
No. 22-30609

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOUISIANA FAIR HOUSING ACTION CENTER, INC.,

Plaintiff-Appellee,

v.

AZALEA GARDEN PROPERTIES, L.L.C.,

Defendant-Appellant

On Appeal from the United States District Court for the Eastern District of
Louisiana, No. 22-74, Hon. Jay C. Zainey presiding

**BRIEF OF AMICUS CURIAE NATIONAL HOUSING LAW PROJECT
IN SUPPORT OF APPELLEE**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for amicus curiae National Housing Law Project (NHLP) hereby certifies that the following listed persons and entities as have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. All persons and entities identified in the certificates of interested persons filed by the parties and other amici;
2. Amicus curiae National Housing Law Project;
3. Marie Claire Tran-Leung & Eric Dunn, counsel for the National Housing Law Project.

s/Marie Claire Tran-Leung
Attorney for NHLP

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STATEMENT OF INTEREST

The National Housing Law Project (NHLP) is a nonprofit organization that works to advance tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. NHLP pursues these goals primarily through technical assistance and support to legal aid attorneys and other housing advocates. Since 1981, NHLP has published *HUD Housing Programs: Tenants' Rights*; commonly known as the "Greenbook," it is the seminal authority on the rights of HUD tenants and program participants.

For over 40 years, NHLP has also coordinated the Housing Justice Network, which now includes more than 1,600 legal aid lawyers and other housing advocates throughout the United States. Members of the Housing Justice Network advocate on behalf of prospective tenants facing barriers when applying for housing, including illegal discrimination against criminal records. Housing Justice Network Members and NHLP staff have extensive experience supporting and enforcing the Fair Housing Act, and NHLP is committed to expanding housing opportunities for people who have had contact with the criminal legal system and holding providers liable when they impose discriminatory barriers to housing.

Amicus NHLP is a nonprofit organization; NHLP has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. No

party or party’s counsel authored the proposed brief in whole or in part. No party or party’s counsel, or any other person or entity other than Amicus NHLP, its staff, and its counsel, contributed money that was intended to fund the preparation or submission of the proposed brief.

INTRODUCTION

Criminal history screening policies that impose wide-reaching bans on applicants with felony convictions are prone to exclude members of protected racial and ethnic groups disproportionately in violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq. (FHA) . Moreover, a landlord who uses such a policy cannot avoid its fair housing obligations simply by using a third-party screening company.

ARGUMENT

I. REJECTING APPLICANTS FOR FELONY CONVICTIONS REGARDLESS OF WHEN THEY OCCURRED HAS AN UNJUSTIFIED DISCRIMINATORY EFFECT.

Appellant’s written screening policy rejects applicants with “[a]ny [f]elony convictions (with no time limit).” This policy amounts to a “blanket ban” that is highly suspect under the FHA, even if Appellant does not consider arrests under its policy. *See, e.g., Jackson v. Tryon Park Apartments, Inc.*, 2019 WL 331635 (challenging “Defendants’ policy of excluding a person with a felony conviction” under the FHA).

The FHA prohibits facially neutral policies that have an unjustified disparate impact on protected classes, including race. *See* 24 C.F.R. § 100.500(a). HUD has warned housing providers that a criminal records screening policy may violate the FHA where it: (1) has a disparate impact on individuals because of a particular race, (2) is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider; and (3) such interest could be served by a less discriminatory practice.¹

A. Bans on applicants with felony convictions disproportionately impact Black Americans because of differing rates of punishment.

The practice of banning applicants with felony convictions usually has a disparate racial impact because of the disproportionate rate at which Black individuals are convicted of felony offenses.² As of 2010, only 8 percent of all adults in the United States had felony convictions.³ Yet approximately 23 percent of African American adults had felony convictions, despite representing just 13

¹ U.S. Dep't of Hous. and Urb. Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 2 (2016).

² For example, Black New Yorkers represent 14 percent of the state's population, but account for 40 percent of felony convictions. Latinx New Yorkers represent 16 percent of the state's population, but account for 22 percent of felony convictions. White New Yorkers represent 60 percent of the state population, but account for only 35 percent of felony convictions. Jesse Barber & Simon McCormack, A Racial Disparity Across New York That is Truly Jarring (Dec. 16, 2022), <https://www.nyclu.org/en/news/racial-disparity-across-new-york-truly-jarring>.

³ Sarah K. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, DEMOGRAPHY (2017).

percent of the general population.⁴ For Black men, the percentage with felony convictions rose to 33 percent.⁵ Between 1980 and 2010, while the number of adults with felony convictions increased threefold, the number of Black adults with felony convictions increased fivefold.⁶ Similar racial disparities exist in Louisiana, where 10-15 percent of Black adults have felony records, compared with 2.5-5 percent of the overall population.⁷ By adopting blanket bans on applicants with felony convictions, housing providers infuse these racial disparities into their admission screening processes.

Numerous studies have attributed similar racial disparities in the criminal legal system to differing rates of punishment rather than of behavior. For instance, in a study of federal defendants, Black men received longer prison sentences than white men for the same offenses, even when they had identical criminal history records.⁸ Another study found that of those arrested for similar felony drug- and

⁴ United States Census Bureau, *QuickFacts United States* (2021), <https://www.census.gov/quickfacts/fact/table/US/PST045221#qf-headnote-a>.

⁵ Shannon et al., *supra* note 3.

⁶ Tim Henderson, *Felony Conviction Rates Have Risen Sharply, But Unevenly*, PEW (Jan. 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/02/felony-conviction-rates-have-risen-sharply-but-unevenly>.

⁷ Shannon et al., *supra* note 3, fig. 1.β

⁸ M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences* 122 J. POL. ECON. 1320, 1349 (2014), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles>

alcohol-related offenses, Black individuals were more likely than white individuals to be booked into jail as opposed to cited and released, highlighting disparities in punishment.⁹

B. Broad bans on felony convictions do not identify criminal conduct that indicate a demonstrable risk to resident safety or property.

“Felonies” is an overly broad category, one that ignores the diversity of offenses underlying the convictions¹⁰ and sweeps in records that have no bearing on a person’s ability to meet the obligations of tenancy. In using a felony ban, housing providers like Appellant screen on the basis of legal terms that do not “accurately distinguish[] between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not,” as required by HUD.¹¹ Appellant’s felony ban “fails to take into account the nature and severity of an individual’s conviction [and ...] the amount of time that has passed since the criminal conduct has occurred” and therefore cannot meet the standard that HUD established in its 2016 fair housing guidance on the use of

⁹ Emily Owens et al., Quattrone Center for the Fair Administration of Justice, *Examining Racial Disparities in Criminal Case Outcomes among Indigent Defendants in San Francisco 2* (2017).

¹⁰ Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining* 59 BOSTON COLLEGE LAW REVIEW 1187, 1219 (2017) (“Felony crimes as a class include a very diverse group of offenses. Some felonies are associated with penalties of just over a year in prison, whereas others carry potential sentences of up to sixty years or even life imprisonment.”).

¹¹ U.S. Dep’t of Hous. and Urb. Dev, *supra* note 1 at 6.

criminal records.¹² In fact, in a June 2022 supplement to the 2016 guidance, HUD flagged felony bans – both time limited and absolute – as examples of the type of policies that likely violate the Fair Housing Act.¹³

Felony bans are especially likely to have overbroad impacts in Louisiana, which does not even distinguish between different levels of felony offenses. Louisiana has lumped together a varying range of behavior under the same “felony” label, from causing more than \$100 in damage to a coin-operated device¹⁴ to unauthorized use of food stamps¹⁵ to harming the health and safety of others.¹⁶ The lack of coherence in this system means that there is no inherent meaning to a

¹² *Id.* at 7.

¹³ Memorandum from Demetria McCain, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 5 (2022) (directing fair housing investigators to investigate policies for rejecting “persons with felony convictions less than two years old [as well as] any felony conviction regardless of date”)

¹⁴ LA Rev Stat § 14:56:1 (repealed 2017). Although the law creating this specific crime was repealed in 2017, it was not retroactive. Furthermore, the purpose of the repeal was to bring specific theft offenses under a general theft statute. Louisiana Dep’t. Public Safety & Corrections, Louisiana’s Justice Reinvestment Reforms: Practitioner’s Guide (2017), https://www.lasc.org/documents/LA_Practitioners_Guide_Justice_Reinvestment_Reforms_FINAL_2017-8-1.pdf.

¹⁵ LA Rev Stat § 14:68.2

¹⁶ For a list of felony offenses in Louisiana, see Louisiana Justice Reinvestment Task Force, Report and Recommendations, at A-1 app. A (2017), https://www.lasc.org/documents/LA_Task_Force_Report_2017_FINAL.pdf.

felony record and how severe the underlying offense is,¹⁷ thus diminishing its relevance for tenant screening.

Most states have a felony classification system that categorizes felonies according to the severity of the underlying offense,¹⁸ including Alabama, Arkansas, and Texas.¹⁹ Ala. Code 1975 § 13A-5-3, Ark. C.A. § 5-1-106, V.T.C.A., Penal Code § 12.04. By contrast, Louisiana has “an ad hoc collection” of over 600 felony offenses dispersed throughout the state’s criminal statutes.²⁰ With no such classification system, actors inside and outside of Louisiana’s criminal justice system lack even such rudimentary indicators for assessing the severity of a felony record.²¹ Indeed, in calling for reform of this ad hoc system, a governor-appointed

¹⁷ *Id.* at 32. (“Lawyers, judges, crime victims, and families of incarcerated people have expressed that the state’s inconsistent and confusing sentencing and release laws make it needlessly difficult to predict how much time a person will spend in prison.”)

¹⁸ Kelly Lyn Mitchell, Robina Institute of Criminal Law and Criminal Justice, University of Minnesota Law School, *Examining Offense Classification Schemes*, 6-8 (July 3, 2021), <https://nmsc.unm.edu/criminal-code-update/resources/offense-classification-report-15july2021.pdf>.

¹⁹ Texas has five classes of felonies: capital, first degree, second degree, third degree, and state jail felonies. V.T.C.A., Penal Code § 12.04.

²⁰ Paul Braun, *Felony Class System Could Streamline Sentencing*, *Shreveport Times* (Jan. 31, 2018), <https://www.shreveporttimes.com/story/news/local/louisiana/2018/01/31/felony-class-system-could-streamline-sentencing/1082661001/>.

²¹ John Simerman et al., *State, Law Enforcement Officials Seek Compromise on Criminal Justice Reform*, *The Advocate* (Apr. 29, 2017), <https://www.houmatoday.com/story/news/crime/2017/04/29/state-law-enforcement-officials-seek-compromise-on-criminal-justice-reform/21265377007/>.

criminal justice taskforce in Louisiana pointed to the absurd results of relying solely on felony records. As of 2017, for example, stealing a cell phone worth \$600 was a misdemeanor, but possessing a stolen phone worth \$600 was a felony.²²

Felony bans have frequently featured in fair housing testing and enforcement actions in recent years. In Washington State, the state attorney general sent testers to pose as prospective renters with felony convictions, and five housing providers denied their applications without inquiring about the nature, circumstances, or timing of the convictions.²³ As a result, the state attorney general entered into consent decrees for each of the five housing providers to adopt more narrowly-tailored admission policies.²⁴ A fair housing center in Washington, D.C.,

²² See Louisiana Justice Reinvestment Task Force, Report and Recommendations, 32-34 (2017).

²³ Press Release, Washington State Office of the Attorney General, AG takes on discriminatory blanket housing bans on renters with criminal histories (Jan. 23, 2017), <https://www.atg.wa.gov/news/news-releases/ag-takes-discriminatory-blanket-housing-bans-renters-criminal-histories>.

²⁴ *Id.*; see also Assurance of Discontinuance, State of Wash. v. Weidner Property Mgmt., LLC. No. 17-2-00821-4 SEA (Wash. Super. Ct., Jan. 19, 2017), available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/AOD_FINAL.pdf; Consent Decree, State of Wash. v. Dobler Mgmt Co., Inc. No. 16-2-12461-1 (Wash. Super. Ct., Nov. 7, 2016), available at <https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/6%20-%20Consent%20Decree.pdf>; Consent Decree, State of Wash. v. Coho Real Estate Grp., LLC No. 16-2-26931-1 (Wash. Super. Ct., Nov. 4, 2016), available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/3-%20Consent%20Decree_FINAL.pdf; Consent Decree, State of Wash. v. Pacific Crest Real Estate LLC No. 16-2-20773-1 SEA (Wash. Super. Ct., Aug. 29, 2016), available at [8](https://agportal-</p></div><div data-bbox=)

conducted similar fair housing tests and discovered that the company's online portal would not allow an applicant who self-reported a past felony conviction to complete the application.²⁵ In Virginia, fair housing testers discovered through conversations with multiple property management staff that the housing provider systematically denied the application of anyone with a felony record.²⁶

II. HOUSING PROVIDERS LIKE APPELLANT CANNOT AVOID THEIR FAIR HOUSING DUTIES BY OUTSOURCING TO TENANT SCREENING TO THIRD-PARTY COMPANIES.

The Court should not be led astray by Appellant's insinuation that its use of a third-party tenant screening service somehow diminishes its own responsibility for non-discrimination in the selection of tenants.

s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/6%20-%20Consent%20Decree.pdf; Consent Decree, State of Wash. v. Premier Residential, LLC No. 16-2-19043-0 (Wash. Super. Ct., Aug. 10, 2016), available at <https://agportal->

s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Consent%20Decree_FINAL.pdf.

²⁵ Press Release, Equal Rights Center, ERC Resolves Race Discrimination Lawsuit Against Nation's Largest Private Landlord (Oct. 5, 2018), <https://equalrightscenter.org/maa-consent-order-press-release/>; *see also* Consent Order, Equal Rights Center vs. Mid-America Apartment Association No. 1:17-cv-02659 (TNM) (D.D.C., Oct. 3, 2018), available at <https://equalrightscenter.org/wp-content/uploads/maa-consent-order-10-3-18.pdf>.

²⁶ Complaint at 2, *Kniaz v. Kay Mgmt. Co., et al.*, No. 19-CV-01343-LO-IDD (E.D. Va, Oct 23, 2019), available at <https://www.washlaw.org/wp-content/uploads/2019/10/2019.10.23-ECF-001-Complaint.pdf>; *see also* Partial Judgment Against Defendants by Consent, *Kniaz v. Kay Mgmt. Co., et al.* No. 19-CV-01343-LO-IDD (E.D. Va, June 9, 2020), available at https://www.virginiamercury.com/wp-content/uploads/2020/07/Kniaz_v_Kay_Management_judgment.pdf.

With the increasing digitization of public records and credit data since the 1990s, the residential tenant-screening industry has grown to a \$1.3 billion industry—with third-party tenant screening reports widely utilized in rental housing admissions.²⁷ Criminal background checks are a common feature of tenant-screening reports, with screening companies reporting criminal records obtained directly from public sources or from other private data vendors.²⁸

Many third-party tenant screening reports also provide landlords with analytical reports, such as “risk scores” or lease recommendations regarding applicants.²⁹ Such analytical reports can serve functionally as leasing decisions, particularly for landlords who receive only the score or recommendation and not the underlying criminal records (or other adverse information) on which a low score or denial recommendation is based.³⁰ *See Connecticut Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259 (D. Conn. 2020) (tenant-screener may deny or make housing unavailable when it reports to landlord only

²⁷ Consumer Financial Protection Bureau, TENANT BACKGROUND CHECKS MARKET, § 3.1, pp. 10-11 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf

²⁸ *Id.* at § 3.1, pp. 16-17.

²⁹ *Id.* at § 4.3, p. 40.

