MINIMUM INCOME REQUIREMENTS BRING MAXIMUM LEGAL TROUBLE

HOW LANDLORDS ILLEGALLY USE MINIMUM INCOME REQUIREMENTS TO DENY HOUSING TO VOUCHER HOLDERS

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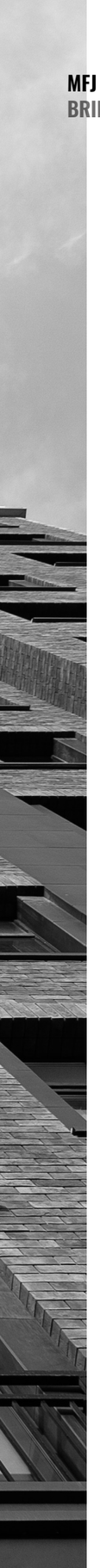

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ABOUT MOBILIZATION FOR JUSTICE ("MFJ")

Envisioning a society in which there is equal justice for all, Mobilization for Justice ("MFJ") has provided legal services to low-income New Yorkers for over sixty years.

MFJ has five main projects. These include Children and Families; Disability and Aging Rights; Economic Justice; the Special Litigation Project; and Housing. While proud of the work we have been doing, we are excited to announce the expansion of our Housing Project—which has traditionally focused on eviction defense—to include a Fair Housing Project ("FHP").

The FHP is dedicated to working with individuals who have experienced housing discrimination based on their race, disability, national origin, source of income, or any other protected characteristic. It is our hope that by creating the FHP, we will get closer to ensuring that every New Yorker has access to safe and affordable housing—because MFJ believes that housing is a human right.

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EXECUTIVE SUMMARY

Landlords in New York City cannot discriminate against people who use housing vouchers to help pay their rent. The New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL") prohibit that and all other forms of source of income ("SOI") discrimination. The prohibition is not new, but the ways in which SOI discrimination manifests adapts with time. Suffice to say that it is alive and well.

SOI discrimination is about more than how the rent gets paid. In New York City, and in many other metropolitan areas around the country, the overwhelming majority of people who use vouchers to help defray the cost of rent are people of color and people with disabilities. Thus, widespread SOI discrimination is often a proxy for other, perhaps more odious, forms of discrimination. And when rental applicants experience SOI discrimination, they experience serious negative consequences, including housing insecurity and potentially homelessness.

Notably, SOI discrimination is not explicitly prohibited under the federal Fair Housing Act ("FHA"). But that does not mean federal law is irrelevant. If SOI discrimination disparately impacts any of the classes protected under the FHA—such as a particular racial group or people with disabilities—then such SOI discrimination could also violate federal law.

Three recent cases—two in the Southern District of New York and one in New York Supreme Court—show how courts in New York will not stand for SOI discrimination, nor will they turn a blind eye to what is at stake.

In this report, we focus on these three cases and their implications. Also, in an effort to help attorneys, tenants, and policymakers, we walk through how to gather and analyze relevant data to determine whether an SOI discrimination claim under the NYCHRL might also be a violation of the FHA.

"Three recent cases show how courts in New York will not stand for SOI discrimination, nor will they turn a blind eye to what is at stake."

BACKGROUND AND INTRODUCTION

The government—from federal to local—deploys resources that help ensure residents have access to affordable housing. A critical one is rental assistance that is paid to private landlords on behalf of lower-income tenants, sometimes referred to as housing subsidies or vouchers. These housing subsidies play a vital role in the lives of many New Yorkers. But their benefits are stifled, and New Yorkers are harmed, when landlords treat voucher holders differently than other applicants or tenants. That is, when landlords commit source of income ("SOI") discrimination.

SOI discrimination can take many forms, such as "we don't take vouchers." But it can also be much more subtle and sophisticated. One such method of subtle SOI discrimination has been to implement requirements that nearly no one with a voucher could satisfy. One stands out: inflexible minimum income requirements that lack a legitimate relationship to the tenant's portion of the rent. Fortunately, legal paths to justice are being paved, providing opportunities for New Yorkers to fight and defeat these discriminatory policies and practices. Here, in summary, are the reasons why this is important.

First, housing vouchers provide crucial support to many New Yorkers. There are various kinds of subsidies that New Yorkers can receive to help them pay their rent. Some of these include a HASA subsidy (a subsidy that is provided by the HIV/AIDS Services Administration)[1]; an Olmstead Housing Subsidy ("OHS")[2]; a Family Homelessness & Eviction Prevention Supplement ("FHEPS" voucher)[3]; a CityFHEPS voucher, which is an NYC addition to the FHEPS voucher[4]; and a Housing Choice Voucher ("HCV"), which is popularly known as a Section 8 voucher.[5] The New York City Housing Authority runs the largest Section 8 program in the United States, with approximately 85,000 vouchers and over 25,000 owners currently participating in the program.[6] Stated simply, while many more people could benefit from vouchers, there are tens of thousands of New Yorkers who are able to call this ever-increasingly unaffordable city home because of this rental assistance.

Second, SOI discrimination has serious negative consequences. Many people who have rental assistance are only eligible because they are experiencing housing instability, homelessness, or have other characteristics that make them vulnerable to both. Thus, when landlords reject applicants based on their use of a housing voucher, they likely produce or prolong their experience of housing insecurity or homelessness.[7] There is ample evidence that these experiences have serious health consequences.[8] For example, those who experience homelessness "have higher premature mortality than those who are appropriately housed"[9]; they often lack access to medications and other needed health resources[10]; and experiencing homelessness "is overwhelmingly coincident with socioeconomic vulnerability and poor behavioral health, both mental illness and substance use."[11] Said succinctly, experiencing homelessness or facing housing insecurity can be "brutal[]"[12]—and landlords discriminating against applicants who use housing vouchers can create and perpetuate such experiences.

Third, it violates New York State and New York City law to discriminate against applicants based on their use of a housing subsidy. Under the New York State Human Rights Law ("NYSHRL")[13] and New York City Human Rights Law ("NYCHRL"),[14] it is illegal for landlords or real estate agents to deny someone housing or treat them differently based on their lawful source of income, or to discriminate against them because they receive a housing subsidy.

