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# WISCONSIN'S 2011 ACT 108, LEGISLATIVE INACTION, AND SEVERE RACIAL DISPARITY: A RECIPE FOR A FAIR HOUSING VIOLATION

By: Taylor N. Haefele\*

## ABSTRACT

When individuals are released from prison, the biggest predictor of whether they will reoffend or successfully reenter society is whether the recently released individual has access to stable housing. Unfortunately, nearly every avenue to housing requires passing a criminal background check. Recognizing this as posing a nearly insurmountable barrier to accessing stable housing upon release from prison, Seattle, Washington; Minneapolis, Minnesota; and San Francisco, California have all enacted ordinances regulating the use of background checks to help ensure access to stable housing for formerly incarcerated individuals.

Madison, Wisconsin, and other Wisconsin cities had similar ordinances that regulated the use of background checks in housing. Those ordinances were abrogated in 2011 through Act 108, which prohibited localities from regulating landlords and instead reserved that power to the state government. In the eleven years that have passed since Act 108, the state legislature has not passed any legislation that would alleviate the burden of finding stable housing for recently released convicts. This Comment suggests that, in light of guidance issued in 2016 from the Department of Housing and Urban Development which explained that pretextual use of criminal background checks to deny housing may be actionable under the Fair Housing Act, the inability of localities to regulate the use of criminal records in housing prevents Wisconsin localities from “affirmatively further[ing] fair access to housing for all.”

## INTRODUCTION

As part of a decade long crusade to decrease regulation of landlords,<sup>1</sup> the Wisconsin legislature enacted a measure to prohibit municipalities from imposing any limitations on landlord tenant screening policies.<sup>2</sup> This blanket ban is pervasive throughout the state and results in substantial barriers to housing for the thousands of Wisconsin citizens who have a criminal record.

Research suggests that eighty percent of formerly incarcerated individuals have been denied access to housing on the basis of their conviction.<sup>3</sup> In other words, roughly fifty-six to eighty million Americans and their families have been or will be denied access to housing due to the criminal record of any member of the household.<sup>4</sup> For the formerly incarcerated, the inability to access housing is a substantial barrier to successfully rejoining society after release. Access to stable housing is a particularly strong predictor of the extent to which a justice-involved<sup>5</sup> individual will successfully reintegrate into society following release from incarceration<sup>6</sup> because access to stable

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<sup>1</sup> See Lisa Speckhard Pasque, *Locked Out: How Sweeping Changes to Wisconsin's Landlord Tenant Laws Affect Vulnerable Populations*, CAPITAL TIMES (Feb. 7, 2018), [https://madison.com/ct/news/local/govt-and-politics/locked-out-how-sweeping-changes-to-wisconsin-landlord-tenant-laws-affect-vulnerable-populations/article\\_8989c57-ce9c-506b-bc9c-63bf55de3d88.html](https://madison.com/ct/news/local/govt-and-politics/locked-out-how-sweeping-changes-to-wisconsin-landlord-tenant-laws-affect-vulnerable-populations/article_8989c57-ce9c-506b-bc9c-63bf55de3d88.html).

<sup>2</sup> WIS. STAT. § 66.0104(2)(a) (2019-20).

<sup>3</sup> SANETA DEVIUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUM. RTS. ET AL., WHO PAYS?: THE TRUE COST OF INCARCERATION ON FAMILIES 26-27 (Sep. 2015), <http://whopaysreport.org/who-pays-full-report/> [hereinafter ELLA BAKER REPORT].

<sup>4</sup> See *id.*; Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), [https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas#:~:text=Today%2C%20nearly%20one%2Dthird%20of,more%20than%20100%20million%20records](https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas#:~:text=Today%2C%20nearly%20one%2Dthird%20of,more%20than%20100%20million%20records.). Estimates of individuals in the United States with a criminal record range from seventy to one hundred million Americans as having a criminal record of some form. Friedman, *supra*.

<sup>5</sup> This is a term of art often used in lieu of descriptions like formerly incarcerated, felon, convict, etc. as these terms are reflections of stigmas surrounding criminal records.

<sup>6</sup> Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records will Improve Public Safety and Strengthen the Economy*, 42 W.L. REV. 1, 11 (2014) (indicating that a lack of stable housing is estimated to make it seven times more likely that a justice-involved individual will recidivate after reentry). See also Megan C. Berry & Richard L. Wiener, *Exoffender Housing Stigma and Discrimination*, 26 PSYCH. PUB. POL'Y & L. 213, 213 (May 2020).

housing decreases the likelihood that a formerly incarcerated individual will recidivate<sup>7</sup> or become homeless.<sup>8</sup>

Barriers to housing access for justice-involved individuals disproportionately harms racial minorities<sup>9</sup> because racial minorities are arrested and convicted at significantly higher rates than other populations.<sup>10</sup> When these barriers are coupled with historical problems relating to housing discrimination further compounds the issue by exacerbating the mass incarceration of minorities at historically high rates.<sup>11</sup> Despite various governmental attempts to prohibit discrimination in housing,<sup>12</sup> little has been done to address the implicit discriminatory barriers to housing encountered by justice-involved individuals and their families.

