

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

EQUAL RIGHTS CENTER,

Plaintiff,

v.

MID-AMERICA APARTMENT
COMMUNITIES, INC.

and

MID-AMERICA APARTMENTS, L.P.,

Defendants.

COMPLAINT

JURY DEMAND

1. Mid-America Apartment Communities, Inc. and Mid-America Apartments, L.P. (collectively, “Defendants” or “MAA”) maintained and enforced a criminal screening policy in at least 55 apartment complexes containing over 20,000 apartments across the country that categorically barred an untold number of individuals with criminal records from living at their properties. Plaintiff Equal Rights Center (“ERC”) brings this suit against MAA pursuant to the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3601 *et seq.*, to (1) prevent Defendants from continuing or renewing their discriminatory and unlawful conduct at the affected properties and ensure that applicants affected by the policy—who are disproportionately African American and Latino—will have a meaningful opportunity to secure sorely needed rental housing; and (2) redress the harm ERC has suffered as a direct result of Defendants’ conduct.

2. The policy’s disproportionate adverse impact on African Americans and Latinos violates the federal Fair Housing Act and local ordinances, as set forth below, while additionally flying in the face of instructions issued by the United States Department of Housing and Urban

Development, which expressly condemn such across-the-board bans. A less discriminatory alternative for dealing with any potential concerns raised by applicants with criminal records has always been available to Defendants. Instead of automatically excluding every applicant covered by their far-reaching criminal screening policy, Defendants should have assessed potential residents with a criminal history individually by considering factors directly relevant to the prospective tenant's qualifications. Through an individualized assessment of each applicant, Defendants would have maintained the ability to review carefully the qualifications of applicants to the apartment buildings at issue here while permitting prospective tenants who have felony convictions or other criminal histories, but pose no realistic threat to the community or the property, to obtain housing.

NATURE OF THE ACTION

3. Plaintiff Equal Rights Center seeks injunctive, monetary, and declarative relief against Defendants for engaging in a practice of illegal discrimination on the basis of race and national origin in properties that Defendants own and operate.

4. From November 2016, or earlier, through at least January 2017, Defendants stated on their website and online application that they automatically exclude any person from renting an apartment in the 55 affected apartment complexes ("The Properties") who has a conviction for any felony (the "Felony Ban") or a pending felony charge (together, the "Felony Policy"). Defendants also stated on their website and online application that they maintain and enforce a closely related policy of automatically excluding any person from renting an apartment who has one of a number of undisclosed misdemeanor convictions or a pending charge for a misdemeanor on that undisclosed list (the "Misdemeanor Policy"). Both the Felony Policy and the Misdemeanor Policy (together, the "Criminal Records Policy") were absolute and did not permit

exceptions. An applicant who has a criminal history within the scope of the Criminal Records Policy was 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 any threat to safety or property. What is more, individuals with felony convictions were screened out before any of their other qualifications were considered; a felony conviction, no matter how long in the past or what the felony, was an automatic bar to completing their applications for housing at The Properties.

5. As a direct result, applicants with a criminal record were either (1) deterred from ever applying to The Properties after learning of the Policy; or (2) automatically denied an opportunity to apply to The Properties because of their criminal history.

6. Defendants have now removed explicit references to their Criminal Records Policy from their website and online application, but do not indicate whether or not they continue to maintain the Criminal Records Policy and enforce it against all applicants within its scope.

7. For the reasons discussed below, Defendants' Criminal Records Policy had (and if it is still maintained, continues to have) the effect of disproportionately barring African Americans and Latinos in violation of the Fair Housing Act. Moreover, as further demonstrated below, intentional discrimination unlawfully motivated the adoption of the policy, which was intended to minimize the number of African Americans and Latinos living in The Properties.

8. Analysis of criminal records and other data shows that the Criminal Records Policy maintained by Defendants across The Properties had a severe disparate impact on the basis of race and national origin. African Americans who lived in each of the rental markets where The Properties are located and satisfied Defendants' income requirements for The

Properties are two to twelve times as likely as whites¹ to be excluded by Defendants' prohibition against people with certain criminal records. Latinos are two to four times as likely as whites to be excluded in many of these markets.

9. The Fair Housing Act prohibits any policy that has a disparate impact unless it is necessary to achieve a substantial, legitimate, nondiscriminatory business purpose that cannot be satisfied with a less discriminatory alternative.

10. Defendants' Criminal Records Policy was not necessary to achieve a substantial, legitimate, nondiscriminatory business purpose. In April 2016, the U.S. Department of Housing and Urban Development ("HUD") issued guidance which provided that automatic bans like Defendants' have a disproportionate adverse effect on African Americans and Latinos because of disparities in the criminal justice system, and that automatic bans which categorically exclude applicants as a result of their criminal history are *never* necessary to achieve the potentially legitimate interest of protecting safety and/or property.

11. What is more, a less discriminatory alternative for dealing with any potential concerns raised by applicants with criminal records was available to Defendants—one that is already well-established in the area of employment discrimination law and regulation, and established through the above HUD Guidance.

12. Instead of automatically excluding every applicant covered by their far-reaching Criminal Records Policy, Defendants should have assessed potential residents with a criminal history individually by considering factors directly relevant to the qualifications for tenancy such as the nature of the conviction or conduct, how long ago it occurred, the age of the person at the time of the conviction, post-conviction and post-release conduct, evidence of rehabilitation,

¹ "White" is used herein to refer to non-Hispanic Caucasians.

evidence of any current threat to safety or property, letters of recommendation, the individual's history as a tenant and as a whole, and other relevant factors. When considered in their totality, such an individualized assessment would enable a landlord to make a reasoned decision about the particular individual's suitability as a resident.

13. 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 African Americans and Latinos categorically barred from housing at The Properties.

14. ERC brings this action to address Defendants' discriminatory and unlawful conduct at The Properties and to redress the harm it has suffered and will continue to suffer as a direct result of that conduct absent relief.

PARTIES

15. Plaintiff Equal Rights Center is a national fair housing advocacy organization and non-profit corporation headquartered in Washington, D.C. ERC provides a multidisciplinary program dedicated to furthering the advancement of, *inter alia*, fair housing throughout the United States. Pursuant to its mission, ERC identifies and seeks to eliminate unlawful and unfair discrimination in a variety of areas, including housing, on behalf of individuals in D.C. and throughout the nation. To advance its mission, ERC engages in education and outreach nationwide; provides counseling to individuals facing discrimination; works with local and federal officials to enhance fair housing laws and their enforcement; undertakes investigations to uncover unlawful discrimination; and, when necessary, initiates enforcement actions.

16. Defendant Mid-America Apartment Communities, Inc. is a Tennessee corporation and real estate investment trust. It is publicly traded on the New York Stock Exchange and

included in the S&P 500. It is the sole general partner of Defendant Mid-America Apartments, L.P., of which it owns 96.4%.

17. Defendant Mid-America Apartments, L.P. is a Tennessee limited partnership and subsidiary of Defendant Mid-America Apartment Communities, Inc.

18. Defendants Mid-America Apartment Communities, Inc. and Mid-America Apartments, L.P. state in filings with the U.S. Securities and Exchange Commission (“SEC”) that they are operated “as one business.” MAA’s assets exceed \$11 billion. It owns and operates 302 apartment communities with over 99,000 apartment units, including Post Massachusetts Avenue in Washington, D.C. MAA’s net income for the first half of 2017 exceeded \$93 million.