Fourth, plaintiffs do not need to prove that a landlord is intentionally discriminating on the basis of SOI to win under the NYCHRL. A plaintiff can succeed by showing only that a landlord's policy has an inadequately justified disparate impact on subsidy holders. Under the NYCHRL, plaintiffs can succeed using a disparate impact theory of liability. Specifically, if a policy or practice "results in a disparate impact to the detriment" of subsidy holders and is unjustified, "an unlawful discriminatory practice based upon disparate impact" may be established by the plaintiff.[15]

Fifth, SOI discrimination can amount to discrimination on the basis of disability, race, or another protected status, which violates the FHA. And it is possible in New York to expand an SOI discrimination claim under the NYCHRL into an FHA claim. Under the FHA, it is unlawful to refuse someone housing or to discriminate against them because of their race, color, religion, sex, familial status, disability, or national origin.[16] Like the demands of the NYCHRL, plaintiffs can succeed under the FHA by showing that a policy or practice has an unjustified disparate impact on an FHA-protected group.[17] While SOI discrimination alone cannot be the basis for an FHA violation,[18] when landlords discriminate against subsidy holders, their actions may also have a disparate impact on an FHA-protected group.[19] In that case, a plaintiff may also be able to bring a disparate impact claim under the FHA for discrimination on the basis of race, disability, or another protected status.

Two recent cases out of the Southern District of New York support the idea that it is potentially beneficial—and surely possible—for a plaintiff to expand an SOI discrimination claim under the NYCHRL into an FHA claim.[20]

Overall, landlords and New Yorkers with housing subsidies should be aware that a landlord using facially neutral policies—such as minimum income requirements—to a deny a voucher-holder's rental application (as well as landlords outright refusing to accept housing vouchers) might amount to SOI discrimination and discrimination against an FHA-protected group. And New York courts are not afraid to say so. Three tenant-friendly announcements have been made by courts in New York since July 2022.[21] These cases provide clear legal strategies on how to be successful against landlords who discriminate against a person's SOI and potentially discriminate against a group that is protected under the FHA.

COURTS IN NEW YORK ARE CRACKING DOWN ON SOI DISCRIMINATION AND FHA VIOLATIONS

It is no secret that, despite prohibitions on SOI discrimination, some landlords in New York continue to engage in it. Indeed, there is no shortage of popular media describing the phenomenon. For example, as early as June 2018, the *New York Times* published an article telling how New York City had failed since 2014 to persuade some landlords and leasing agents to rent apartments to rental subsidy holders.[22]

In May 2022, Mihir Zaveri—also writing for the *New York Times*—wrote how New Yorkers continued to struggle to utilize their vouchers to rent safe and affordable housing due to, at least in part, landlords and real estate agents discriminating against rental subsidy holders.[23] According to Zaveri, a lawsuit had been filed accusing "more than 120 real estate companies, brokers and property owners across the city of engaging in the illegal practice" of discriminating against those with rental subsidies.[24]

Finally, as recently as October 2023, Karen Yi (writing for the *Gothamist*) describes how one of Unlock NYC's reports alleges that "several New York City landlords and brokers are routinely barring tenants from renting apartments if they rely on government assistance to help pay for it."[25] In other words, there are some landlords in NYC who are serial discriminators.

Although it is an unfortunate fact that landlords and real estate brokers continue to discriminate, there is hope for a brighter tomorrow. This is supported by at least three cases that have recently come out of courts in New York. These show that some courts in New York are now more likely to crack down on landlords who discriminate against those with rental subsidies.

As noted above, SOI discrimination is not always immediately obvious. One of the ways in which it occurs is in the form of minimum income requirements that either no tenant with a voucher could satisfy or do not seem to further a legitimate business interest. While certainly not every tenant experiencing discrimination has been able to vindicate their rights in court, some have. What follows in this section of the report is an overview of two of three recently impactful cases. The two in this section involve strong enforcement of the intersection of minimum income requirements and SOI antidiscrimination laws.

"Even the threat of homelessness constitutes irreparable injury"

OLIVIERRE V. PARKCHESTER (N.Y. SUP. CT. JULY 29, 2022)

In July 2022, Judge Richard G. Latin issued a momentous decision: *Olivierre v. Parkchester Preservation Co., L.P.*[26] It was momentous because the New York Supreme Court's opinion "mark[ed] the first time a New York court has ruled that minimum-income policies for people with full-rent subsidies violate[d] city and state laws."[27] More specifically, in *Olivierre*, Judge Latin granted the plaintiff—Keishe Olivierre—a preliminary injunction against the defendants, Parkchester Preservation Company, L.P., and Preservation Management, LLC, (collectively "Parkchester"), ordering them to process Ms. Olivierre's "application for a three-bedroom apartment if one was available, or if not, for a two-bedroom apartment, utilizing [her full-rent housing voucher] and without considering its minimum income requirements."[28] If neither a three-bedroom nor a two-bedroom apartment was available, the defendants needed to place Ms. Olivierre on a waiting list based on the date of her original application.[29]

THE FACTS

At the time of the decision, Ms. Olivierre was 34 years old, homeless, and sleeping on the floor of her friend's house with her two young sons.[30] She had a CityFHEPS voucher that would cover up to $2,217 of rent per month, with her share being fixed at $0.[31] When she applied in April 2022 for an apartment at Parkchester that rented for $2,100 per month, Parkchester rejected her application because she could not meet the minimum income requirements.[32] Namely, she could neither show that she had an annual income of at least $62,000 nor secure two guarantors that earned a combined annual income of at least $124,000. Ms. Olivierre sued Parkchester, claiming that its minimum income requirements discriminated against her based on her lawful source of income under the New York City Human Rights Law and the New York State Human Rights Law.[33] Among other relief, she sought a preliminary injunction.

THE LAW

The Preliminary Injunction

To receive the preliminary injunction against Parkchester, Ms. Olivierre needed to "establish 1) a likelihood of success on the merits, 2) the danger of irreparable harm if the injunction [was] not granted, and 3) a balancing of equities in her favor."[35] The court ruled for Ms. Olivierre on all three prongs.