This Comment argues that Wisconsin's 2011 Act 108,<sup>13</sup> which prohibits local governments from regulating landlords' tenant screening processes, contravenes the *Fair Housing Act's* guarantee of fair access to housing because 2011 Act 108 permits landlords to avoid liability for discriminatory blanket bans against renting to individuals with a criminal history. Part I of this Comment will explore federal and state laws prohibiting discrimination in housing access and the barriers to fair housing access for justice-involved individuals. In Part II, this Comment will analyze how Wisconsin's 2011 Act 108 conflicts with the *Fair Housing Act's* goal of ensuring fair access to housing because 2011 Act 108 prevents local governments from acting to ensure fair access to housing for the formerly incarcerated and their families. Part III argues that Wisconsin's state legislature should enact a *Fair Chance at Housing* measure to further the *Fair Housing Act's* mandate that governments aggressively and affirmatively further programs designed to defeat discriminatory practices in housing. In addition to advocating for the immediate repeal of

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<sup>7</sup> See Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 196 (2009) (citing ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, & POLITICS* 83 (2009)).

<sup>8</sup> *Id.* Homelessness is a serious problem among parolees due to the substantial barriers to accessing housing after release and the lack of resources available via reentry programs to assist the parolee in securing stable housing. *Id.* at 196-97. Homelessness or instability of housing for a formerly incarcerated individual is frequently associated with recidivism, which renders current versions of reentry programs for the formerly incarcerated ineffective. *Id.*

<sup>9</sup> Emily Ponder Williams, *Fair Housing's Drug Problem: Combatting the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform*, 54 HARV. C.R.-C.L. L. REV. 769, 770, 772, 779 (2019).

<sup>10</sup> *Id.* at 770.

<sup>11</sup> TERRY-ANN CRAIGIE ET AL., *CONVICTION, IMPRISONMENT, AND LOST EARNINGS* 7, 10 (2020).

<sup>12</sup> *Fair Housing and Related Laws*, U.S. DEP'T HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/fair\\_housing\\_and\\_related\\_law](https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_and_related_law) (last visited Nov. 9, 2020).

<sup>13</sup> 2011 Wis. Acts 108 (codified at WIS. STAT. § 66.0104(2)(a) (2019-20)).

2011 Act 108, this Comment will emphasize the illogical disconnect between Wisconsin's expansive limitations upon an employer's consideration of a job applicant or employee's criminal record with the lack of regulation in the housing sector as it relates to landlord review of a potential tenants past interaction with the criminal justice system.

## **PART I: THE FAIR HOUSING ACT, WISCONSIN'S OPEN HOUSING ACT, AND THE USE OF CRIMINAL BACKGROUND CHECKS IN HOUSING**

Before evaluating the conflict between 2011 Act 108 and the federal *Fair Housing Act*, this Comment will explore several components essential to understanding the underlying problem with discrimination through the use of criminal background checks in housing discrimination. First, this Comment will explore the importance of housing access for the justice-involved and how housing restrictions may conflict with the property rights of landlords. Next will be an evaluation of the federal *Fair Housing Act*, and the implications of the Department of Housing and Urban Development's 2016 guidance on using criminal records in housing decisions. Finally, there will be a discussion of Wisconsin's *Open Housing Act*, and its relationship to the federal *Fair Housing Act*.

### **Housing Access for Individuals with Criminal Records**

A "criminal record" is a list documenting an individual's arrests and convictions.<sup>14</sup> Not only do criminal records detail all of an individual's convictions, but they frequently also contain details about arrests even if the individual was neither charged nor convicted.<sup>15</sup> Approximately one-third of Americans have some form of a criminal record,<sup>16</sup> and an estimated 58.9 million Americans have been convicted of a felony or misdemeanor.<sup>17</sup> A 2017 study by the Brennan

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<sup>14</sup> *Information about Criminal Records: What exactly is a criminal record?*, LEGAL AID AT WORK <https://legalaidatwork.org/factsheet/records/>.

<sup>15</sup> *Id.* In Wisconsin, an individual's arrest will be reflected in their criminal record any time that person has been questioned, apprehended, taken into custody, held for investigation, arrested, charged with a felony, misdemeanor, or other offense. *Arrest and Conviction Record*, WIS. DEP'T OF WORKFORCE DEV., <https://dwd.wisconsin.gov/er/civil-rights/discrimination/arrest.htm>. A conviction record will contain information of an individual's conviction for a misdemeanor or felony, a judgment of delinquency, less than honorable discharge, placement on probation, fines, imprisonment, or parole. *Id.*

<sup>16</sup> Although actual numerical estimates vary, the general consensus is that approximately one in three Americans have a criminal record. *See, e.g.*, ELLA BAKER REPORT, *supra* note 3, at 12; Friedman, *supra* note 4; ELAYNE WEISS, HOUSING ACCESS FOR PEOPLE WITH CRIMINAL RECORDS: 2019 ADVOCATE'S GUIDE 6-27, [https://nlihc.org/sites/default/files/AG-2019/06-07\\_Housing-Access-Criminal-Records.pdf](https://nlihc.org/sites/default/files/AG-2019/06-07_Housing-Access-Criminal-Records.pdf) (last visited Feb. 1, 2021).

<sup>17</sup> CRAIGIE ET AL., *supra* note 11, at 7.

Center for Justice found that of the 7.7 million formerly incarcerated Americans, 5 million were Black or Latino.<sup>18</sup>

There are over 1,300 barriers to housing access as a result of criminal conviction.<sup>19</sup> The risk of losing access to housing in the private or public sectors increases significantly when a member of the household has been incarcerated,<sup>20</sup> with only nine percent of formerly incarcerated people reporting that they are stably housed while the vast majority report experiencing a decline in their housing situation following reentry.<sup>21</sup> A 2014 study found that nearly 80% of formerly incarcerated individuals—approximately 570 of those surveyed—had been denied housing due to blanket bans on tenants with criminal records.<sup>22</sup>

The rights associated with property ownership provide private landlords with a substantial amount of discretion in deciding whether to rent their property to a prospective tenant.<sup>23</sup> Nine in ten landlords automatically conduct background checks on prospective tenants as part of the rental decision process.<sup>24</sup> As the utilization of background checks in the private sector has increased, landlords have increasingly employed various criminal record databases as part of the screening process for prospective new tenants.<sup>25</sup> Landlords often use these databases without verifying the accuracy of the database they are using,<sup>26</sup> but consider an applicant's criminal background as one of the most important criteria when making their rental decisions.<sup>27</sup>

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<sup>18</sup> *Id.* at 10.