19. Defendant MAA acquired Post Properties, Inc. and Post Apartment Homes, L.P. (collectively, “Post”) on December 1, 2016, for approximately \$4 billion. On that date Post Properties, Inc. was merged with and into Defendant Mid-America Apartment Communities, Inc., and Post Apartment Homes, L.P. was merged with and into Defendant Mid-America Apartments, L.P. The separate corporate existence of the two Post companies, which had also operated “as one business” as stated in SEC filings, ended and Post became part of MAA. Post’s liabilities for the legal violations addressed in this Complaint became MAA’s liabilities. Three Post directors became directors of MAA.

20. Post owned and operated at least 55 apartment communities with approximately 20,000 apartment units, including Post Massachusetts Avenue in Washington, D.C. The apartment communities at issue in this Complaint were among those owned and operated by Post. MAA became the owner and operator of Post’s apartment buildings, including all of The Properties, upon MAA’s acquisition of Post.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this matter pursuant to 42 U.S.C. § 3613. This Court also has jurisdiction under 28 U.S.C. §§ 1331 and 1343 because the claims alleged herein arise under the laws of the United States.

22. Venue is proper in this district under 28 U.S.C. § 1391(b) because Defendants are residents of the district and one of Defendants' apartments buildings is located in the district, with several others in close proximity, and a substantial part of the events and omissions giving rise to the claims occurred in the district.

FACTUAL BACKGROUND

I. THE PROPERTIES AND THE CRIMINAL RECORDS POLICY ENFORCED AT THE PROPERTIES

A. The Properties

23. The Properties are 55 apartment complexes across the country containing over 20,000 units. Defendants own and operate The Properties, and Defendants have applied their Criminal Records Policy at all of them. The Properties are listed in Exhibit A and are located in the District of Columbia, Florida, Georgia, Maryland, North Carolina, Texas, and Virginia.

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

- a. One apartment community in Washington, D.C. and two others in the nearby Maryland suburbs of Rockville and Hyattsville. Minimum rent ranges from \$1,100 to \$2,150 per month in these communities.

- b. Four apartment communities in Northern Virginia (Alexandria, Arlington, Centreville, and McLean). Minimum rent ranges from \$1,300 to \$1,525 per month in these communities.
- c. Five apartment communities in Charlotte. Minimum rent ranges from \$775 to \$1,090 per month in these communities.
- d. One apartment community in Raleigh. The minimum rent is \$875.
- e. Fifteen apartment communities in the Dallas/Ft. Worth area. Minimum rent ranges from \$865 to \$2,205 per month in these communities.
- f. Four apartment communities in Austin. Minimum rent ranges from \$1,060 to \$1,460 per month in these communities.
- g. Three apartment communities in Houston. Minimum rent ranges from \$830 to \$1,140 per month in these communities.
- h. Five apartment communities in Tampa. Minimum rent ranges from \$975 to \$1,320 per month in these communities.
- i. Three apartment communities in the Orlando area. Minimum rent ranges from \$1,020 to \$1,255 per month in these communities.
- j. Twelve apartment communities in the Atlanta area. Minimum rent ranges from \$945 to \$1,575 per month in these communities.

25. Amenities offered at The Properties vary. Some include pools, gyms, concierge services, and outside recreational space. Defendants present their properties as upscale and of high quality.

B. Defendants' Policy Prevented Applicants with Criminal Records from Applying

26. In 2016, as part of its mission to identify and eliminate unlawful and unfair discrimination in housing and to increase access to fair and affordable housing, ERC conducted a series of tests to assess the types and severity of the barriers individuals with criminal histories face when seeking housing in Washington, D.C. In the course of those tests, ERC encountered the policies and practices of Post Massachusetts Avenue, a property of Defendants located in Washington, D.C. Post Massachusetts Avenue's stated policy regarding criminal records—an automatic ban targeting not only convictions but also criminal charges as applied to all felonies and a substantial number of misdemeanor convictions and charges—was so exclusionary and broad in its impact that ERC launched a deeper investigation into Post's practices nationwide.

27. From November 2016 through early 2017, ERC conducted an investigation into the Criminal Records Policy maintained at The Properties. Specifically, Defendants' website revealed that, at each of The Properties, Post expressly stated that individuals with felony convictions and certain unspecified misdemeanor convictions, or pending charges of either level of offense, would not be accepted as tenants and precluded individuals with felony convictions from even submitting an application.

28. The investigation showed that Post maintained the website www.postproperties.com. This website was the first hit that appeared after prospective tenants searched for "Post Properties" using the Google search engine. On the home page for www.postproperties.com, a bar appeared across the top of the page and included different headings, such as "Communities," "Why Post," and "About Us."

29. When the ERC investigator hovered the computer cursor over the "About Us" heading, a box appeared with several subheadings on which the investigator could click. One

subheading was “FAQ” with the text “Get answers to frequently asked questions about living at a Post community.” When the investigator clicked on this subheading, it brought the investigator to another page entitled “Post Properties FAQs,” which was located at <http://www.postproperties.com/faq-full#002005>. Underneath was the following text: “Finding the right apartment home can be exciting—and a little overwhelming! At Post, we want to make the process as easy as possible so we have assembled answers to some Post Properties FAQs...”

30. The rest of the page had several sections organized by the types of questions raised, including one section entitled “Questions Regarding the Post Application Process.” In this section, there were questions such as “How do I know if the apartment I want is available?” and “How does Post determine whether or not they accept my application?” The ERC investigator clicked on this latter question and was directed to the answer farther down on the page. The answer stated as follows: “Post’s Resident Selection Criteria includes: (1) criminal history, (2) previous rental history, (3) current income, (4) credit history, and (5) employment verification. This information is verified by a third-party screening company.”

31. Immediately after this statement, the ERC investigator encountered an italicized heading for “Criminal History” and then the following statement: “**Any felony conviction or pending felony charge as well as certain misdemeanors or pending misdemeanor charges will result in denial of an Application for Residency.**” This language evidences a clear refusal to rent to people with a broad array of conviction and arrest histories.

32. Individuals visiting the website www.postproperties.com who were interested in renting an apartment could search and apply for available apartments directly from the website. The ERC investigator found that Post repeated its Felony Ban in the online application available on the website.

33. The home page included a section entitled “Search for an Apartment,” where prospective tenants were prompted to select a specific apartment community from a drop-down menu, the type of unit, and the available date on which they desired to move. When the ERC investigator did this, the website generated a list of units that matched the selected search criteria. The investigator could also click on individual units to get more information, which led to a screen that included a picture of the individual unit’s floorplan, pricing options for different lease terms, and also a “Lease Now” button. Clicking this button led to a separate portal entitled “Post Open Door.”

34. Throughout “Post Open Door,” the pages appeared with a vertical panel on the left-hand side of the screen. The panel included tabs numbered 1 through 8 and labeled as follows: (1) Rental Options; (2) Qualifying Criteria; (3) Applicant Info; (4) Additional Applicants; (5) Rentable Items; (6) Application Charges; (7) Lease Summary; and (8) Lease Documents.

