
THE SCARLET LETTER “E”: HOW TENANCY SCREENING POLICIES EXACERBATE HOUSING INEQUITY FOR EVICTED BLACK WOMEN

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ABSTRACT

The COVID-19 pandemic resulted in an unprecedented health and economic crisis in the United States. In addition to more than nine hundred thousand deaths in the United States and counting, another kind of crisis emerged from the pandemic: an eviction crisis. In August 2020, an estimated thirty to forty million people in America were at risk of facing eviction by the end of the year. Black women renters faced a higher risk of losing their homes than other groups. At the onset of the pandemic, the federal government implemented eviction moratoria to prevent the evictions of tenants who were unable to pay their rent. However, the temporary nature of the moratoriums had little to no impact on the persisting effects evictions have on Black women seeking future housing. Black women were the most affected by evictions before the pandemic but were devastatingly impacted throughout the pandemic and beyond. The pandemic brought this oft forgotten group’s plight to the forefront.

Using an intersectional lens, this Article seeks to analyze the ongoing eviction crisis to highlight who is most burdened and why. Widespread concern has been expressed about the discriminatory effects, especially on Black and Brown people, of landlords’ use of criminal records in making rental decisions. This Article is the first to contextualize similar concerns about the use of eviction records and its disparate impact on Black women. Having an eviction record, much like having a criminal record, blacklists tenants from securing future housing. Renters with mere eviction filings—not final eviction orders—on their records face the harsh collateral consequences of eviction. As others have, I refer to this stigma that follows a person with a record of an eviction proceeding on their public record as the “Scarlet Letter E.” Landlords regularly displace or blacklist Black women who have prior eviction records, thereby preventing

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them from accessing future available housing units. To assist with tenant screenings, landlords typically hire tenant screening companies to conduct background reports, which typically compile information related to a tenant's criminal history, residential history, credit score, and eviction history. Landlords' use of these reports disproportionately impacts Black women who have an eviction filing on their record and prevents them from securing public and private housing.

This Article is the first to analyze the disparate impact of the use of eviction filings in rental housing decisions under the Fair Housing Act ("FHA"). It argues that blanket tenant screening policies are arbitrary, artificial, and unnecessary barriers that operate to invidiously discriminate against Black women and, therefore, violate the FHA. It then recommends areas for reform, such as eviction record expungement, sealing laws, and "ban the box" initiatives, all of which draw heavily on work related to the use of criminal records in tenant screening. In addition, this Article suggests a novel interpretation of the FHA by both the Department of Housing and Urban Development ("HUD") and the courts that would hold landlords and the tenant screening companies that produce these tenant screening reports liable under the FHA for the disparate impact that these policies and practices have on Black women.

CONTENTS

INTRODUCTION	272
I. THE ROLE AND IMPACT OF TENANT SCREENING POLICIES AND PRACTICES IN EVICTIONS	276
A. <i>Evictions, Generally</i>	276
B. <i>Black Women Bear the Brunt of the Eviction Crisis</i>	277
C. <i>Tenant Screening and Its Problems</i>	282
II. THE FAIR HOUSING ACT AND DISPARATE IMPACT LIABILITY	287
A. <i>Establishing Liability Under the FHA: Disparate Treatment v. Disparate Impact</i>	288
B. <i>Discerning FHA’s Applicability: Who’s Liable? Landlords, Tenant Screening Companies, or Both?</i>	292
III. BLANKET TENANT SCREENING POLICIES AND PRACTICES DISPARATELY IMPACT BLACK WOMEN AND THUS VIOLATE THE FHA.....	294
A. <i>Blanket Tenant Screening Policies Disparately Impact Black Women</i>	295
B. <i>No Substantial, Legitimate, Nondiscriminatory Interest Exists in Tenant Screening Practices That Invidiously Discriminate Against Black Women</i>	296
C. <i>Individualized Assessments of Eviction History Could Lessen Disparate Impact on Black Women</i>	299
IV. PROPOSALS.....	300
A. <i>Require Fair Tenant Screening on State and Federal Levels</i>	301
1. Expand Fair Credit Reporting Act Enforcement To Cover Eviction Records.....	301
2. Nationwide Adoption of Fair Tenant Screening Acts	303
B. <i>Limit Landlords’ Access to Prospective Tenants’ Eviction Records: Sealing, Expungement, and “Banning the Box”</i>	305
1. Sealing and Expungement of Eviction Records	305
2. “Ban the Box”	306
C. <i>Issue New HUD Guidance on Use of Eviction Records</i>	308
CONCLUSION.....	310

INTRODUCTION

In 2012, Nikita Smith's landlord filed an eviction case against her for failure to pay rent.¹ Smith then "entered into a payment plan [agreement] with [her] landlord . . . and paid off the landlord's claim in full."² As a result, Smith was never evicted.³ Approximately two years later, Renton Housing Authority ("RHA") issued Smith a Housing Choice Voucher.⁴ The voucher would allow Smith to rent an apartment and pay thirty percent of her income in rent and utilities each month while RHA would be responsible for paying the remaining amount directly to her landlord.⁵ To make use of the voucher, Smith began searching for apartments, which led her to Wasatch Hills Apartment Homes.⁶ While touring Wasatch Hills, Smith disclosed that she had previously been named in an eviction suit to a Wasatch Hills representative.⁷ The representative notified Smith that the eviction suit would preclude her from being admitted or even considered as a potential tenant.⁸ Wasatch Hills would not consider any explanation and instead informed Smith that her application would be denied regardless of the basis or outcome of the eviction suit.⁹ Ultimately, Smith was denied the opportunity to live at Wasatch Hills.¹⁰ She sued.¹¹

Unfortunately, Smith's story is neither isolated nor unique. Similar policies and practices implemented by landlords across the country prevent tenants with eviction filings on their records from seeking and acquiring public and private housing.¹² Like Smith, the mere existence of a prior eviction filing—even in cases that did not result in a final judgment against the tenant—is enough to prevent tenants from accessing other housing opportunities, whether private or public.¹³ Landlords' overreliance on these incomplete and often erroneous tenant screening reports, generated by tenant screening companies for profit,

¹ Sandra Park, *Unfair Eviction Screening Policies Are Disproportionately Blacklisting Black Women*, ACLU (Mar. 30, 2017), <https://www.aclu.org/blog/womens-rights/violence-against-women/unfair-eviction-screening-policies-are-disproportionately> [<https://perma.cc/GGW7-JRGW>]; see also Complaint for Unlawful Housing Discrimination at 6, *Smith v. Wasatch Prop. Mgmt., Inc.*, No. 2:17-cv-00501 (W.D. Wash. Mar. 30, 2017).

² Complaint for Unlawful Housing Discrimination, *supra* note 1, at 6.

³ *Id.*

⁴ *Id.* at 5.

⁵ *Id.* at 6.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² See James Bell, *Beyond Displacement: How the Ripples Effects of an Eviction Can Last for Years*, PUBLICSOURCE (Nov. 11, 2020), <https://www.publicsource.org/eviction-collateral-impact-displacement-employment-transit-school-mental-health/> [<https://perma.cc/56KG-VJCH>] (noting prior evictions can hinder renter's future applications).

¹³ See *id.*

drapes tenants who have had evictions filed against them with a “Scarlet Letter E”: a badge of shame and stigma that effectively deems the tenant unworthy of housing.¹⁴

Smith’s experience exemplifies the cycle of poverty and homelessness that is perpetuated when people with an eviction filing on their record are denied access to private or public housing facilities.¹⁵ Black and Latinx people bear the brunt of the millions of evictions that are filed each year in the United States.¹⁶ Eighty percent of people facing eviction identify as non-white, with Black women facing eviction at disproportionately high rates.¹⁷ From 2012 to 2016, Black women were evicted three times as often as white women and thirty-seven percent more often than Black men.¹⁸ The ACLU Women’s Rights Project and Data Analytics team found that, on average, Black women renters had evictions filed against them by landlords at double the rate of white renters or higher in seventeen out of thirty-six states.¹⁹ The COVID-19 pandemic worsened historic racial inequities in housing security and disproportionately affected renter households, which are primarily headed by Black women.²⁰ At the height of the pandemic, landlords filed more evictions against Black women than against Black men.²¹ A study from the National Women’s Law Center found that Black women have been twice as likely to be behind on rent as white renters during the pandemic, putting them at increased risk for homelessness.²²

¹⁴ Kaelyn Forde, ‘Scarlet E’: An Eviction in the US Can Become a Life Sentence, AL JAZEERA (Aug. 21, 2020), <https://www.aljazeera.com/economy/2020/8/21/scarlet-e-an-eviction-in-the-us-can-become-a-life-sentence> [<https://perma.cc/YD8T-Q73Y>]; cf. NATHANIEL HAWTHORNE, THE SCARLET LETTER 186 (Random House 2000) (1850) (noting previous “stigma[,] . . . shame[,] and anguish” of Hester Prynne’s scarlet letter A).

¹⁵ See Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 120 (2012) (noting evictions may propagate homelessness and contribute to urban poverty).

¹⁶ See Emily A. Benfer, David Vlahov, Marissa Y. Long, Evan Walker-Wells, J.L. Pottenger Jr., Gregg Gonsalves & Danya E. Keene, *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. HEALTH 1, 2 (2021).

¹⁷ See *id.* at 4-5.

¹⁸ See Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 654-55 (2020).

¹⁹ See Sophie Beiers, Sandra Park & Linda Morris, *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU (Jan. 10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/> [<https://perma.cc/W23T-SNB5>].

²⁰ Emily Lemmerman, Renee Louis, Joe Fish & Peter Hepburn, *Preliminary Analysis: Who Is Being Filed Against During the Pandemic?*, EVICTION LAB (Dec. 21, 2020), <https://evictionlab.org/pandemic-filing-demographics/> [<https://perma.cc/FS3G-Y8M5>].

²¹ *Id.* (“Since the start of the pandemic, that gap has narrowed, but remains large: we have observed 25% more filings against Black women than against Black men.”).

²² JASMINE TUCKER & CLAIRE EWING-NELSON, AS EVICTION DEADLINE LOOMS, BLACK, NON-HISPANIC WOMEN ARE OVER TWO TIMES MORE LIKELY THAN WHITE, NON-HISPANIC

Why are Black women more vulnerable to evictions than any other group? Black women are often the heads of households in their families, which means that they spend more of their income on household expenses like rent than other groups do. As a result, Black women tend to be more cost-burdened than other groups. As the heads of households, Black women also tend to be named leaseholders for rental properties. Additionally, the race and gender wage gap contributes to the lack of income to cover critical expenses.²³

Landlords have fully embraced the availability of background information on prospective tenants.²⁴ While tenant screening reports could arguably aid landlords in determining which tenants are more likely to miss rent,²⁵ the widespread adoption of tenant screening policies and practices related to a potential tenant's eviction records is highly problematic.²⁶ One major concern that arises with the increased adoption of these reports is the disparate impact that it has on Black women, who, as explained below, are disproportionately evicted and therefore more likely to be disqualified from housing options under this practice. Additionally, as Smith's story illustrates, the degree of accuracy of these reports on evictions is questionable and has dire consequences.²⁷

The disparate impact of policies and practices barring Black and Brown male applicants from housing based on criminal records is well documented.²⁸ Many scholars, housing advocates, and government agencies have recognized that

MEN TO BE BEHIND ON RENT OR MORTGAGE PAYMENTS 2 (2020), <https://nwlc.org/wp-content/uploads/2020/12/pulseFS12.pdf> [<https://perma.cc/58K2-JV45>].

²³ See *infra* Section I.B.

²⁴ One study found that eighty-five percent of landlords reported running eviction reports on all applicants. See *TransUnion Independent Landlord Survey Insights*, TRANSUNION SMARTMOVE (Aug. 7, 2017), <https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page> [<https://perma.cc/738J-FMTG>].

²⁵ See Robert W. Benson & Raymond A. Biering, *Tenant Reports as an Invasion of Privacy: A Legislative Proposal*, 12 LOY. L.A. L. REV. 301, 302 (1979).

²⁶ Legal scholars have described the mechanisms of tenant screening reports, decried their effects, and proposed statutory solutions to deal with them. See, e.g., Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 183 (2000) (stating even accurate tenant screening reports may be misleading); Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 SW. U. L. REV. 1077, 1150 (1995) (arguing misleading tenant screening reports can deprive tenants of access to housing); Cheryl M. Sheinkopf, Comment, *Balancing Free Speech, Privacy and Open Government: Why Government Should Not Restrict the Truthful Reporting of Public Record Information*, 44 UCLA L. REV. 1567, 1571 (1997) (citing privacy concerns surrounding use of information provided in tenant screening reports); Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239, 265-66 (1987) (considering how tenant screening reports "infringe substantially upon the legal rights" of tenants).

²⁷ See Park, *supra* note 1.

²⁸ See Rebecca Oyama, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 186 (2009) (surveying how landlords can deny housing to renters with criminal records, which disproportionately impacts people of color).

blanket policies denying housing to individuals with criminal records disparately impact these protected classes and thus violate various antidiscrimination statutes.²⁹ This Article is the first to argue that blanket tenant screening practices and policies that deny prospective applicants based on eviction records disparately impact Black women, and, therefore, violate the Fair Housing Act (“FHA”). It proceeds in four parts. Part I begins with an explanation of evictions, generally, outlines the tenant screening process and its problems, and demonstrates how evictions disproportionately impact Black women. Eviction is associated with many harms to tenants and falls within two main categories: (1) harms having to do with the acute crisis of removal from one’s home and (2) long-term harms having to do with the Scarlet Letter E that an eviction filing alone leaves on a tenant’s rental history,³⁰ which prevents the tenant from accessing housing later.³¹ This Article focuses on the latter. Part II then provides an overview of the FHA, outlining its purpose and explaining two types of housing discrimination claims—disparate treatment and disparate impact. It also offers an interpretative framework to hold both landlords and the tenant screening companies they hire liable under section 3604 of the FHA for the disparate impact that blanket tenant screening policies and practices have on Black women. Part III argues that blanket tenant screening policies and practices are artificial, arbitrary, and unnecessary barriers to housing that invidiously discriminate against Black women, and therefore violate the FHA. Part IV suggests possible proposals, drawing a parallel between expungement, records sealing, and “ban the box” laws for criminal records and the civil eviction context that could lessen the disparate impact of blanket tenant screening policies.

