

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

MARA B. KNIAZ, et al.,

Plaintiffs,

v.

KAY MANAGEMENT COMPANY et al.,

Defendants.

COMPLAINT

Introduction

1. This action challenges Defendants’ application of a criminal records screening policy that categorically bars persons with virtually any type of criminal record from living at the more than 12,000 apartments that Defendants own or manage in Virginia and Maryland.

Defendants’ application of this policy not only prevented the individual plaintiffs in this action from securing a unit of suitable size in the Pinewood Plaza Apartments (“Pinewood Plaza”) in Fairfax Virginia but, on the basis of an old and irrelevant conviction, required them to vacate the smaller apartment they had occupied at Pinewood Plaza without incident for years. Because this policy disproportionately excludes Black and Hispanic applicants from access to rental housing and fails to achieve a legitimate, substantial, and non-discriminatory business interest, it violates the federal Fair Housing Act, as well as Virginia civil rights laws. To avoid the discriminatory impact of such a sweeping prohibition, Defendants must discontinue their current policy and individually assess prospective tenants to determine whether their criminal record indicates that they pose a risk to other tenants or the property.

2. Defendants’ violations of federal and state law are serious. Sweeping criminal record prohibitions, not cabined by timeframes, types of offenses, or consideration of personal

qualities or rehabilitative efforts of the renter, affect a significant portion of the population and increase the risk of homelessness or substandard living conditions for many prospective renters. The increase in incarceration in recent decades causes the impact of overly exclusive practices to fall most heavily on persons of color. The relief plaintiffs seek is intended both to compensate them for the injuries Defendants' policies have caused, and to eliminate this illegal practice that thwarts the ability of so many persons of color to secure stable housing of their choice.

Nature of the Action

3. Plaintiffs Mara Kniaz, Kuir Phillips, and Housing Opportunities Made Equal of Virginia ("HOME") seek injunctive, monetary, and declaratory relief against Defendants for engaging in a practice of illegal discrimination on the basis of race at the properties that Defendants own and operate in Virginia ("Subject Properties").

4. Defendants have a policy to automatically exclude from renting an apartment at the Subject Properties any person who has a felony conviction. On information and belief, Defendants additionally deny housing at most of the Subject Properties to individuals with certain misdemeanor convictions. With respect to felonies and applicable misdemeanors, Defendants consider and exclude individual applicants with convictions up to 99 years prior to the date of the application.

5. Defendants' policy of automatically excluding people based on a criminal conviction for all felonies and most misdemeanors (the "Criminal Records Policy")—which Plaintiff HOME confirmed through testing is enforced in practice—does not permit exceptions. An applicant who has a conviction within the scope of the Criminal Records Policy is automatically barred regardless of the nature of the conviction, the amount of time that has lapsed since the conviction, evidence of rehabilitation, or any other factor related to whether the person poses a threat to the safety of others or property. In cases where a prospective tenant has

a minor misdemeanor conviction, Defendants *may* take a second look at the conviction; however, they afford their staff limited discretion to consider the extent to which, if any, individual circumstances related to such convictions are relevant to qualification for the individual's tenancy.

6. As a direct result of Defendants' policies and practices, applicants with a criminal record are automatically denied because of the Criminal Records Policy or may be deterred from applying to Defendants' properties after learning of the Criminal Records Policy.

7. Defendants' Criminal Records Policy has the effect of disproportionately barring people who are Black¹ or Hispanic from obtaining rental housing at Defendants' properties, in violation of the federal Fair Housing Act, 42 U.S.C. § 3601 et .seq., and the Virginia Fair Housing Law VA Code Ann. §36-96.3.

8. As set forth below, analysis of criminal records and other data shows that the Criminal Records Policy maintained by Defendants, though facially neutral, has a disparate impact on the basis of race in the rental markets in which they do business.

9. The Fair Housing Act prohibits the application of any policy that has a disparate impact unless it is necessary to achieve a substantial, legitimate, nondiscriminatory business interest that cannot be satisfied by an alternative that has a less discriminatory effect.

10. Defendants' Criminal Records Policy is not necessary to achieve a substantial, legitimate, nondiscriminatory business interest. A less discriminatory alternative for dealing with any potential concerns raised by applicants with criminal records is available to Defendants,

¹ "White" is used throughout to refer to non-Hispanic Caucasians. "Black" is used throughout to refer to non-Hispanic African-Americans or any persons having ancestral origins in any of the Black racial groups of Africa.

following an individualized approach that is well-established in the area of housing and employment discrimination law.

11. Instead of automatically excluding every applicant covered by their far-reaching Criminal Records Policy, Defendants should individually assess potential residents with a criminal history by considering factors directly relevant to the applicant's qualifications for tenancy, such as the nature of their conviction or conduct, when it occurred, their age at the time the conduct occurred, their post-conviction and post-release conduct, evidence of their rehabilitation, evidence of whether their presence would create a direct threat to the health or safety of others or whose tenancy would result in substantial damage to the property of others, their history as a tenant, and other relevant factors. When considered in their totality, such an individualized assessment enables a landlord to make a reasoned decision about a particular applicant's qualification for tenancy.

12. The more tailored approach required by an individual assessment protects public safety and property, yet it is less discriminatory and exclusionary because it reduces the number of Black and Hispanic applicants who are categorically barred from housing at Defendants' properties.

13. Plaintiffs brings this action to address Defendants' discriminatory and unlawful conduct at the Subject Properties and to redress the harm they have suffered and will continue to suffer as a direct result of that conduct, absent relief.

Parties

14. Plaintiff Mara Kniaz, is a 44-year old, bi-racial female who identifies as Black and is recognized as such in court filings and on her criminal history record. Ms. Kniaz is a student finishing her degree in Graphic Design.

15. Plaintiff Kuir Phillips, is a 66-year old Black male from Trinidad. Mr. Phillips has been employed at Pohanka Lexus in Chantilly, Virginia for at least the past 10 years.

16. Plaintiff HOME is a fair housing advocacy organization and non-profit corporation formed in Virginia and headquartered in Richmond, Virginia. HOME offers a variety of programs and services designed to advance fair housing in Virginia. To advance its mission of ensuring equal access to housing for all, HOME engages in education and outreach; provides counseling to individuals facing discrimination; and coordinates with local and federal officials to ensure adherence to fair housing laws. When conduct that is in direct conflict with HOME's mission comes to its attention, HOME undertakes investigations to uncover the extent of unlawful discrimination; and, when necessary, initiates enforcement actions.

17. Defendant Kay Management Company ("Kay Management") is a property management company based in Silver Spring, MD with a principal place of business at Kay Mgt Co. Inc., Suite 410, 8720 Georgia Ave, Silver Spring, MD 20910-3638. Kay Management owns and/or manages at least 12,000 apartments in 31 multi-family residential developments in the states of Virginia and Maryland. Their portfolio includes Pinewood Plaza (where plaintiffs Kniaz and Phillips lived and sought to stay), Barcroft Plaza Apartments, Barcroft View Apartments, London Park Towers, and Woodmont Park Apartments, through which Kay Management regularly and systematically does business in this district.

18. Defendant Indian River Associates, LLC ("Indian River") is a property management company based in Silver Spring, MD with a principal place of business at Kay Mgt Co. Inc., Suite 410, 8720 Georgia Ave, Silver Spring MD 20910-3638, through which Indian River regularly and systematically does business in this district. On information and belief, Indian River directly or indirectly owns and/or manages the Pinewood Plaza located at 3963

Persimmon Drive, Fairfax, VA 22031. On information and belief, Indian River is directly or indirectly owned and/or controlled by Defendant Kay Management.

19. Defendant Malibu Circle Associates Limited Partnership (“Malibu Circle”) has a principal place of business at Kay Mgt Co. Inc., Suite 410, 8720 Georgia Ave, Silver Spring MD 20910-3638. On information and belief, Malibu Circle directly or indirectly owns and/or manages the Barcroft Plaza Apartments located at 3601-A Malibu Circle, Falls Church, VA, 22041, through which Malibu Circle regularly and systematically does business in this district. On information and belief, Malibu Circle is directly or indirectly owned and/or controlled by Defendant Kay Management.

20. Defendant Kay Jack et al has a principal place of business at Kay Mgt Co. Inc., Suite 410, 8720 Georgia Ave, Silver Spring, MD 20910-3638. On information and belief, Kay Jack et al directly or indirectly owns and/or manages the Barcroft View Apartments located at 6001 Columbia Pike, Falls Church, VA 22041, through which Kay Jack et al regularly and systematically does business in this district. On information and belief, Kay Jack et al is directly or indirectly owned and/or controlled by Defendant Kay Management.

21. Defendant Paxton Duke Associates, Limited Partnership (“Paxton Duke”) has a principal place of business at Kay Mgt Co. Inc., Suite 410, 8720 Georgia Ave, Silver Spring, MD 20910-3638. On information and belief, Paxton Duke directly or indirectly owns and/or manages the London Park Towers Apartments located at 5275 Duke Street, Alexandria, VA 22304, through which it regularly and systematically does business in this district. On information and belief, Paxton Duke is directly or indirectly owned and/or controlled by Defendant Kay Management.

22. Defendant North Beauregard Associates Limited Partnership (“North Beauregard”) has a principal place of business at 8720 Georgia Ave, Suite 410, Silver Spring, MD 20910-3638. On information and belief, North Beauregard directly or indirectly owns and/or manages the Woodmont Park Apartments located at 5465 North Morgan Street, Alexandria, VA 22312, through which it regularly and systematically does business in this district. On information and belief, North Beauregard is directly or indirectly owned and/or controlled by Defendant Kay Management.

Jurisdiction and Venue

23. This Court has jurisdiction over this matter under 42 U.S.C. § 3613, 28 U.S.C. § 1331, and 28 U.S.C § 1343. This Court has supplemental jurisdiction over Plaintiff’s state law claims under 28 U.S.C. § 1367.

24. This Court has authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

25. This Court has specific and general personal jurisdiction over Defendants consistent with the principles of due process and/or the Virginia Long Arm Statute (Va. Code Ann. § 8.01-328.1). For example, each of the Defendants regularly transact business in this District at each of the Subject Properties; each of the Defendants have an interest in, use, and possess real property in this District (e.g., the Subject Properties); the acts and omissions giving rise to this complaint occurred in this District; and, on information and belief, each of the Defendants regularly use a computer or computer network located in the District at each of the Subject Properties.

26. Venue is proper in this district under 28 U.S.C. § 1391(b) because Plaintiffs Ms. Kniaz and Mr. Phillips are residents of the District, a substantial part of the events and omissions giving rise to the claims occurred in this District, and the Subject Properties are located in the

District. In addition, one or more of the Defendants “reside” in this District because they conduct regular and systematic business in this District.

Factual Background

I. INDIVIDUAL, SPECIFIC DISCRIMINATION RESULTS FROM ENFORCEMENT OF KAY MANAGEMENT’S CRIMINAL RECORDS POLICY

27. Ms. Kniaz and Mr. Phillips resided at Pinewood Plaza in Fairfax, VA, with their adult daughter Kiara Kniaz-Phillips and Gabby Kniaz, a minor child, until December 2017.

28. On information and belief, units offered for rent at Pinewood Plaza are studio, one-, two-, and three-bedroom apartments. The amenities offered at Pinewood Plaza include a relaxing pool, a large play area, laundry and mailing delivery in each building, an on-site management office, and 24-hour emergency maintenance.

29. Units offered for rent in the Subject Properties are predominantly studios, one-, two-, and three-bedroom apartments. These units are offered at a range of price points, depending on location. The geographic distribution of the Subject Properties, and minimum rents based on publicly available information on Defendants’ website, are as follows:

- i. Two apartment communities in Falls Church, VA (Barcroft Plaza Apartments; Barcroft View Apartments). Minimum rent ranges from \$1,398 to \$1,785 per month for two-bedroom units in these communities.
- ii. Two apartment communities in Alexandria, VA (London Park Towers; Woodmont Park Apartments). Minimum rent ranges from \$1,442 to \$1,870 per month for two-bedroom units in these communities.

iii. At Pinewood Plaza, minimum rents range from \$1,598 to \$1,718 per month for two-bedroom units.²

30. Mr. Phillips and daughter Kiara Kniaz-Phillips moved into the Pinewood Plaza in September of 2012. Ms. Kniaz and daughter Gabby Kniaz moved into the same unit with Mr. Phillips in April of 2014. Ms. Kniaz was not on the lease; however, Kay Management was aware that Ms. Kniaz lived with Mr. Phillips. Ms. Kniaz repeatedly interacted with Pinewood Plaza management in a manner that clearly evidenced her residence at Pinewood Plaza, including by submitting maintenance requests and frequently using the business center.

31. On October 30, 2017, Ms. Kniaz and Mr. Phillips applied to transfer to a larger unit at Pinewood Plaza.

32. The next day, November 1, 2017, Ms. Kniaz and Mr. Phillips received adverse action letters from Kay Management. Kay Management stated that it could not approve Ms. Kniaz and Mr. Phillips' application due to "information contained in consumer report(s) obtained from or through CoreLogic® Rental Property Solutions LLC [the "Consumer Reports"], which may include credit or consumer information from one or more credit bureaus or consumer reporting agencies."

33. The Consumer Reports explicitly recommended that Pinewood Plaza "accept" both Ms. Kniaz and Mr. Phillips as tenants. The recommendation is based upon a "SafeRent® Score DECISION" that purports to take into account Kay Management's "established decision points for applicant approval." The only cautionary or potentially negative content in the

² Kay Management discloses its rental prices for apartments at its Virginia-based properties on its website under the "Check Current Prices & Availability" link for each respective property. Rental pricing information in this complaint is current as of October 10, 2019, available at: <https://www.kayapartments.com/search/>.

Consumer Report was the notation that results of a criminal records check should be reviewed prior to making a leasing decision.

34. Ms. Kniaz's Consumer Report included an automated criminal records check, which showed a felony conviction from March 1, 2008 for possession of cocaine and misdemeanor traffic violations. The Consumer Report also identified arrests from 2008 that do not appear to have led to any additional convictions. Mr. Phillips' Consumer Report included an automated criminal records check, which only showed a misdemeanor traffic violation from January of 2006. Had Kay Management taken the time to investigate the information generated in Mr. Phillips' Consumer Report, they would have learned that the listed misdemeanor traffic violation had nothing to do with to Mr. Phillips and was actually a case of mistaken identity.

35. On November 1, 2017, the same day that Kay Management denied the application to transfer to the larger apartment, Kay Management posted a Notice to Vacate on Ms. Kniaz and Mr. Phillips' front door. Kay Management addressed the Notice to Vacate to Mr. Phillips and daughter Kiara. The Notice indicated that the initial term of the lease expired on September 30, 2013, and Mr. Phillips, daughter Kiara, and "residents" had been living month-to-month since that time. It stated that the landlord "desire[d] to have and repossess the premises" and gave Mr. Phillips, daughter Kiara, and "residents" up to two (2) months (through December 31, 2017) to vacate and surrender the apartment.

36. The Notice to Vacate provided no reason for requiring that Mr. Phillips, daughter Kiara, and "residents" vacate the premises. Ms. Kniaz and Mr. Phillips repeatedly called and left messages with Kay Management and representatives of Pinewood Plaza requesting clarification and reconsideration of the basis for the Notice to Vacate. Kay Management did not otherwise provide a reason for compelling the family to move out or needing to repossess the unit, nor did

it provide a written policy that explained why Mr. Phillips, daughter Kiara, and “residents” had to vacate the premises. Instead, Kay Management referred Ms. Kniaz and Mr. Phillips to the property manager of Pinewood Plaza. The property manager indicated that she was under no obligation to provide Ms. Kniaz and Mr. Phillips with a basis for the Notice to Vacate and refused to respond to their inquiries.

37. In December of 2017, due to the directive in the Notice to Vacate, Ms. Kniaz and Mr. Phillips moved out of Pinewood Plaza and into the Point at Ashburn, in Ashburn, VA, which caused Ms. Kniaz and Mr. Phillips to incur significant expenses and experience emotional hardships.

II. HOME’S INVESTIGATION OF DEFENDANTS’ POLICIES

38. In November 2017, Ms. Kniaz sought the assistance of Plaintiff HOME. During the initial intake, Ms. Kniaz stated that Kay Management had refused to rent her and her family a larger, upgraded two-bedroom apartment at Pinewood Plaza despite the fact that she, Mr. Phillips, and their children had lived at the property for years, without incident.

39. As a result of Ms. Kniaz’s complaint, HOME redirected its testing resources from other planned activities to northern Virginia and conducted a series of tests to assess the types and severity of the barriers individuals with criminal histories face when seeking housing at Defendants’ properties.

40. As part of this effort, HOME diverted resources to investigate the manner in which Defendants rely on and apply the Criminal Records Policy. The investigation took place from December 2017 to July 2018 and included the review of application materials and testing of several of Defendants’ properties, including Pinewood Plaza.

41. Specifically, HOME investigators conducted phone-based tests of Defendants’ properties to investigate the existence and scope of the Criminal Records Policy. HOME’s

investigators posed as representatives of an organization that worked with individuals with criminal histories and sought housing resources on such individuals' behalf. During the tests, the investigators asked Defendants' agents about the Criminal Records Policy and the effect a criminal record would have on a prospective applicant's ability to apply and qualify for a unit.

42. In the course of its investigation of Pinewood Plaza, HOME learned that the written application at Pinewood Plaza does not mention the Criminal Records Policy, other than an indication that a "criminal/background check for all applications 18 years and older" is required. However, conversations with multiple leasing agents and with the property manager revealed a systematic policy at Pinewood Plaza to automatically deny the application of any person(s) with a criminal background that includes a felony conviction, regardless of how long ago the criminal activity occurred. The property manager stated that leasing agents have no discretion to determine whether applicants with criminal records are approved. Instead, the property manager explained that leasing agents merely input the applicant's information into a system, which is controlled by the owners of Pinewood Plaza, and the system tells them whether the applicants are approved or denied. The property manager confirmed that the system automatically rejects all applicants that have a criminal record that includes a felony conviction.

43. During the tests of the Barcroft Plaza Apartments, Barcroft View Apartments, and London Park Towers, leasing agents at each property informed HOME investigators that an applicant with a criminal record would not be approved.

44. A leasing agent at Barcroft Plaza Apartments specifically indicated that Barcroft Plaza's policy is to deny an apartment to anyone with a conviction.

45. Similarly, a leasing agent at the London Park Towers stated that Defendants' policy is to deny an apartment to anyone with a conviction within the last 99 years.

46. During a test of the Barcroft View Apartments, a leasing agent indicated that every apartment under management by Kay Management utilizes the same background criteria.

47. HOME's investigation revealed that Kay Management's Criminal Records Policy excludes all applicants with felony convictions. Additionally, the policy excludes most applicants with misdemeanor convictions; only one property appears to lack clarity as to how staff handle misdemeanor convictions in assessing a prospective applicant's suitability for tenancy. To the extent Defendants *may* take a second look at misdemeanor convictions at this property, any discretion to consider the extent to which, if any, individual circumstances related to such convictions are relevant to qualification for the individual's tenancy, is limited.

48. On information and belief, Kay Management denied Ms. Kniaz and Mr. Phillips' applications to rent a two-bedroom unit at Pinewood Plaza as a result of the criminal record information contained in Ms. Kniaz's Consumer Report. This criminal record information caused Defendants to apply their blanket ban excluding any applicants with a criminal record, pursuant to their Criminal Records Policy. The same criminal history information found in Ms. Kniaz's Consumer Report also led Kay Management to require Mr. Phillips and "residents" (Ms. Kniaz and the family's two children) to vacate their apartment.

49. The Criminal Records Policy restricts housing opportunities at the Subject Properties for applicants with criminal records. Because the terms of the Criminal Records Policy fall more heavily on Black applicants with criminal records who seek housing at the Subject Properties, such as Ms. Kniaz and Mr. Phillips, than on White applicants, the Criminal Records Policy violates the Fair Housing Act. Defendants' Criminal Records Policy similarly discriminates against Hispanic applicants with criminal histories, as their opportunities to rent at the Subject Properties are also curtailed due to the Policy. Further, while legitimate business

interests such as protection of resident safety or property may support a carefully tailored criminal records policy, Defendants' overbroad policy is not so tailored and excludes persons without regard to whether its broad exclusions further a legitimate business interest. Instead, any legitimate business interest could be met through a policy that gives individualized consideration to each potential resident's circumstances and desirability as a tenant.

III. DEFENDANTS' CRIMINAL RECORDS POLICY DISPARATELY IMPACTS AFRICAN AMERICAN AND HISPANIC PERSONS, INCLUDING PLAINTIFFS, AND THEREFORE CONSTITUTES UNLAWFUL DISCRIMINATION.

50. Facially neutral housing practices that have a disparate impact on the basis of race are prohibited by the Fair Housing Act unless they are necessary to achieve a legitimate business purpose that cannot be satisfied through a less discriminatory alternative practice.

51. Because of racial disparities among people with criminal records, automatic bans based on felony convictions or other criminal history bans have a severe disparate impact on Black applicants and depending on the jurisdiction, on Hispanic applicants. Defendants' Criminal Records Policy operated and continues to operate to disqualify otherwise-qualified Black and Hispanic applicants from living at Defendants' properties at a rate. Depending on the specific property at issue, Black and Hispanic applicants are disqualified up to six or nearly eight times the rate at which otherwise-qualified White applicants were disqualified. The disparities persist even when applicants must, because of the size or location of the unit, meet Defendants' higher income requirements.

52. Defendants' legitimate interests, such as protecting safety and property, can be satisfied through the less discriminatory alternative of giving individualized consideration to each prospective resident's circumstances and qualifications for tenancy.

53. Policies that automatically deny housing to people with criminal records and are not necessary to achieve a legitimate business purpose in the least discriminatory manner,

including the Criminal Records Policy maintained and enforced by Defendants at the Subject Properties, are unlawful.

a. Automatic Criminal Record Bans Disproportionately and Severely Impact Black and Hispanic Applicants.

54. Those subjected to bans based on criminal records are disproportionately Black and Hispanic because the inmate population as a whole is disproportionately Black and Hispanic. 95% of inmates are eventually released.³

55. The imprisonment rate for Black males (2,236 per 100,000 Black males) is almost six times that of the rate for White males (397 per 100,000 White males); Hispanic males (1,054 per 100,000) face similar disparities as they are imprisoned at nearly three times the rate of White males. Among females, the imprisonment rate for Black females (92 per 100,000 Black females) is almost double that for White females (49 per 100,000 White females) while the rate of imprisonment of Hispanic females (67 per 100,000) also exceeds that of White females.⁴

56. Studies show that formerly incarcerated persons are almost 10 times more likely to be homeless than persons who have not been incarcerated.⁵ Within the population of formerly incarcerated individuals, Black and Hispanic persons are more likely than their White

³ Jennifer Bronson and E. Ann Carson, U.S. Dept. of Justice, *Prisoners in 2017*, BJS Bulletin, 12 (April 2019) at 1 and 15, <https://www.bjs.gov/content/pub/pdf/p17.pdf> (“*Prisoners in 2017*”); see also David B. Muhlhausen, National Institute of Justice, *An Overview of Offender Reentry*, U.S. Dept. of Justice Office of Justice Programs, 1 (2018), <https://www.ncjrs.gov/pdffiles1/nij/251554.pdf?ed2f26df2d9c416fbddddd2330a778c6=hepeewja-da-hebykysae>.

⁴ The Sentencing Project, Fact Sheet: Trends in U.S. Corrections, 2 (updated June 2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

⁵ See Lucas Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people* (August 2018), <https://www.prisonpolicy.org/reports/housing.html>; Demelza Baer, Avinash Bhati, et al. *Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute’s Prisoner Reentry Portfolio*, 8-9 (January 2006), <https://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>.

counterparts to be homeless upon reentry, whether sheltered (residing in a homeless shelter) or unsheltered (living without a fixed residence). Further, formerly incarcerated Black women experience the highest rates of sheltered homelessness.⁶ The fact that Black and Hispanic individuals are far more likely than White persons to have a criminal record means that Black and Hispanic applicants are more likely than White applicants to be barred from housing by automatic exclusions of people with criminal records and that the absolute number of Black and Hispanic persons excluded is significant.

57. In Virginia where Defendants' properties are located, the disparities are similarly stark. Black persons are 7.8 times as likely as White individuals to have a criminal record⁷ by ages 18-24, 6.1 times as likely by ages 30-34, and 7.1 times as likely by ages 55-59. For Hispanic persons living in Virginia, the disparities also persist. Hispanic individuals in Virginia

⁶ See Lucas Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people* (August 2018), <https://www.prisonpolicy.org/reports/housing.html>. The data shows that approximately 2% of formerly incarcerated Black women experience the highest rates of sheltered homelessness compared to 1.2% of White women and 1% of Black and Hispanic men, as well as 0.6% of White men. Further, women of color experience unsheltered homelessness at higher rates than White women. (Although the data on unsheltered formerly incarcerated African-American and Hispanic women was too limited in number to analyze, the rate of unsheltered homelessness among White women was substantially lower than the rate for women generally; a fair inference from this data thus suggests that formerly incarcerated African-American and/or Hispanic women experience unsheltered homelessness at higher rates than White women.) *Id.*

Formerly incarcerated women are more likely to be homeless than formerly incarcerated men even though their Black male counterparts have much higher rates of unsheltered homelessness than White or Hispanic men. *Id.*

⁷ Due to the overlap between misdemeanor and felony conviction, and prison and jail incarceration, it is scientifically justifiable and valid in the field of demography to consider incarceration estimates as representative of racial disparities in the cumulative prevalence of misdemeanor and felony conviction as reflected in the table below. Additionally, data is not available from which to estimate the cumulative prevalence of conviction. For that reason, this complaint refers to racial disparities in the likelihood of incarceration or imprisonment in the states of Virginia and counties where the Subject Properties are located rather than the likelihood of conviction.

are 1.6 times as likely as White persons to have a criminal record by age 18-24, 1.4 times as likely by ages 30-34, and 4.5 times as likely by ages 55-59.

Likelihood of Imprisonment and Racial Disproportionality in Imprisonment for Black, Hispanic, and White Males and Females by Age Living in Virginia⁸

	<u>Cumulative Risk</u>			<u>Racial Disparity Ratio in the Cumulative Risk of Imprisonment</u>	
	Black	Hispanic	White	Black/White	Hispanic/White
Virginia					
By age 18-24	6.2%	1.3%	0.8%	7.8	1.6
By age 30-34	11.0%	2.5%	1.8%	6.1	1.4
By age 55-59	16.3%	10.3%	2.3%	7.1	4.5

58. At the same time that the number of persons with a criminal record has skyrocketed it has become much easier and more common for housing providers to identify and exclude people with criminal records from housing because of the growth of companies that provide inexpensive background checks to housing providers.⁹

59. The U.S. Department of Housing and Urban Development (“HUD”), the agency authorized to enforce and interpret fair housing laws in the U.S., provided guidance that, where a housing provider implements “a more tailored policy or practice that excludes individuals with only certain types of convictions,” unlike this case, that provider “must still prove that its policy is necessary to serve a ‘substantial, legitimate, nondiscriminatory interest.’” See Exhibit A

⁸ Estimates are based on analyses of data from the Survey of Inmates in State and Federal Correctional Facilities (2004), the National Corrections Reporting Program (2004), year-end prison reports (2004), and bridged age by race estimates provided by the Centers for Disease Control and Prevention’s CDC Wonder (2004).

⁹ Thatcher, David, The Rise of Criminal Background Checks in Rental Housing, Law & Social Inquiry, March 2008, <https://doi.org/10.1111/j.1747-4469.2008.00092.x>.

(HUD, *Office of Gen. Counsel Guidance on Application of FHA Standards to the Use of Criminal Records by Providers of Hous. and Real Estate-Related Transactions*) (Apr. 4, 2016) (“HUD Guidance”) at 6. A policy categorically banning all “felonies” without distinction and appropriate time limits associated with those preclusive felonies—as here—runs counter to HUD’s directive and does not begin to satisfy a defendant’s burden of proof. Such a policy does not even attempt to meet HUD’s directive to “accurately distinguish[] between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.” *Id.*

60. The Equal Employment Opportunity Commission’s (“EEOC”) analysis of the impact of automatic criminal records bans in the employment context parallels and further confirms the disparate impact described here. The EEOC has concluded from analyzing national criminal records data that automatic criminal history bans have a disparate impact on the basis of race and sets forth such a presumption in its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (“Enforcement Guidance”), 2012 WL 1499883 (Apr. 25, 2012).

61. The EEOC’s analysis and conclusion are instructive with respect to the disparate impact analysis here because categorical criminal record policies and felony bans operate the same way in housing as they do in employment. In both contexts, applicants are uniformly and permanently excluded, whether from housing opportunities or employment, before due consideration of the merits or qualifications of the applicant for the job or housing in question are considered and without any individualized assessment of whether the individual’s criminal record makes the individual personally unqualified. These persons are excluded based solely on the fact of a prior conviction, regardless of whether the individual poses a current risk. Indeed,

HUD itself used EEOC guidance and Title VII case law as support for the conclusions reached in its April 2016 Criminal Records Guidance. *See* Exhibit A (HUD Guidance) at 6-7, 9.

b. Defendants' Criminal Records Policy Disproportionately and Severely Impacts Black and Hispanic Applicants in the Rental Markets Where Defendants Properties Are Located.

62. Defendants' automatic criminal records ban at the Subject Properties has a disparate impact on the basis of race, and continues to do so to the extent that Defendants continue to maintain and enforce the Criminal Records Policy. In fact, because disparities in incarceration rates are more severe at the city and county level than at the national level, including those cities where the Subject Properties are located, the disparate impact in the rental markets in which Defendants' properties are located is starker than national statistics alone suggest.

63. The rental market for each of the Subject Properties is the immediately surrounding metropolitan area and includes all income-qualified renters in that area.

64. The Subject Properties maintain minimum income thresholds for applicants, requiring prospective tenants to earn at least three or 3.2 times the unit's rent. Given the monthly rent ranges identified in Paragraph 29, this means that applicants must earn a minimum of approximately \$50,300 to \$71,800 per year to rent a two-bedroom unit (the same unit type for which Ms. Kniaz and Mr. Phillips applied) depending on the property, to be income-qualified.

65. Even taking Defendants' income requirements into account, the Criminal Records Policy disproportionately excludes otherwise-qualified Black and Hispanic applicants with incomes at the levels required to rent units at Defendants' properties.

66. With regard to Black and White persons, the disparities only become greater as the income level increases. At annual minimum income levels of up to \$60,000 and up to

\$80,000 per year, Black persons are 2.8 and 3.2 times more likely than White persons to have a criminal record, respectively.

67. Criminal conviction disparities between Hispanic and White people also persist as income increases. At annual minimum income levels of up to \$60,000 and up to \$80,000 per year, Hispanic persons are 1.9 and 2.1 times more likely than White persons to have a criminal record, respectively.

Disparity Ratio between Black or Hispanic Potential Applicants and White Applicants in Likelihood of Having a Criminal Record by Income

Income	<u>Racial Disparity Ratio in Likelihood of Having a Criminal Record</u>	
	Black-White	Hispanic-White
Up to \$50,000	2.7	1.8
Up to \$60,000	2.8	1.9
Up to \$80,000	3.2	2.1
Entire cohort (aggregated across all income levels)	4.4	2.7

68. Available data on the disparities among individuals with criminal records additionally shows that rates of disproportionality in incarceration persist when a minimum income requirement of up to \$50,000, \$60,000, or \$80,000 is taken into account. Further, aggregated across all income levels needed to qualify to rent a unit at the Subject Properties, the racial disparities are stark as Black persons are 4.4 times as likely to have a criminal record than White persons, while Hispanic persons are 2.7 times as likely as White persons to have a criminal record.

69. Black and Hispanic applicants who are income-qualified to rent at the Subject Properties are thus substantially more likely than White applicants to be categorically excluded by Defendants' Criminal Records Policy.

70. Other rental screening criteria listed online, such as the pet policy, do not affect demographic analyses of the rental markets for the Subject Properties. Each of the rental markets served by Defendants' properties include substantial populations of Black and Hispanic renters who are income-qualified to become tenants at the Subject Properties but, for those who have criminal records, are nevertheless *per se* ineligible for tenancy because of the Criminal Records Policy.

71. Defendants' refusal to provide housing to people on the basis of their Criminal Records Policy has had a racially disparate, adverse impact on Black and Hispanic applicants. That impact continues to the extent the policy remains in force.

IV. DEFENDANTS' BLANKET BAN ON APPLICANTS WITH CRIMINAL RECORDS IS NOT NECESSARY TO ACHIEVE LEGITIMATE NON-DISCRIMINATORY INTERESTS.

72. Defendants' current policy is not a necessary or effective way to achieve any substantial, legitimate, nondiscriminatory interest, such as one that relates to safety and security of the property or its tenants. A blanket ban allows for no consideration of a variety of factors that might be relevant to an assessment of whether a previous offender might present a safety risk to other persons or property.

73. The Department of Justice has stated that, without considering the nature and seriousness of a crime and the length of time since the conviction, there is no effective way to accurately determine the risk that an applicant with a criminal background will pose.¹⁰

¹⁰ DOJ Statement of Interest, *Fortune Society Inc., v. Sandcastle Towers Housing Development Fund Corp.*, at 11-12.

74. Furthermore, criminological research has shown that after six to seven years following their last conviction, a person with a criminal record has the same likelihood of committing another crime as someone without a prior conviction.¹¹

75. Neither research nor public policy considerations justify Defendants' blanket ban on all applicants with criminal records, because the policy does not include an adequate, individualized assessment of the risk posed by applicants to tenants and the property.

V. INDIVIDUALIZED REVIEW OF APPLICANTS WITH CRIMINAL RECORDS IS A MORE EFFECTIVE AND LESS DISCRIMINATORY ALTERNATIVE THAT WOULD FULFILL ANY SUBSTANTIAL, LEGITIMATE, AND NONDISCRIMINATORY INTERESTS THE DEFENDANTS USE TO JUSTIFY THE CURRENT POLICY.

76. Individualized review of the circumstances and severity of an applicant's criminal history is a less discriminatory alternative to the Defendants' use of a blanket ban that also satisfies any alleged substantial, legitimate, nondiscriminatory interest on the part of Defendants.

77. HUD Guidance on the use of criminal background screening by housing providers indicates that the individualized process should consider "the facts or 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 and/or after the conviction or conduct; and evidence of rehabilitation efforts."¹²

¹¹ Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol'y* 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among person with no criminal record); *see also* Carl Warren, *Success in Housing: How Much Does Criminal Background Matter?*, Wilder Research, 15 (January 2019) (noting that "[c]riminal offenses that occurred more than 5 years prior to move-in have no significant effect on housing outcomes"), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

¹² Department of Housing and Urban Development, *Office of the General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of*

78. In this case, neither Ms. Kniaz nor Mr. Phillips have convictions for violent offenses, neither is a registered sex offender, and neither has a conviction more recent than 2008. Mr. Phillips' criminal history only consists of a speeding ticket and a misdemeanor. At the time Ms. Kniaz applied for the two-bedroom unit, she had not had any convictions, indeed, no involvement with the criminal justice system whatsoever, for almost 10 years. Further, both had been living at the property without incident for more than 3 years when they sought to move to a larger unit. An individualized review of Mr. Phillips and Ms. Kniaz would have revealed that they pose no threat to the safety and security of the development and its tenants. Application of an individualized assessment would have avoided the issuance of the Notice to Vacate and their disqualification from renting a larger unit at Pinewood Plaza.

79. Individualized review of applicants with criminal records is a less discriminatory alternative that would allow Defendants to satisfy their interest in screening out potentially dangerous tenants, without posing the risk of unjust exclusion of the many, disproportionately Black and Hispanic, potential applicants with criminal records who do not pose a security risk.

INJURY TO PLAINTIFFS

80. As a result of being forced out of their residence at Pinewood Plaza, Ms. Kniaz and Mr. Phillips incurred, and in certain instances continue to incur, significant costs including additional fees, deposits, and insurance required by the Point at Ashburn, moving expenses, and daycare expenses. The additional fees, deposits, and insurance include a pet deposit, application and reservation fees, monthly pet rent, and mandatory renters' insurance. Mr. Phillips withdrew \$4,327 from his 401(k) retirement fund to cover some of these expenses, which triggered

Housing and Real Estate-Related Transactions, Apr. 4, 2016, https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASStandCR.pdf.

penalties and taxes due to the timing of the withdrawal. The penalties include a six-month freeze on Mr. Phillips' contributions to his 401(k). In addition, Ms. Kniaz's commute to school increased substantially and now includes tolls. The increased commute results in additional gasoline expenses and contributes to wear and tear on her vehicle.

81. Ms. Kniaz and Mr. Phillips additionally endured months of emotional distress while they grappled with the impact of having to suddenly move from their home in Fairfax, VA, to Ashburn, VA, search for new housing, and uproot their youngest daughter from her prior school. As of the time of this complaint, Ms. Kniaz and Mr. Phillips continue to spend sleepless nights with their youngest daughter who is afraid to be left alone in the new apartment or sleep in her own bed. Further, Ms. Kniaz has personally suffered humiliation and embarrassment as a result of being denied housing on the basis of a minor and outdated conviction that is irrelevant to the qualifications for tenancy.

82. As a result of Defendants' Criminal Records Policy, HOME has had to divert scarce resources from other core programmatic activities to counteract the policy and has thereby been directly and substantially injured. Defendants' policy has frustrated HOME's mission to ensure equal access to housing for all persons and its ability to carrying out all of the programs and services it seeks to provide. These services include promoting integrated living patterns, advocating for fair and meaningful housing policies, educating the public about fair housing rights, and counseling individuals impacted by discriminatory housing practices or regarding rental and home ownership opportunities.

83. When HOME became aware of Defendants' pervasive punitive and overbroad criminal record screening policies, including the adverse impact such policies have on African-American and Hispanic prospective tenants, it invested considerable time and resources to

educate the Virginia community regarding the importance of housing access for individuals with criminal records.