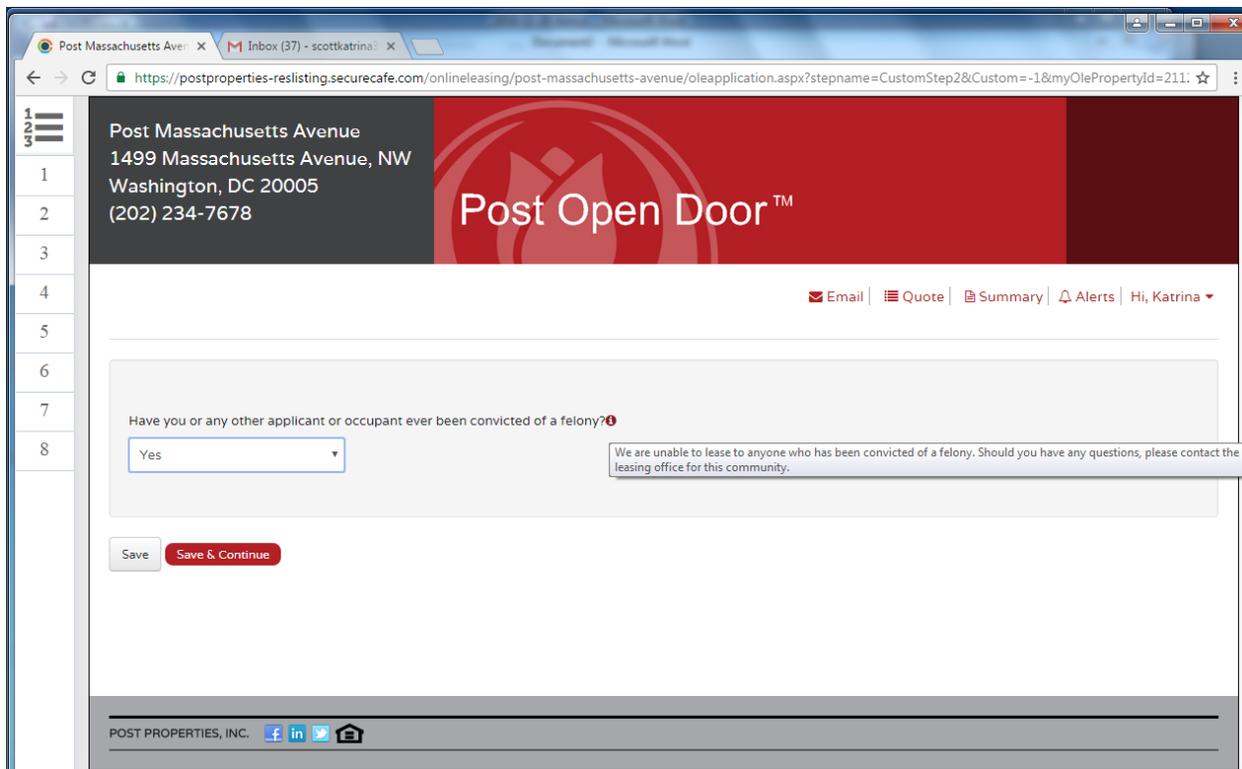
35. The first page of the “Post Open Door” portal showed basic details about the particular unit of interest, and on the left-hand panel, the first tab entitled “Rental Options” was highlighted. Underneath the unit details was a “Start Application” button, which led to another page that said “Apply Online Now” and “Get the apartment you want right away!” This page required the user to create a personal account to proceed: it included blanks for a name, email address, password, and phone number, followed by a “Create My Account” button.

36. After creating a personal account, the investigator saw a page describing various policies at The Properties regarding occupancy limits, income requirements, pets, and vehicles. The second tab entitled “Qualifying Criteria” was highlighted on the left-hand panel. At the

bottom of the page there was a checkbox next to the statement “I accept the Qualifying Criteria.” The investigator could move to the next page only after checking this box.

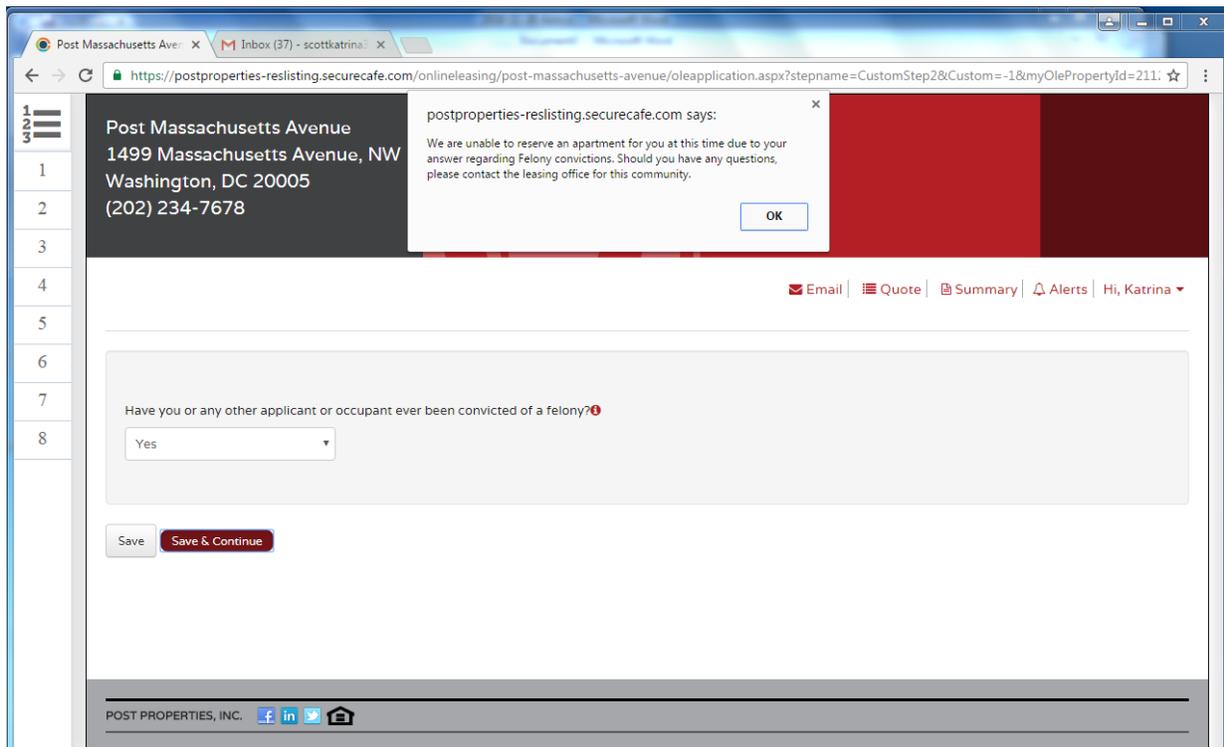
37. On the following page, the only text that appeared was this question: “Have you or any other applicant or occupant ever been convicted of a felony?” Below the question was a drop-down menu with “yes” or “no” as options. Immediately after the text of the question, there was a circular icon indicating additional information, and when the ERC investigator hovered the computer cursor over this icon, a text box appeared with the following statement: “We are unable to lease to anyone who has been convicted of a felony. Should you have any questions, please contact the leasing office for this community.”