²⁹ *Id.* at 185 (citing studies that show that racial discrimination in criminal justice system contributes to higher rates of convictions for people of color); *see also* Farrakhan v. Gregoire, 590 F.3d 989, 1010 (9th Cir.) (“[T]he significant racial disparities in arrest rates are not fully warranted by race or ethnic differences in illegal behavior.”), *aff’d on reh’g en banc*, 623 F.3d 990 (9th Cir. 2010); THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 6 (2008), https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrusts.org/reports/sentencing_and_corrections/onein100pdf.pdf [<https://perma.cc/HW6L-UNTM>] (reporting that Black men are incarcerated at more than six times the rate of white men).

³⁰ *See* Kathryn A. Sabbath, *Erasing the “Scarlet E” of Eviction Records*, APPEAL: THE LAB (Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/> [<https://perma.cc/ZBV6-MNY6>] (arguing eviction filings may later “haunt” tenants by acting as complete bar to successful rental applications).

³¹ *See generally* Katelyn Polk, *Screened out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions*, 15 NW. J.L. & SOC. POL’Y 338 (2020) (describing how eviction filings can lead to homelessness and job loss); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income Tenants*, 24 GEO. J. ON POVERTY L. & POL’Y 59 (2016) (discussing how evictions cause “downward moves” to unsafe housing quality for tenants); Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal To Protect Public Records*, 116 YALE L.J. 1344 (2007) (arguing tenant screening reports can blacklist tenants from other housing accommodations).

I. THE ROLE AND IMPACT OF TENANT SCREENING POLICIES AND PRACTICES
IN EVICTIONS

Landlords have fully embraced “tenant screening”—the practice of gathering background information about tenants before making decisions to offer or decline housing.³² Such background reports, which are frequently called tenant screening reports, chronicle a potential tenant’s criminal background, creditworthiness, and history of past evictions.³³ In the past, landlords manually screened tenants by requesting prospective renters to submit records and documentation in support of their rental applications.³⁴ Now, tenant screening has gone digital, with some processes being fueled by artificial intelligence (“AI”).³⁵ While these screening reports are problematic for many reasons, this Article focuses on the role they play in supplying information about a potential tenant’s previous landlord-tenant disputes and court filings³⁶ and how these impact landlords’ decisions in extending or declining housing to a prospective renter.

A. *Evictions, Generally*

Eviction is the process by which a landlord recovers possession of real property from a tenant. Approximately “2.3 million evictions were filed in the U.S. in 2016,” which equates to “a rate of four [eviction filings] every minute.”³⁷ Common reasons for eviction include a tenant’s failure to pay rent, violation of a lease agreement, or a tenant remaining on the property after the expiration of the lease.³⁸ When people hear the term “eviction,” they may visualize a tenant being removed from the property. However, this is the last step in a very lengthy legal process that a landlord must undergo before the tenant must vacate the

³² NAT’L L. CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS 18, 31 (2018), <https://homelesslaw.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf> [<https://perma.cc/8RWF-VJEF>] (“About 90 percent of landlords use tenant-screening reports in deciding whether to accept applicants, and 85 percent of landlords review eviction records.”).

³³ *Id.* at 18.

³⁴ See Benson & Biering, *supra* note 25, at 304.

³⁵ See Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 255 (2020) (noting rental application decisions are now often made by algorithms).

³⁶ See Stauffer, *supra* note 26, at 242 (stating tenant screening reports contain “at least one of three categories of information” including information pulled from public records, like court records).

³⁷ Terry Gross, *First-Ever Evictions Database Shows: ‘We’re in the Middle of a Housing Crisis,’* NPR (Apr. 12, 2018, 1:07 PM), <https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis> [<https://perma.cc/A5HJ-LCTD>].

³⁸ Alia Hoyt, *10 Legal Reasons for Evictions*, APARTMENTGUIDE: THE LEASE (May 25, 2021), <https://www.apartmentguide.com/blog/legal-reasons-for-eviction/> [<https://perma.cc/Z74Y-MASN>] (listing common reasons for eviction).

premises.³⁹ The timeline of the eviction process varies by jurisdiction including how and when landlords are required to file eviction documents with the court and how tenants must be notified that eviction documents have been filed.⁴⁰

Generally, a landlord must have cause to evict a tenant before the end of the term of the tenancy. For a landlord to begin eviction summary proceedings,⁴¹ the tenant, while still occupying the leased property, must either fail to pay or refuse to pay the rent under the lease agreement for at least seven days after the landlord has given the tenant written notice.⁴² To prevail in an eviction action, the landlord must show that: (1) the landlord has the right to possession of the subject property, (2) the tenant is unlawfully occupying the subject property, (3) the landlord has served the tenant proper notice, and (4) if applicable, the amount of rent due.⁴³ If the landlord prevails, the judge will grant an order of possession, which states the date by which the tenant must vacate the property—that is the eviction notice.⁴⁴

B. *Black Women Bear the Brunt of the Eviction Crisis*

Black women are the most impacted by the eviction process and its collateral consequences.⁴⁵ Several factors contribute to this dynamic.⁴⁶ First, Black women are more likely to be the heads of their households. In almost eighty percent of Black households, women are the main breadwinners, and their

³⁹ See Mary Jo Weindorf, *Your Account Balance is Due—Pay Up or Get Out: Streamlining the Eviction Process in Michigan*, 56 WAYNE L. REV. 773, 776 (2010) (illustrating eviction process through Michigan statute).

⁴⁰ See *id.* at 775-76.

⁴¹ Eviction summary proceedings refer to the legal process that landlords must go through to get a formal order from the court that states the tenant must leave the occupied space. Landlords have the right to recover possession of the premise due to nonpayment, which is the most common basis for an eviction, and for other lease agreement violations. See Weindorf, *supra* note 39, at 780-82 (describing steps required for landlord to begin eviction proceedings).

⁴² *Id.*

⁴³ Harold J. Krent, Peter Cheun, Kayla Higgins, Matthew McElwee & Alexandra McNicholas, *Eviction Court and a Judicial Duty of Inquiry*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 547, 549 (2016).

⁴⁴ See *id.* at 548-49.

⁴⁵ See MATTHEW DESMOND, POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 2 (2014), https://www.macfound.org/media/files/hhm_research_brief_-_poor_black_women_are_evicted_at_alarming_rates.pdf [<https://perma.cc/3CM5-LZEU>] (“Women from black neighborhoods represented only 9.6 percent of the population, but they accounted for 30 percent of the evictions in Milwaukee.”).

⁴⁶ See ELYSE SHAW & C. NICOLE MASON, HOLDING UP HALF THE SKY: MOTHERS AS WORKERS, PRIMARY CAREGIVERS, & BREADWINNERS DURING COVID-19, at 3 (2020), <https://iwpr.org/wp-content/uploads/2020/06/Holding-Up-Half-the-Sky-Mothers-as-Breadwinners.pdf> [<https://perma.cc/4W8Z-WDTW>] (“Across all states, Black mothers are more likely to be breadwinners, or contribute the lion’s share of the household income.”).

families rely heavily on their income to meet the family's needs.⁴⁷ As a result, if the breadwinner suffers any sort of financial loss, as we have seen during the recent COVID-19 pandemic, the entire family is placed at a greater risk of being evicted. The pandemic exacerbated the eviction risk disparity between Black women and other demographics.⁴⁸ Black women's "higher pre-pandemic labor force participation rates compared to other women, . . . [came] at a cost: their names are more likely to be listed as leaseholders."⁴⁹ The compounding impact of race and gender rings true as the pandemic lingers on. For example, before the pandemic in Milwaukee, Wisconsin, low-income Black women renters were about nine times more likely to be evicted as compared to low-income white women renters.⁵⁰ As part of their response to the COVID-19 pandemic, Congress established the Emergency Rental Assistance program to assist households experiencing financial hardship with the cost of rent and utilities.⁵¹ Data reveal that "85% of those served" through this program were Black women.⁵² These statistics have worsened throughout the pandemic, with nearly one in five renters reporting to be both behind on rent and likely to face eviction.⁵³ Studies show that when eviction moratoria lifted, it hit Black women the hardest.⁵⁴

Even within communities of color, the disparate impact of evictions is not uniformly felt. Princeton University's Eviction Lab models indicate that "while race and gender independently increase the likelihood of eviction, Black women are facing *compounded* risk of eviction compared to Black men and women of

⁴⁷ NAT'L P'SHIP FOR WOMEN & FAMS., BLACK WOMEN, THE WAGE GAP, AND EVICTIONS: AN URGENT CALL FOR EQUITABLE HOUSING SOLUTIONS 1 (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/other/black-women-and-evictions.pdf> [<https://perma.cc/J7TJ-B3JY>] ("Almost 80 percent of Black mothers are key breadwinners for their families, which means their households rely heavily on their wages to make ends meet and get ahead.")

⁴⁸ *See id.* ("[T]he massive economic upheaval of COVID-19 has made it even harder for Black women to make rent throughout more than a year of reduced hours, layoffs, lost income and slower job recovery compared to all men and most women.")

⁴⁹ *Id.* at 2; *see also* *Civilian Labor Force Participation Rate by Age, Sex, Race, and Ethnicity*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm> [<https://perma.cc/PM5H-MGNN>] (last updated Sept. 8, 2022) (demonstrating the higher rate of labor force participation by Black women related to women of other races).

⁵⁰ *See* DESMOND, *supra* note 45, at 2.

⁵¹ Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Awards \$2 Million To Assess the Impact of Emergency Rental Assistance on Housing Stability (Nov. 3, 2022), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_22_226 [<https://perma.cc/M8U6-9L5F>].

⁵² Dominique Dillon, *Black Women Face Greater Risk of Eviction than Any Other Group*, YAHOO! NEWS (Apr. 6, 2022), <https://news.yahoo.com/black-women-face-greater-risk-235729025.html> [<https://perma.cc/V86N-AU8U>].

⁵³ NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 47, at 2.

⁵⁴ *See id.*

other races.”⁵⁵ Compared to Black men, for instance, Black women face an eviction rate that is 36.3% higher.⁵⁶ This gap is wider when compared to other women of color.⁵⁷ Black women are most likely to be under threat of eviction because they are more cost-burdened, in the amount they must pay for housing compared to their total income, than other women of color.⁵⁸ Black women are more cost-burdened in part due to the wage and income gap that Black women endure.⁵⁹ On average, Black women make sixty-three cents for every dollar that white, non-Hispanic men make.⁶⁰ That amounts to an annual loss of \$24,000.⁶¹ Further, as a group, “Black mothers . . . are more likely to be breadwinners than [w]hite, Hispanic, or Asian mothers in every state,”⁶² where “[f]our out of 5 Black mothers (79 percent) are breadwinners, with a majority of Black mothers (56 percent) raising families on their own.”⁶³

The information that tenant screening companies include in their reports and on which landlords rely often has detrimental consequences for Black women. One such type of information is records of eviction filings. “[S]creening agencies ‘have little or no incentive to avoid accurate but misleading items’” and many do not differentiate between case outcomes.⁶⁴ Yet, landlords, relying on tenant screening reports, frequently refuse to rent to prospective tenants who have been involved, even if only minimally, in eviction proceedings—functionally blacklisting tenants “without context or nuance.”⁶⁵ As a result, an eviction record will “all but assure [the] denial” of rental applications.⁶⁶

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ DESMOND, *supra* note 45, at 3. Cost-burdened renters are those who pay “more than 30 percent of their income in rent.” *Id.*

⁵⁹ *Black Women & the Pay Gap*, AAUW, <https://www.aauw.org/resources/article/black-women-and-the-pay-gap/> [<https://perma.cc/UW5D-9MSE>] (last visited Jan. 18, 2023) (“According to the U.S. Census Bureau, on average, Black women were paid 58% of what non-Hispanic white men were paid in 2020.”).

⁶⁰ NAT’L P’SHP FOR WOMEN & FAMS., *supra* note 47, at 1.

⁶¹ *Id.* at 2.

⁶² SHAW & MASON, *supra* note 46, at 6.

⁶³ *Id.* at 5.

⁶⁴ Shannon Price, *Stay at Home: Rethinking Rental Housing Law in an Era of Pandemic*, 28 GEO. J. ON POVERTY L. & POL’Y 1, 30 (2020) (quoting Kleysteuber, *supra* note 31, at 1366).

⁶⁵ Paula A. Franzese, *A Place To Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 688 (2018); see Kevin Perk, *What Is a No Fault Eviction?*, SMARTER LANDLORDING (July 20, 2016), <https://smarterlandlording.com/what-is-a-no-fault-eviction/> [<https://perma.cc/6L9J-ABCH>]; see also Desmond, *supra* note 15, at 120 n.21; Teri Karush Rogers, *Only the Strongest Survive*, N.Y. TIMES (Nov. 26, 2006), <http://www.nytimes.com/2006/11/26/realestate/26cov.html> (noting ninety-nine percent of New York landlords “reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is”).

⁶⁶ Franzese, *supra* note 65, at 669.

Eviction filings saddle Black women with what tenant advocates call a Scarlet Letter E—a stigma “that can haunt a tenant for years.”⁶⁷ It is well established that women are more likely than men to be named in eviction proceedings.⁶⁸ Multiple studies have concluded that Black mothers are more likely to face eviction than any other demographic group.⁶⁹ And because Black mothers are most likely to be evicted, they are also most likely to be blacklisted from securing future housing.⁷⁰ This is further exacerbated by landlords’ reliance on tenancy screening reports that often are erroneous, lack context, or contain bias due to AI errors. Felisha Nelson, a Black mother seeking housing in Omaha, Nebraska, encountered the consequences of her Scarlet Letter E when she faced difficulty finding an apartment because of a seven-year-old eviction case in her background report.⁷¹ Nelson and many women like her face these challenges daily.