PRONG ONE: LIKELIHOOD OF SUCCESS ON THE MERITS

On the first element, the court considered Ms. Olivierre's chances of prevailing on the merits of an SOI discrimination claim under the NYCHRL.[36] Judge Latin observed that it was "undisputed" that Parkchester denied Ms. Olivierre's rental application because she could not meet the minimum income requirements, "despite the fact that [she] had a CityFHEPS voucher that would pay her entire months' rent directly from the City to Parkchester."[37] Importantly, the court rejected the argument that the policy was not discriminatory simply because the defendants applied it to all applicants.[38] He also explicitly rejected Parkchester's argument that the minimum income requirement was necessary to ensure that other potential costs could be covered, such as those related to property damage and post-possession charges, considering that a Security Voucher is generally provided to cover such situations.[39]

Finding Parkchester's denial of Ms. Olivierre's full-rent voucher to be SOI discrimination and their defenses weak, Judge Latin ruled for Ms. Olivierre on the first of the three elements.

PRONG TWO: DANGER OF IRREPARABLE HARM IF THE INJUNCTION WAS NOT GRANTED

Judge Latin ruled for Ms. Olivierre on the second element of the preliminary junction.

The court unequivocally noted how "*a remedy at law would be inadequate, and the brutality of homelessness is too great a risk*," thus making this the exact type of case that injunctive relief is meant to address.[40] Additionally, the court stated that subsidies such as CityFHEPS are meant to address both homelessness and housing insecurity, and that "even the threat of homelessness constitutes irreparable injury."[41]

PRONG THREE: BALANCING OF EQUITIES

Ruling for Ms. Olivierre on prong three, Judge Latin stated—perhaps somewhat cheekily, but also most accurately—that "the scales tip in favor of *[Ms. Olivierre] who will suffer from the threat of homelessness without an injunction, as opposed to the defendants who will still receive full market rent and will face the inconvenience and hardship of one of its six thousand units not conforming with its income requirements.*"[42]

OVERALL

It is important to point out two important facts.

01 First, Ms. Olivierre had a full-rent subsidy, not a partial-rent subsidy.

02 Second, there is no claim of discrimination under the FHA in *Olivierre*.

Ultimately, *Olivierre* stands for the idea that New York City landlords cannot reject a rental applicant with a *full-rent* subsidy for not meeting a minimum income requirement.

FAIR HOUSING JUSTICE CENTER, INC. V. PELICAN MANAGEMENT, INC., (S.D.N.Y. SEPT. 29, 2023)

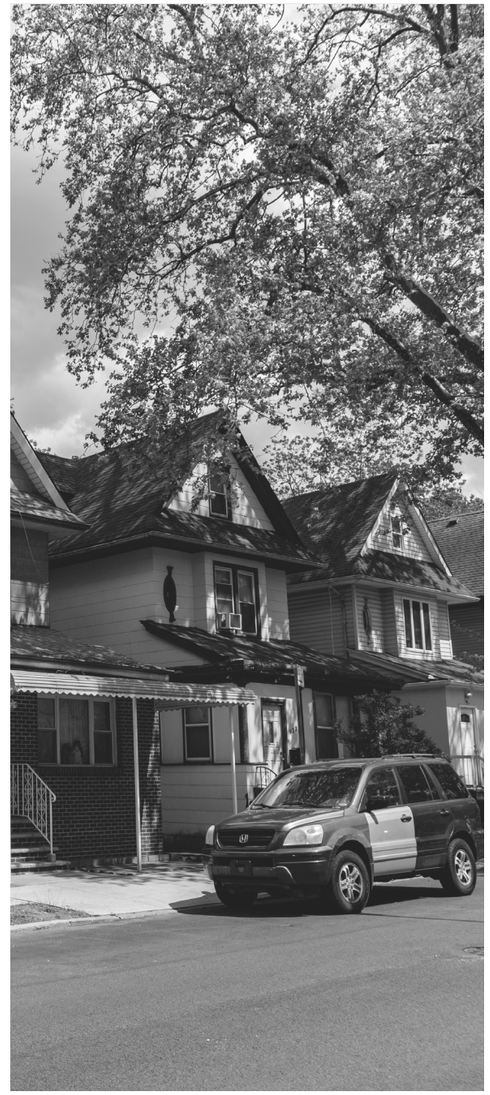
The second case of interest to us is *Fair Housing Justice Center, Inc. v. Pelican Management, Inc.*[43] If Judge Latin's *Olivierre* decision turned the knob of the door to justice, Judge Ramos's opinion in *Pelican* threw it wide open. *Pelican* marks a true turning point in SOI discrimination and discrimination against a legally protected group under the FHA.[44]

THE FACTS

The formal defendants in this case are Pelican Management, Inc., Fordham One Company, LLC, and Cedar Two Company, LLC (collectively "Defendants"). But they can be referred to as "Goldfarb properties" or simply "Goldfarb."[45]

In 2017, Alfred Spooner attempted to utilize an Olmstead Housing Subsidy ("OHS") to rent an apartment in a Goldfarb property.[46] With the OHS, Mr. Spooner would have been responsible for putting 30% of his monthly income toward his rent, and his subsidy would have covered the rest.[47] But his application was rejected due to insufficient income under Goldfarb's 2015 rental policy (the "2015 Policy").[48]

Mr. Spooner contacted the Fair Housing Justice Center ("FHJC"), who then conducted four different tests using three different types of subsidies—including the OHS, the New York City HIV/AIDS Services Administration ("HASA") subsidy, and the Housing Choice Voucher ("HCV"), commonly known as Section 8.[49] More specifically, FHJC had three different people call Goldfarb properties and act like they or a family member wished to rent an apartment using one of the three subsidies.[50] In all instances, the Goldfarb staff confirmed that rental applicants needed to earn at least 43 times the monthly rent annually under the 2015 Policy, no matter if they had a full-rent subsidy or a partial-rent subsidy.[51]



FHJC brought an action against Defendants alleging that Goldfarb's 2015 Policy was unlawful. Specifically, they alleged that the minimum income requirement in the 2015 Policy amounted to SOI discrimination under the NYCHRL, discrimination on the basis of disability under the FHA, and discrimination on the basis of disability under the NYCHRL.[52] All three causes of action being premised upon a disparate impact theory of liability.

