UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE FORTUNE SOCIETY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. CV-14-6410 (VMS)
	)	
SANDCASTLE TOWERS HOUSING DEVELOPMENT FUND CORP., *et al.*,	)	
	)	
Defendants.	)	
	)	

UNITED STATES OF AMERICA'S STATEMENT OF INTEREST

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I. INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to address the application of disparate-impact liability under the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(a), (b), in challenges to tenant-screening policies that ban persons who have criminal convictions. The United States Department of Justice ("DOJ") and the United States Department of Housing and Urban Development ("HUD") share enforcement authority under the FHA. *See* 42 U.S.C. §§ 3610; 3612(a), (b), (o); 3613(e); 3614. Additionally, the DOJ and its federal partners have taken steps in recent years to help formerly incarcerated individuals return to their communities. In 2011, DOJ convened the Federal Interagency Reentry Council to discuss and implement strategies to remove barriers to successful reentry of formerly incarcerated individuals so that they can compete for jobs, attain stable housing, support their children and families, and contribute to their communities.[1] As part of these efforts, HUD released guidance concerning how the FHA applies to the use of criminal records by providers or operators of housing and real-estate related transactions. *See* HUD, Office of Gen. Counsel Guidance on Application of Fair Hous. Act Standards to the Use of Criminal Records by Providers of Hous. & Real Estate-Related Transactions (Apr. 4, 2016) ("HUD Guidance"),

[1] *See* DOJ, Roadmap to Reentry: Reducing Recidivism Through Improved Reentry Outcomes at the Fed. Bureau of Prisons 2 (Apr. 2016), *available at* https://www.justice.gov/reentry/file/844356/download; DOJ, Federal Interagency Reentry Council, https://www.justice.gov/reentry/federal-interagency-reentry-council (last visited Sept. 17, 2016); *see also* The White House & DOJ, The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future 50-52 (Aug. 2016) (discussing the Federal Interagency Reentry Council's accomplishments and actions in the context of housing), *available at* https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf.

available at http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf.[2]

The United States thus has a strong interest in ensuring the correct interpretation and application of the FHA in this case, thereby promoting the dismantling of unlawful barriers to housing for formerly incarcerated individuals.

II. BACKGROUND

A. Barriers to Housing for Individuals with Criminal Records

Each year in America, more than 600,000 citizens are released from federal and state prisons, and 11.4 million individuals are released from local jails.[3] Upon release, these individuals face the potential "experience [of] the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check." *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting); *see also Doe v. United States*, __ F.3d __, 2016 WL 4245425, at *5 (2d Cir. Aug. 11, 2016) (observing "the unfortunate lifelong toll that . . . convictions often impose on low-level criminal offenders" including the inability to obtain rental housing). One of the greatest potential barriers to successful reentry for those released from incarceration relates to housing, as "[s]table housing is particularly critical for people returning from prison and jail, who face a myriad of challenges while reestablishing themselves in their

[2] Previously, HUD had issued guidance directed at the use of arrest records in housing decisions by public housing agencies and owners of federally-assisted housing. *See* HUD, Office of Pub. & Indian Hous., Guidance for Public Hous. Agencies (PHAs) and Owners of Federally-Assisted Hous. on Excluding the Use of Arrest Records in Hous. Decisions (Nov. 2, 2015), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf.

[3] *See* Roadmap to Reentry: Reducing Recidivism Through Improved Reentry Outcomes at the Fed. Bureau of Prisons, *supra* note 1, at 1.

communities."[4] However, "[m]any individuals leaving the criminal justice system are unable to obtain access to housing and as many as 45 percent return to homelessness."[5] This is not just coincidence; as the Attorney General recently remarked, it is "an unfortunately common practice" that landlords deny housing to re-entering individuals based on their criminal records.[6]

B. The Sandcastle's Use of Criminal Records in its Application Process

The Sandcastle is an affordable rental apartment complex with 917 units in Far Rockaway, Queens. Plaintiff filed suit in October 2014, alleging among other things that the Sandcastle has a policy of categorically excluding applicants who have felony or non-traffic misdemeanor convictions from tenancy, which causes an unjustified disparate impact on African-American and Hispanic applicants in violation of FHA. After discovery, both parties moved for summary judgment on this disparate-impact claim.