In reality, most eviction actions end in settlement.⁷² Cases often end in dismissals for lack of good cause to evict the tenant, or agreements in which the tenant remains a tenant and continues to pay rent.⁷³ In their 2018 report, *Prejudged*, the Housing Action Illinois and the Lawyers’ Committee for Better Housing found that thirty-nine percent of the 105,272 public eviction cases in Cook County, Illinois, from 2014 to 2017 did not end in the tenant’s eviction—burdening some 15,091 residents each year with an eviction record despite no judgment against them.⁷⁴ This problem is exacerbated in jurisdictions known for serial eviction filings: in Philadelphia, Pennsylvania, only 5.9% of 22,573 filings in 2016 came before a judge;⁷⁵ in Baltimore, Maryland, only four percent of

⁶⁷ Sabbeth, *supra* note 30; *see id.* (“Private companies collect and sell housing court data, culling court records for names of defendants in eviction proceedings—whether they win or not—and then compiling them to profit off the tenants’ misfortune.”).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Park, *supra* note 1.

⁷¹ Matthew Goldstein, *The Stigma of a Scarlet E*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/business/eviction-stigma-scarlet-e.html> (quoting Nelson as saying, “[The Scarlet Letter E] hangs over your head . . . [and] labels you, and that is not who you are”).

⁷² *See* Spector, *supra* note 26, at 185 & n.223.

⁷³ *Id.* at 184-85 (describing flaws associated with eviction proceedings and noting many cases end with dismissal).

⁷⁴ HOUS. ACTION ILL. & LAWS.’ COMM. FOR BETTER HOUS., PREJUDGED: THE STIGMA OF EVICTION RECORDS 8 (2018), <https://lcbh.org/sites/default/files/resources/Prejudged-Eviction-Report-2018.pdf> [<https://perma.cc/Y7DD-T7JA>] (providing data related to completed cases in Cook County).

⁷⁵ Jake Blumgart, *To Reduce Unfair Evictions, Tenants Need Lawyers*, WHYY (Mar. 16, 2017), <https://whyy.org/articles/to-reduce-unfair-evictions-tenants-need-lawyers/> [<https://perma.cc/7HME-LDQN>].

about 140,000 annual filings result in a tenant’s eviction;⁷⁶ and in Connecticut, “nearly all contested cases are successfully settled.”⁷⁷ Some evictions have nothing to do with the tenant’s inability to pay at all. Some have accused landlords of using eviction filings as a “blunt tool . . . in a variety of ways.”⁷⁸ In some cases, like Nelson’s, a landlord can file an eviction case against a tenant to force the tenant to vacate the property so the landlord can sell it.⁷⁹ In other cases, landlords file cases to dissuade tenants from exercising their legal rights. Examples include landlords filing evictions against victims of domestic violence who call 911 to report their abusers,⁸⁰ tenants with disabilities requesting reasonable accommodations under their lease terms, and tenants withholding rent to compel their landlords to repair inhabitable living conditions.⁸¹

However, an eviction filing remains a part of the tenant’s public record, regardless of whether the parties settle, the case is dismissed, or the tenant wins.⁸² This is an insurmountable obstacle for tenants who attempt to secure housing after a landlord filed an eviction against them. Tenant screening companies and landlords that contract with these companies, however, often fail to recognize the difference between an eviction filing and an eviction order.⁸³ And, even if they do recognize the difference, most refuse to take into account

⁷⁶ PUB. JUST. CTR., THE ECONOMIC IMPACT OF AN EVICTION RIGHT TO COUNSEL IN BALTIMORE CITY 19-20 (2020), <https://bmorerentersunited.org/rtc/stoutreport/> [<https://perma.cc/3V36-6CZ7>].

⁷⁷ THE CITIZENS ADVISORY COUNCIL FOR HOUS. MATTERS, REPORT TO THE GENERAL ASSEMBLY 4 (2005), <https://portal.ct.gov/-/media/CACHM/CAC2005fullreportpdf.pdf> [<https://perma.cc/UD9L-TWEP>] (summarizing “at least five detailed reports” over last twenty years that measured processing speed and outcomes in Connecticut housing cases).

⁷⁸ Goldstein, *supra* note 71.

⁷⁹ *Id.*

⁸⁰ One study that analyzed nuisance citations over a two-year period in Milwaukee found that properties in Black neighborhoods were disproportionately cited, and that nearly one-third of all citations were generated by domestic violence. See Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 118 (2013) (“Landlords also took steps to discourage tenants from calling 911; overrepresented among callers, women were disproportionately affected by these measures.”). “In light of these observations, it is especially distressing that domestic violence related citations are disproportionately deployed in black neighborhoods, given that black women often face unique obstacles when attempting to escape abusive relationships.” *Id.* at 138.

⁸¹ See Franzese, *supra* note 65, at 674-75 (describing case of renter who withheld rent due to her bathroom ceiling collapsing, only to have her landlord sue for eviction).

⁸² MASS. L. REFORM INST., EVICTED FOR LIFE: HOW EVICTION COURT RECORDS ARE CREATING A NEW BARRIER TO HOUSING 1 (2019), https://www.passthehomesact.org/uploads/2/7/0/4/27042339/evicted_for_life_mlri.pdf [<https://perma.cc/TC8Q-67P3>].

⁸³ Kristin Ginger, *Eviction Filings Hurt Tenants, Even if They Win*, SHELTERFORCE (July 30, 2018), <https://shelterforce.org/2018/07/30/eviction-filings-hurt-tenants-even-if-they-win/> [<https://perma.cc/YCT9-PUQM>] (implying many landlords “do not understand that an eviction filing does not mean someone was actually evicted”).

the context or outcome of a case.⁸⁴ The mere sight of the word “eviction” on a prospective tenant’s public record effectively blacklists the tenant from securing future housing in most cases.⁸⁵

These factors not only place Black women at greater risk of being evicted but also decrease their chances of finding affordable housing in the future, creating a cycle of homelessness for entire families.

C. *Tenant Screening and Its Problems*

Landlords commonly charge prospective tenants an application fee to obtain a background report. Typically, this background report compiles information related to the prospective renter’s criminal history, credit report, residential report, and eviction history.⁸⁶ To assess a tenant’s history, landlords engage the help of tenant screening companies.⁸⁷ Tenant screening companies use technology to gather residential tenant information to produce reports that either include only those data, such as credit history or eviction records, or ones that include such data and provide “recommendations” or “scores” based upon those data.⁸⁸ These data are often mined from public records using algorithms and artificial intelligence.⁸⁹

There are several drawbacks associated with these reports. First, a major concern that arises with the increased dependence on eviction history information is the degree of accuracy. Often, tenant screening reports are rife with errors. A study that reviewed “hundreds of federal lawsuits filed against screening companies over the past 10 years show[ed] how hasty, sloppy matches can lead to reports that wrongly label people deadbeats, criminals or sex offenders.”⁹⁰ Take for instance, Samantha Johnson, who suffered from a case of mistaken identity when applying for an apartment in Oregon.⁹¹ The landlord used an automated background check that mined data from criminal databases in states where Johnson had never lived and pulled records of women whose middle names, races, and dates of birth did not match hers to conclude that she

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Franzese, *supra* note 65, at 667.

⁸⁷ Lauren Kirchner & Matthew Goldstein, *How Automated Background Checks Freeze Out Renters*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html> (noting tenant screening now includes “criminal records from across the country, sex-offender registries, terrorism watch lists and housing court records”).

⁸⁸ *Id.* (“Some screening companies don’t even provide the underlying records to landlords, instead producing a color-coded ‘risk’ score or a thumbs-up or thumbs-down lease recommendation.”).

⁸⁹ See Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 404 (2017) (“AI is best understood as a set of techniques aimed at approximating some aspect of human or animal cognition using machines.”).

⁹⁰ Kirchner & Goldstein, *supra* note 87.

⁹¹ *Id.*

was a risky tenant.⁹² In addition to erroneous criminal records, automatic screening reports may result in devastating consequences when they misreport eviction records. Sandra Smith, a Black woman, was denied public housing in Florida “after a background check reported a 2013 eviction for a different Sandra Smith.”⁹³ In another instance, a lawsuit brought by Leon Howard against RealPage, a large tenant screening company, alleged that RealPage included criminal records for Lonnie Howard and eviction records for Linnea Howard in his background report for a rental property in Georgia.⁹⁴ It is not surprising that these errors tend to have a greater effect on people with common surnames.⁹⁵ Because people of color tend to bear more common surnames than white people,⁹⁶ these errors disproportionately affect them.

Second, tenant screening reports often are incomplete.⁹⁷ Take the case of Joyce Williams, who lost her job a few days before Thanksgiving in 2019.⁹⁸ As a result, she fell behind on her rent payments, and her landlord moved to evict her.⁹⁹ Through a local legal aid organization, Williams and her landlord agreed that she “would leave, and he would withdraw the eviction.”¹⁰⁰ Unfortunately, Williams learned very quickly that despite the landlord’s withdrawal of the eviction, that case filing would ultimately become a barrier to securing future housing.¹⁰¹ Williams’s application for a new apartment was rejected because the automated prospective tenant screening report the landlord used showed the eviction filing on her record. As Williams aptly put it, “It seems that people weren’t really looking at the full picture of what I was going through.”¹⁰²

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See Am. Counts Staff, *Hispanic Surnames Rise in Popularity*, U.S. CENSUS BUREAU (Aug. 9, 2017), <https://www.census.gov/library/stories/2017/08/what-is-in-a-name.html> [<https://perma.cc/T4NX-6DL4>] (“[I]t takes fewer names to cover a large segment of the Hispanic, Asian or black populations, compared to the white population, which has higher surname diversity.”).

⁹⁷ Princeton University’s Eviction Lab, which examined more than “3.6 million eviction court records from twelve states, found that, on average, 22% of eviction records contain ambiguous information on how the case was resolved or falsely represent a tenant’s eviction history.” Adam Porton, Ashley Gromis & Matthew Desmond, *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 31 HOUS. POL’Y DEBATE 377, 378 (2021).

⁹⁸ Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People To Bounce Back from Tough Times*, CONSUMER REPS. (Mar. 11, 2021), <https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/> [<https://perma.cc/Q9F5-PBC6>].

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

Williams eventually secured housing, thanks to a “landlord [who] was willing to talk over her circumstances.”¹⁰³ Many, however, are not as fortunate.

Third, there are well documented issues concerning bias and the use of AI.¹⁰⁴ According to housing advocates, a new type of housing discrimination has emerged with the increased use of AI in the selling and renting of homes.¹⁰⁵ The reliance on property technology, or “PropTech,”¹⁰⁶ has systemized existing discrimination and bias in housing, resulting in further disenfranchisement of people of color.¹⁰⁷ As Nadiyah Humber notes, automated tenant screenings rely on algorithms that collect data “such as eviction records, credit reports, and criminal histories,” all of which are “laden with decades of discriminatory information.”¹⁰⁸ Such algorithms are especially problematic because they use “dirty data,”¹⁰⁹ which, in the housing context, include “data originated from racially discriminatory practices in both [the] housing and financial industries,

¹⁰³ *Id.*

¹⁰⁴ See Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 502, 508, 520, 532 (2021) (discussing how purportedly objective algorithms, such as those used to identify crime hotspots, are actually discriminatory and work to create a feedback loop that encourages more discriminatory behavior); Schneider, *supra* note 35, at 280 (discussing how AI’s focus merely on whether or not a tenant was evicted and not reason for that eviction leads to inaccurate predictions of future tenant behavior); Ngozi Okidegbe, *When They Hear Us: Race, Algorithms and the Practice of Criminal Law*, 29 KAN. J.L. & PUB. POL’Y 329, 330-32 (2020) (discussing how proliferation of AI in criminal justice harms minority communities because it disproportionately ascribes behavioral risk factors that are not reliable indicators); McKenzie Raub, *Bots, Bias and Big Data: Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices*, 71 ARK. L. REV. 529, 530-32 (2018) (discussing how use of AI in hiring process has Title VII disparate impact implications through gender and racial biases of coders, who are predominantly white and male).

¹⁰⁵ See Patrick Sisson, *Housing Discrimination Goes High Tech*, CURBED (Dec. 17, 2019, 6:12 PM), <https://archive.curbed.com/2019/12/17/21026311/mortgage-apartment-housing-algorithm-discrimination> [<https://perma.cc/3CEA-WU7S>].

¹⁰⁶ Humber defines “PropTech” as a term used to describe the advent of technologies that use algorithms and machine learning to automate workflows within the real estate industry. Nadiyah J. Humber, *A Home for Digital Equity: Algorithmic Redlining in Property Technology*, 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 3-4).

¹⁰⁷ See *id.* (noting prospective tenant screening tools operate using AI serve to reinforce unequal housing outcomes for minorities by relying on factors such as credit scores, eviction records, and criminal records, and how disparate impact claims under the FHA can remediate some of these outcomes).

¹⁰⁸ *Id.* (manuscript at 24-25).