In January 2019, while the case was ongoing, Defendants adopted a new minimum income policy.[53] They subsequently asserted a counterclaim, "in which they sought a declaration that" their 2019 Policy (the "2019 Policy") was lawful, and FHJC in turn argued that it was not.[54] The 2019 Policy had different requirements for applicants depending on whether they had no subsidy, a partial subsidy, or a full subsidy.[55] FHJC made four arguments against the 2019 Policy.[56] One of these is relevant here: FHJC argued that their expert witness's analysis "reflect[ed] that the 2019 Policy continue[d] to have an adverse disparate impact on source of income, specifically on applicants with partial subsidies."[57]

THE LAW

Source of Income Discrimination Under the NYCHRL—The 2015 Policy

The first of the four relevant claims that will be covered is FHJC's claim that the minimum income requirement in the 2015 Policy amounted to SOI discrimination under the NYCHRL due to its disparate impact on applicants with any one of the three subsidies mentioned previously.

In order to win a NYCHRL claim for SOI discrimination under a disparate impact theory of liability, FHJC needed to succeed in a burden shifting framework. Specifically, FHJC needed to initially "prove two elements: (1) the occurrence of certain outwardly neutral policies or practices; and (2) a significant adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."[58] If FHJC could establish those two elements, "the burden [would] shift to [Defendants] to prove that its actions further, in theory and in practice, a legitimate bona fide interest."[59] Finally, "[i]f Defendants [could] meet their burden, then [FHJC] must show that the interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[60]

The *Pelican* court found FHJC successful in this burden shifting framework. FHJC established the first element by identifying the "neutral policy in Defendants' 2015 Policy requiring all applicants, including subsidy holders, to meet the 43-times-the-rent requirement."[61]

FHJC met the second element of establishing disparate impact with the use of its expert's "finding[s] that 100% of OHS applicants, 100% of HASA applicants, and 97% of Section 8 applicants would not be able to satisfy Goldfarb's 2015 Policy."[62]

Defendants failed to show that its 2015 Policy and practices furthered, in theory and practice, a legitimate bona fide interest. Defendants offered three main arguments, all of which were unavailing. First, Defendants made an argument similar to Parkchester's in *Olivierre*, saying that its 2015 Policy was not discriminatory because it "treated all sources of income the same, including rent subsidies, which [it] treated as income in evaluating applications."[63] Judge Ramos here in *Pelican*—like Judge Latin in *Olivierre*—rejected this argument, essentially asserting that applying a neutral policy uniformly against all applicants does not render its harms against a certain group lawful.[64]

Second, Defendants argued that the 2015 Policy's minimum income requirement was needed to truly assess whether a rental applicant could afford to pay the rent, and that it "was created to reduce the high level of rent arrears among Goldfarb tenants."[65] The *Pelican* court rejected these arguments, asserting that Goldfarb never "evaluate[d], let alone determine[d], that subsidy tenants contributed" to the high rent arrears it says caused it to implement its 2015 Policy, nor did Defendants "analyze[] the frequency with which subsidy holders did or did not pay their portion of the rent, despite having the data" needed to do so.[66]

Third and finally, Judge Ramos noted that there could be no real business need to look at an applicant's income who had a full-rent voucher.

Because FHJC met its burden and Defendants failed to meet theirs, the *Pelican* court found for "FHJC on the discrimination claim based on source of income pursuant to NYCHRL."[67]

Source of Income Discrimination Under the NYCHRL—The 2015 Policy

The second of the four relevant claims to be discussed is FHJC's claim that the minimum income requirement in the 2015 Policy amounted to discrimination on the basis of disability under the FHA.

To analyze FHJC's housing discrimination claim on the basis of disability under the FHA, the *Pelican* court utilized the same burden shifting framework it used when evaluating the SOI discrimination claim under the NYCHRL.[68]

FHJC'S FIRST ELEMENT IN THE BURDEN SHIFTING FRAMEWORK

FHJC established the first element in the burden shifting framework by pointing to the 2015 Policy's minimum income requirements.[69]

FHJC'S SECOND ELEMENT IN THE BURDEN SHIFTING FRAMEWORK

Next, FHJC took two key steps while establishing the second element to turn an SOI discrimination claim alone into a disability discrimination claim under the FHA. One, FHJC established that those applicants with the three subsidies were disparately impacted by Defendants' 2015 Policy by showing that "100% of OHS applicants, 100% of HASA applicants, and 97% of Section 8 applicants would not be able to satisfy Goldfarb's 2015 Policy."[70]

Two, FHJC showed that a disproportionate number of those with the three subsidies were in households that included a person with disabilities.[71] FHJC argued "that because OHS and HASA voucher holders are used only by households with disabled persons, and 47% of section 8 households include an individual with a disability, the 2015 Policy adversely affected applicants with subsidies that have a disabled person in the household."[72] In other words—as noted by the *Pelican* court—FHJC showed a "correlation between disability and source of income as it related to OHS and HASA subsidies because those programs are only used by households with a disabled individual. [And] [f]or Section 8 vouchers, FHJC demonstrated a disparate impact on applicants with disabled household members by making an inference from general population data showing that there is a higher than average number of households with disabled persons among Section 8 voucher holders."[73]

Defendants unsuccessfully attempted to refute FHJC's correlational data and statistical inferences. First, Defendants compared this case to a 2012 Southern District of New York case—*Short v. Manhattan Apartments, Inc.*[74]—in which a prospective tenant with a HASA subsidy brought a housing discrimination claim under the FHA "against real estate brokers, alleging that brokers had refused to rent to that tenant and others, based on disability and source of income discrimination."[75] In *Short* though, the court found that the plaintiffs "failed to make their prima facie case of disability discrimination under the FHA because [their] disparate impact analysis conflated disability, which is a protected status under the FHA, with source of income, which is not."[76] Additionally, the *Short* court noted how "because 'plaintiffs offered no statistical evidence concerning the correlation between disability and source of income, the court [could] not conclude that Defendant's policies and practices ha[d] a disproportionate effect on persons with disabilities.'"[77]

But Judge Ramos in *Pelican* rejected Goldfarb's comparison to *Short*, saying that FHJC—unlike the plaintiffs in *Short*, who "offered no statistical evidence and showed *no* disproportionate impact of the policy on people with disabilities" [78]—had provided "statistical evidence concerning the correlation between disability and the three specific subsidies it alleges Goldfarb's policies have affected."[79]

Second, Defendants tried to argue that FHJC had "not made its prima facie case because it 'merely raise[d] an inference of discriminatory impact.'"[80] The heart of Defendants' argument was that by using general population data rather than actual applicant data—which was available—FHJC failed to show evidence of robust causality, and that "national or state general data are appropriate where actual applicant data is not available."[81] The court rejected this argument, saying that FHJC's use of general population data was appropriate in this case.[82]

By showing that the 2015 Policy disproportionately affected those with any one of the three subsidies, and that a disproportionate amount of those with subsidies were in households that included a person with disabilities, FHJC successfully met its burden—ultimately allowing FHJC to successfully turn an SOI discrimination claim into a claim of discrimination on the basis of disability under the FHA.