38. The following screenshot from the website shows what the investigator saw for the Post Massachusetts Avenue property (a full page version of the image is attached as Exhibit B):



39. When ERC’s investigator selected “yes” from the drop-down menu and clicked to continue, a box popped up on the screen. The box contained this statement: “We are unable to reserve an apartment for you at this time due to your answer regarding Felony convictions. Should you have any questions, please contact the leasing office for this community.” When the investigator tried to proceed to the next step of the application by clicking the “Save & Continue” button, the same box popped up and the application process would not proceed. In this way, the investigator found that the online application worked not only to deter prospective tenants with felony convictions from applying to The Properties, but actually to block further efforts to apply.

40. The following screenshot shows what the investigator saw (a full page version of the image is attached as Exhibit C):



41. Alternatively, when the ERC investigator selected “no” from the drop-down menu and clicked to continue, a new page appeared where the third tab entitled “Applicant Info” was

highlighted on the left-hand panel. The top of the page said “Getting Started” and described the subsequent steps for completing the online application as well as the information needed to do so. The ERC investigator scrolled down the page and was prompted to provide, *inter alia*, personal contact information, a current address, current and past employment, and vehicle information. Upon entering this information the investigator could proceed with the rest of the application. One of the additional steps, under the heading “Screening Information,” required the investigator to authorize Post to obtain a criminal history report.

42. Plaintiff’s investigation confirmed that the same Criminal Records Policy applied at each of The Properties. Specifically, Plaintiff expended dozens of hours creating applicant profiles, submitting applicant information, and documenting the process of applying to each one of The Properties.

43. After Post was merged into MAA in December 2016, Plaintiff continued its investigation into the Criminal Records Policy implemented at The Properties. Through testing conducted in January 2017, Plaintiff found that MAA integrated much of Post’s website into its own, including the elements described above. In the same way as before the merger, the online application could not be completed by an individual with a history of a felony conviction. The website and online application likewise set forth the policy automatically prohibiting applicants from renting apartments at The Properties based on pending felony charges, certain misdemeanor convictions, and certain pending misdemeanor charges.

44. MAA subsequently removed information about its Criminal Records Policy from its website. Its website no longer states one way or the other whether it continues to maintain and enforce the Criminal Records Policy at The Properties.

II. DEFENDANTS' CRIMINAL RECORDS POLICY CONSTITUTES UNLAWFUL DISCRIMINATION ON THE BASIS OF DISPARATE IMPACT

45. Facially neutral housing practices that have a disparate impact on the basis of race or national origin 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. Policies that automatically deny housing to people with criminal records, including the Criminal Records Policy maintained and enforced by Defendants at The Properties, are unlawful under this standard.

46. As detailed below, automatic bans based on felony convictions or other criminal history bans have a severe disparate impact on African Americans and Latinos. Because of racial disparities among people with criminal records, Defendants' Criminal Records Policy operated to disqualify otherwise-qualified African Americans and Latinos from living at The Properties at a rate, depending on the specific property at issue, up to twelve times the rate at which otherwise-qualified whites were disqualified.

47. Even where a housing provider implements "a more tailored policy or practice that excludes individuals with only certain types of convictions," the provider "must still prove that its policy is necessary to serve a 'substantial, legitimate, nondiscriminatory interest.'" See Exhibit D (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 runs counter to HUD's directive and does not begin to satisfy Defendants' burden of proof, as such a policy does not even attempt to "accurately distinguish[] between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not," as is required. *Id.*

48. Any legitimate concerns, including those with respect to protecting safety and property, can be satisfied through the less discriminatory alternative of giving individualized consideration to each potential resident's circumstances and desirability as a tenant. Protecting safety and property is not a valid reason for an automatic ban, but is offered as an excuse by some property owners to justify an unlawful and discriminatory policy.

A. Automatic Bans in General Disproportionately and Severely Impact African Americans and Latinos at the National, State, and City Levels

49. More than 640,000 inmates are released from confinement each year and become new targets of automatic criminal history bans.² They are disproportionately African-American and Latino because the inmate population as a whole is disproportionately African-American and Latino, and 95% of inmates are eventually released.³

50. The sheer number of people released from prison every year has skyrocketed largely because the incarcerated population in the United States has grown from 300,000 in 1980 to more than 2.3 million today. Approximately 10 million misdemeanor cases are filed every year.⁴ An additional 12 million people across the country have at least one felony conviction.⁵ At the same time, it has become much easier and more common for housing providers to identify and ban people with criminal records because of the growth of companies that provide inexpensive background checks via the Internet.

² E. Ann Carson and Elizabeth Anderson, U.S. Dept. of Justice, *Prisoners in 2015*, BJS Bulletin, 10 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> ("*Prisoners in 2015*").

³ Devah Pager, *The Mark of a Criminal Record*, 108.5 Am. J. of Sociology 937, 957-960 (2003).

⁴ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314-1315 (2012).

⁵ See supra note 3 at 938.

51. The national prison population is now comprised overwhelmingly of individuals convicted of non-violent crimes. As of 2015, less than 8% of the federal prison population had been convicted of a violent crime.⁶

52. The massive increase in incarceration and in the number of people with criminal convictions has hit African Americans and Latinos especially hard. They are incarcerated at rates significantly disproportionate to their numbers in the United States general population. Together, African Americans and Latinos comprise approximately 56% of all prisoners.⁷ However, they only make up 32% of the U.S. population.⁸

53. The fact that African Americans and Latinos are far more likely than whites to have a criminal record means both that African Americans and Latinos are much more likely than whites to be barred from housing by automatic exclusions of people with criminal records and that the absolute number of African Americans and Latinos excluded is very large.

54. The Equal Employment Opportunity Commission's ("EEOC") analysis of the impact of automatic criminal history bans in the employment context 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

⁶ Carson and Anderson, *supra* note 2 at 5.

⁷ See generally Nat'l Ass'n for the Advancement of Colored People, *Criminal Justice Fact Sheet* (2016), <http://www.naacp.org/criminal-justice-fact-sheet/>.

⁸ See U.S. Census Bureau, *Quickfacts: Race and Hispanic Origin* (2016), <https://www.census.gov/quickfacts/fact/table/US/RHI325216#viewtop>.

and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (“Enforcement Guidance”), 2012 WL 1499883 (Apr. 25, 2012).⁹

55. The EEOC’s conclusion applies 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 their criminal history makes them personally unqualified. They are excluded based solely on the fact of a prior conviction or even a pending criminal charge, regardless of whether they pose 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 D (HUD Guidance) at 6-7, 9.

B. Defendants’ Criminal Records Policy Disproportionately and Severely Impacted African Americans and Latinos in the Rental Markets Where Defendants Operate

56. Defendants’ automatic criminal history ban at The Properties had a disparate impact on the basis of race and national origin, 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 level than at the national level, including those cities where The Properties are located, the disparate impact in the urban rental markets in which The Properties are located is starker than national statistics alone suggest.

⁹ The prior versions from 1987 and 1990 reached the same conclusion and set forth the same presumption.

57. Upon information and belief, the rental market for each of The Properties is the immediately surrounding metropolitan area and includes all income-qualified renters in that area.

58. The Properties maintain minimum income thresholds for applicants, requiring prospective tenants to earn at least three times the unit's rent. Given the monthly rent ranges identified in Paragraph 24, this means that applicants must earn a minimum of approximately \$40,000 to \$70,000 per year, depending on the property, to be income-qualified.