¹⁰⁹ Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 18 (2019) (citing Won Kim, Byoung-Ju Choi, Eui-Kyeong Hong, Soo-Kyung Kim & Doheon Lee, *A Taxonomy of Dirty Data*, 7 DATA MINING & KNOWLEDGE DISCOVERY 81, 81 (2003)) (discussing how authors expand definition of “dirty data” to include data influenced by individual and societal biases in criminal justice system, and how rise of AI can lead to magnifications of such data).

such as residential redlining, that resulted in the racial wealth gap and concentrated poverty in urban centers.”¹¹⁰

Although the use of eviction records in making rental decisions has not been widely challenged, the use of criminal records has.¹¹¹ In March 2019, the District of Connecticut found that CoreLogic, a third-party tenant screening company that uses data collection and data mining to produce tenant screening reports, could be held liable for violations of the FHA because it “held itself out as a company with the knowledge and ingenuity to screen housing applicants by interpreting criminal records and specifically advertised its ability to improve ‘Fair Housing compliance.’”¹¹² The Connecticut Fair Housing Center alleged that CoreLogic’s automated tenant screening software tool, “CrimSAFE,” denied Carmen Arroyo’s request to move her disabled son into her rental apartment based on records of a dismissed shoplifting arrest from 2014.¹¹³ Arroyo’s son Mikhail was injured in a July 2015 accident that left him unable to speak, walk, or care for himself, leaving Arroyo as his conservator.¹¹⁴ After becoming his conservator, Arroyo asked her landlord for permission to move Mikhail into her home and out of the nursing home where he was recovering.¹¹⁵ She submitted a rental application on her son’s behalf. But his application was denied because CoreLogic’s CrimSAFE background check stated that Mikhail had a “disqualifying [criminal] record.”¹¹⁶ Ruling on CoreLogic’s motion for summary judgment, the Court rejected CoreLogic’s argument that the FHA does not apply to screening companies and instead found that the plaintiffs sufficiently pleaded that CoreLogic’s conduct resulted in a discriminatory housing practice and that they could be found vicariously liable for an apartment management company’s conduct.¹¹⁷

¹¹⁰ See Humber, *supra* note 106 (manuscript at 25).

¹¹¹ Colin Lecher, *Automated Background Checks Are Deciding Who’s Fit for a Home*, VERGE (Feb. 1, 2019, 8:00 AM), <https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic> [<https://perma.cc/6WKF-JQ9H>]; see also *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 248-49 (3rd Cir. 2007) (holding Southeastern Pennsylvania Transportation Authority was able to terminate conditionally hired employee because he had forty-year-old murder conviction and his contract stated that drivers with violent criminal convictions could not be hired); Valerie Schneider, *Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing*, 53 U. RICH. L. REV. 923, 924-25 (2019) (discussing how extensive use of criminal history to bar potential tenants from housing has disparate impact among minority communities, which the Department of Housing and Urban Development’s (“HUD”) 2016 guidance reflects).

¹¹² *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362, 372 (D. Conn. 2019).

¹¹³ *Id.* at 367-69.

¹¹⁴ *Id.* at 367.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 303 (D. Conn. 2020).

Cases like Arroyo's demonstrate the danger of discrimination that results from landlords' reliance on information supplied by algorithms. Such reliance on big data and algorithms opens the door to "reproduce existing patterns of discrimination, inherit the prejudice of prior decision makers, or simply reflect the widespread biases that persist in society."¹¹⁸ It is especially problematic when it involves eviction records that reflect what Valerie Schneider calls "bad data," which she defines as "cases that were ultimately dismissed or cases that were brought because tenants were seeking remedies to housing code violations."¹¹⁹ The opportunity for "bad data" to create an unnecessary barrier to housing is great, especially for minorities, where housing providers assume that a prospective renter with an eviction record is indicative of future behavior.¹²⁰

Unlike the Department of Housing and Urban Development ("HUD"), the Federal Trade Commission ("FTC") has openly recognized how facially "neutral" AI can produce and reinforce discrimination based on protected characteristics.¹²¹ In April 2020, the FTC issued a press release, aimed at businesses, emphasizing that "the use of AI tools should be transparent, explainable, fair, and empirically sound, while fostering accountability."¹²² While touting the benefits of AI, the FTC recognized that AI tools present significant risks "such as the potential for unfair or discriminatory outcomes or the perpetuation of existing socioeconomic disparities."¹²³ The FTC reiterated this concern in its April 2021 press release, which noted that "apparently 'neutral' technology can produce troubling outcomes—including discrimination by race or other legally protected classes."¹²⁴ In advising businesses, the FTC warned that it could challenge the use of models that result in "digital redlining"

¹¹⁸ Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 674 (2016).

¹¹⁹ Schneider, *supra* note 35, at 280.

¹²⁰ *Id.* at 279-81 (noting eviction records created where tenant refused to pay rent due because of deteriorating building conditions are not noted as such in AI algorithms and thus create artificial barrier to rent for minorities).

¹²¹ The FTC issued a report in January 2016 chronicling the issues of algorithmic bias and its impact on low-income and underserved groups. See *generally* FED. TRADE COMM'N, *BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION?* (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> [<https://perma.cc/Z5HR-C6TD>].

¹²² Andrew Smith, *Using Artificial Intelligence and Algorithms*, FED. TRADE COMM'N: BUS. BLOG (Apr. 8, 2020), <https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-algorithms> [<https://perma.cc/ZBV6-7TMX>].

¹²³ *Id.*; see Okidegbe, *supra* note 104, at 331 (arguing currently employed algorithms reproduce racial status quo in criminal justice system).

¹²⁴ Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, FED. TRADE COMM'N: BUS. BLOG (Apr. 19, 2021), <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai> [<https://perma.cc/D2YN-S9UX>].

as unfair under the Fair Credit Reporting Act (“FCRA”).¹²⁵ The FTC issued a report to Congress in June 2022 expressing concerns about the harms associated with AI, such as inaccuracy, bias, and discrimination.¹²⁶ As Maggie Martin argues, however, cases like Arroyo’s demonstrate that the FCRA fails to protect renters and “allows for . . . unseen, intermediary entit[ies] to continually disadvantage African American and Latino renters.”¹²⁷

II. THE FAIR HOUSING ACT AND DISPARATE IMPACT LIABILITY

Title VIII of the Civil Rights Act of 1968, or the FHA, makes it unlawful for housing providers and other entities to discriminate against individuals based on race, color, religion, sex, familial status, and national origin.¹²⁸ Congress enacted the FHA to eliminate housing discrimination in the United States. Specifically, the FHA “ensure[s] the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of racial or other impermissible characteristics.”¹²⁹ Section 3604(a) of the FHA makes it unlawful “[t]o 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.”¹³⁰ To effectuate Congress’s intent to provide fair

¹²⁵ *Id.* (noting advertising model that targets consumers based on protected classes can be challenged by FTC “if it causes or is likely to cause substantial injury to consumers . . . and [is] not outweighed by countervailing benefits to consumers or to competition”).

¹²⁶ Press Release, Fed. Trade Comm’n, FTC Report Warns About Using Artificial Intelligence To Combat Online Problems (June 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-report-warns-about-using-artificial-intelligence-combat-online-problems> [<https://perma.cc/VP7M-2YQG>].

¹²⁷ Maggie Martin, *Racial Discrimination in Tenant Screening Services*, WAKE FOREST L. REV. (Apr. 19, 2022), <http://www.wakeforestlawreview.com/2022/04/racial-discrimination-in-tenant-screening-services%EF%BF%BC/> [<https://perma.cc/GM6F-REHF>] (asserting Arroyo’s case in *Connecticut Fair Housing Center* is part of larger pattern of litigation on AI in property rentals).

¹²⁸ *The Fair Housing Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fair-housing-act-1> [<https://perma.cc/WUY5-C86G>] (last updated May 31, 2022); see *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (holding under FHA, term “sex” also encompasses discrimination based on sexual orientation and gender identity).

¹²⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed [under Title VII]. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”); see also 42 U.S.C. § 3604; *United States v. City of Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980).

¹³⁰ 42 U.S.C. § 3604(a). It is likewise unlawful “to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” *Id.* § 3604(b).

housing to all regardless of such characteristics,¹³¹ the Supreme Court and other federal courts construe the FHA's language broadly and liberally.¹³² The FHA was passed just four years after Title VII of the Civil Rights Act of 1964,¹³³ which was enacted to eliminate employment discrimination. Both acts were intended to combat discrimination in both public and private domains—Title VII for employment and Title VIII for housing respectively. Given the shared purpose and construction of both statutes, courts often borrow the legal precedent and enforcement standards of each statute for guidance in applying each in their different contexts.¹³⁴

A. *Establishing Liability Under the FHA: Disparate Treatment v. Disparate Impact*

The HUD Office of Fair Housing and Equal Opportunity is charged with investigating formal complaints brought under the FHA and overseeing enforcement. Housing discrimination claims typically fall within two categories:¹³⁵ disparate treatment, which encompasses allegations of intentional discrimination based on a protected characteristic, or disparate impact, in which a facially neutral decision or practice has discriminatory effects on a protected group. Each type of claim involves different legal hurdles for a plaintiff to overcome before successfully pleading a FHA violation.

¹³¹ See *id.* § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”).

¹³² See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 211-12 (1972) (holding civil rights statutes should be read expansively to fulfill their purpose); *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1018 (E.D. Pa. 1976) (holding that neighbors and residents of Whitman Park Townhouse Project were not allowed to scream racial epithets and derogatory terms at workers trying to work on project and that Philadelphia had to make efforts to stop these actions), *modified*, 503 F. Supp. 383 (E.D. Pa. 1980), *and* 564 F.2d 126 (3d Cir. 1977).

¹³³ See *The Fair Housing Act*, *supra* note 128.

¹³⁴ See, e.g., *Trafficante*, 409 U.S. at 209; *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990) (“The mental element required in a [Title VIII racial] steering case is the same as that required in employment discrimination cases challenged . . . under Title VII of the Civil Rights Act of 1964 . . . on a theory of disparate treatment.”); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288-89 (7th Cir. 1977) (reasoning by analogy FHA case under Title VIII to Title VII); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. 1988) (asserting Title VII analysis is persuasive in interpreting Title VIII), *aff'd in part sub nom. Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988). Compare *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) (“Courts have recognized that Title VIII is the functional equivalent of Title VII . . .”), with *Curtis v. Loether*, 415 U.S. 189, 197-98 (1974) (holding Title VII jurisprudence is inappropriate when language cited in Title VII differs from language cited in Title VIII).

¹³⁵ See *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011) (“The FHA can be violated by either intentional discrimination or if a practice has a disparate impact on a protected class.”); *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997).

To prevail on a disparate treatment claim under the FHA, a plaintiff must establish a prima facie case of intentional discrimination¹³⁶ using the three-part framework that the Supreme Court articulated in *McDonnell Douglas Corp. v. Green*.¹³⁷ Under this standard, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence.¹³⁸ If the plaintiff satisfies this burden, then the burden shifts to the defendant to “articulate some legitimate, nondiscriminatory reason” for its action.¹³⁹ If the defendant satisfies this burden, the plaintiff then has the opportunity to prove that the legitimate reasons asserted by the defendant are mere pretexts.¹⁴⁰

Proving a disparate impact claim under the FHA similarly involves a three-part burden-shifting framework modeled after *Griggs v. Duke Power Co.*,¹⁴¹ in which the Supreme Court held disparate impact claims cognizable under Title VII.¹⁴² *Griggs* involved a policy that required a high school diploma or passage of a high school equivalency exam as a prerequisite for employment with Duke Power.¹⁴³ Before this new policy, Duke overtly refused to hire Black people in any department besides the labor department, which paid less than the lowest-paying jobs of any department.¹⁴⁴ Black employees alleged that Duke’s policy violated Title VII because the white employees fared better under those requirements than Black employees.¹⁴⁵ The Court held, although there was no discriminatory purpose, Title VII prohibited Duke from requiring a high school education or passing a standardized general intelligence test as a condition of

¹³⁶ Cf. Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1628-29 (2021) (arguing disparate treatment and intentional discrimination are two different, yet often conflated, concepts). Eyer defines disparate treatment as “the outcome would have been different ‘but for’ the protected class of those affected” and defines intentional discrimination as “the narrower class of disparate treatment that is perpetrated with discriminatory intent.” *Id.*

¹³⁷ 411 U.S. 792, 802 (1973), *modified*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *McDonnell Douglas* involved plaintiff Percy Green, a Black man who worked as a mechanic and lab technician and had been laid off by the defendant, McDonnell Douglas Corp. *Id.* at 794. Green protested that his firing and McDonnell Douglas’s employment practices were racially discriminatory by participating in a stall-in. *Id.* Three weeks later, Green applied for a position McDonnell Douglas advertised but was turned down because of his participation in the protest. *Id.* at 796. Green then filed a Title VII claim, alleging racial discrimination and retaliation based on his race. *Id.* at 802-06; *see also, e.g.*, *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992); *Sec’y, U.S. Dep’t of Hous. & Urb. Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) (stating three-part framework developed by Supreme Court in *McDonnell Douglas* governs in discrimination cases brought under FHA).

¹³⁸ *McDonnell Douglas*, 411 U.S. at 802.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 804.

¹⁴¹ 401 U.S. 424 (1971).

¹⁴² *Id.* at 429-30.

¹⁴³ *Id.* at 427.

¹⁴⁴ *Id.* at 426-27.

¹⁴⁵ *Id.* at 430.

employment or job transfer.¹⁴⁶ The Court reasoned that the tests were unlawful because both requirements operated to disqualify Black applicants at a substantially higher rate than white applicants in jobs where racial imbalance persists because of Duke's previous overtly discriminatory policy and neither standard was shown to be significantly related to successful job performance.¹⁴⁷ In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,¹⁴⁸ the Supreme Court cited *Griggs* when stating that "[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"¹⁴⁹ The earliest case to apply *Griggs*'s disparate impact framework in the housing context, *United States v. City of Black Jack*,¹⁵⁰ similarly recognized that the effect of facially neutral housing policies—not the motivation—is dispositive.¹⁵¹ There, the Eighth Circuit held that a neutral zoning ordinance prohibiting multi-family housing in an all-white suburb of St. Louis, Missouri, was an "artificial, arbitrary, and unnecessary" practice that was properly invalidated under disparate impact doctrine.¹⁵² In *Black Jack*, a nonprofit organization sought "to create alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis" in the form of 108 units of two-story townhouses.¹⁵³ The district court had found that the virtually all-white population in the suburbs of St. Louis County had doubled and triggered a housing boom, while Blacks were concentrated "in the city and in pockets in the county" and thereby were confined disproportionately "in overcrowded or substandard accommodations."¹⁵⁴

In reviewing the challenged ordinance, the Eighth Circuit analogized to Title VII protections against barriers to equal employment in stating that "[j]ust as Congress requires 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing."¹⁵⁵ The Eighth Circuit determined that "[t]he ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the

¹⁴⁶ *Id.* at 436.