"The 2015 Policy adversely affected applicants with subsidies that have a disabled person in the household."

DEFENDANT'S BURDEN OF SHOWING THAT THE 2015 POLICY FURTHERED A LEGITIMATE BUSINESS INTEREST

When the burden shifted to Defendants, they failed to show that the practice or policy furthered a legitimate interest.[83] The arguments offered by Defendants as to how their 2015 Policy and related practices were in furtherance of a legitimate business interest were the same here as they were in the SOI discrimination claim under the NYCHRL.

Consequently, the court found "for FHJC on the disability discrimination claim for Goldfarb's 2015 Policy under the FHA."[84]

Disability Discrimination Under the NYCHRL—The 2015 Policy

The third claim we will cover is FHJC's claim that the 2015 Policy's minimum income requirement amounted to discrimination on the basis of disability under the NYCHRL.

The *Pelican* decision devotes just three sentences to FHJC's claim that Goldfarb's 2015 Policy discriminated against persons with disabilities under the NYCHRL.[85] This is because "[i]n evaluating claims based on a disparate impact theory of liability under both the FHA and NYCHRL, courts apply the [same] burden shifting framework [as] described above."[86] But, when evaluating the NYCHRL claim here, "the Court must 'address the NYCHRL's uniquely broad and remedial purposes, which go beyond those of counterpoint State or federal civil rights laws.'"[87] Since Judge Ramos previously "found that FHJC had prevailed on its FHA disability claim, and the same analysis is applied, the Court found for FHJC on the disability discrimination claim for Goldfarb's 2015 Policy under the NYCHRL."[88]

FHJC's success on this claim reveals how plaintiffs can turn an SOI discrimination claim into a claim alleging discrimination on the basis of disability under not only the

FHA, but also the NYCHRL (as disability is a protected status under the NYCHRL),[89] using the same strategy to do so in the NYCHRL framework as the one used in the FHA framework. One could even skip the FHA claim altogether and instead bring the disability discrimination claim under the NYCHRL alone if they found that to be a better route.

The 2019 Policy's Disparate Impact on Those with Partial Subsidies

The final claim that is relevant is FHJC's claim that the 2019 Policy's minimum income requirement had an inadequately justified disparate impact on partial subsidy holders.

The 2019 Policy is best viewed by how it changed requirements for those with no subsidies, those with partial subsidies, and those with full subsidies. Its criteria were unchanged for those with no subsidies.[90] Those with partial rent subsidies had to demonstrate that they earned 40 times their portion of the monthly rent (rent minus voucher amount), and that they had a rent-to-income ratio of no greater than 40%.[91] And for those with full subsidies, Goldfarb's 2019 Policy did not apply an income test.[92] Instead, they needed to prove their income, confirm that the first month's rent and security deposit would be paid when the parties executed the lease, and have an acceptable criminal history.[93]

FHJC'S FIRST AND SECOND ELEMENTS IN THE BURDEN SHIFTING FRAMEWORK

FHJC successfully argued that their expert witness's findings "reflect[ed] that the 2019 Policy continue[d] to have an adverse disparate impact on source of income, specifically on applicants with partial subsidies,"[94] thus meeting the first two parts of its burden in the legal framework.

FHJC showed such a disparate impact on those with partial subsidies with expert analysis, which indicated that when including all reasons for denial, 30% of those applicants without subsidies were approved under the 2019 Policy, but only 13% of those with partial subsidies were approved—which is a statistically significant adverse impact.[95]

Additional attention is owed to the *Pelican* court finding the inclusion of no contact denials to be appropriate. FHJC's expert and Defendants' expert disagreed on whether "no contact" denials should be included in the analysis

of applicants being accepted or rejected.[96] No contact denials are essentially those denials that are a result of communication ceasing between Goldfarb and the applicant. These denials can result from "actions of the applicant or by the discretionary determinations of Goldfarb's agents."[97] For example, "Goldfarb's leasing agents have discretion as to when to contact the applicant, how many attempts to make to contact the applicant, what time of day to attempt contact, and what means to make contact (email or phone). The leasing agent also has discretion to decide when an applicant can officially be categorized as 'no contact.'"[98]

Judge Ramos found that including no contact denials was appropriate.[99] This is especially important due to just how pervasive no-contact denials are in New York City. According to David Brand in *City Limits*, "[a]gents, brokers and landlords . . . often steer applicants with vouchers away from certain rentals, flat-out reject them or stop taking their calls—a practice known as 'ghosting.'"[100] What is more, in an article published by the *Gothamist*, "*New Yorkers with housing vouchers say they are frequently 'ghosted' by brokers or real estate agents who learn they have government-backed rent subsidies*—even though the program is supposed to guarantee the bulk of their monthly rent payment. [And] [d]isappearing brokers and real estate agents account for half

of the complaints compiled by UnlockNYC and Neighbors Together."[101] In other words, landlords are much less likely to get away with ghosting (or going the no-contact route) in NYC after *Pelican*.

Finally, even when "'no contact'" denials were excluded from the analysis in this case, those with partial subsidies were approved just 20% of the time, and those with no subsidy were approved 30% of the time, which also shows a statistically significant adverse impact.[102]

DEFENDANTS' BURDEN OF SHOWING THAT THE 2019 POLICY FURTHERED A LEGITIMATE BUSINESS INTEREST

Because FHJC met their burdens of identifying the neutral policy and showing its disparate impact on those receiving partial subsidies, the burden shifted to Defendants to prove that it furthered a legitimate business interest. Defendants failed to meet this burden.

