; Turner et al., *supra* note 196, at 40–41.

²⁸⁹ See *Stevenson*, 579 F. Supp. 2d at 923; *Carter*, 880 N.E.2d at 787; DeLuca et al., *supra* note 38, at 9–11; Turner et al., *supra* note 196, at 40–41.

²⁹⁰ See DeLuca et al., *supra* note 38, at 9; Turner et al., *supra* note 196, at 40–41; Rotem, *supra* note 137, at 1982.

²⁹¹ See Rotem, *supra* note 137, at 1982; Sterken, *supra* note 242, at 221.

²⁹² See Beck, *supra* note 277, at 161–65; Rotem, *supra* note 137, at 1982–84; Zeabart, *supra* note 38, at 790.

ties.²⁹³ It is likely that landlords who enter into the voucher program will be incentivized to make sure that their units comply with the Housing Quality Standards so they can avoid legal battles with their Section 8 tenants.²⁹⁴ Along these same lines, a private right would reduce the threat of losing voucher status for failing to find new housing within the required time period.²⁹⁵

With more Section 8 tenants remaining in their homes, as well as more Section 8 apartments complying with the Housing Quality Standards, there would be additional available housing for voucher holders still in search of acceptable units.²⁹⁶ This would not only help more families find housing within the required time period, but it would also help families move into less impoverished areas.²⁹⁷ With more housing available for all low-income families, a private right to action would further the policies of the Housing Act.²⁹⁸

CONCLUSION

Decent and affordable housing is a matter of ever-increasing importance in the United States. Currently, the demand is much greater than the supply, and it is adversely affecting low-income families. Even those families that receive rental assistance from federal programs, such as the HCVP, have trouble maintaining a decent place to live. Currently, the landlords of Section 8 tenants are not at risk of facing repercussions if they fail to maintain their units in compliance with the Housing Quality Standards, leaving Section 8 tenants exposed to a potential termination of their funding without any possible recourse. Section 8 tenants are essentially on their own when it comes to these types of issues because Supreme Court precedent does not allow them to enforce the Housing Quality Standards in court.

One way to combat this issue is to provide Section 8 voucher participants with the right to contest the termination of funding due to poor landlord maintenance. Courts would no longer have to determine

²⁹³ See *Perry*, 664 F.2d at 1211; *Reyes-Garay*, 818 F. Supp. 2d at 418; DeLuca et al., *supra* note 38, at 10–11.

²⁹⁴ See *Perry*, 664 F.2d at 1211; *Reyes-Garay*, 818 F. Supp. 2d at 418; DeLuca et al., *supra* note 38, at 10–11.

²⁹⁵ See 24 C.F.R. §§ 982.303, .314 (2012); DeLuca et al., *supra* note 38, at 2.

²⁹⁶ See *Carter*, 880 N.E.2d at 787; Mbulu, *supra* note 193, at 400; Rotem, *supra* note 137, at 1979–80.

²⁹⁷ See DeLuca et al., *supra* note 38, at 2; Turner et al., *supra* note 196, at 31; Mbulu, *supra* note 193, at 400.

²⁹⁸ See United States Housing Act, 42 U.S.C. § 1437 (2006); *Howard*, 738 F.2d at 730; *Stevenson*, 579 F. Supp. 2d at 923.

ad hoc whether a Section 8 tenant had a viable claim against a landlord, and there would be a set of procedures already established by HUD that would lead to an efficient resolution. This would allow families to remain in their homes and leave more housing available to those who are still searching. It is imperative for Congress to take charge and provide Section 8 tenants with a right to protect themselves from funding termination.