59. Even taking this income requirement into account, Defendants' Criminal Records Policy disproportionately excluded otherwise-qualified minority applicants.

60. At the national level, African Americans earning at least \$40,000 annually are 3.81 times more likely to have a criminal record than whites earning at least \$40,000 annually. Similarly, at this income level, Latinos are 2.69 times more likely than whites to have a criminal record.

61. With regard to African Americans and whites, the disparities only become greater as the income level increases. At annual minimum income levels of \$50,000, \$60,000, and \$70,000 per year, African Americans are 4.83, 9.78, and 12.61 times more likely than whites to have a past criminal conviction, respectively.

62. While less stark, criminal conviction disparities between Latinos and whites also persist as income increases. At minimums of \$50,000 and \$60,000, Latinos are 2.37 and 4.13 times likelier than whites to have a past criminal conviction, respectively.¹⁰

63. Just as at the national level, African Americans in the locations where The Properties are located are much more likely than whites to have a criminal record. For example,

¹⁰ Although reliable data is not available at the \$70,000 minimum income level, there is no reason to believe that the disparity at that level decreases.

African Americans are ten times as likely as whites to have a criminal record in Washington, D.C.; 5.08 times as likely in Tampa, Florida; 12.55 times as likely in Dekalb County, Georgia; 4.64 times as likely in Raleigh, North Carolina; 6.77 times as likely in Collin County, Texas; and 9.96 times as likely in Arlington County, Virginia. The same is true for Latinos. For example, Latinos are 5.69 times as likely as whites to have a criminal record in Charlotte, North Carolina; 2.51 times as likely in Fort Bend County, Texas; and 2.55 times as likely in Alexandria, Virginia. This pattern persists throughout the relevant jurisdictions.

64. Available data on the disparities in incarceration additionally show that rates of disproportionality in incarceration change very little when a minimum income requirement of \$40,000, \$50,000, and \$60,000 is added. Racial disparities in criminal conviction rates in the local markets where The Properties are located persist to approximately the same degree or greater as income levels rise.

65. The disparities identified herein persist across categories of crime, such as felonies and misdemeanors, as well as across offense types, including drug possession, and with respect to both convictions and charges.

66. African Americans and Latinos who are income-qualified to rent at The Properties are thus substantially more likely than whites to have been harmed by Defendants' policy against renting to people with criminal records.

67. Other "Qualifying Criteria" listed online, such as the pet and vehicle policy, do not affect demographic analyses of the rental markets for The Properties. Each of the rental markets served by The Properties include substantial populations of African-American and Latino renters who are income-qualified to become tenants at The Properties but are nevertheless *per se* ineligible for tenancy because of the Criminal Records Policy.

68. Defendants' refusal to provide housing to people on the basis of their Criminal Records Policy had a racially disparate, adverse impact on African Americans and Latinos. That impact continues to the extent the policy remains in force.

C. Giving Individualized Consideration to Applicants' Circumstances Is a Less Discriminatory Alternative That Would Satisfy Any Legitimate, Non-Discriminatory Concern

69. Defendants' Criminal Records Policy was not necessary to achieve a legitimate, nondiscriminatory business purpose, and other less discriminatory alternatives exist.

70. Giving individualized consideration to each potential resident's circumstances is a less discriminatory alternative to Defendants' Criminal Records Policy and would serve any legitimate, nondiscriminatory justification for the policy.

71. Specifically, to the extent that public safety or protection of property at The Properties is a legitimate, nondiscriminatory justification, protection of safety and property can be accomplished through the use of individual assessments that consider the nature of an individual's conviction, the amount of time since the conviction or release, and evidence of rehabilitation, among other factors. An individualized assessment allows people who have a criminal record, but who pose no realistic current or future threat to the community, to obtain housing. This more targeted and narrower approach both protects public safety and property and is less discriminatory and exclusionary because it reduces the number of minority applicants who are banned from The Properties.

72. The HUD Guidance expressly calls for the use of individualized consideration as a less discriminatory alternative to automatic exclusion on the basis of criminal history, through consideration of factors such as the "nature, severity, and recency of criminal conduct" and "evidence of rehabilitation." Exhibit D (HUD Guidance) at 7.

73. In the analogous employment context, the EEOC recognizes that individualized assessments are almost always required by law because they provide a less discriminatory alternative to automatic criminal history bans and are sufficient to protect legitimate interests like safety.

74. The EEOC's Enforcement Guidance advocates the use of "a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job," "notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity."¹¹

75. It would not have compromised any legitimate concern Defendants may have to give individualized consideration to applicants' particular circumstances and allow those whose tenancy would not threaten public safety or property interests to live at The Properties. Defendants' Criminal Records Policy nonetheless prevented any individualized consideration. Defendants' policy of automatically excluding people with felony convictions, certain misdemeanor convictions, and even some arrests, was not necessary to achieve a legitimate business purpose.

¹¹ Enforcement Guidance at 14.

III. DEFENDANTS' CRIMINAL RECORDS POLICY IS EVIDENCE OF INTENTIONAL DISCRIMINATION BECAUSE IT AIMS TO REDUCE THE NUMBER OF AFRICAN AMERICANS AND LATINOS LIVING AT THEIR PROPERTIES

76. Several factors strongly indicate that the real reason Defendants adopted the Criminal Records Policy was not to protect safety or property, or for any other legitimate reason, but to diminish the number of African Americans and Latinos who become tenants. Any such purported justification is really pretext for intentional discrimination.

77. Intentional discrimination may be inferred from a number of factors, including whether the challenged action weighs more heavily on one group than another, whether there have been changes in normal procedures, and whether there have been substantive departures from usual practices. *Vill. of Arlington Heights v. Metro. Dev. Corp.*, 429 U.S. 252 (1977).

78. The statistical disparities here are extraordinary. That is, the difference in the rates at which prospective African American and Latino tenants were adversely affected by the policy is dramatically larger than the rate at which prospective white tenants were affected. This is not a situation where a facially neutral policy harms minorities 10% or 20% more frequently than it harms non-minorities. Rather, as shown above, otherwise-qualified African Americans were two to twelve times as likely to be barred from The Properties because of Defendants' Criminal Records Policy, and otherwise-qualified Latinos were commonly two to four times as likely. Moreover, these dramatic disparities were entirely foreseeable because of well-known disparities in the criminal justice system. As the Supreme Court has explained, large statistical disparities are "often a telltale sign of purposeful discrimination..." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977).

79. The HUD Guidance was released more than 18 months ago, in April of 2016, and has been well-publicized. Upon information and belief, Defendants have been well aware of it

since its release. The Guidance is not ambiguous; it clearly explains how broad-based criminal background policies that rely on criminal histories cause a disparate impact on minorities, how automatic blanket bans that categorically exclude applicants as a result of their criminal history are not necessary to satisfy a legitimate business purpose, and that giving individualized consideration to applicants based on factors such as the nature of a conviction and evidence of rehabilitation is a less discriminatory alternative that satisfies legitimate interests in protecting safety and property.