Judge Ramos rejected the idea that Goldfarb needed the 2019 Policy to assess whether the applicant can pay the rent, noting that "Defendants ha[d] not offered any evidence reflecting that partial subsidy holders are not able to pay their portion of the rent absent the 2019 Policy, or provided any evidence reflecting that partial subsidy holders are unlikely to pay the portion of their rent that their programs have deemed them qualified to pay."[103]

Notably, Judge Ramos notes in a different part of *Pelican* that there is nothing in the NYCHRL source of income discrimination statute "stating that landlords cannot make an assessment of an applicant's ability to pay rent. The source of income statute only forbids discrimination; it does not require landlords to accept applicants with subsidies regardless of the amount of their incomes."[104] The implication of this statement when considered alongside the rest of the *Pelican* opinion is that it is not per se unlawful for landlords to have certain minimum income requirements for those with partial subsidies. But the landlord must be able to justify their purpose with statistical data if a plaintiff shows that the policy disparately impacts those with partial subsidies.[105]

Since the Defendants failed to satisfy their burden, the court found the 2019 Policy unlawful "as to the partial subsidy requirements."[106]

OVERALL

There are at least three major takeaways from *Pelican*.

01 First, voucher holders can succeed on an SOI discrimination claim under the NYCHRL if they can show that a facially neutral policy—such as a minimum income requirement—has an unjustified disparate impact.

02 Second, SOI discrimination can have a disparate impact on groups protected by the FHA, and thus can be actionable under federal law.

03 Third, landlords cannot use ghosting—or no contact—as a way to deny voucher holders an apartment without potential consequences.

HOW TO TURN SOI DISCRIMINATION INTO AN FHA CLAIM

Pelican opened up a world of opportunities. Read narrowly, *Pelican* shows that plaintiffs litigating in S.D.N.Y. can successfully take the claim that a landlord's minimum income requirements have an unjustified disparate impact on voucher holders under the NYCHRL and turn it into a claim that those requirements also discriminate on the basis of disability under the FHA (as well as a claim that those requirements discriminate on the basis of disability under the NYCHRL itself).

But *Pelican* read more broadly might stand for the proposition that any policy—not just a minimum income requirement—that has an inadequately justified disparate impact on those with housing subsidies might not only allow for an SOI discrimination claim under the NYCHRL, but also call for a claim that the policy discriminates against any class or status that is protected under the FHA (or the NYCHRL), not just disabled persons.

In this section of the report, we first discuss *Housing Rights Initiative v. Compass, Inc.* (S.D.N.Y. Feb 14, 2023) ("*HRI*") in order to show that *Pelican* might be read more broadly.[107] We then—having been inspired and partly led by *Pelican* and *HRI*—walk through how to analyze whether a landlord's policy has a disproportionate impact on voucher holders who are themselves disproportionately people of color, which would allow an SOI discrimination claim to be expanded into a claim alleging discrimination under the FHA.

HOUSING RIGHTS INITIATIVE V. COMPASS, INC., (S.D.N.Y. FEB. 14, 2023)

Housing Rights Initiative v. Compass, Inc. (S.D.N.Y. Feb. 14, 2023) supports the idea that an SOI discrimination claim under the NYCHRL can be turned into a claim alleging that the policy has an unjustified disparate impact on race or national origin.[108]

THE FACTS

Beginning in 2017, the plaintiff (Housing Rights Initative ("HRI")), learned that its mission of preserving affordable housing in New York City and helping tenants secure such housing "was being impeded by the widespread refusals of landlords to accept [Housing Choice Voucher] holders" (popularly known as Section 8 voucher holders) "despite the fact that the HCV holders could demonstrably pay the asking rent."[109]

HRI proceeded to bring an action "against 77 defendants that are landlords and brokers of housing accommodations, or have the right to approve rental accommodations."[110] The plaintiff's action contained four main claims against the defendants.[111] The claim that is of interest to us is the one where HRI alleged, under a disparate impact theory of liability, "that defendants' refusal to rent to HCV holders violate[d] the FHA by having a discriminatory impact on African Americans and Hispanic Americans."[112]

"Eleven defendants moved to dismiss" HRI's action, "one defendant moved for judgment on the pleadings, and two defendants moved for both."[113] The majority of these motions focused on two arguments, one of which is relevant to us: defendants argued that—under Federal Rule of Civil Procedure 12(b)(6)—HRI's FHA claim "insufficiently pleaded disparate impact."[114] Judge Sidney H. Stein denied defendants' motion to dismiss.[115]

THE LAW

HRI showed that landlords discriminated against voucher holders based on their source of income by refusing to accept Housing Choice Vouchers; that HCV holders in New York City were disproportionately African American as well as Hispanic American; and that such refusals therefore discriminated against not only SOI but also on the basis of race and national origin under the FHA.[116]

Judge Stein finding for HRI at these earlier stages of litigation supports the idea that *Pelican* should potentially be read more broadly. That is, because of *Pelican* and *HRI*, it is reasonable to think that plaintiffs can succeed on a discrimination claim under the FHA whenever a policy—such as a minimum income requirement, a minimum credit score, or an outright refusal of vouchers—has an unjustified disparate impact on those with vouchers, and those with such vouchers are disproportionately members of an FHA-protected class.

ANALYZING WHETHER A POLICY DISPARATELY IMPACTS AN FHA-PROTECTED GROUP

HRI provides a valuable example of how to successfully expand a claim of SOI discrimination by demonstrating a disparate impact on an FHA-protected class. In this section of the report, we will illustrate how existing demographic data can be analyzed for evidence of such disparate impact. We will focus specifically on how a landlord with a policy against accepting HCV/Section 8 would disproportionately affect Black households in the Bronx. However, it should be noted that with the appropriate data, the same methods used here can be applied to other forms of SOI discrimination (such as discrimination against CityFHEPS or HASA users), to other FHA-protected classes, and to other geographic areas.

01

STEP ONE: DEFINING THE GROUPS

The first step in looking for evidence of disparate impact is to define all the relevant groups being analyzed.

- At the broadest level, we start with a **general population** to which all these groups belong. For our analysis, this is all renter-occupied households in the Bronx.
- Within this general population there will be **a group that is adversely affected by the target policy.** Since we are looking at a hypothetical landlord with a policy against accepting HCVs, any household using an HCV will be unable to rent and will thus be adversely affected by the policy.
- Within the general population there will also be **a group that is protected from housing discrimination under the FHA.** In this report, we focus on Black households, as race is an FHA-protected class.