<sup>19</sup> Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People With Criminal Convictions*, CTR. FOR AM. PROGRESS (Apr. 14, 2021), <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions>.

<sup>20</sup> ELLA BAKER REPORT, *supra* note 3, at 27. In tenant screening processes, landlords typically will screen all individuals of a household. *Id.* The denial of a prospective tenant's application need not be based on the applicant's criminal background, but may also be based on a household member's record. *Id.*

<sup>21</sup> Lake, *supra* note 19.

<sup>22</sup> See ELLA BAKER REPORT, *supra* note 3, at 7, 26.

<sup>23</sup> Oyama, *supra* note 7, at 194.

<sup>24</sup> Lake, *supra* note 19.

<sup>25</sup> Oyama, *supra* note 7, at 191-92 (stating that approximately 80% of large-scale housing rental agencies, and the majority of smaller scale rental agencies, use criminal record databases in their tenant screening processes).

<sup>26</sup> *Id.* at 194; see also Lahny R. Silva, *Criminal Histories in Public Housing*, 2015 WIS. L. REV. 375, 386 (explaining that studies show that even governmentally maintained criminal record databases have been found to be full of errors).

<sup>27</sup> TransUnion SmartMove, *TransUnion Independent Landlord Survey Insights*, SMART MOVE RESOURCES (Aug. 7, 2017), <https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page>.

Criminal record databases are widely available for use in the private sector.<sup>28</sup> Despite the high rates of error in these databases, individuals are rarely notified about a database's documentation of their criminal records' contents nor given an opportunity to correct the error.<sup>29</sup> This is due to a combination of the lack of regulation of background screening companies and the automation of the screening process which prevents landlords from making individualized decisions.<sup>30</sup> The continued use of criminal record databases that are rife with errors<sup>31</sup> perpetuates stigmatization of individuals with a criminal record<sup>32</sup> and exacerbates the cycle of recidivism.<sup>33</sup> Ultimately, minority populations in the United States are the most likely to be negatively harmed by the unfettered use of criminal record checks in housing decisions because of their increased likelihood of having a criminal record.<sup>34</sup> The stigma surrounding criminal records compounds with implicit bias against minorities to create nearly insurmountable barriers to housing access.<sup>35</sup>

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<sup>28</sup> Despite their widespread availability, little has been done to correct the high rates of inaccuracies within these databases nor have most consumers of these databases been made aware of the high error rates. Oyama, *supra* note 7, at 188-89.

<sup>29</sup> *Id.* Many prospective tenants are put in the position of choosing between risking a denial of housing if they truthfully disclose their criminal record or being penalized in the future for concealing their criminal record. *Id.* at 194. Additionally, the lack of regulation of background screening companies and their documented inaccuracies creates significant barriers to an applicant's ability to ensure that their background is reported accurately in every criminal record database. ARIEL NELSON, NATIONAL CONSUMER LAW CENTER, BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING 3, 10-11 (2019) <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf>.

<sup>30</sup> NELSON, *supra* note 29, at 3.

<sup>31</sup> E.g. Derek Gilna, *Criminal Background Checks Criticized for Incorrect Data, Racial Discrimination*, PRISON LEGAL NEWS (Feb. 15, 2014), <https://www.prisonlegalnews.org/news/2014/feb/15/criminal-background-checks-criticized-for-incorrect-data-racial-discrimination/>; Nicole Weissman & Marina Duane, *Five problems with criminal background checks*, URBAN INSTITUTE (Mar. 14, 2017), <https://www.urban.org/urban-wire/five-problems-criminal-background-checks>.

<sup>32</sup> Berry & Wiener, *supra* note 6, at 214-15. In a study on landlords' willingness to rent to individuals with a criminal record, only forty-three percent of the landlords were willing to rent to an applicant with a criminal record. *Id.* The same study also confirmed that people hold negative stereotypes of people classified as "released prisoners." *Id.*

<sup>33</sup> Gianna Baker & Kristin Ginger, *A Fair Chance at Housing For Those With Records*, SHELTERFORCE (Apr. 13, 2020), <https://shelterforce.org/2020/04/13/a-fair-chance-at-housing-for-those-with-records>.

<sup>34</sup> See *Wisconsin profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/WI.html> (last visited Apr. 12, 2022). Black and Latino Americans are significantly more likely to be arrested and convicted than their white counterparts and comprise a disproportionate percentage of the justice-involved population. *Id.* In Wisconsin, white inmates comprise fifty-two percent of the prison population, but represent eighty-three percent of the state's population while Black inmates comprise thirty-eight percent of the prison population but only six percent of the state's population. *Id.*

<sup>35</sup> Margaretta Lin et al., *A Policy Justice Brief for Oakland Political Leaders*, JUST CITIES, 4-5 (Dec. 19, 2019), <https://static1.squarespace.com/static/5c09723c55b02cf724c3d340/t/5e3a1ae6f8a25f606a7bc3f9/1580866279444/Oakland+Fair+Chance+Housing+Policy+Brief+12.19.19.pdf>.