¹⁴⁷ *Id.* at 426.

¹⁴⁸ 576 U.S. 519 (2015).

¹⁴⁹ *Id.* at 543 (quoting *Griggs*, 401 U.S. at 431); see *Griggs*, 401 U.S. at 431 ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed [under Title VII]. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

¹⁵⁰ 508 F.2d 1179 (8th Cir. 1974).

¹⁵¹ See *id.* at 1187-88.

¹⁵² *Id.*

¹⁵³ *Id.* at 1182.

¹⁵⁴ *Id.* at 1183.

¹⁵⁵ *Id.* at 1184 (citation omitted) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units.”¹⁵⁶ As the Eighth Circuit stated, “we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.”¹⁵⁷

In 2013, HUD issued regulations to formalize its “long-held interpretation of the availability of ‘discriminatory effects’ liability under the Fair Housing Act and to provide nationwide consistency in the application of that form of liability.”¹⁵⁸ HUD adopted the “2013 Rule,” a “three-part burden-shifting test currently used by . . . most federal courts.”¹⁵⁹ Under HUD’s regulations, a plaintiff must first establish a prima facie case showing that the defendant’s practice has or will have a discriminatory effect on a protected class.¹⁶⁰ Plaintiffs must do so by showing: (1) an “outwardly neutral” policy, procedure, or practice; and (2) “a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant’s] facially neutral acts or practices.”¹⁶¹ Discriminatory effect is typically established with demographic statistics in both the fair housing and employment discrimination contexts. Showing intentional discrimination is not required.¹⁶² The burden then shifts to the defendant to prove that the practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.¹⁶³ If the defendant satisfies this burden, the plaintiff can still prevail by proving that defendant’s interests could have

¹⁵⁶ *Id.* at 1186.

¹⁵⁷ *Id.* at 1185 (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967)).

¹⁵⁸ See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2021)) (citation omitted).

¹⁵⁹ *Id.* at 11460, 11474.

¹⁶⁰ *Id.*

¹⁶¹ See *Pfaff v. U.S. Dep’t of Hous. & Urb. Dev.*, 88 F.3d 739, 745 (9th Cir. 1996) (alterations in original) (quoting *Palmer v. United States*, 794 F.2d 534, 538 (9th Cir. 1986)).

¹⁶² See *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984) (“[A] landlord’s housing practice may be found unlawful under Title VIII either because it was motivated by a racially discriminatory purpose or because it is shown to have a disproportionate adverse impact on minorities.”); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (holding violation of FHA made by “showing of discriminatory effect without a showing of discriminatory intent”); *United States v. Pelzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973) (holding defendants actions violate FHA because his words had discriminatory effect even if he had no intent to discriminate); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1374 n.72 (S.D.N.Y. 1985), *aff’d*, 837 F.2d 1181 (2d Cir. 1987); *cf. Smith v. City of Jackson*, 544 U.S. 228, 235-36 (2005) (permitting disparate impact claim in age discrimination case, but noting statute must contain specific “effects” language to allow disparate impact claims).

¹⁶³ See 24 C.F.R. § 100.500(c)(2).

been met through less discriminatory means.¹⁶⁴ However, if the plaintiff fails to meet this burden, the defendant prevails.¹⁶⁵

B. *Discerning FHA's Applicability: Who's Liable? Landlords, Tenant Screening Companies, or Both?*

The FHA allows individuals to bring claims of discrimination if they can prove that a certain policy, procedure, or practice results in a disparate impact on a protected group.¹⁶⁶ Black women impacted by the tenant screening process should be allowed to bring a claim of housing discrimination under the FHA. Both race and gender are protected categories groups under the FHA.¹⁶⁷ As a result, Black women, burdened by their dual identity as both Black and women, are protected by the FHA. Moreover, eviction studies regarding tenant screening have demonstrated that Black women are disproportionately affected by the practices of landlords and the tenant screening companies they hire.¹⁶⁸ Therefore, courts should interpret the FHA to hold both landlords and tenant screening companies liable for relying on the information provided in tenant screening reports. The FHA should allow claims of discrimination to be brought where landlords and tenant screening companies deliberately use and supply, respectively, information that has been shown to disparately impact people of color generally and Black women specifically.

Whether tenant screening companies can be held liable for discrimination under the FHA is subject to debate.¹⁶⁹ One view, held by tenant screening companies and their proponents, is that section 3604 precludes tenant screening company liability.¹⁷⁰ Proponents of this view rely on the Southern District of New York's interpretation of section 3604 in *Frederick v. Capital One Bank (USA), N.A.*¹⁷¹ *Frederick* involved a claim brought against several banking and consumer credit companies alleging that their practices caused a decrease in the plaintiff's credit score, which harmed his ability to obtain financing to purchase real estate.¹⁷² Specifically, the plaintiff alleged that the defendants targeted him for these practices based on his race and, accordingly, violated section 3604(a) of the FHA by making housing opportunities "otherwise unavailable."¹⁷³ In response, two credit reporting agencies, who also provide tenant screening

¹⁶⁴ *Id.* § 100.500(c)(3).

¹⁶⁵ *Id.* § 100.500(b)(1)(ii).

¹⁶⁶ *Id.* § 100.500(d)(2)(i).

¹⁶⁷ *See* 42 U.S.C. § 3604.

¹⁶⁸ *See supra* Part I.

¹⁶⁹ *See* Shivangi Bhatia, *To "Otherwise Make Unavailable": Tenant Screening Companies' Liability Under the Fair Housing Act's Disparate Impact Theory*, 88 FORDHAM L. REV. 2551, 2566 (2020).

¹⁷⁰ *Id.*

¹⁷¹ No. 14-cv-5460, 2015 WL 5521769 (S.D.N.Y. Sept. 17, 2015).

¹⁷² *Id.* at *1.

¹⁷³ *Id.* at *2.

services to landlords, argued that the FHA was inapplicable to their actions because they did not engage in the “sale or rental” of housing.¹⁷⁴ The court agreed, explaining that a relationship between the challenged practice and the “sale or rental” of housing was necessary under section 3604 and that credit reporting practices were not intrinsically related to real estate transactions.¹⁷⁵

The competing view, held by critics of tenant screening services, is that section 3604 should be interpreted broadly to encompass tenant screening companies.¹⁷⁶ To support this view, critics point to the District of Connecticut’s interpretation of section 3604 in *CoreLogic*, which broadly interpreted the “otherwise make unavailable” language in section 3604(a) to encompass tenant screening companies.¹⁷⁷ There, the court rejected CoreLogic’s argument that it could not be liable under the FHA because section 3604 only applies to “individuals who deal directly with prospective buyers or tenants and are in control of the housing-related decisions.”¹⁷⁸ The court found that the absence of explicit language providing for tenant screening company liability under the FHA was not dispositive.¹⁷⁹ Relying on *Mitchell v. Shane*,¹⁸⁰ where the Second Circuit held that a listing agent could be liable under section 3604 though he was not a housing provider,¹⁸¹ the district court concluded that entities other than housing providers could be liable under the FHA.¹⁸²

Federal agencies are similarly divided on whether tenant screening companies can be held liable for their (mis)use of technology-driven tenant reports.¹⁸³ More recently, the FTC and Consumer Financial Protection Bureau (“CFPB”) issued warnings to businesses that the use of racially biased algorithms could violate consumer protection laws.¹⁸⁴ Arguably, that includes tenant screening

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See Morgan Baskin, *Trump Wants To Give Landlords Even More Power over People with Criminal Records*, VICE (Sept. 7, 2019, 11:00 AM), <https://www.vice.com/en/article/vb5bm3/trump-wants-to-give-landlords-even-more-power-over-people-with-criminal-records> [<https://perma.cc/TV7B-VWUS>] (discussing how proposed rule would, in some cases, limit renters’ ability to sue landlords); see also Madeline Byrd & Katherine J. Strandburg, *CDA 230 for a Smart Internet*, 88 FORDHAM L. REV. 405, 418-19 (2019) (discussing how FHA liability standards could apply to disparate advertisement targeting).

¹⁷⁷ *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362, 371 (D. Conn. 2019).

¹⁷⁸ *Id.* at 372 (noting defendant cited no authority to support argument that FHA only applied to housing providers).

¹⁷⁹ *Id.* at 374.

¹⁸⁰ 350 F.3d 39 (2d Cir. 2003).

¹⁸¹ *Id.* at 49-50.

¹⁸² *CoreLogic*, 369 F. Supp. 3d at 373-75 (noting Second Circuit’s extension of liability beyond direct housing providers is logical based on purpose of FHA).

¹⁸³ See, e.g., Sisson, *supra* note 105 (discussing differing perspectives of HUD, National Bureau of Economic Research, and Federal Housing Finance Agency).

¹⁸⁴ See *CFPB Acts To Protect the Public from Black-Box Credit Models Using Complex Algorithms*, CONSUMER FIN. PROT. BUREAU (May 26, 2022), <https://www.consumer>

companies. The courts have offered little guidance on the issue of a landlord's use of eviction records to deny a prospective tenant housing. No court has yet ruled on whether tenant screening companies can be held liable for discrimination under the FHA for their role in a landlord's use of eviction records to disqualify prospective renters. There is, however, persuasive reasoning in the context of criminal records that can and should be applied to eviction records.¹⁸⁵

III. BLANKET TENANT SCREENING POLICIES AND PRACTICES DISPARATELY IMPACT BLACK WOMEN AND THUS VIOLATE THE FHA

Blanket tenant screening policies are arbitrary and unnecessary barriers that discriminate against Black women and thus violate the FHA.¹⁸⁶ The practice of private landlords rejecting rental applicants based on the mere sighting of an eviction record creates a barrier to desirable living conditions and leaves Black women housing insecure. More importantly, such policies or practices undercut the spirit and purpose of the FHA to prohibit stereotyping and discriminatory acts in housing and cannot justify the disparate impact that they impose on Black women. Because many private housing screening policies fail to account for individualization when considering a rental applicant's eviction record,¹⁸⁷ they produce adverse outcomes for Black women and exacerbate Black homelessness.¹⁸⁸ As in *Griggs and Black Jack*, blanket tenant screening practices that operate to exclude Black women by limiting their housing choices based on their eviction record violate the FHA.¹⁸⁹ Because marginalized plaintiffs with intersectional identities like Black women are protected from discrimination under Title VII,¹⁹⁰ they are similarly protected from

finance.gov/about-us/newsroom/cfbp-acts-to-protect-the-public-from-black-box-credit-models-using-complex-algorithms/ [https://perma.cc/H5DW-LH6S].

¹⁸⁵ See *CoreLogic*, 369 F. Supp. 3d at 371 (concluding discriminatory effect from policy or practice that denies housing based on prior criminal record cannot be justified).

¹⁸⁶ Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁸⁷ See *supra* Part I.

¹⁸⁸ See Desmond, *supra* note 15, at 99 (determining Black women renters face eviction at higher rates than both men and white women).

¹⁸⁹ See *Griggs*, 401 U.S. at 431 (holding barriers that operate to discriminate on basis of race are impermissible); *United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974) (same).

¹⁹⁰ U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL ON RACE AND COLOR DISCRIMINATION § 15-IV(C) (2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination> [https://perma.cc/B38B-D8HP] (noting that Title VII prohibits discrimination because of the intersection of two or more protected bases, such as race and sex). See generally Yvette N.A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1 (2019) (arguing Black women are a protected class under Title VII).

discrimination under the FHA from facially neutral housing practices, such as tenant screening policies, that disparately impact them.¹⁹¹

A. *Blanket Tenant Screening Policies Disparately Impact Black Women*

Black women are more likely than any other group to face eviction and be evicted.¹⁹² While Black women represent less than ten percent of all renters, one in five Black women is likely to face eviction at some point in their life, compared with one in fifteen white women.¹⁹³ One study found that women from Black neighborhoods made up only 9.6% of the city’s population but accounted for thirty percent of evicted tenants.¹⁹⁴ Women renters from Black neighborhoods faced eviction more than 1.8 times as often as male renters from the same neighborhoods and more than five times as often as women renters from white neighborhoods.¹⁹⁵ As Princeton University’s Eviction Lab research shows, “36.3 percent more Black women get evicted than Black men.”¹⁹⁶ Other studies found that people of color made up about eighty percent of those facing eviction in several cities, and women were sixty-one percent of the tenants facing eviction in Chicago, with Black women accounting for forty-nine percent of all tenants appearing in court¹⁹⁷ and seventy percent the tenants in

¹⁹¹ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 190 (looking to Title VII for guidance on interpretation of FHA); see also *Pfaff v. U.S. Dep’t of Hous. & Urb. Dev.*, 88 F.3d 739, 739 n.1 (9th Cir. 1996).

¹⁹² See, e.g., Tim Thomas, Malcolm Drewery, Meredith Greif, Ian Kennedy, Alex Ramiller, Ott Toomet & Jose Hernandez, *Baltimore Eviction Map*, EVICTIONS STUDY (May 8, 2020), <https://evictionresearch.net/maryland/report/baltimore.html> [<https://perma.cc/NNW7-B7NF>] (“The number of Black female headed household removals is 3.9 times higher (296% more) than the number of white male headed evictions (2,996 vs. 775) and 2.3 times higher for Black male headed households.”).

¹⁹³ See generally U.S. CENSUS BUREAU, HOUSEHOLD PULSE SURVEY PUF: JUNE 29-JULY 11 (2022), <https://www.census.gov/programs-surveys/household-pulse-survey/datasets.html> (scroll to “Household Pulse Survey PUF: June 29-July 11” and select the compatible data file for download) (last visited Jan. 18, 2023) (listing unpublished calculation of demographic share of renters behind on rent and renters very or somewhat likely to face eviction in next two months). Across their lifetime, one in five Black women are evicted, compared with one in fifteen white women. Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color*, CTR. FOR AM. PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/article/pandemic-exacerbated-housing-instability-renters-color/> [<https://perma.cc/TK37-6XXD>].