- Finally, **an appropriate comparison group for the FHA-protected group being analyzed** must be selected. Because we are looking at race—specifically at Black households—the comparison group used here is White households.
- The general population, adversely affected group, and FHA-protected group can all be selected according to the specifics of the policy being tested for discrimination.

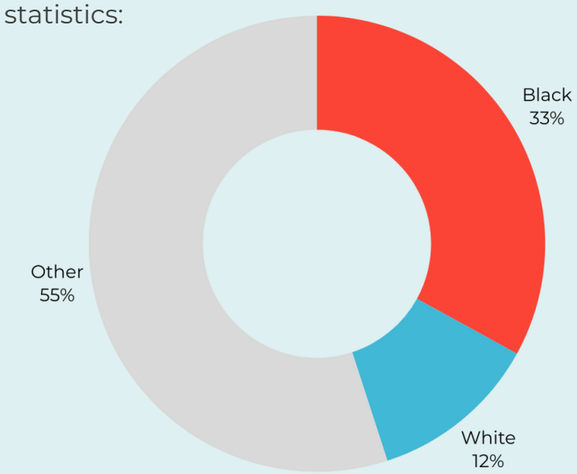
Ultimately, the goal is to show that members of the FHA-protected group are disproportionately likely to belong to the adversely affected group, and that the policy therefore has a disparate impact.

Adversely Affected	Not Adversely Affected	
Black households with Section 8	Black households without Section 8	General population of interest: all renters in Bronx
White households with Section 8	White households without Section 8	

02 STEP TWO: CHOOSING DATA SOURCES AND GATHERING EVIDENCE

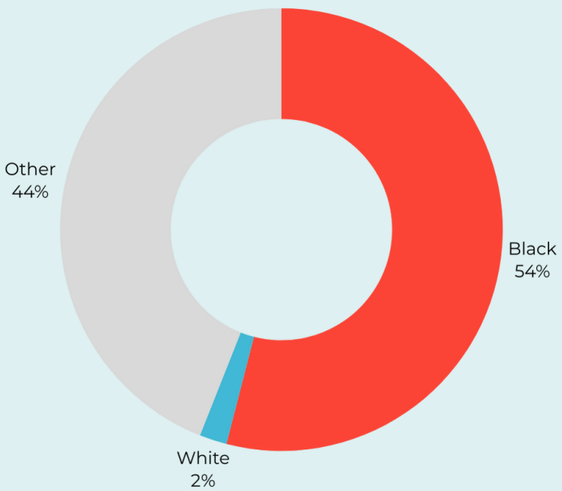
After defining the groups being analyzed, the next step is to find both numbers and percentages for each of those groups. Here, we rely on data from the U.S. Department of Housing and Urban Development (HUD), as well as the U.S. Census Bureau, which reveals the following statistics:

- There are 420,196 renter-occupied households in Bronx County.[117]
  - » Of these, 140,191 (33%) are Black,[118] and 48,361 (12%) are non-Hispanic White.[119]



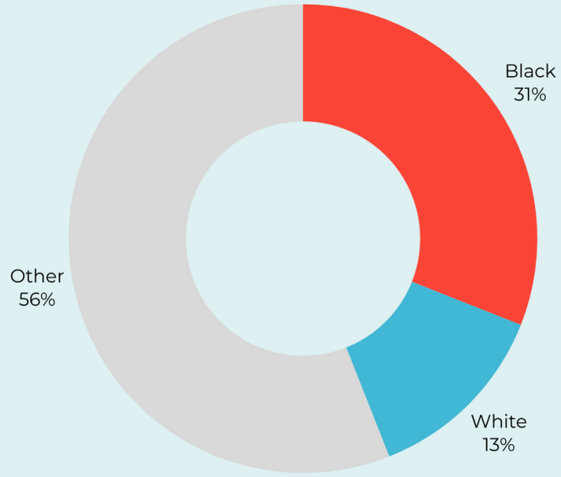
Total Renter-Occupied Households in the Bronx

- There are 48,369 Section 8 vouchers reported in Bronx County.[120]
  - » Of these, approximately 26,119 (54%) are used by Black households and approximately 967 (2%) are used by non-Hispanic white households. [121]



Section 8 Households in the Bronx

- This means that there are approximately 371,827 non-Section 8 renter households in the Bronx, of which approximately 114,072 (31%) are Black and 47,394 (13%) are White.



Non Section 8 Households in the Bronx

	Has Section 8 (Adversely Affected)	No Section 8 (Not Adversely Affected)
Black Households	26,119	114,072
White Households	967	47,394

03

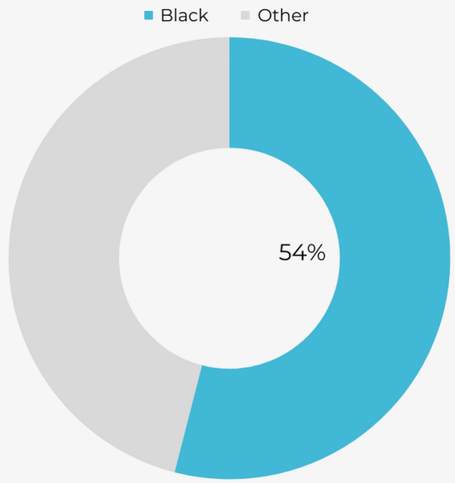
STEP THREE: ANALYZING THE DATA

One Method of Analysis

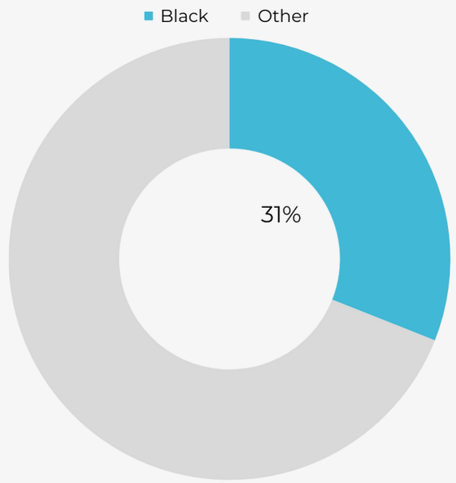
One way to prove the disparate impact of a discriminatory policy is to compare members of an FHA-protected class who are adversely affected by the policy to members of the protected class who are not adversely affected. In other words, if there is a higher percentage of the protected class within the adversely affected population than within the general population, that suggests that members of that protected class are more likely to be adversely affected.