80. Accordingly, on information and belief, Defendants were aware of the disparate and discriminatory impact that their Criminal Records Policy would have on African Americans and Latinos, and they were aware of a less-discriminatory approach to screening potential tenants — individual assessment of the potential tenant’s criminal history, based on the factors identified above — that not only would protect their safety and property interests but also complied with HUD’s explicit Guidance. However, despite this knowledge and awareness, Defendants maintained exactly the type of policy that the HUD Guidance rejects. Defendants deliberately chose to implement the more discriminatory method for criminal record screening that would automatically exclude a greater number of African American and Latino tenants. One can infer from this that the disparate outcome identified by HUD was exactly the outcome intended by Defendants.

81. Defendants’ choice to maintain the overly broad and discriminatory Criminal Records Policy also reflects substantive departures from usual industry practices, which further raises an inference of discriminatory intent.

82. Defendants’ refusal until sometime earlier this year to allow people with felony convictions to even submit an application is entirely counter to normal business practices in the

apartment industry. In the normal course of business, landlords and property managers are highly motivated to get people in the door to see their buildings. Even if someone who visits does not become a tenant, word of mouth is an important component of apartment marketing as visitors may tell others about the building. Defendants' policy instead assured that a group of people — disproportionately minority — would have no reason to visit The Properties. Departures like this from industry norms suggest an illicit motive.

83. Defendants' elevation of a felony conviction as an absolute bar to residency without consideration of other eligibility criteria for tenancy is also counter to normal business practices in the apartment industry. In the normal course of business, consideration of income, prior rental history, credit, and other factors occurs simultaneously during the application process, and after an application has been submitted.

84. Defendants' refusal to afford individualized consideration is contrary to the practices recommended by major industry organizations including the National Multifamily Housing Council, the National Apartment Association, and National Association of Realtors. These major industry organizations, among others, all disseminated information about the HUD Guidance and emphasized the importance of dispensing with automatic criminal history bans.¹² It is very unusual for a large apartment company to so thoroughly disregard sound and well-known industry practices designed to prevent discrimination.

¹² Nat'l Multifamily Hous. Council, *Criminal Conviction Screening Policies* (June 23, 2016), http://www.nmhc.org/uploadedFiles/News/NMHC_News/Criminal%20Conviction%20Screening%20Policies%20_NMHC_NAA_062316%20webinar.pdf; Nat'l Apartment Ass'n, *Fed Officials Warn Against Blanket Criminal History Exclusions* (April 25, 2016), <https://www.naahq.org/news-publications/fed-officials-warn-against-blanket-criminal-history-exclusions>; Nat'l Ass'n of Realtors, *What the Latest Fair Housing Guidance on Criminal Background Checks Means for Real Estate* (May 13, 2016), <https://www.nar.realtor/newsroom/what-the-latest-fair-housing-guidance-on-criminal-background-checks-means-for-real-estate>.

85. In light of these facts, there is no non-discriminatory explanation for why Defendants deliberately chose to implement the Criminal Records Policy over an individualized screening policy. Rather, these facts collectively support the inference — indeed, they strongly suggest — that Defendants fully understood the unnecessary and unlawful disparate impact of their Criminal Records Policy on African-American and Latino applicants, and that they created their policy precisely because of its discriminatory impact. The Criminal Records Policy is a tool that Defendants intentionally used to minimize the number of African Americans and Latinos residing in their buildings in violation of the Fair Housing Act.

IV. DEFENDANTS’ CRIMINAL RECORDS POLICY PREVENTED FORMERLY INCARCERATED INDIVIDUALS FROM OBTAINING CRITICALLY IMPORTANT SAFE AND STABLE HOUSING

86. The harm inflicted by discriminatory automatic criminal history bans is great not only in terms of the sheer number of people affected, as shown above, but also in terms of the consequences for individuals trying to reenter society, their families, and the health of our communities.

87. Individuals reentering society after time in prison confront an array of challenges in achieving social and economic stability. These include finding employment, securing government benefits, and reestablishing community ties. But their most immediate need is to secure safe and affordable housing.

88. Research shows that success in finding adequate housing, though difficult, is critically important to meeting the other challenges faced by reentrants. Housing has been characterized, properly, as the “lynchpin that holds the reintegration process together.”¹³ Or as

¹³ Jeremy Travis, *But They All Come Back: Facing Challenges of Prisoner Reentry* 219 (2005).

another expert put it, “[t]he search for permanent, sustainable housing portends success or failure for the entire reintegration process.”¹⁴

89. Other research has shown that reentrants who do not find stable housing in the community are more likely to recidivate than those who are able to secure permanent housing. Recidivism additionally impacts the whole surrounding community.

90. An Urban Institute study likewise found a causal connection between the inability to find permanent housing and recidivism. According to the study, reentrants often did not succeed in the community if they could not find a safe and stable place to live.¹⁵

91. This and other evidence makes plain that safe and permanent housing is crucial to success in the reintegration process. Yet automatic criminal history bans directly prevent reentrants from obtaining such housing. By design, these policies do so thoughtlessly, without giving any consideration to the particular circumstances of a person trying to find a place to live. This complete disregard for individual circumstances cannot be justified under the law, and needlessly inflicts great harm on the formerly incarcerated, their communities, and organizations like Plaintiff that are committed to preserving access to equal housing opportunities.

INJURY TO PLAINTIFF

92. As a result of Defendants’ actions described above, ERC has been directly and substantially injured. Plaintiff has been frustrated in its mission to eradicate discrimination in housing and in carrying out the programs and services it provides, including encouraging

¹⁴ Barbara H. Zaitzow, *We’ve Come a Long Way, Baby... Or Have We? Challenges and Opportunities for Incarcerated Women to Overcome Reentry Barriers* 233 (in *Global Perspectives on Re-Entry* (2011)).

¹⁵ Jeremy Travis and Caterina G. Roman, Urban Inst., *Taking Stock: Housing, Homelessness, and Prisoner Reentry* 7-10 (2004), <http://www.urban.org/publications/411096.html>.

integrated living patterns, eliminating unlawful barriers in housing, educating the public about fair housing rights and requirements, educating and working with industry groups on fair housing compliance, and providing assistance to individuals and families looking for housing or affected by discriminatory housing practices.

93. After becoming increasingly aware of the effects of broad and punitive criminal record screening policies, including the exclusion of applicants with criminal records without individualized consideration, as well as the disparate impact such policies have on minority applicants, ERC invested considerable time and effort in education about the importance of accessible housing for people with criminal records. In the wake of its discovery of Defendants' policy, ERC directed much of its education and counseling efforts to rebutting the impression that automatic criminal history bans like Defendants' are permissible.

94. Because Defendants' Criminal Records Policy has had the effect of discouraging people with criminal records, who are predominantly minorities, from applying for housing, Defendants' conduct frustrated Plaintiff's mission of ensuring equal housing opportunity for all individuals, free of arbitrary barriers.

95. Plaintiff has been damaged by having to divert scarce resources that could have been used to provide the aforementioned services, *supra* at ¶ 92, to instead identify, investigate, and counteract Defendants' discriminatory conduct.

96. Specifically, Plaintiff's staff expended over 50 hours investigating Defendants' unlawful policy and practices by examining Defendants' website and interfacing with online applications for each of the 55 properties. Plaintiff's staff also documented each application attempt.