Plaintiff has presented evidence that Sandcastle publicized its policy of excluding tenants with criminal convictions, including through online advertisements and dozens of e-mail responses to prospective applicants stating that applicants must have "no criminal history" or "no criminal background" to be approved. Pl. Mem. in Supp. of Mot. for Summ. J. (Doc. 94-1) at 10-11. The advertisements and e-mails that plaintiff introduced did not specify any exceptions to the "no criminal history" policy. *Id*. Plaintiff also analyzed the Sandcastle's accepted

[4] The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future, *supra* note 1, at 49.

[5] Exec. Office of the President, Nat'l Drug Control Strategy 42 (2011) (footnote omitted), *available at* https://www.whitehouse.gov/ondcp/2011-national-drug-control-strategy.

[6] Attorney General Loretta E. Lynch, Remarks at Nat'l Reentry Week Event in Philadelphia (Apr. 25, 2016), *available at* https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-reentry-week-event, *quoted in Doe*, 2016 WL 4245425, at *5.

application files and found evidence of no more than six accepted tenants with non-traffic-related criminal convictions in the past decade. Pl. Opp'n to Defs. Mot. for Summ. J. (Doc. 98) at 7.

Defendants dispute that they employ a categorical ban. Defs. Mem. in Supp. of Mot. for Summ. J. (Doc. 97-1) at 12. They respond that there are examples of tenants who have criminal convictions living at the property and that defendants' employees state that they sometimes accepted applicants with non-serious misdemeanor convictions. *Id.* at 15-16, 19-22. Defendants justify what they say is their policy of conducting a case-by-case analysis of criminal records by invoking a duty to secure the rental premises and provide for the safety of their tenants. *Id*. at 31-32; Defs. Opp'n to Pl. Mot. for Summ. J. (Doc. 95) at 11, 29-30.

Defendants have retained 1,145 application files for individuals they accepted as tenants between 2006 and June 2015. Pl. Mem. in Supp. of Mot. for Summ. J. (Doc. 94-1) at 11. Defendants admit that Sandcastle does not systematically retain records related to applicants who have been denied. Defs. Resp. to Pl. R. 56.1 Statement (Doc. 95-1) ¶134. The experts for both plaintiff and defendants agree that no meaningful statistical analysis can be done with respect to the denied applications because not all denied applications were retained, and there is no way to determine whether those that were kept amount to a representative sample of denied applicants. Parnell Suppl. Report (Doc. 94-10 Ex. 24) at 4-5; Welsch Suppl. Report (Doc. 101-5 Ex. KK) at 2.

Plaintiff retained Dr. Christopher Wildeman to provide expert testimony about demographic analysis and incarceration risk rates. Based on reported periods of incarceration for participants in the National Longitudinal Survey of Youth 1979 ("NLSY79"), Dr. Wildeman calculated incarceration risk rates for non-Hispanic whites, African Americans, and Hispanics broken down by income bands. Wildeman Report (Doc. 94-12 Ex. 27) at 8-9 & tbl. A1. For

example, Dr. Wildeman found that the incarceration risk rate within the $30,000 to $70,000 income band is 1.37% for non-Hispanic whites, 4.76% for African Americans, and 3.00% for Hispanics. *Id.* at tbl. A1. According to plaintiff, this income band aligns with the population eligible to rent under Sandcastle's affordable rental programs. Pl. Mem. in Supp. of Mot. for Summ. J. (Doc. 94-1) at 19. Dr. Wildeman also explained why NLSY79 is an appropriate data set to use to measure incarceration risk rates and why incarceration risk rates are an appropriate proxy for likelihood of a conviction history. Wildeman Report (Doc. 94-12 Ex. 27) at 2, 5-6. In addition to the analysis of the NLSY79 data, Dr. Wildeman calculated incarceration risk rates for non-Hispanic whites, African Americans, and Hispanics from various sources that provide data about incarceration in New York State. *Id.* at 7-9, 11-12 & tbl. 2. Based on these two sets of incarceration risk rates, he determined that "the disproportionalities reported at the national level, at all income levels, can be expected to be significantly greater at the New York State and [New York] City level." Wildeman Declaration (Doc. 94-7 Ex. 21) ¶14. Plaintiff's statistical expert, Dr. Allan Parnell, determined that the disparities in incarceration risks rates for the income bands relevant to the Sandcastle, if applied to various housing markets relevant to the Sandcastle, result in statistically significant disparities in who is excluded by a ban of tenants with felony or non-traffic misdemeanor convictions. Parnell Report (Doc. 94-9 Ex. 23) at 10.

Defendants argue that these analyses are not relevant. Instead, they argue that the proper comparators are the tenants currently in the complex, which defendants say is close to 70% African American and Hispanic. Defs. Opp'n to Pl. Mot. for Summ. J. (Doc. 95) at 18, 20.

III. ARGUMENT

Although the FHA does not forbid housing providers from considering applicants' criminal records, it does require that providers do so in a way to avoid overbroad generalizations

that disproportionately disqualify people based on a characteristic protected by the statute, such as race or national origin. To that end, the FHA bars criminal records bans that have a disparate impact on applicants based on race or national origin unless they are supported by a legally sufficient justification. Analysis of the lawfulness of such bans proceeds according to the three-step framework that HUD has established to evaluate discriminatory effects liability under the FHA. At the first step, a plaintiff must establish a *prima facie* case of discrimination by showing that a ban on tenants with criminal records causes a disparate impact based on race or national origin. Once a plaintiff challenging such a ban introduces reliable evidence proving a *prima facie* case, the burden shifts to the housing provider to prove with evidence – and not just by invoking generalized concerns about safety – that the ban is necessary to actually accomplish the provider's substantial, legitimate, nondiscriminatory interest. Even if this showing is made, the ban will nevertheless be unlawful if a plaintiff proves a less discriminatory alternative, such as that an individualized review of applicants' criminal records could serve the defendant's needs.

A. Challenges to the Discriminatory Effects of Bans on Criminal Records Are Evaluated Based on the FHA's Three-Step Framework

Disparate impact claims under the FHA are evaluated based on the burden-shifting framework set out at 24 C.F.R. § 100.500. *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016).[7] At the first step of that regulation's burden-shifting framework, the plaintiff bears the burden of establishing a *prima face* case by proving that the "challenged practice caused or predictably will cause a discriminatory effect" on a protected class. 24 C.F.R. § 100.500(c)(1). Making such a showing "is a fact-specific inquiry." HUD, Implementation of

[7] The HUD regulation is consistent with the Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), which confirmed the availability of disparate-impact liability under the FHA and discussed limiting principles for such claims. *See MHANY Mgmt.*, 819 F.3d at 618 ("The Supreme Court implicitly adopted HUD's approach . . . .").

the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,468 (Feb. 15, 2013). "No single test controls in measuring disparate impact, but the [plaintiff] must offer proof of disproportionate impact, measured in a plausible way." *Mt. Holly Gardens Citizen in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 382 (3d Cir. 2011) (alteration and internal quotation marks omitted), *cert. dismissed*, 134 S. Ct. 636 (2013).[8]

If the plaintiff proves its *prima facie* case, the regulation specifies that the practice may still be lawful if there is a "legally sufficient justification" for it. 24 C.F.R. § 100.500. A legally sufficient justification can be established if, at step two, the defendant meets its "burden of proving that the challenged practice is necessary to achieve one or more [of its] substantial, legitimate, nondiscriminatory interests," *id.* § 100.500(c)(2), and the plaintiff fails to prove, at step three, that the interests "could be served by another practice that has a less discriminatory effect," *id.* § 100.500(c)(3).

With one exception, this framework applies to evaluating whether housing providers' policies that consider criminal records in an application process produce unlawful discriminatory effects.[9] The FHA does not impose disparate-impact liability for policies that deny housing because a person is "convicted . . . of the illegal manufacture or distribution of a controlled substance." 42 U.S.C. § 3607(b)(4); *see also Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520-21 (2015) (holding that this provision is a defense to disparate-impact liability). All other criminal records bans must comply with the disparate

[8] When consistent with the regulation, preexisting FHA case law and legal sources analyzing disparate impact claims brought under Title VII of the Civil Rights Act of 1964 ("Title VII") remain relevant to evaluating FHA disparate impact claims. *See MHANY Mgmt.*, 819 F.3d at 618-19; *see also Inclusive Cmtys.*, 135 S. Ct. at 2522-23 (relying upon interpretations of Title VII to interpret the FHA).

[9] Such bans may also be subject to intentional discrimination liability. *See* HUD Guidance at 8-10.

impact standards of the FHA. The fact that Congress created an exemption to disparate-impact liability only for convictions for certain drug offenses supports the availability of disparate impact challenges to housing providers' exclusions of tenants who were convicted of other types of offenses. As the Supreme Court has explained, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

Consistent with the above discussion, HUD issued Guidance in April 2016 on the application of FHA standards to the use of criminal records by housing providers. *See* HUD Guidance, *supra*, p. 2. The Guidance specifies that the standard three-step framework applies to claims that a housing provider's consideration of criminal records has a discriminatory effect violating the FHA. The Guidance also provides detail about how the analysis proceeds at each step.

B. Blanket Bans on Tenants with Criminal Records May Have a Disparate Impact

Blanket bans on tenants with criminal records – *i.e.*, categorical prohibitions that do not consider "when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then," HUD Guidance at 6 – run a substantial risk of having a disparate impact based on race or national origin. African-American and Hispanic individuals, and African-American and Hispanic men in particular, make up a disproportionate number of individuals with arrest and convictions records in the United States.[10]

[10] *See, e.g.*, Exec. Office of the President, Econ. Perspectives on Incarceration and the Criminal Justice System 28-32 & fig.25-28 (Apr. 2016), available at https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf. As one recent report on such disparities notes, "rigorous academic research . . . finds that racial disparities persist in

When assessing the impact of a criminal records policy, the relevant question is the policy's effect on individuals screened out by the policy versus individuals not affected by it. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003), *superseded on other grounds as recognized by MHANY Mgmt.*, 819 F.3d at 619. To establish a discriminatory effect at the first step of the disparate impact analysis, a comparison of the two groups must reveal that the tenant-screening policy "actually or predictably results in a disparate impact" on a protected group of individuals. 24 C.F.R. § 100.500(a); *see also Tsombanidis*, 352 F.3d at 575. Such comparisons will normally be based on statistical evidence. *See Tsombanidis*, 352 F.3d at 575-76. A plaintiff can thus establish a *prima facie* case by introducing reliable statistical analyses proving that a ban on tenants with criminal records will predictably have a disproportionate adverse effect on members of a protected group compared to other individuals.

Many of the statistics available to prove racial and ethnic disparities in criminal records[11] – especially statistics that account for additional demographic characteristics like income[12] – are derived from nationwide survey data. It is not necessary for a plaintiff challenging a criminal records policy to obtain data on incarceration risk rates specific to the population that lives in a geographic housing market, so long as a plaintiff provides sufficient foundation to support the

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police interactions, arrests, and sentencing, even after controlling for defendant and offense characteristics." *Id*. at 29.

[11] In this case, plaintiff's expert, Dr. Wildeman, explained why incarceration data is a sound way to measure the risk of having been convicted of a felony or misdemeanor. Wildeman Report (Doc. 94-12 Ex. 27) at 5-6. In light of the fact-specific inquiry necessary to determine whether a plaintiff has satisfied the *prima facie* case, this Court need only find that plaintiff's method was at least one valid option for proving racial disparities in criminal records.