In the public sector, the local Public Housing Authority (PHA) may enact its own regulations regarding when an individual's criminal record would disqualify that individual from accessing public housing but is still subject to regulations promulgated by the Department of Housing and Urban Development (HUD). Moreover, PHAs have implemented "one strike and you're out" rules which permit PHAs to evict people who become involved in criminal activity,<sup>36</sup> even if those individuals have not been arrested, charged, or convicted for the activity. PHAs also enforce policies that permanently exclude individuals who have been convicted of certain crimes,<sup>37</sup> most frequently drug crimes.

Seemingly contrary to the 2016 guidance, HUD has explicitly directed local PHAs to exclude entire families when a member of the household is known to have participated in illicit drug-related activities, even if the individual has not actually been convicted of a drug-related offense.<sup>38</sup> In both the public and private sectors, denying access to housing on the basis of contact with the criminal justice system is problematic because landlords and PHAs rarely distinguish between records indicating that an individual may be unable to meet the obligations of tenancy and records regarding crimes wholly unrelated to the ability to meet those same obligations.<sup>39</sup>

### The Federal Fair Housing Act<sup>40</sup>

Recognizing the importance of housing access to citizens' well-being,<sup>41</sup> and the many barriers to housing access for disenfranchised

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<sup>36</sup> Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment>.

<sup>37</sup> *Id.*

<sup>38</sup> U.S. DEP'T HOUS. & URB. DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK, 28 (2003) [https://www.hud.gov/sites/documents/DOC\\_10760.PDF](https://www.hud.gov/sites/documents/DOC_10760.PDF) (prohibiting public housing authorities from admitting families in which a member: (1) has been previously evicted from federally assisted housing for drug related criminal activity; (2) is currently illegally using a drug; (3) has shown a pattern of use of illegal drugs that would interfere with peaceful enjoyment of the premises; (4) is a registered sex offender; (5) abuses alcohol in a way that would interfere with peaceful enjoyment of the premises; or (6) has been convicted of a methamphetamine-related crime on the premises of federally assisted housing).

<sup>39</sup> See generally WEISS, *supra* note 16 (explaining that the lack of guidance available to landlords for what is and is not appropriate for considering a criminal record in tenancy decisions leads to undetected abuses of discretion and the failure of landlords to consider applicants as more than what their, potentially erroneous, criminal record indicates).

<sup>40</sup> A detailed description of the *Fair Housing Act* is outside the scope of this Comment. For a more in-depth explanation of the *Fair Housing Act*, see *Fair Housing Act Overview and Challenges*, NAT'L LOW INCOME HOUS. COAL. (Oct. 23, 2018), <https://nlihc.org/resource/fair-housing-act-overview-and-challenges>.

<sup>41</sup> Fair Housing Act, 42 U.S.C. § 3601. A lack of stable housing is closely linked to increased rates of both incarceration and homelessness and negatively impacts the well-being of children. See U.S. Dep't of Hous. & Urb. Dev., *How Housing Instability Impacts*

populations in the United States, Congress enacted the FHA in 1968,<sup>42</sup> just four years after the enactment of the original *Civil Rights Act*. The FHA was enacted in response to the continued systemic discrimination against African Americans by both public and private entities in the United States.<sup>43</sup> The FHA's stated purpose is to promote the United States' policy of providing fair housing to all within the country.<sup>44</sup>

Despite the FHA's purported guarantee of fair housing for all, the United States does not recognize an affirmative right to housing.<sup>45</sup> Nevertheless, the FHA mandates that all governmental agencies "aggressively and affirmatively" expand access to fair housing within the nation.<sup>46</sup> There is much debate among scholars as to what the drafters of the FHA meant by requiring governments to affirmatively further access to housing, and it is unlikely that the intent will become clear anytime soon because of the difficulties inherent in enforcing the FHA.<sup>47</sup> Despite the strong language requiring affirmative action from governmental agencies, critics of the FHA have long regarded the Act as toothless, given the convoluted methods of enforcement that resulted from the various compromises made by the proponents and opponents of the Act.<sup>48</sup>

The FHA generally prohibits discrimination in access to housing.<sup>49</sup> Originally enacted in response to racial discrimination in zoning and rental decisions,<sup>50</sup> the Act's prohibition of discrimination further extends to discrimination on the basis of color, race, sex, religion, familial status, national origin, or handicap.<sup>51</sup> Although the FHA includes only seven explicitly protected classes,<sup>52</sup> fair housing jurisprudence recognizes two types of discriminatory effects claims for those who cannot prove discrimination on the basis of an enumerated

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*Individual and Family Well-Being*, HUD USER: PD&R EDGE (Feb. 4, 2019), <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-020419.html>.

<sup>42</sup> See Rigel C. Oliveri, *50 Years After MLK's Death, Segregation Persists*, LEXIS LAW360 (Apr. 3, 2018), <https://www.law360.com/articles/1028546/50-years-after-mlk-s-death-housing-segregation-persists>.

<sup>43</sup> *Id.*

<sup>44</sup> Fair Housing Act, 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

<sup>45</sup> See *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972).

<sup>46</sup> 42 U.S.C. §§ 3608(d), (e)(5) (imposing a duty on the Department of Housing and Urban development to ensure that all enacted policies go toward furthering the stated policies of the FHA).

<sup>47</sup> Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 252 (2016).

<sup>48</sup> *Id.* at 248-49, 252.

<sup>49</sup> Lisa L. Walker, *The Fair Housing Act Turns 50 Years Old – Part 1: A Legal Retrospective from the Public & Affordable Housing World*, 47 NO. 2 REAL ESTATE REV. J. ART. 2 (2018) (citing 42 U.S.C. § 3601).

<sup>50</sup> Oliveri, *supra* note 42.