Adversely Affected	Not Adversely Affected
Black households with Section 8	Black households without Section 8
White households with Section 8	White households without Section 8

- As 54% of Section 8 users in the Bronx are Black households, while only 31% of non-Section 8 users are Black, Section 8 users are 1.7 times as likely to be Black as non-Section 8 users.



Section 8 Households in Bronx



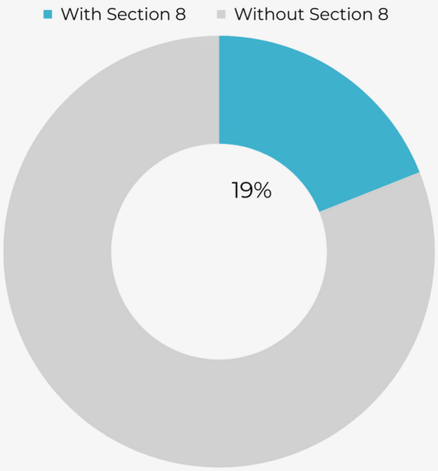
Non-Section 8 Households in Bronx

- This suggests any policy that excludes Section 8 vouchers is 1.7 times as likely to impact Black renters. This result is comparable to numbers successfully used in *HRI* (in which members of the adversely affected population were 1.6 times more likely to belong to the protected group, compared to 1.7 times here) to prove disparate impact.[122]

Another Method of Analysis

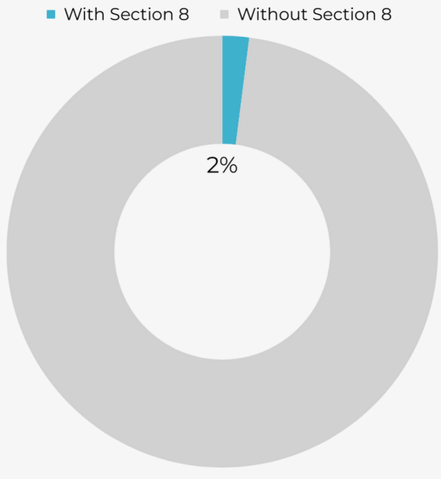
A second way to consider disparate impact is to find what percentage of the FHA-protected class of interest belongs to the adversely affected population, and compare it to the percentage of the comparison group that is adversely affected.

- 26,119 of 140,191, or 19%, of Black renter households in the Bronx use Section 8.



Black Renter Households in Bronx

- In comparison, 967 of 48,361, or 2%, of White renter households in the Bronx use Section 8.



White Renter Households in Bronx

- This means that Black households in the Bronx are almost ten times more likely to use Section 8 than White households, and therefore Section 8-based discrimination will disproportionately affect Black renters compared to White renters. This result is significantly higher than numbers successfully used in *HRI* (in which members of the protected group were 3.2 times more likely to be adversely affected than the comparison group, compared to 9.5 times more likely here) to prove disparate impact.[123]

Adversely Affected	Not Adversely Affected
Black households with Section 8	Black households without Section 8
White households with Section 8	White households without Section 8

OVERALL

By carefully defining the groups of interest, choosing appropriate data sources, and properly analyzing the data, it can be straightforward and rather pain-free to determine whether a certain policy disparately impacts an FHA-protected group. It is our hope that this section of the report helps practitioners and policymakers make such determinations.

KEY TAKEAWAYS

While we hope there is much to learn from this report, here are four of the most important takeaways.

01

One, an applicant with a full-rent subsidy should be able to meet minimum income requirements. If an applicant has a full-rent subsidy (like Ms. Olivierre, who had a full-rent CityFHEPS voucher), they should very likely not be denied an apartment due to minimum income requirements.

02

Two, if partial-rent subsidy holders are denied an apartment because of a policy like a minimum income requirement, they can potentially get that policy struck down. Partial-rent subsidy holders can likely be lawfully denied an apartment due to not meeting certain minimum income requirements. But if such requirements are having an unjustified disparate impact on them, then they should be able to get those requirements invalidated by bringing an SOI discrimination claim under the NYCHRL or potentially an FHA claim.

03

Three, an SOI discrimination claim might be expanded into an FHA claim. If a landlord's policy is discriminating against those with rental subsidies, then those affected voucher holders can likely bring an SOI discrimination claim under the NYCHRL. But they might also consider bringing an FHA discrimination claim if such SOI discrimination is having an unjustified disparate impact on a group that is protected under the FHA, such as people with disabilities or racial minorities.

04

Fourth and finally, lawyers and tenants should recognize a landlord's failure to communicate with the subsidy holder (*i.e.*, the landlord ghosting the applicant) as a denial. And those with rental subsidies who have been denied in such a way—*i.e.*, who have been ghosted—should know that such a denial might be SOI discrimination. If a landlord or a leasing agent stops returning an applicant's calls—or never returns an applicant's call in the first place—that landlord or agent has functionally denied the application in the form of a no-contact denial. This practice is otherwise known as ghosting, and it will likely be recognized as a denial by the Southern District of New York.

CONCLUSION

As Judge Richard G. Latin said in *Olivierre v. Parkchester Preservation, L.P.*, housing insecurity and homelessness can be "brutal[]."[124] Rental subsidies are designed to help solve such difficulties. But landlords have sometimes made it hard for people to utilize them. At times, they outright refuse to accept housing vouchers, while at other times they deny a voucher holder's application for some other reason that does not further a legitimate business interest, such as an irrational minimum income requirement

Fortunately, courts in New York are cracking down on landlords who discriminate against those with rental subsidies. These discussed rulings should make it clear that such discrimination will not be tolerated. Hopefully many of the existing discriminatory policies will be removed by landlords themselves. But even if they are not removed before an applicant with a rental subsidy is rejected, the rulings should make it more likely that the subsidy holder can succeed in New York on an SOI discrimination claim under the NYCHRL or on a claim alleging an FHA violation.

With rent subsidies becoming easier to use, they should become a more effective tool for reducing housing insecurity and homelessness in New York. Increasing access to safe and affordable housing is a goal of MFJ's, and we are thus eager to get to work on more SOI discrimination cases and FHA claims with the creation of our Fair Housing Project.

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