97. In addition, Plaintiff has diverted time and money to education and outreach efforts directly and specifically aimed at countering Defendants' discrimination. After encountering Defendants' blatantly discriminatory practices in late 2016, Plaintiff developed community education programs to counteract them. For example, Plaintiff (a) added content to its educational presentations about discriminatory criminal records screening policies, using Defendants' policy as an example; (b) developed and recently launched an online learning course titled "Best Practices for Ensuring that Criminal Records Screening Policies & Practices Comply with Fair Housing Requirements," which targets housing providers to ensure they avoid unlawful and unnecessary automatic criminal history bans; (c) added new content to its Fair Housing Toolkit designed to help people with criminal records understand their rights; and (d) engaged in community and housing industry events to help educate individuals with criminal records and service providers who have faced automatic criminal history bans in the housing market.

98. Plaintiff engaged in each of the aforementioned activities in specific response to Defendants' practices because they were significantly more egregious and exclusionary than the practices of other housing providers. These activities have caused Plaintiff's staff, from the Executive Director on down, to expend more than 400 hours of time that, but for the need to address Defendants' practices, would have been spent on other objectives.

99. Plaintiff has also expended funds on these efforts that would have been otherwise allocated. Notably, Plaintiff specifically opted not to develop two online courses on accessibility or update its general fair housing course in order to devote funds to the "Best Practices for Ensuring that Criminal Records Screening Policies & Practices Comply with Fair Housing Requirements" course developed in response to Defendants' conduct.

100. Until redressed and permanently ceased, Defendants' unlawful, discriminatory actions will continue to injure Plaintiff, by *inter alia*:

- a. interfering with efforts and programs intended to bring about equality of 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 Plaintiff's other activities and services, such as education, outreach, and counseling; and
- c. frustrating Plaintiff's mission and purpose of promoting the equal availability of housing to all persons without regard to their membership in any protected category, including race and national origin.

101. Defendants' discriminatory conduct, if continued, will also deprive individuals to whom Plaintiff provides services and others living in and near The Properties of the benefit of living in a diverse community.

CAUSES OF ACTION

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

102. Plaintiff repeats and incorporates by reference all allegations set forth in Paragraphs 1 through 101 above.

103. Defendants' acts, policies, and practices have had an adverse and disproportionate impact on African Americans and Latinos in the rental markets in which The Properties are located as compared to similarly-situated whites. This adverse and disproportionate impact is the direct result of Defendants' policy of automatically refusing housing to all persons within either component of its Criminal Records Policy—the Felony Policy (which includes the Felony Ban)

or the Misdemeanor Policy—with no consideration of their individual characteristics and circumstances.

104. Defendants' Criminal Records Policy was not and is not necessary to serve any substantial, legitimate, nondiscriminatory interest, and any such interest could be satisfied by another practice—providing individualized consideration—that would have a less discriminatory effect.

105. Defendants' acts, policies, and practices constitute discrimination and violate the Fair Housing Act, as amended, 42 U.S.C. § 3604, and its implementing regulations, in that:

- a. Defendants' acts, policies, and practices constitute a refusal to rent housing or negotiate for the rental of housing because of race and/or national origin, and have made housing unavailable because of race and/or national origin, in violation of 42 U.S.C. § 3604(a);
- b. Defendants' acts, as described above, provide different terms, conditions, and privileges of rental housing, as well as different services and facilities in connection therewith, on the basis of race and/or national origin in violation of 42 U.S.C. § 3604(b); and
- c. Defendants' notices and statements have indicated a preference, limitation, and discrimination based on race and/or national origin in violation of 42 U.S.C. § 3604(c). Defendants' statements in their Criminal Records Policy that excluded any person from renting an apartment at The Properties because of criminal history subject to the Felony Policy and/or Misdemeanor Policy have a discriminatory effect on African Americans and Latinos because they actually or predictably result in a disparate impact on the basis of race and national origin.

Count II: Disparate Treatment in Violation of the Fair Housing Act, 42 U.S.C. § 3604

106. Plaintiff repeats and incorporates by reference all allegations set forth in Paragraphs 1 through 101 above.

107. Defendants' acts, policies, and practices have been carried out with the intention of discriminating on the basis of race and national origin.

108. On information and belief, Defendants were aware of the disparate impact that their Criminal Records Policy would have on African Americans and Latinos. They were also aware of HUD's April 2016 Guidance regarding criminal records-based screening policies, including its repudiation of automatic blanket bans and its instructions to adopt less discriminatory approaches to screening, such as individual assessment of criminal history, that would adequately protect public safety and property concerns.

109. However, despite this knowledge and awareness, Defendants departed from industry practices and deliberately chose to implement the more discriminatory method for screening on the basis of criminal history. Under these facts, no legitimate, non-discriminatory explanation exists for Defendants' choice in adopting and maintaining the more discriminatory and exclusionary policy. Defendants selected the Criminal Records Policy with the intent and expectation that the policy would disproportionately prevent African Americans and Latinos from obtaining housing at The Properties.

110. Defendants' acts, policies, and practices constitute intentional discrimination and violate the Fair Housing Act, as amended, 42 U.S.C. § 3604, and its implementing regulations, in that:

- a. Defendants' acts and practices constitute a refusal to rent housing or negotiate for the rental of housing because of race and/or national origin, and have made

housing unavailable because of race and/or national origin, in violation of 42 U.S.C. § 3604(a); and

- b. Defendants' acts, as described above, provide different terms, conditions, and privileges of rental housing, as well as different services and facilities in connection therewith, on the basis of race and/or national origin in violation of 42 U.S.C. § 3604(b).
- c. Defendants' notices and statements have indicated a preference, limitation, and discrimination based on race and/or national origin in violation of 42 U.S.C. § 3604(c).

DEMAND FOR JURY TRIAL

111. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury on all issues triable as of right.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court grant it the following relief:

- (1) Enter a declaratory judgment finding that the foregoing actions of Defendants violate 42 U.S.C. § 3604;
- (2) Enter a permanent injunction:
 - (a) enjoining Defendants and their directors, officers, agents, and employees from publishing, implementing, and enforcing the illegal, discriminatory conduct described herein;
 - (b) directing Defendants and their directors, officers, agents, and employees to revise their Criminal Records Policy, to the extent it continues, to reduce

- the adverse and disproportionate effect it causes on the basis of race and national origin and make it consistent with the HUD Guidance; and
- (c) directing Defendants and their directors, officers, agents, and employees to take all 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 Plaintiff in an amount to be determined by the jury that would fully compensate Plaintiff for injuries caused by the conduct of Defendants alleged herein;
- (4) Award punitive damages to Plaintiff in an amount to be determined by the jury that would punish Defendants for the willful, malicious, and reckless conduct alleged herein and that would effectively deter similar conduct in the future;
- (5) Award Plaintiff its reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 3613(c)(2);
- (6) Award prejudgment interest to Plaintiff; and
- (7) Order such other relief as this Court deems just and equitable.