<sup>51</sup> Fair Housing Act of 1968, 42 U.S.C. § 3604 (2018).

<sup>52</sup> *Id.*

protected class.<sup>53</sup> The Department of Housing and Urban Development (HUD) is the agency responsible for the administration of the FHA, but the Department of Justice is responsible for its enforcement.<sup>54</sup> While HUD cannot enforce the FHA, HUD is responsible for promulgating regulations and interpretations of the FHA.<sup>55</sup>

### Department of Housing and Urban Development's 2016 Guidance

Recognizing the importance of housing access to those reentering society following incarceration and the problems created by the use of criminal record background checks in housing decisions, HUD released official guidance as to how an individual may challenge an adverse housing decision made on the basis of that individual's criminal record.<sup>56</sup> In particular, HUD's guidance was issued in response to concerns that criminal history-based restrictions to housing likely have a disproportionate impact on minority populations.<sup>57</sup> A housing provider who uses criminal history-based restrictions may violate the FHA via the theories of either discriminatory effects liability or disparate treatment liability.<sup>58</sup>

Although HUD is responsible for the administration and interpretation of the FHA, HUD's guidance is only binding when it adheres to the notice-and-comment administrative rulemaking requirements.<sup>59</sup> HUD's failure to create an enforceable rule in releasing its guidance on the use of criminal records in housing decisions renders the guidance unlikely to alleviate discriminatory housing practices.<sup>60</sup> However, despite the problems created by the promulgation of HUD's 2016 guidance, the guidance outlines theories of liability for discriminatory use of criminal records in housing decisions and

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<sup>53</sup> Robert G. Schwemm, *Segregative-Effect Claims under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 710 (2017).

<sup>54</sup> Zasloff, *supra* note 47, at 251.

<sup>55</sup> *Id.* at 251-52.

<sup>56</sup> HELEN R. KANOVSKY, U.S. DEP'T HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1 (Apr. 4, 2016) ("[T]his 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 . . . based on an individual's criminal history."):

<sup>57</sup> *Id.* at 2 (explaining that this could violate the FHA because the burden of these restrictions tends to fall on housing market participants of particular races or national origins).

<sup>58</sup> *Id.* (citing 24 C.F.R. § 100.500) ("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.").

<sup>59</sup> Matthew D. Goldstein, *HUD's 2016 Legal Guidance: An Administrative Dilemma*, 69 ADMIN. L. REV. 951, 955-56 (2017).

<sup>60</sup> *Id.*

officially recognizes the importance of ensuring that the justice-involved population is able to access housing.<sup>61</sup>

### 1. *Discriminatory Effects Liability and Criminal Records*

HUD first explains how the three-part, burden shifting test for discriminatory effects liability<sup>62</sup> would work when a plaintiff asserts that a housing provider's policy of using criminal history records in housing decisions is discriminatory.<sup>63</sup> First, the plaintiff must prove that the criminal history policy has a discriminatory effect, meaning that the policy results in a disparate impact on individuals because of their race or national origin.<sup>64</sup>

If the plaintiff proves that there is disparate impact as a result of the policy, the burden then shifts to the housing provider.<sup>65</sup> The provider must then provide a justification for the challenged policy which tends to prove that the policy is necessary to achieve a "substantial, legitimate, nondiscriminatory interest" of the provider.<sup>66</sup> HUD explicitly rejects policies in which a housing provider excludes a prospective tenant based solely on prior arrests of the individual and prospective tenants who have been convicted of any crime.<sup>67</sup> A challenged policy that does not consider the nature, severity, or recency of a conviction is equally unlikely to meet the requirements of the second prong.<sup>68</sup> If the housing provider proves the policy serves a substantial, legitimate, and nondiscriminatory interest, then the plaintiff must prove that the interest could be served via a less discriminatory alternative.<sup>69</sup>

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<sup>61</sup> *Id.* at 961-63.

<sup>62</sup> See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) (explaining the difference between a disparate impact and disparate treatment claim); *Giron de Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415, 424 (4th Cir. 2018) (The first step of a disparate impact claim requires the plaintiff to demonstrate a causal connection between the challenged policy and the disparate impact it has on a protected class. Second, the burden shifts to the defendant to prove that the challenged policy serves a legitimate interest. If the defendant meets their burden, the plaintiff then must show that the defendant's interests could be served equally effectively under a different policy that would have a less discriminatory effect.).

<sup>63</sup> *KANOVSKY, U.S. DEP'T HOUS. & URB. DEV.*, *supra* note 56, at 2-3.

<sup>64</sup> *Id.* at 3 (explaining that the first prong of the test is typically proved through the use of local, state, and national statistics).

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.* ("The interest . . . may not be hypothetical or speculative, meaning the housing provider must . . . provide evidence proving . . . a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.").

<sup>67</sup> *Id.* at 5-6.

<sup>68</sup> *Id.* at 7.

<sup>69</sup> *Id.* (providing examples of less discriminatory alternatives such as: individualized assessments of mitigating circumstances like the facts or circumstances of the conduct, the individual's age at the time, individual's history of being a good tenant, and rehabilitation

## 2. *Intentional Discrimination and Criminal History Records*

A housing provider's use of criminal records as a pretext for intentional discrimination on the basis of a protected class will be found to violate the FHA.<sup>70</sup> A plaintiff may prove intentional discrimination through overt, direct evidence of disparate treatment of prospective tenants with comparable criminal records, however, if direct evidence is unavailable, the plaintiff is still able to prove intentional discrimination via the traditional method of proving disparate treatment.<sup>71</sup> Under the burden-shifting method of proving intentional discrimination, a plaintiff who received an adverse housing decision must first establish a prima facie case of discriminatory intent when the alleged discrimination occurred through the housing provider's consideration of the plaintiff's criminal record in reaching the adverse housing decision.<sup>72</sup> The burden then shifts to the housing provider to prove that the adverse housing decision was due to a legitimate, nondiscriminatory reason.<sup>73</sup> If the housing provider provides evidence that there was a legitimate, nondiscriminatory reason for the adverse decision, the plaintiff may still prevail if there is evidence that the adverse housing decision on the basis of the plaintiff's criminal record was a "pretext for unlawful discrimination."<sup>74</sup>

### **Wisconsin's Open Housing Act**

Twenty-one states and one territory, including Wisconsin, have enacted local fair-housing regulations to amplify the protections provided by the FHA.<sup>75</sup> Wisconsin's Open Housing Act (OHA) expands on the list of protected classes contained in the FHA; in particular, Wisconsin's Act has been lauded for expressly prohibiting

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efforts or delaying the consideration of criminal history until financial and other qualifications are first verified).

<sup>70</sup> See *id.* at 8.

<sup>71</sup> *Id.* at 8-9.

<sup>72</sup> *Id.* at 9. Unlike disparate impact liability, where there is no requirement to prove discriminatory intent, a disparate treatment claim will require the plaintiff to prove that the defendant had discriminatory intent in making the adverse decision or in creating the challenged policy. See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015).

<sup>73</sup> KANOVSKY, U.S. DEP'T HOUS. & URB. DEV., *supra* note 56, at 9. (explaining that although an individual's criminal record can be a legitimate, nondiscriminatory reason for an adverse decision, the housing provider's policy may still be found to be in violation of the FHA).

<sup>74</sup> *Id.*

<sup>75</sup> Temple Univ. Ctr. for Pub. Health L. Rsch., *Maps Outlining State Fair Housing Laws, State Landlord-Tenant Laws, and City Nuisance Laws are Now Available on LawAtlas*, HARV. U. (Feb. 15, 2018), <https://blog.petrieflom.law.harvard.edu/2018/02/15/maps-outlining-state-fair-housing-laws-state-landlord-tenant-laws-and-city-nuisance-property-laws-are-now-available-on-lawatlas>.

discrimination in access to housing on the basis of sexual orientation.<sup>76</sup> On top of the expansive protections provided by Wisconsin's statute, the OHA directs local governments to enact regulations which further the goal of providing equal opportunities for housing.<sup>77</sup>

In addition to recognizing twelve protected classes under the OHA, Wisconsin courts have recognized disparate treatment as a viable cause of action for discrimination in access to housing that does not fall under a protected class.<sup>78</sup> However, unlike the federal courts, Wisconsin courts have not affirmatively decided whether a disparate impact claim is cognizable for housing discrimination claims.<sup>79</sup>

## **PART II: WISCONSIN'S 2011 ACT 108 AND THE STATE LEGISLATURE'S PROHIBITION OF LOCAL REGULATION OF LANDLORDS' TENANT SELECTION PROCESS CONFLICTS WITH THE PURPOSE OF THE *FAIR HOUSING ACT***

In stark contrast to its expansive *Open Housing Act*, Wisconsin's legislature passed a law prohibiting municipal regulation imposing limitations on landlords' use or access to information used in making tenancy decisions.<sup>80</sup> The law, commonly known as 2011 Act 108,<sup>81</sup> prohibits municipalities from enacting ordinances that would limit or prohibit a landlord from obtaining and using arrest and conviction records of current and prospective tenants,<sup>82</sup> or limit how far back in time a landlord may look at conviction records when evaluating prospective tenants' rental applications.<sup>83</sup> Originally enacted in December 2011, the statute further invalidated any ordinances deemed

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<sup>76</sup> "It is the intent of this section to render unlawful discrimination in housing. It is the declared policy of this state that all persons shall have an equal opportunity for housing regardless of sex, race, color, *sexual orientation, disability, religion, national origin, marital status, familial status, status as a victim of domestic abuse, sexual assault, or stalking, lawful source of income, age, or ancestry.*]" WIS. STAT. § 106.50(1) (2019-20) (emphasis added). See Dep't of Admin., *Fair Housing Plan: Analysis of Impediments to Fair Housing and Actions to Overcome Them*, 7, STATE OF WISCONSIN (2019).

<sup>77</sup> WIS. STAT. § 66.1011(1) (2019-20); see WIS. DEP'T OF ADMIN., *FAIR HOUSING PLAN: ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING AND ACTIONS TO OVERCOME THEM* 6 (2019) (providing suggestions as to how local governments can assist in effectuating the goals of fair housing initiatives to decrease inequality in access to housing).

<sup>78</sup> See generally *Jones v. Baecker*, 891 N.W.2d 823 (Wis. Ct. App. 2017).

<sup>79</sup> *But see* WIS. HOUS. & ECON. DEV. AUTH. v. *Tri-Corp Hous., Inc.*, 332 Wis. 2d 804, ¶30-31 (Ct. App. 2011) (unpublished decision) (recognizing a disparate impact claim for a *Fair Housing Act* violation for foreclosure).

<sup>80</sup> See WIS. STAT. § 66.0104(2)(a) (2019-20).

<sup>81</sup> See generally Ben Siegel, *New Wisconsin landlord laws wipe out hard-fought victories for Madison renters*, ISTHMUS CMTY. MEDIA, INC. (Nov. 1, 2013), <https://isthmus.com/news/news/new-wisconsin-landlord-laws-wipe-out-hard-fought-victories-for-madison-renters/>.

<sup>82</sup> WIS. STAT. § 66.0104(2)(a)(1)(e) (2019-20).

<sup>83</sup> WIS. STAT. § 66.0104(2)(a)(2) (2019-20).

inconsistent with the new statute.<sup>84</sup> In the nine years since its enactment, this provision has remained unchanged.

The bill was initially presented in the state Senate as a way to “level the legal playing field” between landlords and tenants and make it easier for landlords to deal with problems on their properties without needing governmental assistance.<sup>85</sup> The purported underlying purpose of 2011 Act 108 is to “level the legal playing field” between landlords and tenants,<sup>86</sup> yet there is no logical connection between this stated purpose and how the Act’s prohibition of local regulations of landlord tenant law is an appropriate means by which to accomplish its end goal.

There is no evidence to support the bill’s proponents’ contention that the various municipal regulations of landlords gave tenants too much legal power.<sup>87</sup> Pro-tenant local regulation is typically enacted to provide tenants with some means by which they can have *some* legal power in disputes with landlords.<sup>88</sup> Thus, the state legislature’s assertion that 2011 Act 108 was necessary to ensure landlords were on equal legal footing with tenants is baseless.<sup>89</sup> Instead, 2011 Act 108 was part of the state legislature’s thinly veiled efforts to decrease regulation of property and consolidate power at the state level.<sup>90</sup> Legislators in support of 2011 Act 108 and attorneys representing landlords throughout Wisconsin were vocal about their disdain for the variance in landlord regulation between municipalities, making their

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<sup>84</sup> WIS. STAT. § 66.0104(3)(a) (2019-20).

<sup>85</sup> Jason Stein, *Senate passes bill giving landlords more power in tenant dealings*, MILWAUKEE J. SENTINEL (Sep. 17, 2013), <https://archive.jsonline.com/news/senate-considers-bill-tuesday-giving-landlords-more-power-in-tenant-dealings-b99100105z1-224079021.html/> (Although written in response to amendments which further decreased local authorities’ abilities to regulate housing discrimination, the proponents and opponents of the bill remain largely the same as two years earlier.).

<sup>86</sup> *Id.*

<sup>87</sup> See generally Laura, *Assert the Rights You Have*, TENANT RES. CTR.: YOUR RIGHTS BLOG (Apr. 21, 2016), [https://www.tenantresourcecenter.org/assert\\_the\\_rights\\_you\\_have](https://www.tenantresourcecenter.org/assert_the_rights_you_have) (explaining that the majority of tenants that seek assistance from the center are attempting to enforce rights that they do not really possess); WIS. DEP’T OF AGRIC., TRADE & CONSUMER PROT., TENANT RIGHTS AND RESPONSIBILITIES, <https://datcp.wi.gov/Documents/LT-TenantsRights143.pdf>.

<sup>88</sup> See Laura, *For Landlords: Screening Applicants Based on Criminal History*, TENANT RES. CTR.: YOUR RIGHTS BLOG (July 6, 2016), [https://www.tenantresourcecenter.org/for\\_landlords\\_criminal\\_history](https://www.tenantresourcecenter.org/for_landlords_criminal_history).

<sup>89</sup> See generally Heidi Lee Cain, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 144-45 (2003) (discussing the imbalance of bargaining power between landlords and tenants).

<sup>90</sup> See generally Michael P. May, *Rejected: Municipal Home Rule Powers in Milwaukee Cases*, 89 WIS. LAWYER 10 (Nov. 1, 2016), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/pages/article.aspx?Volume=89&Issue=10&ArticleID=25202> (explaining that the Wisconsin Supreme Court and Wisconsin State Legislature have crusaded against the Wisconsin Home Rule Amendment in attempts to undermine local governmental power and consolidate all legal power at the state level despite the Wisconsin Constitution’s expressed intention that there be a separation of powers between state and local governmental authorities).

frustration with local regulation of landlords' property rights the more probable, true underlying purpose of the Act.<sup>91</sup>

Opponents of the bill characterized it instead as an attempt to decrease tenants' rights and governmental oversight and regulation of landlord activities.<sup>92</sup> This characterization of the Act, as a self-interested piece of legislation by landlord-legislators, more likely than not properly characterized the reality of 2011 Act 108's impact on landlord-tenant relations and housing access.<sup>93</sup> Essentially, the Act impliedly authorizes landlords to reject any prospective tenant on any grounds so long as they do not intentionally discriminate on the basis of an enumerated protected class.<sup>94</sup> In light of Wisconsin's extensive history of extreme housing segregation statewide,<sup>95</sup> there is substantial cause for concern that landlords consistently deny prospective tenants' applications by using criminal records pretextually. In fact, Wisconsin is currently the most segregated state in the United States.<sup>96</sup> 2011 Act 108's invalidation of all local landlord regulations and the legislature's rigorous pursuit of pro-landlord legislation<sup>97</sup> serves only to exacerbate the already significant issues with housing segregation in Wisconsin.

Prior to 2011 Act 108, some municipalities in Wisconsin had enacted laws prohibiting or significantly limiting a landlord's consideration of a current or prospective tenant's arrest or conviction record.<sup>98</sup> Ten years ago, all of these ordinances, including the 1999 City

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<sup>91</sup> See generally Stein, *supra* note 85; Siegel, *supra* note 81; Tristan R. Pettit, *HUD Issues New Guidelines on the Use of Criminal Records in the Rental Screening Process*, PETRIE & PETTIT: TRISTAN'S LANDLORD-TENANT BLOG (Apr. 14, 2016), <https://petriepettit.com/blog/landlord-tenant/hud-issues-new-guidelines-on-the-use-of-criminal-records-in-the-rental-screening-process>.