[12] Outside the context of challenges to criminal records policies, courts evaluating FHA disparate impact challenges related to affordable housing have sometimes sought disparity data specific to "the relevant income pool" of prospective tenants. *See, e.g., Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 298 (5th Cir. 2009).

reliance on national data for the disparities present in the geography relevant to its case.[13] *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (approving, in a Title VII disparate impact case, "reliance on general population demographic data . . . where there was no reason to suppose" that the relevant demographic data for the geography at issue "differ markedly from those of the national population"); *Brown v. Omaha Hous. Auth.*, No. 8:05-cv-423, 2007 WL 2123750, at *2 (D. Neb. July 20, 2007) (noting the possible permissible use of national statistics in an FHA disparate impact challenge to a policy denying government housing assistance vouchers to individuals with criminal backgrounds); HUD Guidance at 3-4.[14]

When complete data for the actual applicants processed according to the policy is not available, or when potential applicants may have been discouraged by the policy, measuring a screening policy's impact may appropriately be based on all individuals in the housing market served by the complex at issue. *See R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 125-26 (D.R.I. 2015) (using statewide census data to evaluate a disparate impact challenge to a landlord's policy rejecting applicants seeking to house more than two persons per bedroom); *Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc.*, 801 F. Supp. 2d 12, 16-17 (D. Conn. 2011) (using citywide census data to evaluate a disparate impact challenge to a condominium association's policy rejecting applicants seeking to house more than two persons per bedroom);

[13] In this case, Dr. Wildeman explained why the incarceration risk rates that account for income, which he calculated based on the NLSY79's national sample, is representative of disparities found in New York State and New York City. Wildeman Declaration (Doc. 94-7 Ex. 21) ¶14; Wildeman Report (Doc. 94-12 Ex. 27) at 2, 11.

[14] In contrast, courts have not always accepted the use of national statistics by FHA plaintiffs who do not provide evidence affirmatively justifying the national statistics' relevance to a more localized housing market. *See, e.g.*, *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1253 (10th Cir. 1995); *see also id.* at 1257-58 (Henry, J., dissenting) (noting the record lacked evidence "conclusively showing" that the local market *differed* from the national statistics).

see also Easterling v. Connecticut, 783 F. Supp. 2d 323, 333-34 (D. Conn. 2011) ("The eligible labor pool may also be used in lieu of the actual applicant pool if lack of information as to an applicant pool would render it impossible to establish a prima facie disparate impact.") (internal alterations and quotation marks omitted) (quoting *Malave v. Potter*, 320 F.3d 321, 327 (2d Cir. 2003)). Accordingly, when only incomplete records exist of actual applicants to a complex, or a complex advertised its use of a criminal background check thereby discouraging people with criminal records from applying (as plaintiff alleges here),[15] it is appropriate to evaluate the disparities caused by the policy by reference to its impact on the relevant housing market served by the complex rather than by analyzing the actual applicant pool. *See Dothard*, 433 U.S. at 330 ("There is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."); *EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.*, 186 F.3d 110, 119 (2d Cir. 1998).

Although the United States takes no position on whether there are sufficient undisputed facts necessary to prove plaintiff's *prima facie* case at the summary judgment stage of this case, we note that defendants have put forward several specious arguments in challenging plaintiff's satisfaction of the *prima facie* case. First, defendants wrongly rely on an analysis about the demographics of the tenants currently in the complex. *See* Defs. Opp'n to Pl. Mot. for Summ. J. (Doc. 95) at 18, 20. Contrary to defendants' argument, the claim that the complex at issue currently has a predominately African-American and Hispanic population does not preclude plaintiff from establishing a *prima facie* case. It is blackletter law under both Title VII and the FHA that the absence of racial disparities in the final results of a multi-step process – at the

[15] In this case, both plaintiff's expert and defendants' expert agree that the incomplete data on denied applicants precludes meaningful statistical analyses of the applicant pool. Parnell Suppl. Report (Doc. 94-10 Ex. 24) at 4-5; Welsch Suppl. Report (Doc. 101-5 Ex. KK) at 2.

bottom line – does not excuse discrimination at a particular step of the process. *See Connecticut v. Teal*, 457 U.S. 440, 456 (1982); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987-88 (4th Cir. 1984). A criminal records policy that disproportionately disqualifies African Americans and Hispanics from the opportunity to advance in the residency screening process is discriminatory in the absence of a legally sufficient justification. *See Teal*, 457 U.S. at 451 ("The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria."). Based on just such reasoning, a federal district court recently rejected an attempt to defend against an FHA disparate impact challenge to a criminal records policy based on the fact that the tenants at the complexes at issue were predominately (and, in one case, exclusively) African-American. *See Alexander v. Edgewood Mgmt. Corp.*, No. 1:15-cv-1140-RCL, 2016 WL 5957673, at *3 (D.D.C. July 25, 2016).

Second, defendants wrongly state that plaintiff needs to demonstrate that defendants applied their criminal records ban in every instance in order to prove a blanket ban. *See, e.g.*, Defs. Opp'n to Pl. Mot. for Summ. J. (Doc. 95) at 8 ("The presence of tenants with felonies and misdemeanors proves that a blanket ban does not exist . . . .") But even setting aside the evidence that defendants described their policy in categorical terms in advertisements and communications with applicants, evidence that a defendant did not always apply its policy of excluding tenants with certain criminal records does not refute the existence of the policy.[16] Establishing the existence of a discriminatory policy does not require showing that *none* of the

[16] The existence of a policy is also not refuted by it being informal or unwritten. *See, e.g.*, *Bischoff v. Brittain*, No. 2:14-1970, 2014 WL 5106991, at *6 (E.D. Cal. Oct. 10, 2014) (unwritten policy); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1293 (C.D. Cal. 1997) (informal policy); *Bryant Woods Inn, Inc. v. Howard Cty.*, 911 F. Supp. 918, 939 (D. Md. 1996) (custom as policy), *aff'd*, 124 F.3d 597 (4th Cir. 1997).

individuals living at the property has a criminal record. *See United States v. Garden Homes Mgmt., Corp.*, 156 F. Supp. 2d 413, 423 (D.N.J. 2001) (holding, for a claim brought under the Attorney General's authority to take action against a "pattern or practice" of discrimination violating the FHA, that "a defendant might on occasion make exceptions to its discriminatory norm, but that such exceptions do not bar liability"). Even the most stringent ban may permit occasional exceptions. For example, in the Title VII context, the Eighth Circuit sustained a disparate impact challenge to a policy that disqualified for employment any individual with a criminal (non-traffic-related) conviction, even though the employer's "stringent policy occasionally ha[d] been relaxed." *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1293 & n.6 (8th Cir. 1975); *see also Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 520 (E.D. La. 1971) (noting that a categorical ban for people with criminal convictions excluded minor traffic violations and that the plaintiff was hired, even though he had been convicted of two crimes other than minor traffic violations, as a result of "a clerical error made in processing the . . . application[]"), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

Third, contrary to defendants' misguided assertions, plaintiff does not impermissibly seek to hold defendants liable for racial disparities in the criminal justice system. *See* Defs. Opp'n to Pl. Mot. for Summ. J. (Doc. 95) at 13-15. Instead, liability would be based on plaintiff proving that defendants themselves imposed a policy of considering criminal records in a non-individualized manner and that the policy had an unjustified discriminatory impact on African Americans and Hispanics. It is common that the disparities underlying policies found to have a disparate impact are rooted in past discriminatory practices. *See Inclusive Cmyts.*, 135 S. Ct. at 2515-16 (summarizing twentieth century practices that gave rise to segregated housing patterns and explaining that "[*d*]*e jure* residential segregation by race was declared unconstitutional

almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life") (citation omitted). For example, the Supreme Court first recognized disparate-impact liability in a case that held an employer responsible for the disparate impact of its policy requiring applicants to have a high school diploma. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). The Court explicitly recognized that the reason for such a policy having a discriminatory effect was the inferior segregated schooling historically provided by the State of North Carolina to African Americans, *see id*. at 430, but that did not immunize the employer from liability for its own decision to impose the diploma requirement.

C. Blanket Bans on Tenants with Criminal Records Cannot be Justified by Generalizations about Safety and Security

Once a plaintiff establishes that a challenged policy predictably will result in a disparate impact, a defendant must prove its policy "is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests." *See* 24 C.F.R. § 100.500(c)(2). The defendant's claim of necessity "must be supported by evidence and may not be hypothetical or speculative." *Id*. § 100.500(b)(2); *see MHANY Mgmt.*, 819 F.3d at 617 (noting that the defendant must "prove that its actions furthered, *in theory and in practice*, a legitimate, bona fide governmental interest") (emphasis added) (internal quotation marks and citations omitted). Courts of appeals addressing disparate impact challenges to the use of criminal background checks in the employment context have held that Title VII requires demonstrable proof to support a defendant's justification. *See El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d Cir. 2007) (citing *Dothard*, 433 U.S. at 334); *Green*, 523 F.2d at 1296. In light of this legal authority, defendants are flatly wrong to claim that they face only a burden of production – not proof – at this step. *See* Defs. Opp'n to Pl. Mot. for Summ. J. (Doc. 95) at 30.

While the FHA does not require individualized assessment of housing applicants' criminal history in all circumstances, "[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 [its] burden" of proving necessity. HUD Guidance at 6. Defendants thus correctly "concede that a blanket ban would not be narrowly tailored to balance the safety of the building and other tenants with the rights of a potential applicant." Defs. Mem. in Supp. of Mot. for Summ. J. (Doc. 97-1) at 32. The Eighth Circuit's decision in *Green* illustrates well why a defendant generally will be unable to prove the necessity of a blanket ban. *Green* considered a Title VII challenge to an employer's policy of refusing to hire individuals with a criminal conviction other than a minor traffic offense. *See* 523 F.2d at 1292. After determining that the plaintiffs had established a *prima facie* statistical case of discrimination, *see id*. at 1293-95, *Green* held such a "sweeping disqualification . . . resting solely on past behavior" could not meet the requirements of the business necessity test without considering whether the "conduct . . . may be remote in time or . . . significantly bear[s] upon the particular job requirements," *id.* at 1296, 1298.[17] *Green* noted that, although the employer had proffered seven reasons for the policy, ranging from fear of theft to possible impeachment as a witness, "they in no way justify an absolute policy which sweeps so broadly." *Id*. at 1298. Instead, the Eighth Circuit observed, "[w]e cannot 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

[17] Title VII's "business necessity defense" is analogous to the FHA's "legally sufficient justification." *See* 78 Fed. Reg. at 11,472 (noting 24 C.F.R. § 100.500(b)(1) is "consistent with Congress's 1991 enactment of legislation codifying that, in the employment context, a practice that has a disparate impact must be consistent with 'business necessity'"); *see also Inclusive Cmtys.*, 135 S. Ct. at 2522 (observing that the legally sufficient justification "step of the [FHA] analysis is analogous to the business necessity standard under Title VII").

unemployed." *Id*. (emphasis added); *see also Field v. Orkin Extermination Co.*, No. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) ("[A] blanket policy of denying employment to any person having a criminal conviction is a violation of Title VII.").

Although maintaining safety and security at a property is an important duty for housing providers, simply invoking the need to ensure "safety" or "security" cannot justify a screening policy that categorically excludes any tenant who has a criminal conviction. A ban on tenants with convictions without consideration of factors like the conviction's nature, severity, and recency is over-inclusive and lacks any principled way to assess who, if anyone, poses a risk to safety or security in the property. For example, the Eighth Circuit affirmed an injunction that required an employer to consider "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied" if it wanted to consider an applicant's criminal record. *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977); *see also Waldon v. Cincinnati Pub. Sch.*, 941 F. Supp. 2d 884, 889 (S.D. Ohio 2013) (finding that, while a policy barring employment for people with specified convictions is justified for "serious recent crimes" "due to the nature of its employees' proximity to children[,]" an individualized approach is still necessary so as not to bar employment people who have offenses that are remote in time, insubstantial, or followed by "demonstrated decades of good performance"); HUD Guidance at 7.[18]

[18] Studies have shown that rates of recidivism decline for older convictions. *See, e.g.*, Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483 (2006) (noting rates of recidivism, even for violent crime, reduce for convictions older than seven years), *cited in* HUD Guidance at 7 & n.34; c*f. El*, 479 F.3d at 247 ("Had [plaintiff], for example, hired an expert who testified that there is time at which a former criminal is no longer any more likely to recidivate than the average person, then there would be a factual question for the jury to resolve.").