December 12, 2017

Respectfully submitted,

/s/ John P. Relman

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Attorneys for Plaintiff

EXHIBIT

A

Exhibit A: The Properties

<i>Apartment Complex</i>	<i>City</i>	<i>Region</i>
Post Massachusetts Avenue	Washington, DC	Washington
Post Falls Grove	Rockville, MD	Washington
Post Park	Hyattsville, MD	Washington
Post Carlyle Square	Alexandria, VA	Washington
Post Corners	Centreville, VA	Washington
Post Pentagon Row	Arlington, VA	Washington
Post Tysons Corner	McLean, VA	Washington
Post Lake at Baldwin Park	Orlando, FL	Orlando
Post Lakeside	Windermere, FL	Orlando
Post Parkside	Orlando, FL	Orlando
Post Bay at Rocky Point	Tampa, FL	Tampa
Post Harbour Place	Tampa, FL	Tampa
Post Hyde Park	Tampa, FL	Tampa
Post Rocky Point	Tampa, FL	Tampa
Post Soho Square	Tampa, FL	Tampa
Post Alexander Reserve	Atlanta, GA	Atlanta
Post Briarcliff	Atlanta, GA	Atlanta
Post Brookhaven	Atlanta, GA	Atlanta
Post Chastain	Atlanta, GA	Atlanta
Post Crossing	Atlanta, GA	Atlanta
Post Gardens	Atlanta, GA	Atlanta
Post Glen	Atlanta, GA	Atlanta
Post Parkside	Atlanta, GA	Atlanta
Post Peachtree Hills	Atlanta, GA	Atlanta
Post Riverside	Atlanta, GA	Atlanta
Post Spring	Smyrna, GA	Atlanta
Post Stratford	Atlanta, GA	Atlanta
Post Ballantyne	Charlotte, NC	Charlotte
Post Gateway Place	Charlotte, NC	Charlotte
Post Park at Phillips Place	Charlotte, NC	Charlotte
Post South End	Charlotte, NC	Charlotte
Post Uptown Place	Charlotte, NC	Charlotte
Post Parkside at Wade	Raleigh, NC	Raleigh
Post Barton Creek	Austin, TX	Austin
Post Park Mesa	Austin, TX	Austin
Post South Lamar	Austin, TX	Austin
Post West Austin	Austin, TX	Austin
Post Abbey	Dallas, TX	Dallas/Ft. Worth
Post Addison Circle	Addison, TX	Dallas/Ft. Worth

<i>Apartment Complex</i>	<i>City</i>	<i>Region</i>
Post Cole's Corner	Dallas, TX	Dallas/Ft. Worth
Post Eastside	Richardson, TX	Dallas/Ft. Worth
Post Gallery	Dallas, TX	Dallas/Ft. Worth
Post Heights	Dallas, TX	Dallas/Ft. Worth
Post Katy Trail	Dallas, TX	Dallas/Ft. Worth
Post Legacy	Plano, TX	Dallas/Ft. Worth
Post Meridian	Dallas, TX	Dallas/Ft. Worth
Post Sierra at Frisco Bridges	Frisco, TX	Dallas/Ft. Worth
Post Square	Dallas, TX	Dallas/Ft. Worth
Post Uptown Village	Dallas, TX	Dallas/Ft. Worth
Post Vineyard	Dallas, TX	Dallas/Ft. Worth
Post Vintage	Dallas, TX	Dallas/Ft. Worth
Post Worthington	Dallas, TX	Dallas/Ft. Worth
Post 510	Houston, TX	Houston
Post at Afton Oaks	Houston, TX	Houston
Post Midtown Square	Houston, TX	Houston

EXHIBIT

B

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Post Massachusetts Avenue
 1499 Massachusetts Avenue, NW
 Washington, DC 20005
 (202) 234-7678

Post Open Door™

Email | Quote | Summary | Alerts | Hi, Katrina ▾

Have you or any other applicant or occupant ever been convicted of a felony? ❗

Yes ▾

We are unable to lease to anyone who has been convicted of a felony. Should you have any questions, please contact the leasing office for this community.

Save Save & Continue

EXHIBIT

C

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- 8

Post Massachusetts Avenue
1499 Massachusetts Avenue, NW
Washington, DC 20005
(202) 234-7678

postproperties-reslisting.securecafe.com says:

We are unable to reserve an apartment for you at this time due to your answer regarding Felony convictions. Should you have any questions, please contact the leasing office for this community.

OK

Email | Quote | Summary | Alerts | Hi, Katrina

Have you or any other applicant or occupant ever been convicted of a felony?

Yes

Save **Save & Continue**

EXHIBIT

D



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

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. 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.3d 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

JS-44 (Rev. 6/17 DC)

<p>I. (a) PLAINTIFFS Equal Rights Center</p> <p>(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____ (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Ryan Downer Relman, Dane & Colfax, PLLC 1225 19th St., NW, Suite 600 Washington, D.C. 20036 (202) 728-1888</p>	<p>DEFENDANTS Mid-America Apartment Communities, Inc. and Mid-America Apartments, L.P.</p> <p>COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p><small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small></p> <p>ATTORNEYS (IF KNOWN)</p>																								
<p>II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)</p> <p><input type="radio"/> 1 U.S. Government Plaintiff <input checked="" type="radio"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="radio"/> 2 U.S. Government Defendant <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY!</p> <table style="width:100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<p><input type="radio"/> A. Antitrust</p> <p><input type="checkbox"/> 410 Antitrust</p>	<p><input type="radio"/> B. Personal Injury/Malpractice</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Medical Malpractice</p> <p><input type="checkbox"/> 365 Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Product Liability</p>	<p><input type="radio"/> C. Administrative Agency Review</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><u>Social Security</u></p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)</p>	<p><input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction</p> <p>Any nature of suit from any category may be selected for this category of case assignment.</p> <p>*(If Antitrust, then A governs)*</p>
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E. General Civil (Other) OR **F. Pro Se General Civil**

<p><u>Real Property</u></p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent, Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p> <p><u>Personal Property</u></p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p><u>Bankruptcy</u></p> <p><input type="checkbox"/> 422 Appeal 27 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p><u>Prisoner Petitions</u></p> <p><input type="checkbox"/> 535 Death Penalty</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Conditions</p> <p><input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement</p> <p><u>Property Rights</u></p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 835 Patent – Abbreviated New Drug Application</p> <p><input type="checkbox"/> 840 Trademark</p>	<p><u>Federal Tax Suits</u></p> <p><input type="checkbox"/> 870 Taxes (US plaintiff or defendant)</p> <p><input type="checkbox"/> 871 IRS-Third Party 26 USC 7609</p> <p><u>Forfeiture/Penalty</u></p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 430 Banks & Banking</p> <p><input type="checkbox"/> 450 Commerce/ICC Rates/etc.</p> <p><input type="checkbox"/> 460 Deportation</p>	<p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p> <p><input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Satellite TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p> <p><input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)</p>
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<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input checked="" type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <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"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multi-district Litigation
 7 Appeal to District Judge from Mag. Judge
 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 42 U.S.C § 3604; discrimination under the Fair Housing Act of 1968

VII. REQUESTED IN COMPLAINT	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____	JURY DEMAND: YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>
VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: 12/12/2017	SIGNATURE OF ATTORNEY OF RECORD
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

EQUAL RIGHTS CENTER

Plaintiff(s)

v.

MID-AMERICA APARTMENT COMMUNITIES, INC.

and

MID-AMERICA APARTMENTS, L.P.

Defendant(s)

Civil Action No. 1:17-cv-02659

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) MID-AMERICA APARTMENT COMMUNITIES, INC.
MID-AMERICA APARTMENTS, L.P.
1015 15th St NW, Suite 1000
Washington, DC 20005

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Ryan Downer
Relman, Dane & Colfax, PLLC
1225 19th St. NW, Suite 600
Washington, DC 20036

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 12/12/2017

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: