WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

Written Testimony of Catherine Cone, Counsel

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON HOUSING AND EXECUTIVE ADMINISTRATION
HEARING ON B24-96 – EVICTION RECORD SEALING
AUTHORITY AMENDMENT ACT OF 2021 &
B24-106 – THE FAIR TENANT SCREENING ACT OF 2021
MAY 20, 2021

Today I offer testimony on behalf of the Washington Lawyers' Committee for Civil Rights and Urban Affairs (the "Washington Lawyers' Committee") to express our strong support for the Fair Tenant Screening Act of 2021 ("FTSA") and the Eviction Record Sealing Authority Amendment Act of 2021 ("Eviction Record Sealing Act") and propose a few changes to the FTSA.

Because the Eviction Record Sealing Act and FTSA raise important civil rights issues and offer protections to vulnerable populations, we ask the Council to pass these bills to advance its commitment to racial equity and further fair housing in the District.

The Washington Lawyers' Committee offers two recommendations to strengthen the FTSA: (1) ensure that the bill modifies the DC Human Rights Act ("Human Rights Act"), as written, rather than the Rental Housing Act, to provide tenants broader remedies, including a private right of action; and (2) limit even further the information landlords can use to screen applicants in Section 227, including conclusions or recommendations by background screening companies related to the fitness of prospective tenants, as well as require background screening companies in Section 229 to certify their reports provide accurate information.

In addition, we endorse any further amendments proposed by the Tenant Barriers Work Group, a coalition of housing advocates intending to reduce barriers to housing for low-income tenants of color, of which we are a part.[1]

I. The FTSA and Eviction Record Sealing Act raise critical racial justice issues that require immediate passage to protect tenants of color in the District.

The FTSA will provide critical protections to low-income DC residents who are routinely denied housing due to unfair rental housing practices that are often aimed at excluding low-income tenants or tenants with subsidies. Further, many of these practices—such as prohibitions on renting to tenants with low credit scores or certain eviction histories without consideration of individual circumstances—have disproportionate and discriminatory effects on District of Columbia tenants of color who constitute the majority of tenants with low incomes.[2] In the

[1] Tenant Barriers Work Group members include The Washington Legal Clinic for the Homeless, Neighborhood Legal Services Program, Upturn, Tzedek, The Legal Aid Society of the District of Columbia, and Bread for the City.

[2] Of the 27% of households in Washington, DC who qualify for extremely low-income housing (46,674 of 170,375), the majority of those households (36,815) are Black households. Forty-seven percent of Black households (36,815 of 79,092) qualify for extremely low-income housing, compared with 8% of white households (4,853 of 62,635). Similarly, sixty-five percent of Black households qualify for very low-income housing (51,551 of 79,092), compared with 13% of white households even though 40% of District households qualify for very low-income housing, overall.

District, 47% of Black households (36,815 of 79,092) qualify for extremely low-income housing, meaning they have incomes at or below 30% of the Area Median Income, compared with 8% of white households (4,853 of 62,635). Relatedly, 65% of Black households (51,551 of 79,092) qualify for very low-income housing because they are at or below 50% of Area Median Income, compared with 13% of white households (7,973 of 62,635).[3]

Because prospective tenants of color are more likely to be low-income and face barriers to housing, including scarcity of the affordable housing on which they rely, this subset of tenants is more likely to be housing insecure.[4] The FTSA, however, will help break down many of these barriers by prohibiting landlords from asking about or considering a number of items when reviewing rental housing applications for prospective tenants with subsidies: (1) a history of unpaid rent that happened prior to receipt of a subsidy; (2) income levels; (3) credit scores; and (4) credit problems that occurred prior to the receipt of the subsidy. As written, the bill will also provide additional protections that guard against consideration of certain eviction histories of any tenant that are not related to the ability of a prospective tenant to meet the obligations of tenancy.

The companion Eviction Record Sealing Act will also remove additional barriers to housing for low-income tenants of color by requiring the sealing of certain eviction records, including where the housing provider (1) violates the Human Rights Act, (2) fails to comply with the DC Housing Code by not maintaining the unit, or (3) secures a judgment in its favor for nonpayment of rent of $500 or less. This sealing practice will favor the District's tenants of color who are more likely to be evicted compared to their white counterparts and more likely to have eviction records appear in their background screening reports that could foreclose future access to housing.[5]

Why do these bills matter to the protection of DC's low-income tenants of color?

See Racial Distribution of Extremely-Low and Very-Low Income Households in Washington, D.C., 2019 American Community Survey (ACS) Public Use Microsample Data (PUMS); *see generally* Consumer Financial Protection Bureau, "Analysis of Differences Between Consumer- and Creditor-Purchased Credit Scores," at 18, Sept. 2012, available at http://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf (discussing prevalence of low credit scores in "lower income" zip codes and zip codes "with high minority populations"); Board of Governors of the Federal Reserve System, Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit 80-81 (Aug. 2007), available at http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf (similar). *See also* Peter Hepburn, Renee Louis, et al., "Racial and Gender Disparities among Evicted Americans," Eviction Lab, available at: https://evictionlab.org/demographics-of-eviction/. The WLC understands that disparities in the District follow national trends.

[3] Racial Distribution of Extremely-Low and Very-Low Income Households in Washington, D.C., 2019 ACS PUMS.

[4] Solomon Greene and Alanna McCargo, "New Data Suggest COVID-19 Is Widening Housing Disparities by Race and Income," Urban Wire: Housing and Housing Finance, The Blog of the Urban Institute, May 29, 2020, available at: https://www.urban.org/urban-wire/new-data-suggest-covid-19-widening-housing-disparities-race-and-income (noting that "[r]acial and economic disparities in access to safe and affordable housing existed long before the COVID-19 pandemic" as "[p]eople of color and low-income families were already facing crushing housing cost burdens and housing instability, stemming in large part from structural racism and a long history of discriminatory housing and lending practices").

[5] Eviction filings also lead to court records that can hurt a resident's ability to find a new home, as many landlords screen out applicants who have an eviction on their record regardless of the outcome.

According to a fall 2020 report by Georgetown University: "Citywide, almost 11 out of every 100 renter households in DC received an eviction filing during the calendar year. In Wards 7 and 8, communities with much larger percentages of Black residents, 20 out of 100, and 25 out of 100, experienced eviction, respectively. In Ward 2, however, which has among the lowest poverty rates and smallest shares of Black residents in D.C., fewer than 3 out of every 100 renter households received an eviction filing in 2018."[6]

With those demographics and racial impacts in mind, the Eviction Record Sealing Act will critically set the stage for prohibiting sealed eviction records from appearing in a tenant's background screening report because such records will no longer be accurate. Accordingly, landlords would no longer be able to see such eviction histories and thus be unable to use them as a basis to deny housing to tenants. This is an important step to furthering racial justice by disallowing evictions to continue closing the doors of housing opportunity to tenants of color who, as noted, experience evictions at higher rates than white tenants. Further, because eviction records are often inaccurate indicators of a tenant's ability to fulfill the obligations of tenancy given the varied fact-specific circumstances that apply to eviction history, this bill will act as a shield from pretextual bases for excluding low-income tenants of color from safe and decent housing.

II. The Procedures and Remedies Available under the Human Rights Act Are Necessary to Fully Redress Violations of the FTSA.

The FTSA raises significant fairness and civil rights issues, and for that reason alone, it should be located within the Human Rights Act that provides critical civil rights protections to DC residents, including in the area of housing. Further, placing the FTSA under the Human Rights Act ensures that the beneficiaries of the bill are afforded a full panoply of remedies, including a private right of action.

In its testimony in the fall of 2020, the Office of Human Rights ("OHR") proposed that the Council consider locating the FTSA in the Rental Housing Act ("RHA"), a point which the Department of Housing and Community Development ("DHCD") reiterated at the recent May 20, 2021 hearing regarding the bill.[7] Doing so will only shortchange DC residents by prohibiting them from accessing a more meaningful set of remedies than those provided under the RHA. Specifically, the RHA would limit tenants who suffer violations of the FTSA to file tenant petitions for violations of the FTSA and limit tenants who are discriminated against or otherwise harmed in violation of the law to an administrative complaint process overseen by the Office of Administrative Hearings and DHCD's Rental Housing Commission. Under the Human Rights Act, however, an "aggrieved person" would have the option to file a charge for an FTSA violation with OHR, or file a complaint in court,[8] including in instances of discriminatory denials of housing.

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[6] McCabe, Brian and Eva Rosen, Eviction in Washington, DC: Racial and Geographic Disparities in Housing Instability, Georgetown University McCourt School of Public Policy, Fall 2020 at 5, 15-16, available at: https://www.stout.com/-/media/pdf/evictions/dc-eviction-report-ada.pdf.

[7] Oral Testimony of Polly Donaldson, Director, Department of Housing and Community Development, Before the Committee on Housing and Executive Administration, May 20, 2021.

[8] D.C. Code § 2-1403.16.

Through an enforcement action filed before a court of competent jurisdiction, an "aggrieved person" is entitled to a panoply of remedies that are intended to fully redress the violation. First, under the Human Rights Act, a court has the power to offer immediate injunctive relief to a plaintiff to "preserve the status quo or prevent irreparable harm."[9] Further, through a civil action filed in court, a plaintiff would be entitled to an array of remedies not limited to those afforded through the administrative process under the RHA, including "any relief [that a court] deems appropriate."[10] This could include an order to specifically move a tenant into a certain unit of housing, a requirement that a housing provider undertake critical training on the FTSA and broader protections afforded under the Human Rights Act, or any other relief the court deems fit to redress the violation and prevent its recurrence. Additionally, because tenants whom the FTSA intends to protect are low-income or rely on a subsidy to afford their rent, they are members of the very same vulnerable population that the Human Rights Act intends to protect. As such, they should be entitled to the same process and full set of remedies that victims of discrimination in housing are provided under the Human Rights Act.[11]

III. The Office of Human Rights Is Better Suited Than DC's Department of Housing and Community Development To Identify and Investigate Discrimination.

Should the FTSA amend the Human Rights Act, as intended, tenants who choose to file complaints through the administrative process at OHR would be able to bring their FTSA cases before an agency well equipped to investigate their claims. Indeed, the FTSA is much more than just a regulatory scheme that seeks to address "the daily operations of housing providers in their transactions with tenants and prospective tenants," as OHR and DHCD have testified.[12] Often, a denial of housing based on an individual's credit score or eviction history, among other reasons, can serve as pretext for denying housing to that individual based on their source of income or another protected category. As the agency responsible for investigating claims of violations of the Human Rights Act, including discriminatory housing practices, OHR has the expertise to handle discrimination issues, including pretextual reasons for denying housing such as credit history and certain eviction histories that fall squarely under the FTSA's prohibited screening criteria provision.[13] Further, to the extent an investigation of a violation of the FTSA reveals discrimination by a housing provider based on source of income or any of the other protected traits under the Human Rights Act, OHR would be better positioned to identify such discriminatory conduct than the DHCD that would oversee FTSA complaints and investigations if the bill instead amends the RHA.

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[9] D.C. Code § 2-1403.07.

[10] D.C. Code § 2-1403.16(b).

[11] Some of the requirements in this bill will need to be further expounded upon through regulations, particularly the sections that require landlords to conduct individualized assessments of tenants' mitigating circumstances information. To that end, it would be helpful to add language to the bill that explicitly requires OHR to issue regulations to fill in these details and the deadline by which OHR should issue the regulations.

[12] Written Testimony of Hnin K. Khaing, D.C. Office of Human Rights, Before the Committee on Government Operations, October 27, 2020, at 4; Oral Testimony of Polly Donaldson, Director, Department of Housing and Community Development, Before the Committee on Housing and Executive Administration, May 20, 2021.

[13] *See* B23-0149, The Fair Tenant Screening Act of 2019, at Section 227, "Prohibited Screening Criteria."

OHR has also testified that it is not suited to enforce the FTSA because the FTSA would benefit all prospective tenants, not just those using housing subsidies, and that it therefore does not prohibit conduct based on a particular protected trait, which DCHD also echoed during its recent testimony.[14] The preamble of the FTSA, however, makes clear that one of its intended purposes is to "prohibit housing providers from inquiring [into] the source of income," which is a protected category under the Human Rights Act, "and credit history of a prospective tenant."[15] And, as mentioned above, the FTSA raises significant civil rights issues more appropriately handled by OHR. So, while the FTSA may also benefit individuals without housing subsidies, the goal of the FTSA is to provide protections to individuals who are frequently denied housing due to practices that are aimed at excluding low-income tenants or tenants with subsidies and to strengthen the source of income protections already encompassed within the Human Rights Act.

As the Council is well aware, OHR suffers from delays and other significant issues, many of which were the subject of a performance oversight hearing on March 5, 2021. While the Washington Lawyers' Committee acknowledges that significant work remains to be done to ensure that OHR fulfills its mission to "secure an end to unlawful discrimination in employment, housing, public accommodations, and educational institutions for any reason other than that of individual merit,"[16] we do not think shifting the responsibility of enforcing the FTSA to DHCD will result in a better outcome for low-income individuals who tend to be tenants of color and include persons who have experienced source of income discrimination. Therefore, we suggest that the Council follow the recommendations set out by the Washington Lawyers' Committee and other advocates during this year's OHR performance oversight hearing, and that the Council commit to ensuring that OHR is provided adequate funding to effectively enforce the provisions of the FTSA.

IV. Further Limitations on Landlords' Consideration of Eviction Records and Certification of Accuracy of Records Included in Background Screening Reports Are Needed.

As currently written, Section 227 of the FTSA would prohibit background screening companies and landlords from considering only certain types of eviction records. Instead, we, along with members of the Tenants Barriers Work Group, recommend that the Council go further in creating protections for tenants that will meaningfully shield them from the misuse by landlords of pending and current eviction histories and credit and risk scores, or other recommendations and conclusions provided in background screening reports that allegedly speak to the fitness of prospective tenants but which are often used to deny housing without considering each individual prospective tenant's circumstances.

Specifically, in Section 227, we recommend including a rebuttable presumption that a housing provider is presumed to have denied a prospective tenant housing based on a basis prohibited from consideration—including a prior or pending eviction—if the prospective tenant is

[14] Written Testimony of Hnin K. Khaing, D.C. Office of Human Rights, Before the Committee on Government Operations, October 27, 2020, at 4; Oral Testimony of Polly Donaldson, Director, Department of Housing and Community Development, Before the Committee on Housing and Executive Administration, May 20, 2021.

[15] B23-0149, The Fair Tenant Screening Act of 2019.

[16] D.C. Code § 2-1411.02.

able to establish that the housing provider requested or received information through a background screening report that related to a potential tenant or that was based on court records relating to a potential tenant. This new framework would ensure that eviction history is prohibited from consideration by a landlord and that the FTSA guards against having evictions serve as a basis for denial of housing. Ensuring that eviction history does not serve as a reason to deny housing is a matter of fairness, particularly with respect to a pending eviction, which does not provide any meaningful indication of whether a tenant is able to meet the obligations of tenancy. This is especially true for so many DC residents who have been hard hit by the pandemic and lost work and income necessary to pay the rent, making them fall behind on rent,[17] among other examples.

We also recommend that the Council ensure housing providers are precluded from denying prospective tenants housing based solely on a prospective tenant's credit score, risk score, recommendation, or other conclusion by background screening companies, or third parties, as to the fitness or readiness of a prospective tenants. These alleged indicators of a tenant's fitness for tenancy often adversely and disproportionately impact and foreclose housing for tenants of color. Many tenants of color have not had the opportunity to build credit or been given the chance to provide contextual information explaining the circumstances behind a particular type of record, type of debt, or other single factor that considered alone does not speak to the totality of the prospective tenant's ability to be a good tenant at the time of his or her application for housing.

Finally, the Council should revise Section 229 of the bill to require background screening companies to certify to the District that their background screening reports provide for "the maximum possible accuracy of information contained in [their reports]." We think it is critical for these companies that are transacting business in the District and playing a significant role in denying and admitting tenants to housing to certify that the their background screening reports contain updated eviction and/or criminal records. In practice, this means such companies should certify that eviction and criminal records reflected in their reports show the updated dispositions, offense names, and offense types, as relevant, and confirm they are not including any expunged or sealed records.

The Washington Lawyers' Committee additionally recommends the Council take any additional technical amendments proposed by the Tenant Barriers Work Group under consideration and that you implement these to further strengthen the FTSA. Doing so will allow for a bill that adds a more robust set of protections for tenants.

Conclusion

The Washington Lawyers' Committee firmly supports the FTSA and Eviction Record Sealing Act. We believe, however, that the FTSA must be strengthened to adequately protect tenants who are routinely fighting to break down barriers to affordable housing by ensuring the FTSA amends the DCHRA and accordingly gives tenants access to the full range of remedies

[17] Jaboa Lake. "The Pandemic Has Exacerbated Housing Instability for Renters of Color," Center for American Progress, October 30, 2020, available at: https://www.americanprogress.org/issues/poverty/reports/2020/10/30/492606/pandemic-exacerbated-housing-instability-renters-color/.

available under the DCHRA, including a private right of action,[18] as well as by incorporating the amendments proposed here.

[18] We also urges the Council to amend the FTSA to add a "first-in-time" rule. Doing so would guarantee that the first qualified applicant gets the housing for which the applicant applied, instead of comparing all applications and using a subjective system to determine who is the "better" tenant. Finally, the bill should add protections for tenants without subsidies to prohibit housing providers from denying them housing because they have no credit or a low credit score on the basis of disputed bills or other similarly problematic reasons. The Committee recommends the Council adopt language proposed by Neighborhood Legal Services Program in its October 2020 testimony, which we incorporate by reference herein, to create the "first-in-time" rule and further credit-related protections described here. *See* Written Testimony of Lori Leibowitz, Neighborhood Legal Services Program, Before the Committee on Government Operations, October 27, 2020, at Attachment A.