84. Although the adverse impact of overbroad criminal record screening policies has been a concern of HOME's, it was not until HOME learned from Ms. Kniaz of Defendants' Criminal Records Policy on November 27, 2017 that it re-directed much of its education and counseling efforts toward Northern Virginia. In light of Defendants' policy and the number of potential applicants subject to that policy, HOME determined it was critical to dispel the notion that criminal record bans, like Defendants' Criminal Records Policy, are permissible.

85. Defendants' Criminal Records Policy frustrated HOME's mission of ensuring equal housing access to all people that is free of arbitrary barriers because it has the effect of excluding persons with criminal records from housing, most of whom are African American or Hispanic. It further contravenes HOME's mission because it is likely to dissuade prospective applicants with criminal records from applying for housing at the Subject Properties.

86. Given the racially exclusionary consequences of the Criminal Records Policy, HOME found itself compelled to divert scarce resources away from its programs and activities, *supra* at ¶¶ 83-84, toward counteracting the impact of Defendants' policy. HOME has suffered injury by having to divert its resources to investigating Defendants' policy and counteracting Defendants' discriminatory conduct.

87. HOME's diversion of resources includes the expenditure of more than 40 hours staff investigating Defendants' policy and its application to and impact on Ms. Kniaz, Mr. Phillips, and their children. Its investigation between November 2017 and July 2018 included conducting phone-based tests of multiple properties and one on-site test of a property—all

managed by Defendants—review of Defendants’ application materials, and research regarding the racial composition of the jurisdictions where the Subject Properties are located.

88. HOME also diverted its resources after learning of Defendants’ policy by counseling Ms. Kniaz and Mr. Phillips, who were injured by the application of the Criminal Records Policy. Specifically, after verifying their complaint and confirming Defendants’ policy, HOME assisted Ms. Kniaz and Mr. Phillips in drafting and filing a charge regarding their denial of housing and virtually simultaneous eviction from their home at Pinewood Plaza with the Fairfax Human Rights Commission Office of Human Rights and Equity Programs.

89. Since discovering and in response to the Criminal Records Policy, HOME has increased and redirected the geographic scope of its outreach and educational efforts. Specifically, HOME refocused many of its activities from the Richmond and Hampton Roads areas of Virginia to Northern Virginia where the Subject Properties are located.

90. To enable its staff to address the effects of Defendants’ Criminal Records Policy, HOME also stopped pending investigations and refocused the subject matter of already scheduled educational events. Specifically, HOME halted investigations into source of income and race-based discrimination against Housing Choice Voucher holders and homeowners’ insurance practices. HOME also decided not to focus on disability discrimination at the Governor’s Housing Conference and focused instead on a presentation aimed at raising awareness of the unlawfulness of punitive criminal record bans, like that of Defendants.

91. HOME also undertook other education and outreach activities to counteract Defendants’ conduct. HOME staff reached out to five organizations that work with individuals who have criminal records to discuss overly broad criminal record bans and their unlawfulness under fair housing laws. HOME staff also reached out to legal service organizations in Northern

Virginia to discuss the implications of such criminal record screening policies, including Defendants', and whether these organizations received complaints about the Defendants.

92. HOME has engaged in a social media campaign targeting affected communities with information about what to do when denied housing because of an overly broad criminal record screening policy such as Defendants'.

93. HOME engaged in each of the aforementioned activities in specific response to Defendants' practices because of the broad and categorically exclusionary nature of those policies. These activities have caused HOME's staff to expend a significant amount of time and money that, but for the need to address Defendants' policy, would have been spent on other objectives.

94. If Defendants' discriminatory policy had not forced HOME to divert its scarce resources to investigating and counteracting Defendants' discrimination, HOME would have focused its education and outreach efforts in other parts of Virginia, continued to pursue two other pending investigations, as well as conducted further investigation of criminal record screening policies which it believes are likely being applied in Hampton Roads, VA. *Supra* at ¶¶ 89-90.

95. Until Defendants abandon their discriminatory policy, their conduct will continue to injure HOME, by *inter alia*:

- a. interfering with HOME's efforts and programs intended to promote and achieve equal opportunity in housing;
- b. requiring the commitment of scarce resources, including substantial staff time and funding, to investigate and counteract Defendants' discriminatory

conduct, thus diverting those resources from HOME's other activities and services, such as education, outreach, and counseling; and

- c. frustrating HOME's mission and purpose of ensuring all individuals have equal access to housing.

96. Defendants' discriminatory conduct, if continued, will also deprive individuals to whom HOME provides services and others living in and near Defendants' properties of the benefit of living in a diverse community.

Causes of Action

Count 1: Disparate Impact in Violation of the Fair Housing Act 42 U.S.C. § 3604

97. Plaintiffs repeat and incorporate all allegations set forth in Paragraphs 1 through 96.

98. Defendants' policies and practices of automatically denying housing to those with criminal backgrounds, including plaintiffs Kniaz and Phillips, have a disproportionate and negative impact on Black and Hispanic applicants compared to similarly situated White applicants.

99. The disproportionate and negative impact is directly caused by the Defendants' policies and practices, as they do not allow for an individualized review of applicants with criminal backgrounds.

100. Defendants' blanket and automatic denial of housing to persons with virtually any type of criminal background is not necessary to achieve any substantial, legitimate, non-discriminatory interest.

101. Any legitimate interest of the Defendants can be met through less discriminatory means, namely, individualized review of the totality of the circumstances surrounding an individual applicant's criminal background.

102. Defendants' blanket ban on applicants with criminal backgrounds constitutes a violation of the Fair Housing Act, 42 U.S.C. § 3604, through:

- a. Use of a policy or practice that results in the refusal to rent, refusal to negotiate to rent, or otherwise deny housing based on race, in violation of 42 U.S.C. § 3604(a).
- b. Use of a policy or practice that results in discrimination in the terms or conditions of a rental dwelling based on race, in violation of 42 U.S.C. § 3604(b).
- c. Use of a policy or practice that represents to applicants that a dwelling is not available for rental based on race, in violation of 42 U.S.C. § 3604(d).

**Count 2: Disparate Impact in Violation of Virginia Fair Housing Law
VA Code Ann. §36-96.3**

103. Plaintiffs repeat and incorporate all allegations set forth in Paragraphs 1 through 102.

104. Defendants' policies and practices of automatically denying housing to those with criminal backgrounds has a disproportionate and negative impact on Black and Hispanic applicants compared to similarly situated White applicants.

105. The disproportionate and negative impact is directly caused by the Defendants' policies and practices, as they do not allow for an individualized review of applicants with criminal backgrounds.

106. Defendants' blanket and automatic denial of housing to persons with virtually any type of criminal background is not necessary to achieve any substantial, legitimate, non-discriminatory interest.

107. Any legitimate interest of the Defendants can be met through less discriminatory means, namely, individualized review of the totality of the circumstances surrounding an individual applicant's criminal background.

108. Defendants' blanket ban on applicants with criminal backgrounds constitutes a violation of Virginia Fair Housing Law, VA Code Ann. §36-96.3, through:

- a. Use of a policy or practice that results in the refusal to rent, refusal to negotiate to rent, or otherwise deny housing based on race, in violation of VA Code Ann. §36-96.3(A)(1).
- b. Use of a policy or practice that results in discrimination in the terms or conditions of a rental dwelling based on race, in violation of VA Code Ann. §36-96.3(A)(2).
- c. Use of a policy or practice that represents to applicants that an available dwelling is not available for rental based on race, in violation of VA Code Ann. §36-96.3(A)(4).

Demand for Jury Trial

109. Pursuant to Fed. R. Civ. P. 38(b), Plaintiffs demand a trial by jury on all issues triable as of right.

Requested Relief

110. WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

- (1) Enter a declaratory judgment finding that Defendants' Criminal Records Policy, and, in particular its categorical criminal records ban, violates 42 U.S.C. § 3604 and VA Code Ann. §36-96.3;
- (2) Enter a permanent injunction:
 - a. enjoining Defendants and their directors, officers, agents, and employees from publishing, implementing, and enforcing their current Criminal Records Policy;
 - b. directing Defendants and their directors, officers, agents, and employees to discontinue or revise their Criminal Records Policy to reduce the adverse and disproportionate effect it causes on the basis of race and make it consistent with HUD Guidance; and
 - c. directing Defendants and their directors, officers, agents, and employees to take affirmative steps necessary to remedy the effects of the illegal, discriminatory conduct described herein and to prevent additional instances of such conduct or similar conduct from occurring in the future;
- (3) Award compensatory damages to Plaintiffs in an amount to be determined by the jury that would fully compensate Plaintiffs for injuries caused by the conduct of Defendants alleged herein;
- (4) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 3613(c)(2);
- (5) Award prejudgment interest to Plaintiffs; and
- (6) Order such other relief as this Court deems just and equitable.

Exhibits

Exhibit A: HUD, Office of Gen. Counsel Guidance on Application of FHA Standards to the Use of Criminal Records by Providers of Hous. and Real Estate-Related Transactions (Apr. 4, 2016)

Dated: October 23, 2019

Respectfully submitted,

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Exhibit A



April 4, 2016

**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**

I. Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin.¹ HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual's criminal history.

II. Background

As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.² The United States prison population of 2.2 million adults is by far the largest in the world.³ As of 2012, the United States accounted for only about five percent of the world's population, yet almost one quarter of the world's prisoners were held in American prisons.⁴ Since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons,⁵ and over 95 percent of current inmates will be released at some point.⁶ When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.⁷ Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing,

¹ 42 U.S.C. § 3601 *et seq.*

² Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2012*, 3 (Jan. 2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

³ Nat'l Acad. Sci., Nat'l Res. Couns., *The Growth of Incarceration in the United States: Exploring Causes and Consequences 2* (Jeremy Travis, et al. eds., 2014), available at: <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

⁴ *Id.*

⁵ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at 29, appendix tbls. 1 and 2, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

⁶ Bureau of Justice Statistics, U.S. Dep't of Justice, *Reentry Trends in the United States*, available at <http://www.bjs.gov/content/pub/pdf/reentry.pdf>.

⁷ See, e.g., S. Metraux, et al. "Incarceration and Homelessness," in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research, #9* (D. Dennis, et al. eds., 2007), available at: <https://www.huduser.gov/portal/publications/pdf/p9.pdf> (explaining "how the increasing numbers of people leaving carceral institutions face an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.").

because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

Across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.⁸ Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).⁹ Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (i.e., disparate treatment liability).

III. Discriminatory Effects Liability and Use of Criminal History to Make Housing Decisions

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.¹⁰ Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.¹¹ Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.¹²

The following sections discuss the three steps used to analyze claims that a housing provider's use of criminal history to deny housing opportunities results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

⁸ See *infra* nn. 16-20 and accompanying text.

⁹ The Fair Housing Act prohibits discrimination based on race, color, religion, sex, disability, familial status, and national origin. This memorandum focuses on race and national origin discrimination, although criminal history policies may result in discrimination against other protected classes.

¹⁰ 24 C.F.R. § 100.500; accord *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507 (2015).

¹¹ 24 C.F.R. § 100.500; see also *Inclusive Cmty. Project*, 135 S. Ct. at 2514-15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500); *id.* at 2523 (explaining that housing providers may maintain a policy that causes a disparate impact "if they can prove [the policy] is necessary to achieve a valid interest.").

¹² See 24 C.F.R. § 100.500.

A. Evaluating Whether the Criminal History Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin.¹³ This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.¹⁴

National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.¹⁵ Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population.¹⁶ Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population.¹⁷ In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the

¹³ 24 C.F.R. § 100.500(c)(1); *accord Inclusive Cmty. Project*, 135 S. Ct. at 2522-23. A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. See 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

¹⁴ *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.") with *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.") (citation omitted).

¹⁵ *Cf. El v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that non-Whites were substantially more likely than Whites to have a conviction), *aff'd on other grounds*, 479 F.2d 232 (3d Cir. 2007).

¹⁶ See FBI Criminal Justice Information Services Division, *Crime in the United States, 2013*, tbl.43A, available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43> (Fall 2014) (reporting that African Americans comprised 28.3% of all arrestees in 2013); U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2013 to December 1, 2013, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html> (reporting data showing that individuals identifying as African American or Black alone made up only 12.4% of the total U.S. population at 2013 year-end).

¹⁷ See E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at tbl. 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>; and U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2014 to December 1, 2014, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html>.

general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.¹⁸ In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.¹⁹ Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.²⁰

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact. Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a housing provider may offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes.

Regardless of the data used, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.²¹ The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.²²

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices.²³ Ensuring

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at table 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

²¹ 24 C.F.R. § 100.500(c)(2); see also *Inclusive Cmty. Project*, 135 S. Ct. at 2523.

²² See 24 C.F.R. § 100.500(b)(2); see also 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

²³ See, e.g., Answer to Amended Complaint at 58, *The Fortune Society, Inc. v. Sandcastle Towers Hsg. Dev. Fund Corp.*, No. 1:14-CV-6410 (E.D.N.Y. May 21, 2015), ECF No. 37 (“The use of criminal records searches as part of the overall tenant screening process used at Sand Castle serves valid business and security functions of protecting tenants and the property from former convicted criminals.”); *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009) (noting, based on affidavit of property owner, that “[t]he policy [against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds ... [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property.”); see also J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, Washington, 61 Fed. Probation 12, 20 (1997) (finding in a survey of 196

resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.²⁴ A housing provider must, however, 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 and/or property. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.

1. Exclusions Because of Prior Arrest

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.²⁵ As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”²⁶ Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (*e.g.*, by failing to indicate whether the individual was prosecuted, convicted, or acquitted),²⁷ the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property.

landlords in Seattle that of the 43% of landlords that said they were inclined to reject applicants with a criminal history, the primary reason for their inclination was protection and safety of community).

²⁴ As explained in HUD’s 2013 Discriminatory Effects Final Rule, a “substantial” interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an interest be “legitimate” means that a housing provider’s justification must be genuine and not false or fabricated. *See* 78 Fed. Reg. at 11470; *see also* *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005) (recognizing that, “in the abstract, a reduction in the concentration of low income housing is a legitimate goal,” but concluding “that the Housing Authority had not shown a need for deconcentration in this instance, and in fact, had falsely represented the density [of low income housing] at the location in question in an attempt to do so”).

²⁵ HUD recently clarified that arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing. *See* Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD PIH Notice 2015-19, (November 2, 2015), available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>.

²⁶ *Schwartz v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957); *see also* *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (“[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) (“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”).

²⁷ *See, e.g.*, U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal History Background Checks* at 3, 17 (June 2006), available at http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (reporting that the FBI’s Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and “the most comprehensive single source of criminal history information in the United States,” is “still missing final disposition information for approximately 50 percent of its records”).

Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.²⁸

2. Exclusions Because of Prior Conviction

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.²⁹ But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden. One federal court of appeals held that such a blanket ban violated Title VII, stating that it “could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”³⁰ Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as “not empirically validated.”³¹

A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest.” To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.³²

²⁸ See U.S. Equal Emp’t Opportunity Comm’n, *EEOC Enforcement Guidance, Number 915.002*, 12 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; see also *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that defendant employer’s policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII because there “was no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees,” such that “information concerning a . . . record of arrests without conviction, is irrelevant to [an applicant’s] suitability or qualification for employment”), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

²⁹ There may, however, be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. See generally SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.

³⁰ *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

³¹ *Id.*

³² *Cf. El*, 479 F.3d at 245-46 (stating that “Title VII . . . require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level or risk and those that do not”).

A policy or practice that fails to take into account the nature and severity of an individual's conviction is unlikely to satisfy this standard.³³ Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.³⁴

Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a "substantial, legitimate, nondiscriminatory interest" of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.³⁵

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.³⁶

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or 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 and/or after the conviction or conduct; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual's financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.