¹⁹⁴ Emily Benfer, David Bloom Robinson, Stacy Butler, Lavar Edmonds, Sam Gilman, Katherine Lucas McKay, Lisa Owens, Neil Steinkamp, Diane Yentel & Zach Neumann, *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/> [<https://perma.cc/G3WD-SNSG>].

¹⁹⁵ Desmond, *supra* note 15, at 99.

¹⁹⁶ NAT’L P’SHIP FOR WOMEN & FAMS., *supra* note 47, at 2.

¹⁹⁷ LISA PARSONS CHADHA, LAW CTR. FOR BETTER HOUS., TIME TO MOVE: THE DENIAL OF TENANTS’ RIGHTS IN CHICAGO’S EVICTION COURT (1996), <http://lcbh.org/resources/time-to-move> [<https://perma.cc/FUT9-6JEE>].

Philadelphia.¹⁹⁸ An analysis of King County, Washington, court filings revealed not only that King county has the highest eviction rate among women but also that Black women account for sixteen percent of evicted tenants but only five percent of the renter population.¹⁹⁹

Unlike information related to criminal records, nationwide eviction data related to protected classes are not as widely studied or available.²⁰⁰ Based on the current data available, however, the disparate impact that evictions have on Black women is incontrovertible. Drawing on court records of eviction cases filed between 2012 and 2016 against roughly 4.1 million individuals in thirty-nine states, researchers found that Black and Latina women renters faced higher eviction rates than their male counterparts.²⁰¹ Black female renters had eviction cases filed against them at double the rate of white renters or higher in seventeen out of thirty-six states.²⁰² In Baltimore, households headed by Black women had the highest number of eviction removals compared to all other groups.²⁰³ Black women are also more likely to have a prior eviction filing that ultimately resulted in a dismissal.²⁰⁴ A study of eviction filings in Massachusetts revealed that nearly three hundred out of ten thousand Black women had evictions filed against them that were dismissed, as compared to less than one hundred out of ten thousand white renters.²⁰⁵ Because Black women are more likely than any other group to have a prior eviction record, they are more likely to be denied housing when a landlord uses a tenant screening report.

B. *No Substantial, Legitimate, Nondiscriminatory Interest Exists in Tenant Screening Practices That Invidiously Discriminate Against Black Women*

Proponents of using tenant screening reports, namely landlords and tenant screening companies, argue that a tenant's previous involvement in an eviction

¹⁹⁸ David Latham Eldridge, *The Making of a Courtroom: Landlord-Tenant Trials in Philadelphia's Municipal Court 107* (Nov. 2, 2001) (Ph.D. dissertation, University of Pennsylvania), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=2811&context=edissertations> [<https://perma.cc/X7Z8-NBVS>].

¹⁹⁹ Romina Ruiz-Goiriena & Kevin Crowe, *'I Lost Everything': Black Women Get Evicted More than Anyone Else. A Looming Eviction Crisis Will Make It Worse*, YAHOO! NEWS (Apr. 5, 2022), <https://www.yahoo.com/gma/lost-everything-black-women-evicted-230204780.html> [<https://perma.cc/2WBH-TYZ4>]; see also Thomas et al., *supra* note 192 (finding Black adults and women are disproportionately evicted in Washington).

²⁰⁰ See Hepburn, *supra* note 18, at 649 (noting prior to study presented in article, "no study ha[d] documented demographics of America's evicted renters in national perspective").

²⁰¹ *Id.* at 649, 657.

²⁰² See Beiers et al., *supra* note 19.

²⁰³ See Thomas et al., *supra* note 192.

²⁰⁴ See Beiers et al., *supra* note 19.

²⁰⁵ *Id.*

proceeding gives insight into the prospective risk of renting to that tenant.²⁰⁶ They claim this information helps guard their financial investments.²⁰⁷ Indeed, the burdens of evictions not only affect the tenants but also impact what are known as “mom-and-pop” landlords.²⁰⁸ More than seventy percent of properties with four or fewer rental units are owned by mom-and-pop landlords.²⁰⁹ When a tenant fails to pay, these landowners are particularly vulnerable because they typically lack additional capital or assets to cover the mortgage payments. Additionally, as a practical matter, landlords are often responsible for additional costs relating to the eviction such as court costs, short-term or long-term vacancy, and the costs of renting to a new tenant. These costs plus the unanticipated loss of income from their tenant-renters make it difficult for landlords to pay their mortgage payments, property taxes, and property maintenance costs, which places mom-and-pop landlords at greater risk for foreclosure and bankruptcy.²¹⁰

Those interests, however, are not compelling enough to deny housing to an entire group of people. Robert Benson and Raymond Biering argued that although records of eviction actions are public, they are not made public to be used by landlords as a tool to measure a renter’s risk.²¹¹ Indeed, they are gravely inadequate to that end.²¹² Benson and Biering warned then that if landlords rely on tenant screening reports, they are likely to “disqualify” any prospective renter who has ever been named in an eviction action and “permanently prevent a tenant from securing housing in a given region altogether.”²¹³ Assuming that a prospective tenant’s eviction history was indicative of the tenant’s rental risk—which, as explained above, it is not—Benson and Biering state poignantly that, “[e]ven if a tenant had once been the wrongdoer in an [eviction action], it would be brutal to exclude [that tenant] permanently from that housing market for the

²⁰⁶ Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 322 (2010).

²⁰⁷ David J. D’Urso, *Tenant Screening Agencies: Implications for Landlords and Tenants*, 26 REAL EST. L.J. 44, 51 (1997) (“The use of tenant screening agents, therefore, provides lessors with a cost-effective approach to limiting potential liability.”); Becky Bower, *Why Tenant Screening Is More Important Now than Ever*, APPLYCONNECT (Oct. 19, 2017), <https://www.applyconnect.com/blog/tenant-screening-important-now-ever> [<https://perma.cc/P2M7-EMVC>].

²⁰⁸ Abby Vesoulis, *Millions of Tenants Behind on Rent, Small Landlords Struggling, Eviction Moratoriums Expiring Soon*, TIME (Feb. 18, 2021, 5:29 AM), <https://time.com/5940505/housing-crisis-2021/>. Mom-and-pop landlords “often live nearby; manage the property themselves; and rely on the rental income to pay their own mortgages, health care bills and monthly expenses.” *Id.*

²⁰⁹ *Id.*

²¹⁰ *See id.*

²¹¹ *See* Benson & Biering, *supra* note 25, at 308.

²¹² *Id.*

²¹³ *Id.*

reason alone.”²¹⁴ And it is—in addition to being blacklisted from renting private housing, eviction filings disqualify prospective renters from subsidies for public housing.²¹⁵ Evicted renters are “pushed to the very bottom of the rental market” and forced to accept lower-quality housing from unreliable landlords in dangerous neighborhoods at a higher cost.²¹⁶ And when renters are “trapped in this cycle,” homelessness is “more and more likely.”²¹⁷

Proponents of tenant screening policies also argue that housing providers have a valid interest in avoiding problem tenants²¹⁸ or securing their real estate investment.²¹⁹ While securing one’s investment is an interest to be considered, it is not a valid interest to support invidious discrimination against Black women under the FHA. As it relates to the exclusion of prospective tenants because of a prior arrest, HUD has explained that “[a] housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.”²²⁰ Per HUD’s guidance, using arrest records is inadequate and unreliable because such records “do not constitute proof of past unlawful conduct and are often incomplete (e.g., failing to indicate whether the individual was prosecuted, convicted, or acquitted).”²²¹ Moreover, arrest records are often tainted by racial bias.²²² In the employment context, the Equal Employment Opportunity Commission (“EEOC”) has similarly explained that denying applicants from

²¹⁴ *Id.*

²¹⁵ Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 67 (2018). Black women are also overrepresented in public housing; see *Public Housing Statistics*, IPROPERTYMANAGEMENT, <https://ipropertymanagement.com/research/public-housing-statistics> [<https://perma.cc/BM4C-RWEW>] (last updated May 9, 2022) (noting forty-five percent of people receiving assistance from HUD are Black); *Picture of Subsidized Households*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.huduser.gov/portal/datasets/assths.html> [<https://perma.cc/8SWS-ZDGD>] (last visited Jan. 18, 2023).

²¹⁶ See Desmond, *supra* note 15, at 118; NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 32, at 32.

²¹⁷ NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 32, at 7.

²¹⁸ See *Tenant Screening Reports for Landlords*, AM. APARTMENT OWNERS ASS’N, <https://www.american-apartment-owners-association.org/tenant-screening/> [<https://perma.cc/8HCS-7AYR>] (last visited Jan. 18, 2023).

²¹⁹ See D’Urso, *supra* note 207, at 68 n.2 (listing landlord liabilities as including lost rent, apartment repairs, court costs, attorney fees, process server fees, marshal fees, and locksmith fees).

²²⁰ U.S. DEP’T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 5 (2016) [hereinafter HUD 2016 Guidance], https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHAFASTANDCR.PDF [<https://perma.cc/3AMV-3WNQ>].

²²¹ *Id.* at 5.

²²² *Id.* at 3 (“Across the United States, African Americans . . . are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.”).

employment on the basis of arrests not resulting in conviction is inconsistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.²²³ Likewise, blanket tenant screening policies that categorically deny prospective tenants with an eviction record, whether they were actually evicted or not, are not a valid means to meet the end of securing one’s investment and should similarly be considered a violation of Title VIII.

C. *Individualized Assessments of Eviction History Could Lessen Disparate Impact on Black Women*

Assuming a housing provider can establish that its blanket tenant screening policy or practice is necessary to achieving a nondiscriminatory goal, there are far less discriminatory alternative means. One such alternative is an individualized assessment. Individualized assessments as a tool to achieve a less discriminatory effect are not new: both HUD and the EEOC have suggested individualized assessment to housing providers and employers to lessen the discriminatory effects of blanket rejections of prospective tenants and employees respectively, as it relates to criminal records.²²⁴ In its 2016 Guidance concerning the use of criminal records and rental housing decisions, HUD encourages but does not require housing providers to individually assess rental applicants. Specifically, HUD recommends housing providers consider the “circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before . . . or after the conviction or conduct; and evidence of rehabilitation efforts.”²²⁵ The EEOC similarly recommends that employers consider such efforts, “[e]mployment or character references . . . regarding fitness for the particular position,” and “[t]he length and consistency of employment history before and after the offense or conduct.”²²⁶ The EEOC also notes that an individualized assessment could provide an individual with an opportunity to prove that the individual “was not correctly identified in the criminal record, or that the record is otherwise inaccurate.”²²⁷

²²³ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT sec. V.B.9 (2012) [hereinafter EEOC 2012 Guidance], http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [<https://perma.cc/T3DA-8A9N>]; see also *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 402-03 (C.D. Cal. 1970) (holding defendant employer’s policy of excluding from employment candidates with arrests without convictions unlawfully discriminated against Black applicants in violation of Title VII), *modified*, 472 F.2d 631 (9th Cir. 1972).

²²⁴ See HUD 2016 Guidance, *supra* note 220, at 7; EEOC 2012 Guidance, *supra* note 223, pt. I (“Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.”).

²²⁵ HUD 2016 Guidance, *supra* note 220, at 7.

²²⁶ EEOC 2012 Guidance, *supra* note 223, sec. V.B.9.

²²⁷ *Id.*

The best alternative housing practice that would lessen the disparate impact on Black women and address the concerns of housing providers is eliminating eviction records from housing decisions completely.²²⁸ That is, however, not the standard. Individualized assessments are a far less discriminatory alternative to the status quo of blanket tenant screening policies or practices that invidiously discriminate against Black women.²²⁹ Housing providers can and should engage in an individualized assessment that considers the facts surrounding the eviction filing or judgment, when the eviction filing or judgment occurred, and other more narrowly tailored considerations.²³⁰ An individualized assessment of an individual flagged in the screening process will also provide that individual with an opportunity to demonstrate that the exclusion because of a past eviction filing or judgment does not properly apply to them.²³¹ One of the most notable concerns about the use of blanket tenant screening policies is the rate of error in the reports.²³² Housing providers that engage in an individualized assessment would guarantee that any errors or inaccuracies within the reports would be flagged and explained to provide the individual a chance to move to the next stage of the process.

IV. PROPOSALS

Blanket tenant screening policies or practices that deny people with an eviction record are illegal under the FHA. The discriminatory effect of such policies and practices on Black women is pronounced and should be challenged. In addition to challenging such policies or practices under the FHA, other legislative steps would help address this issue. Much of the discussion, scholarship, and progress made concerning tenant screening has focused on criminal records.²³³ As such, many of the legislative proposals presented herein draw parallels to the context of criminal records.

²²⁸ Cf. MERF EHMAN, FAIR HOUSING DISPARATE IMPACT CLAIMS BASED ON THE USE OF CRIMINAL AND EVICTION RECORDS IN TENANT SCREENING POLICIES 30 (2015), <https://www.nhlp.org/wp-content/uploads/Merf-Ehman-FH-DI-Claims-Based-on-Use-of-Criminal-and-Eviction-Records-Sept.-2015.pdf> [<https://perma.cc/7FNF-Q92A>] (proposing alternative housing practices that would better address housing providers' concerns without creating disparate impact on marginalized tenants).

²²⁹ *Id.*

²³⁰ See *infra* Part IV.

²³¹ See EEOC 2012 Guidance, *supra* note 223, sec. V.B.9 (“[An individualized assessment] provides an opportunity to the individual to demonstrate that the exclusion does not properly apply . . .”).

²³² See *supra* Section I.C.

²³³ See, e.g., Michael G. Allen, Jamie L. Crook & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 190 (2014) (identifying application of disparate impact standard to criminal records screening by housing providers as frontier of FHA jurisprudence); Jesse Kropf, *Keeping “Them” Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 75, 81 (2012); Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act To Challenge Housing*

A. *Require Fair Tenant Screening on State and Federal Levels*

1. *Expand Fair Credit Reporting Act Enforcement To Cover Eviction Records*

Enacted in 1970, the Fair Credit Reporting Act (“FCRA”)²³⁴ promotes the accuracy, fairness, and privacy of consumer information contained in the files of consumer reporting agencies (“CRAs”),²³⁵ protects consumers from the willful or negligent inclusion of inaccurate information in their consumer reports and regulates the collection, dissemination, and use of consumer information, including consumer credit information.²³⁶ The FTC has unequivocally determined that tenant screening companies and reports fall under the FCRA.²³⁷ Tenant screening reports or background reports created for landlords are “consumer reports”²³⁸ under the FCRA, and companies that provide tenant screening background reports on consumers are CRAs.²³⁹ CRAs must follow reasonable procedures to ensure the “maximum possible accuracy”²⁴⁰ and cannot report certain obsolete information.²⁴¹

The FTC has addressed how the FCRA applies to tenant screening companies as it relates to criminal background checks. The spirit of the FCRA to protect consumers from inaccurate reports and stale information can and should include eviction history checks. The FCRA grants the FTC and the CFPB enforcement powers to ensure compliance.²⁴² Both agencies have used such authority to pursue actions against background screening companies for various FCRA violations, including the failure to employ reasonable procedures to assure the maximum possible accuracy of the information contained in criminal

Barriers Against People with Criminal Records, CLEARINGHOUSE REV. J. POVERTY L. & POL’Y, May-June 2011, at 4, 4 (providing step-by-step approach to building disparate impact challenge to criminal records screening under Title VIII).

²³⁴ 15 U.S.C. § 1681.

²³⁵ *Id.* § 1681(a)(f).

²³⁶ *Id.* § 1681.

²³⁷ In defining a consumer report, the FTC provides the following example: “A report from a tenant-screening service that describes the applicant’s rental history based on reports from previous landlords or housing court records.” FED. TRADE COMM’N, USING CONSUMER REPORTS: WHAT LANDLORDS NEED TO KNOW 2 (2016) [hereinafter USING CONSUMER REPORTS], <https://www.ftc.gov/system/files/documents/plain-language/bus49-using-consumer-reports-what-landlords-need-know.pdf> [https://perma.cc/8VHM-CFHU].

²³⁸ *See* 15 U.S.C. § 1681(a)(d).

²³⁹ *See id.* § 1681(f).

²⁴⁰ *Id.* § 1681(e)(b).

²⁴¹ *Id.* § 1681(c)(a).

²⁴² *See id.* §§ 1681(d), (s)(a) (describing administrative enforcement); 12 U.S.C. §§ 5561-5567 (describing enforcement powers); *see also* Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission 8 (Feb. 25, 2019), https://files.consumerfinance.gov/f/documents/cfpb_ftc_memo-of-understanding_2019-02.pdf [https://perma.cc/QR7W-5ES9].

background reports provided to employers and housing providers.²⁴³ And they should do the same against tenant screening companies that provide inaccurate information about a prospective tenant's eviction history.

There appears to be an appetite for pursuing companies that report inaccurate eviction histories. In a recent enforcement action against AppFolio, Inc., a company that provides background reports to property management companies, the FTC alleged that AppFolio violated the FCRA by reporting obsolete eviction and criminal records and failing to implement reasonable procedures to ensure that criminal and eviction records it received from a third-party vendor were accurate before including such information in its tenant screening reports.²⁴⁴ AppFolio obtained criminal and eviction records for inclusion in tenant screening reports from CoreLogic, a company that has been subject to many lawsuits.²⁴⁵ According to the FTC, AppFolio failed to assess the accuracy of the information it obtained from CoreLogic before including the information in tenant screening reports.²⁴⁶ As a result, AppFolio provided inaccurate information about some applicants like records for individuals with a different name or birthdate, records with a missing or inaccurate disposition, and multiple entries for the same criminal or eviction action. Because of the inaccurate information included in background reports provided by AppFolio, some applicants may have been denied housing or other opportunities. AppFolio agreed to pay \$4.25 million as part of a settlement with the FTC.²⁴⁷ The proposed settlement also prohibits AppFolio from providing nonconviction criminal or eviction records older than seven years and requires the company to maintain reasonable procedures to ensure the maximum possible accuracy of the information included in its background reports.²⁴⁸ As was the case with the FTC's suit against AppFolio, the FTC and CFPB should continue to aggressively pursue and investigate tenant screening companies for FCRA

²⁴³ See, e.g., Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief at 4-5, Fed. Trade Comm'n v. RealPage, Inc., No. 3:18-cv-02727 (N.D. Tex. Oct. 16, 2018) (alleging RealPage failed to follow reasonable procedures to assure that criminal records information in screening reports concerned actual applicant for housing); Complaint at 8-9, Bureau of Consumer Fin. Prot. v. Sterling Infosystems, Inc., No. 1:19-cv-10824 (S.D.N.Y. Nov. 22, 2019) (charging Sterling with numerous violations of FCRA, including failing to employ reasonable procedures to assure maximum possible accuracy); see also ARIEL NELSON, NAT'L CONSUMER L. CTR., BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING 24-25 (2019), <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf> [<https://perma.cc/GLM6-SW57>].

²⁴⁴ Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, United States v. AppFolio, Inc., No. 1:20-cv-03563 (D.D.C. Dec. 8, 2020).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *AppFolio*, No. 1:20-cv-03563.

²⁴⁸ *Id.*

violations.²⁴⁹ In addition to seeking monetary relief, the FTC and CFPB should also require specific policies and practices to encourage compliance.²⁵⁰

2. Nationwide Adoption of Fair Tenant Screening Acts

In addition to federal agencies issuing regulations and enforcing powers bestowed upon them under the FCRA, states should pass legislation that requires users of background reports such as tenant screening reports to thoroughly review the underlying report *before* making a housing decision. Over the last decade, housing activists across several states have campaigned and advocated for the adoption of bills that propose “fair” screening policies. Washington state has been at the forefront of this fight, successfully passing such a bill, with the Washington Low Income Housing Alliance at the helm.²⁵¹ In March 2012, Governor Christine Gregoire signed the Fair Tenant Screening Act into law.²⁵² This law effectively makes the rental process more transparent, by requiring landlords to disclose what types of information would be included in a tenant screening report and to share the criteria that could result in the denial of a prospective tenant’s application.²⁵³ Landlords must also share the contact information of the tenant screening company and provide an “adverse action notice” to rejected prospective renters explaining the landlord’s decision.²⁵⁴

The Fair Tenant Screening Act states:

(1)(a) Prior to obtaining any information about a prospective tenant, the prospective landlord shall first notify the prospective tenant in writing, or by posting, of the following:

- (i) What types of information will be accessed to conduct the tenant screening;
- (ii) What criteria may result in denial of the application;
- (iii) If a consumer report²⁵⁵ is used, the name and address of the consumer reporting agency and the prospective tenant’s rights to obtain

²⁴⁹ See NELSON, *supra* note 243, at 39.

²⁵⁰ *Id.*

²⁵¹ See Press Release, Washington Low Income Hous. All., Washington State Leading the Nation in Addressing Tenant Screening Issues (Mar. 15, 2012), <https://www.wliha.org/press-release-washington-state-leading-nation-addressing-tenant-screening-issues> [<https://perma.cc/9RRW-JWVK>] (last visited Jan. 18, 2023).

²⁵² *Id.*

²⁵³ WASH. REV. CODE ANN. § 59.18.257 (West 2022).

²⁵⁴ *Id.*

²⁵⁵ See *What Tenant Background Screening Companies Need To Know About the Fair Credit Reporting Act*, FED. TRADE COMM’N (Oct. 2016), <https://www.ftc.gov/business-guidance/resources/what-tenant-background-screening-companies-need-know-about-fair-credit-reporting-act> [<https://perma.cc/Y3H8-BS9R>]. A consumer report may contain information about a person’s credit characteristics, rental history, or criminal history. Consumer reports are prepared by a CRA and are covered by the FCRA. A report from a

a free copy of the consumer report in the event of a denial or other adverse action, and to dispute the accuracy of information appearing in the consumer report; and

(iv) Whether or not the landlord will accept a comprehensive reusable tenant screening report made available to the landlord by a consumer reporting agency. If the landlord indicates its willingness to accept a comprehensive reusable tenant screening report, the landlord may access the landlord's own tenant screening report regarding a prospective tenant as long as the prospective tenant is not charged for the landlord's own tenant screening report.²⁵⁶

Additionally, the legislation mandates that if the landlord takes an "adverse action"²⁵⁷ against the tenant, then the landlord must provide their reasons for taking such measures.²⁵⁸ Senator David Frockt explained that "[t]his law requires all landlords to follow what is essentially a best-practice for the industry, and should increase transparency and make the screening process both more accurate and more fair."²⁵⁹ The goal of the Fair Tenant Screening Act is to address "the lack of affordability, accuracy, and access to justice in tenant screening."²⁶⁰ The Fair Tenant Screening Act improves transparency between the landlord and prospective tenant and provides the prospective tenant with an opportunity to dispute an application denial or clarify any information provided within the screening report. Screening reports often lack significant detail of tenants' prior eviction history, or they include information such as incidents of domestic violence that should not be germane in a landlord's decision to approve or deny housing.²⁶¹

Before Washington adopted this legislation, landlords could take adverse actions against the tenant without providing any written notice, and tenants had to incur fees to cover tenant screenings, which in some cases they could not access. This legislation places the burden on the landlord to meet the requirements laid out in section (a) before they can charge the tenant to cover the screenings. Although the legislation does not end the use of tenant

tenant screening service describes the applicant's rental history and includes a credit report the service got from a credit bureau. *See* USING CONSUMER REPORTS, *supra* note 237, at 2.

²⁵⁶ WASH. REV. CODE ANN. § 59.18.257.

²⁵⁷ Adverse action includes denying a rental application, charging a higher deposit, requiring a cosigner on the lease, and raising a tenant's rent. *See* Kaycee Miller, *Legal Requirements for Denying a Rental Applicant (Adverse Action Letter)*, RENTEC DIRECT (Feb. 27, 2020), <https://www.rentecdirect.com/blog/adverse-action-tenant-screening/> [<https://perma.cc/7XFJ-J7HC>].

²⁵⁸ WASH. REV. CODE ANN. § 59.18.257(c).

²⁵⁹ Press Release, Washington Low Income Hous. All., Fair Tenant Screening Act Goes into Effect Today (June 7, 2012), <https://www.wliha.org/press/press-release-fair-tenant-screening-act-goes-effect-today> [<https://perma.cc/GG3R-2V62>].

²⁶⁰ *Programs*, TENANTS UNION OF WASH. ST., <https://tenantsunion.org/programs/fair-tenant-screening-act> [<https://perma.cc/9YXP-W9QV>] (last visited Jan. 18, 2023).

²⁶¹ *See id.* (describing past practices prohibited by Fair Tenant Screening Act).

screenings, it does shift the power dynamics by providing the tenant access to critical information regarding their housing application and allowing them to challenge arbitrary decisions made by the landlords.

While passing the Fair Tenant Screening Act is laudable, the substance of the legislation is lacking. As Jonathan Grant, the Executive Director of the Tenants Union, summarized it, “the bill didn’t address the misleading way that tenant screening companies report eviction records.”²⁶² Specifically, “[e]ven if a tenant was wrongfully named in an eviction lawsuit, they leave court with a permanent mark against them merely because they were named in the lawsuit. That makes it much harder, and sometimes impossible, to rent again in the future.”²⁶³ Although these kinds of legislation are a step in the right direction, they are not far-reaching. Each of these laws focus on landlords and not the tenant screening companies they hire. Broadening the definition of whom the Fair Tenant Screening Act covers would also assist in limiting the use of irrelevant, arbitrary, and unnecessary information that ultimately limits Black women’s opportunities to secure housing.

B. *Limit Landlords’ Access to Prospective Tenants’ Eviction Records: Sealing, Expungement, and “Banning the Box”*

1. Sealing and Expungement of Eviction Records

A popular proposal that has emerged in response to the improper use of tenant screening reports involves implementing laws that limit a landlord’s access to a prospective tenant’s eviction history by way of sealing or expunging evictions. Eviction record sealing laws prevent the courts from releasing information regarding eviction procedures under certain circumstances. Expungement laws permanently erase a prospective tenant’s eviction record from the court’s public system and allow a prospective renter to check “no” when asked on a rental application if they have ever been evicted.²⁶⁴ These laws typically fall into two categories: mandatory and discretionary.²⁶⁵ Mandatory expungement laws provide guaranteed relief, typically without further legal action by the tenant. Discretionary expungement is at the court’s discretion and requires the tenant to have the knowledge, resources, and acumen to litigate. Nevada and California

²⁶² Press Release, Washington Low Income Hous. All., *supra* note 259.

²⁶³ *Id.*

²⁶⁴ Jaboa Lake & Leni Tupper, *Eviction Record Expungement Can Remove Barriers to Stable Housing*, CTR. FOR AM. PROGRESS (Sept. 30, 2021), <https://www.americanprogress.org/article/eviction-record-expungement-can-remove-barriers-stable-housing/> [<https://perma.cc/Z7H5-8CPZ>].

²⁶⁵ *Cf. What Are the Different Types of Expungements and What Do They Require?*, ROOT & REBOUND: ROADMAP TO REENTRY, <https://roadmap.rootandrebound.org/understanding-cleaning-up-your-criminal-record/cleaning-up-your-criminal-record-later-in-reentry/california-expungement-of-state-convictions/what-are-the-different-types-of-expungement-and-wh/> [<https://perma.cc/TX6Q-VX29>] (last visited Jan. 18, 2023) (illustrating similar taxonomy in sealing of criminal records).

are at the forefront of effective eviction-sealing laws. Both states automatically seal any case that does not result in a judgment for the landlord.²⁶⁶ California further provides automatic sealing for all other cases unless the landlord wins within sixty days. This law also creates a pathway for tenants to seal records that resulted in a settlement.²⁶⁷ Oregon's Senate Bill 873 allows the expungement of some eviction records, including cases older than five years with no outstanding money owed, cases where the tenant has completed agreements made between the landlord and tenant in court, and cases that were ruled in the tenant's favor and where the eviction was dismissed.²⁶⁸ But unlike eviction sealing laws, which apply equally to all tenants, the expungement process is completely up to the court's discretion. Moreover, an additional barrier is presented because landlords can challenge a tenant's petition to the court. Tenants are, therefore, disparately impacted due to a lack of access to counsel in these proceedings. Sealing and expungement laws have proven to be effective in curbing the use of criminal records in the employment and housing contexts. Thus, states and cities possess the blueprint to replicate those models as they relate to eviction records.

2. "Ban the Box"

State and local laws that support protections for individuals with criminal records seeking housing and employment can serve as models for the use of eviction records in rental decisions. For criminal history and employment applications, thirty-seven states and over 150 cities nationwide²⁶⁹ have joined what is known as the "ban the box" movement, which aims to remove the criminal conviction question on job applications for prospective employees.²⁷⁰ Other models aim to delay the question until a later stage in the hiring process so that a job offer can be made contingent on a criminal background check.

In the housing context, states have similarly enacted fair chance housing laws, which often prohibit housing providers from inquiring into an applicant's criminal history before extending a conditional offer of housing, limit the types of conviction records housing providers can consider, and require the housing provider to consider several factors in evaluating the applicant's record, such as the applicant's age at the time of the alleged offense, whether the alleged offense arose from an applicant's disability, and the degree to which the alleged offense

²⁶⁶ See NEV. REV. STAT. ANN. § 40.2545 (West 2022); *Eviction Sealing*, NEV. LEGAL SERVS., <https://nevadalegalservices.org/eviction-sealing/> [<https://perma.cc/HT27-F2VP>] (last visited Jan. 18, 2023).

²⁶⁷ See Melissa C. Marsh, *California Unlawful Detainer (Eviction) Cases Will Now Be Sealed*, LAW OFF. OF MELISSA C. MARSH (Jan. 2017), [https://www.yourlegalcorner.com/blog.asp?sel=post&v=173&ttl=California%20Unlawful%20Detainer%20\(Eviction\)%20Cases%20Will%20Now%20Be%20Sealed](https://www.yourlegalcorner.com/blog.asp?sel=post&v=173&ttl=California%20Unlawful%20Detainer%20(Eviction)%20Cases%20Will%20Now%20Be%20Sealed) [<https://perma.cc/Z7R9-VC62>].

²⁶⁸ S.B. 873-A, 81st Gen. Assemb., Reg. Sess. (Or. 2021).

²⁶⁹ See Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 1, 2021), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> [<https://perma.cc/B7TG-BFSN>].

²⁷⁰ See *id.*

would impact the safety of other tenants if it reoccurred. These laws also require housing providers to consider other mitigating factors such as recommendations from community members or participation in education, employment, or other programming. Some cities have proposed or enacted legislation that seeks to ban the question of a prospective tenant’s criminal history from rental applications.²⁷¹ In January and March of 2020, the Oakland City Council and Berkeley City Council, respectively, prohibited landlords from inquiring about prospective tenants’ criminal history on initial rental applications.²⁷²

The same can be done with eviction records. In 2022, the Council of the District of Columbia enacted the Eviction Records Sealing Authority and Fairness in Renting Amendment Act of 2022.²⁷³ In addition to sealing some eviction records, the law prohibits a landlord from inquiring about or refusing to rent to a prospective renter who has been subject to an eviction filing that (1) did not result in a judgment for possession in favor of the landlord or (2) was filed three or more years ago.²⁷⁴ While ban the box laws are not guaranteed to end discrimination, and in some cases have reportedly negatively impacted people of color,²⁷⁵ states and cities should follow D.C.’s lead and enact similar legislation to further reduce barriers to rental housing.

²⁷¹ See, e.g., N.J. STATE ANN. § 46:8-52 (West 2022); S.F., CAL., POLICE CODE art. 49, § 4906 (2022); DANE CNTY., WIS., CODE § 66.0104(2)(a) (2022); CHAMPAGNE, ILL., CODE OF ORDINANCES § 17-4.5 9 (2022).

²⁷² See generally NAT’L HOUS. L. PROJECT, FAIR CHANCE ORDINANCES: AN ADVOCATE’S TOOLKIT (2020), https://www.nhlp.org/wp-content/uploads/021320_NHLP_Fair_Chance_Final.pdf [<https://perma.cc/WYN3-Z9P6>]; BERKELEY, CAL., MUNICIPAL CODE § 13.106.30 (2022); *Just Housing Amendment to the Human Rights Ordinance*, COOK CNTY. GOV., <https://www.cookcountylil.gov/content/just-housing-amendment-human-rights-ordinance> [<https://perma.cc/2KNF-8ME9>] (last visited Jan. 18, 2023).

²⁷³ D.C. CODE § 24-115 (2022) (prohibiting landlords from inquiring about certain eviction filings).

²⁷⁴ *Id.*

²⁷⁵ See, e.g., Casey Leins, *More Data Needed To Determine Whether ‘Ban the Box’ Laws Work*, U.S. NEWS & WORLD REP. (Sept. 10, 2019, 12:20 AM), <https://www.usnews.com/news/best-states/articles/2019-09-10/ban-the-box-laws-could-negatively-impact-minorities> (summarizing study suggesting that ban the box policies hurt young, low-skilled, Black and Latino males who are not ex-offenders by decreasing their probability of employment); Patricia Barnes, *Study Says “Ban the Box” Policies Hurt (Not Help) Young Minority Male Job Seekers*, FORBES (Mar. 1, 2020, 11:06 PM), <https://www.forbes.com/sites/patriciagbarnes/2020/03/01/study-says-ban-the-box-policies-hurt-not-help-young-minority-male-job-seekers/?sh=483c81d740e8> (same); Rebecca Beitsch, *‘Ban the Box’ Laws May Be Harming Young Black Men Seeking Jobs*, PEW CHARITABLE TRS. (Aug. 22, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/08/22/ban-the-box-laws-may-be-harming-young-black-men-seeking-jobs> [<https://perma.cc/AW8F-CB7S>] (same); see also Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (Univ. of Mich. L. & Econ. Rsch. Paper Series, Paper No. 16-012, 2016) (concluding ban the box policies encourage statistical discrimination on basis of race).

C. *Issue New HUD Guidance on Use of Eviction Records*

HUD must expand its current guidance concerning the use of criminal records in evaluating tenants to include the use of eviction records. In 2016, HUD issued guidance acknowledging that criminal record screening tends to have a disparate impact on Black and Latinx renters and clarified that blanket rejections of potential tenants based on the existence of a criminal record are not justifiable under the FHA.²⁷⁶ Specifically, HUD's guidance states that a "housing provider must be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety . . . or property"²⁷⁷ and that a tenant screening policy that fails to consider the nature, severity, and recency of the alleged conduct is unlikely to satisfy this standard.²⁷⁸ Further, HUD recommends delaying the use of criminal background information until *after* the housing provider has evaluated all other qualifications available, including credit history, rental history, and income.²⁷⁹ Despite such guidance, however, criminal records remain a challenging barrier to housing, and several jurisdictions have enacted "crime-free housing" ordinances requiring housing providers to conduct criminal background checks and reject or evict tenants for alleged criminal conduct.²⁸⁰ Building on its 2016 guidance on using criminal records in housing decisions, HUD should issue new guidance that similarly requires landlords who use eviction records to prove through reliable evidence that their use of eviction history assists in assessing rental risk and protecting their investment. Under this proposed HUD guidance, a tenant screening policy that fails to consider the nature, recency, or final disposition of the prior eviction will be deemed unlikely to satisfy the standard.

²⁷⁶ See generally HUD 2016 Guidance, *supra* note 220.

²⁷⁷ *Id.* at 5.

²⁷⁸ See U.S. DEP'T OF HOUS. & URB. DEV., FAQs: EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2-3 (2015), https://www.hud.gov/sites/documents/FAQ_EXCLUDE_ARREST_RECORDS.PDF [<https://perma.cc/HR9Y-PMQJ>] (providing guidance on use of arrest and conviction records in housing decisions).

²⁷⁹ HUD 2016 Guidance, *supra* note 220, at 2.

²⁸⁰ See, e.g., *Nuisance and Crime-Free Housing Ordinances*, HOUS. EQUAL. CTR. OF PA., <https://www.equalhousing.org/fair-housing-topics/nuisance-and-crime-free-housing-ordinances/> [<https://perma.cc/JB7C-4MFL>] (last visited Jan. 18, 2023) (providing recommendations on applying FHA); *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, AM. C.L. UNION, <https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime> [<https://perma.cc/AZF6-8YC3>] (last visited Jan. 18, 2023) (describing how nuisance ordinances harm survivors of domestic violence); Samantha Michaels, *Hundreds of Cities Have Adopted a New Strategy for Reducing Crime in Housing. Is It Making Neighborhoods Safer—or Whiter?*, MOTHER JONES (Nov./Dec. 2019), <https://www.motherjones.com/crime-justice/2019/10/crime-free-housing-making-neighborhoods-safer-or-whiter/> [<https://perma.cc/74WT-TCWY>]; Ginia Bellafante, *The Landlord Wants Facial Recognition in Its Rent-Stabilized Buildings. Why?*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/nyregion/rent-stabilized-buildings-facial-recognition.html>.

HUD can also draw from two EEOC enforcement guidance policies: the Enforcement Guidance on Preemployment Disability Related Questions and Medical Examinations and the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act.²⁸¹ The EEOC’s Americans with Disabilities Act enforcement guidance takes a “ban the box” approach and bars an employer from asking any disability-related questions²⁸² until the final stage of the application process.²⁸³ The Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII addresses the use of an applicant’s criminal history in hiring and clarifies the standards under Title VII that regulate background checks for employers. Like the HUD guidance, this Guidance identifies a targeted screening process for employers that considers: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought. For any individuals “screened out” by this targeted screening process, the EEOC explains the employer’s policy should then conduct an individualized assessment. While the EEOC does not require employers to conduct such an individual assessment, the Guidance emphasizes that a screening process that lacks an individual assessment is more likely to violate Title VII. HUD could issue guidance to housing providers that combines aspects of both guidance policies and its own Guidance to (1) delay asking any questions related to a prospective tenant’s eviction history until after the housing provider has evaluated all other qualifications available and (2) incorporate an

²⁸¹ See generally U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995) [hereinafter EEOC 1995 Guidance]; EEOC 2012 Guidance, *supra* note 223.

²⁸² A “disability-related question” is a question that is likely to elicit information about a disability, such as asking employees whether they have or ever had a disability, the kinds of medications they may be taking, and the results of any medical tests they have had. See generally EEOC 1995 Guidance, *supra* note 281.

²⁸³ In the first stage of employment consideration, before an offer is made, the Americans with Disabilities Act prohibits all disability-related inquiries and medical examinations, even those that may be related to the job. During the second stage, which begins after an applicant is offered a conditional job offer, the employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. However, any decision to reject the applicant based on information provided must be job-related and consistent with business necessity, meaning: “(1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) sec. II.A (2000) (footnote omitted), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> [<https://perma.cc/94N7-8QWU>]. Lastly, in the third stage, after the applicant has been hired, the employer may only ask disability-related questions or require a medical examination when the employer reasonably believes that it is “job-related and consistent with business necessity” and the employer bases this belief on objective evidence. *Id.*

individualized assessment to determine the nature of the eviction filing or judgment and the time that has passed since the eviction filing or judgment.

Additionally, HUD could, similar to the EEOC, treat eviction filings differently than eviction judgments. The EEOC treats exclusion based on an arrest record differently and requires even greater justification for such practices because an arrest record does not establish that a person engaged in the alleged misconduct.²⁸⁴ Thus, an employer whose policy or practice of considering arrest records results in a disparate impact on a protected class must show that the arrest was not only related to the job at issue but also that the applicant engaged in the misconduct. Similarly, in the housing context, an eviction filing does not establish that a person was evicted and should be scrutinized more heavily. As such, HUD should similarly treat eviction filings and eviction judgments differently and require housing providers whose policy or practice of considering records of eviction filings disparately impact Black women or any other protected category under the FHA to show that the prospective tenant was evicted. This would require an individualized assessment, which would lessen the disparate impact that blanket tenant screening policies and practices have on Black women and other protected groups.

CONCLUSION

Since the passage of Title VIII, HUD has made considerable progress in reducing racial discrimination in housing. Despite such progress, however, housing discrimination based on race and sex persists, as demonstrated by the current eviction crisis. The disparate impact that blanket tenant screening policies have on Black women has gone unnoticed for far too long. This Article sheds light on that disparate impact and proposes solutions to address it. Building on the incredible work to eliminate or reduce reliance on the use of criminal arrest and conviction records in housing and employment decisions, federal agencies like the FTC and CFPB and states should require fair tenant screening practices that encourage scrutiny of the use of eviction records. States should also consider passing laws that limit landlords' access to prospective tenants' eviction records, like eviction sealing and expungement laws, as well as ban-the-box-type laws that preclude access to such records at the initial application stage. HUD can assist courts by issuing additional guidance that addresses the use of eviction records in housing decisions that track its guidance on the use of criminal arrests and convictions. It is time for HUD, the courts, and federal and state laws to uphold the spirit of the FHA and root out artificial, arbitrary, and unnecessary policies and practices barriers to housing that invidiously discriminate on the basis of racial or other impermissible classifications.

²⁸⁴ EEOC 2012 Guidance, *supra* note 223, secs. V.B.2, V.B.3 (differentiating between arrest and conviction records).