Even if a defendant adopts a more narrowly tailored policy that prohibits renting to tenants with only certain types of convictions, that housing provider must still *prove* that the more limited ban is necessary to serve its "substantial, legitimate, non-discriminatory interests." 24 C.F.R. § 100.500(c)(2). Merely claiming that the policy is necessary to promote safety and security is not enough. The housing provider must produce evidence proving the necessity of the policy to achieve those interests and cannot simply rely on speculation or hypotheticals. *See id*. § 100.500(b)(2).

Assuming that the plaintiff here has established a *prima facie* case, defendants have not satisfied that burden. Here, without providing any evidence that would allow the Court to assess their justifications, defendants make the conclusory assertion that their criminal records policy is "necessary to protect the health, safety and welfare of residents who already reside in the Sandcastle." Defs. Mem. in Supp. of Mot. for Summ. J. (Doc. 97-1) at 31 (capitalization altered). Defendants further claim, without more, that their policy "serves valid business and security functions of protecting tenants and the property from former convicted criminals." *Id.* at 32 (quoting Defs. Answer); *see also* Defs. Opp'n to Pl.'s Mot. for Summ. J. (Doc. 95) at 11 (noting, in passing, "Sandcastle's obligation to other building residents to maintain a safe building"); *id.* at 29-30 (quoting their Answer for additional, conclusory, unsupported statements related to safety). Such sweeping and unsupported assertions do not amount to proof that defendants' exclusion of tenants with criminal convictions is necessary to further their interest in promoting safety and security. *See MHANY Mgmt.*, 819 F.3d at 617. Defendants must prove their assertions with evidence.

D. An Individualized Review of Tenants with Criminal Records May Provide a Less Discriminatory Alternative to Blanket Bans

If a defendant satisfies its burden of proving the necessity of its criminal records policy, the burden shifts back to the plaintiff to show that an alternative policy with a "less discriminatory effect" could serve the "substantial, legitimate, nondiscriminatory interests" that the defendant invoked in support of its challenged practice. 24 C.F.R. § 100.500(c)(3). As explained above, a housing provider cannot meet its burden of proving the necessity of imposing a blanket ban on renting to any tenant who has been convicted of any crime, regardless of its nature, the age of the conviction, or a person's rehabilitation. But even if a defendant could meet its burden of proof to support a prohibition of tenants with some or all types of convictions, an individualized review of an applicant's criminal record would likely provide a less discriminatory alternative method of satisfying the housing provider's interests. *See Green*, 523 F.2d at 1298 (noting that the justifications proffered by the employer, which did not justify a categorical ban, "can serve as relevant considerations in making individual hiring decisions").

An individualized assessment of applicants' criminal convictions might include consideration of issues such as the circumstances, severity, and recency of any conviction, along with the individual's age at the time of conviction, age now, frequency of criminal convictions, any evidence of rehabilitation, and evidence that the individual has maintained a good tenant history before and/or after the conviction.[19] *See* HUD Guidance at 7. Such a review is likely to more "accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not." *El*, 479 F.3d at 245.

[19] An individualized review may also determine that the conviction record obtained by the housing provider is wrong. *See* 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, *cited in* HUD Guidance at 6 n.29.

IV. CONCLUSION

The Court should apply the three-step framework set forth in the HUD regulation, the HUD Guidance, and this Statement of Interest to evaluate whether defendants' criminal records policy has unjustified discriminatory effects on African Americans and Hispanics in violation of the FHA.

Respectfully submitted,

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