³³ Cf. *Green*, 523 F.2d at 1298 (holding that racially disproportionate denial of employment opportunities based on criminal conduct that "does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden" and violated Title VII).

³⁴ Cf. *El*, 479 F.3d at 247 (noting that plaintiff's Title VII disparate impact claim might have survived summary judgment had plaintiff presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person..."); see also *Green*, 523 F.2d at 1298 (permanent exclusion from employment based on any and all offenses violated Title VII); see Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol'y* 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

³⁵ The liability standards and principles discussed throughout this guidance would apply to HUD-assisted housing providers just as they would to any other housing provider covered by the Fair Housing Act. See HUD PIH Notice 2015-19 *supra* n. 25. Section 6 of that Notice addresses civil rights requirements.

³⁶ 24 C.F.R. § 100.500(c)(3); accord *Inclusive Cmty's. Project*, 135 S. Ct. 2507.

D. Statutory Exemption from Fair Housing Act Liability for Exclusion Because of Illegal Manufacture or Distribution of a Controlled Substance

Section 807(b)(4) of the Fair Housing Act provides that the Act does not prohibit “conduct against a person because such person has been convicted ... of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).”³⁷ Accordingly, a housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

Limitation. Section 807(b)(4) only applies to disparate impact claims based on the denial of housing due to the person’s *conviction* for drug manufacturing or distribution; it does not provide a defense to disparate impact claims alleging that a policy or practice denies housing because of the person’s *arrest* for such offenses. Similarly, the exemption is limited to disparate impact claims based on drug *manufacturing or distribution* convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person’s conviction for drug *possession*.

IV. **Intentional Discrimination and Use of Criminal History**

A housing provider may also violate the Fair Housing Act if the housing provider intentionally discriminates in using criminal history information. This occurs when the provider treats an applicant or renter differently because of race, national origin or another protected characteristic. In these cases, the housing provider’s use of criminal records or other criminal history information as a pretext for unequal treatment of individuals because of race, national origin or other protected characteristics is no different from the discriminatory application of any other rental or purchase criteria.

For example, intentional discrimination in violation of the Act may be proven based on evidence that a housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record. Similarly, if a housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans, intentional discrimination exists.³⁸ A disparate treatment violation may also be proven based on evidence that a leasing agent assisted a White applicant seeking to secure approval of his rental application despite his potentially disqualifying criminal record under the housing provider’s screening policy, but did not provide such assistance to an African American applicant.³⁹

³⁷ 42 U.S.C. § 3607(b)(4).

³⁸ *Cf. Sherman Ave. Tenants’ Assn. v. District of Columbia*, 444 F.3d 673, 683-84 (D.C. Cir. 2006) (upholding plaintiff’s disparate treatment claim based on evidence that defendant had not enforced its housing code as aggressively against comparable non-Hispanic neighborhoods as it did in plaintiff’s disproportionately Hispanic neighborhood).

³⁹ *See, e.g., Muriello*, 217 F. 3d at 522 (holding that Plaintiff’s allegations that his application for federal housing assistance and the alleged existence of a potentially disqualifying prior criminal record was handled differently than those of two similarly situated white applicants presented a prima facie case that he was discriminated against because of race, in violation of the Fair Housing Act).

Discrimination may also occur before an individual applies for housing. For example, intentional discrimination may be proven based on evidence that, when responding to inquiries from prospective applicants, a property manager told an African American individual that her criminal record would disqualify her from renting an apartment, but did not similarly discourage a White individual with a comparable criminal record from applying.

If overt, direct evidence of discrimination does not exist, the traditional burden-shifting method of establishing intentional discrimination applies to complaints alleging discriminatory intent in the use of criminal history information.⁴⁰ First, the evidence must establish a prima facie case of disparate treatment. This may be shown in a refusal to rent case, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) the plaintiff or complainant applied for a dwelling from the housing provider; (3) the housing provider rejected the plaintiff or complainant because of his or her criminal history; and (4) the housing provider offered housing to a similarly-situated applicant not of the plaintiff or complainant's protected class, but with a comparable criminal record. It is then the housing provider's burden to offer "evidence of a legitimate, nondiscriminatory reason for the adverse housing decision."⁴¹ A housing provider's nondiscriminatory reason for the challenged decision must be clear, reasonably specific, and supported by admissible evidence.⁴² Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.⁴³

While a criminal record can constitute a legitimate, nondiscriminatory reason for a refusal to rent or other adverse action by a housing provider, a plaintiff or HUD may still prevail by showing that the criminal record was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination. For example, the fact that a housing provider acted upon comparable criminal history information differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that a housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy. Or pretext may be shown where a housing provider did not actually know of an applicant's criminal record at the time of the alleged discrimination. Additionally, shifting or inconsistent explanations offered by a housing provider for the denial of an application may also provide evidence of pretext. Ultimately, the evidence that may be offered to show that the plaintiff or complainant's criminal history was merely a pretextual

⁴⁰ See, generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating the concept of a "prima facie case" of intentional discrimination under Title VII); see, e.g., *Allen v. Muriello*, 217 F. 3rd 517, 520-22 (7th Cir. 2000) (applying prima facie case analysis to claim under the Fair Housing Act alleging disparate treatment because of race in housing provider's use of criminal records to deny housing).

⁴¹ *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (quotations and citations omitted).

⁴² See, e.g., *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039-40 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

⁴³ See, e.g., *Muriello*, 217 F.3d at 522 (noting that housing provider's "rather dubious explanation for the differing treatment" of African American and White applicants' criminal records "puts the issue of pretext in the lap of a trier of fact"); *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups [because] 'clever men may easily conceal their [discriminatory] motivations.'" (quoting *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974))).

justification for intentional discrimination by the housing provider will depend on the facts of a particular case.

The section 807(b)(4) exemption discussed in Section III.D., above, does not apply to claims of intentional discrimination because by definition, the challenged conduct in intentional discrimination cases is taken because of race, national origin, or another protected characteristic, and not because of the drug conviction. For example, the section 807(b)(4) exemption would not provide a defense to a claim of intentional discrimination where the evidence shows that a housing provider rejects only African American applicants with convictions for distribution of a controlled substance, while admitting White applicants with such convictions.

V. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction. Where a policy or practice excludes individuals with only certain types of convictions, a housing provider will still bear the burden of proving that any discriminatory effect caused by such policy or practice is justified. Such a determination must be made on a case-by-case basis.

Selective use of criminal history as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics violates the Act.

Helen R. Kanovsky, General Counsel

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

MARA B. KNIAZ, et al.

(b) County of Residence of First Listed Plaintiff Loudoun County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
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Michael E. Anderson, William T. DeVinney

DEFENDANTS

KAY MANAGEMENT COMPANY, et al.

County of Residence of First Listed Defendant Montgomery County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question *(U.S. Government Not a Party)*
- 2 U.S. Government Defendant
- 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input checked="" type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. § 3604 and VA Code Ann. §36-96.3
Brief description of cause:
Landlord/tenant policy that disproportionately causes adverse effects based on race.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
October 23, 2019

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF VIRGINIA ALEXANDRIA DIVISION**

MARA B. KNIAZ ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.: _____
)	
KAY MANAGEMENT COMPANY)	
ET AL.,)	
)	
Defendants.)	
)	
_____)	

PLAINTIFF’S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1 and Eastern District of Virginia Local Civil Rule 7.1(A)(1), the undersigned counsel for Plaintiff Housing Opportunities Made Equal of Virginia (“HOME of Virginia”), states that HOME of Virginia has no nothing to report under Eastern District of Virginia Local Civil Rule 7.1(A)(1)(a) and (b).

Date: October 23, 2019

Respectfully submitted,

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