³⁰ *Id.* at § 4.3.2, p. 42 (“Some reports do not include the data used to generate the report and therefore the landlord cannot review the underlying information.”), *citing* Matthew H. Leiwant, Locked Out: How Algorithmic Tenant Screening Exacerbates the Eviction Crisis in the United States, 6 *Geo. L. Tech. Rev.* 276, 286-87 (2022).

that applicant has a disqualifying criminal record but not any other details about that record). In such circumstances, an adverse analytical report can proximately cause the denial of housing to a rental applicant. *See id.* at 291.

The *Connecticut Fair Housing Center (CFHC)* case involved a third-party tenant-screening service that searched for criminal records matching rental applicants, sorted the records into categories, determined whether any criminal records were disqualifying—and then reported only “accept” or “records found” to the landlord. *See CFHC*, 478 F. Supp. 3d at 289. The screening report did not return any additional details about criminal records that were found, and allowed landlords to restrict leasing staff from accessing to those details. *See Id.* at 289. The court found this screener’s actions sufficiently reduced the landlord’s discretion over rental decisions that it could have proximately caused the denial of housing to an applicant for whom a “records found” report was issued. *See Id.* at 290-91.

Like the landlord in *CFHC*, Appellant appears to be using a third-party tenant-screening service to at least locate and report criminal records—if not to also categorize or analyze those records or issue scores or lease recommendations on applicants. Depending on how extensively that screener’s practices influence or affect the actual admission decisions, that screener—like the defendant in *CFHC*, might also proximately cause housing denials of applicants for whom it reports

disqualifying criminal records. *See CFHC* at 289. But even if so, this would in no way diminish Appellant’s own liability for housing discrimination.

As the *CFHC* court observed, “discrimination may have multiple causes and parties other than final decisionmakers may be liable.” *CFHC* at 290, citing *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011). That is, both a landlord and tenant-screening service can be liable when they “act hand-in-glove” to deny housing on a discriminatory basis. *See CFHC* at 291 (“RPS was an integral participant in the denial of housing by WinnResidential to persons charged with an offense even though the charges were dismissed. Parties cannot escape liability by sharing decision making and shielding one another because no single entity is wholly responsible.”).

Indeed, while a third-party tenant screening company can *sometimes* face liability for discriminatory leasing decisions, the landlord itself *always* faces such liability. As the landlord’s agent, a tenant-screening company can be liable only for its own discriminatory conduct. *See* 24 C.F.R. § 100.7(a)(1)(i). A landlord faces both the prospect of vicarious liability for discriminatory admission decisions its agent (i.e., the screening company) might make, as well as direct liability for its own failure to correct or overrule a discriminatory admission decision. *See* 24 C.F.R. § 100.7(a)(1)(ii--iii), (b); *see also Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974) (“The discriminatory conduct of an apartment manager or rental agent is, as

a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of *respondeat superior* and because the duty to obey the law is non-delegable.”).

It is unclear at this early stage of the litigation what screening company Appellant works with, what information appears in the tenant-screening reports, or whether that screener calculates scores, makes lease recommendations, or otherwise participates in admission decisions. But none of this matters insofar as Appellant’s own liability is concerned. As the landlord, Appellant had the ability and the responsibility to establish non-discriminatory criminal history screening policies and to refrain from following discriminatory lease recommendations its screener might make (such as by individually reviewing tenants with criminal history before denying them admission). *See* 24 C.F.R. § 100.7.

CONCLUSION

For the foregoing reasons, the Court should AFFIRM the trial court’s decision below.

Respectfully submitted this 23rd Day of
December, 2022,

NATIONAL HOUSING LAW PROJECT

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CERTIFICATE OF COMPLIANCE WITH LENGTH AND STYLE LIMITS

This brief was prepared using Microsoft Word with Times New Roman font, monospaced and in 14-point type size. This font and spacing complies with Federal Rule of Appellate Procedure 32(a)(5-6). A word count conducted on the final brief, save for items excluded under Rule 32(f), reported 3840 words

/s/Marie Claire Tran-Leung

Attorney for NHLP

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2022, I electronically filed the Motion for Leave and attached proposed Brief of Amicus Curiae using the CM/ECF system, which will automatically send copies to all counsel of record. There are no parties unrepresented by counsel and not being served through the CM/ECF system.

/s/Marie Claire Tran-Leung

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