<sup>92</sup> Stein, *supra* note 85; Siegel, *supra* note 81; Pettit, *supra* note 91.

<sup>93</sup> See Siegel, *supra* note 81 (explaining that fifty percent of residents in Madison rent, forty percent of residents in Milwaukee live in apartments, and that the laws repealed by 2011 Act 108 were enacted due to the municipalities' awareness of the problems in landlord-tenant relations, with Madison in particular directly addressing the use of criminal background history reports in housing decisions).

<sup>94</sup> See *id.*

<sup>95</sup> See, e.g., Aaron Williams & Armand Emamdjomeh, *America is more diverse than ever – but still segregated*, WASH. POST (May 10, 2018), <https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/> (data shows that despite a 19% increase in Milwaukee's African American population between 1990 and 2016, there has been no discernible integration within the city throughout the same time period; instead, population density has increased in areas already predominantly populated by African Americans).

<sup>96</sup> Adam McCann, *2021's States with the Most Racial Progress*, WALLETHUB (Jan. 12, 2021), <https://wallethub.com/edu/states-with-the-most-and-least-racial-progress/18428> (Wisconsin is the least racially integrated state overall, with only Washington D.C. being ranked as less integrated than Wisconsin.).

<sup>97</sup> See Speckhard Pasque, *supra* note 1.

<sup>98</sup> See Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 40 (2014) (citing MADISON, WIS., CODE §39.03 (2013); APPLETON, WIS., CODE § 8-30 (2012); DANE CNTY, WIS., CODE §§ 31.01-31.99(2012)).

of Madison ordinance prohibiting criminal conviction discrimination,<sup>99</sup> were invalidated following the enactment of Wisconsin's 2011 Act 108.<sup>100</sup> Through 2011 Act 108, the Wisconsin's legislature reserved regulation of landlord-tenant law solely to the legislature.<sup>101</sup>

Despite repeated challenges to 2011 Act 108's repeal of local tenants' rights legislation from municipalities, the legislature used 2011 Act 108's passage to subsequently enact increasingly pro-landlord laws which afford tenants little power to protect their rights.<sup>102</sup> The expansive efforts to de-regulate landlords has basically provided landlords with free reign to make housing decisions however they see fit as individuals. Thus, 2011 Act 108 leaves the Wisconsin state legislature as the sole means by which any type of protection for housing access for individuals with any form of criminal record could be provided.<sup>103</sup> While the state legislature was wholly within its powers to enact 2011 Act 108 and remove the power of landlord regulation from localities to the state,<sup>104</sup> allowing municipalities to regulate landlords in way that is responsive to the particular needs of their communities would impose a lower burden on the state than would statewide regulation of landlords.

Not only does 2011 Act 108's blanket prohibition on local regulation of housing access conflict with the spirit of the FHA's call to affirmatively further housing access for all, but it also disincentivizes landlords to comply with HUD's advisory 2016 Guidance regarding permissible criminal history-based policies from housing providers.<sup>105</sup> Because the 2016 guidance is not law, landlords are unlikely to comply with the guidance, partly because it would require more

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<sup>99</sup> Siegel, *supra* note 81 (noting that enactment of 2011 Act 108, and the subsequent enactments of Act 143 and SB 179 in 2013 wiped out over twenty-five of Madison's tenants' rights laws that had been effective for nearly fifteen years).

<sup>100</sup> See WIS. STAT. § 66.0104(2)(a) (2019-20).

<sup>101</sup> *Id.*

<sup>102</sup> See Jason Stein, *Senate passes bill giving landlords more power in tenant dealings*, WIS. J. SENTINEL (Sep. 17, 2013), <https://archive.jsonline.com/news/senate-considers-bill-tuesday-giving-landlords-more-power-in-tenant-dealings-b99100105z1-224079021.html/>.

<sup>103</sup> See Siegel, *supra* note 81 (noting that because the law prohibits any "city, village, town, or county" from enacting tenants' rights laws, there is no institution in the state other than the state legislature to take such affirmative action) <https://isthmus.com/news/news/new-wisconsin-landlord-laws-wipe-out-hard-fought-victories-for-madison-renters/>.

<sup>104</sup> *But see*, Matt Rothschild, *Local Democracy is Under Assault in Wisconsin*, MADISON.COM (Apr. 26, 2018), [https://madison.com/ct/opinion/column/matt-rothschild-local-democracy-is-under-assault-in-Wisconsin/article\\_2efe6741-5ff0-5f3a-930e-d783d076c9dc.html](https://madison.com/ct/opinion/column/matt-rothschild-local-democracy-is-under-assault-in-Wisconsin/article_2efe6741-5ff0-5f3a-930e-d783d076c9dc.html) (explaining that the enactment of pro-landlord regulations, among others, that are statewide, infringes on powers that were intended to be left to the municipalities).

<sup>105</sup> Silva, *supra* note 26 (explaining that the *Fair Housing Act* not only required all government agencies to further the Act's policies, but also required government agencies to cooperate with the Department of Housing and Urban Development as it worked to ensure furtherance of the Act's policies).

work on their part to ensure compliance,<sup>106</sup> and also likely due to “NIMBY”<sup>107</sup> mentalities promoted through the Trump administration’s “protect the suburbs” rhetoric. 2011 Act 108 is also out of sync with Wisconsin’s Open Housing Act, which calls on local communities to assist state-wide efforts to increase access to housing for all.<sup>108</sup> Local communities are almost entirely unable to assist these efforts as they are prohibited from passing any ordinances regarding tenant screening

**PART III: THE WISCONSIN STATE LEGISLATURE MUST IMMEDIATELY REPEAL 2011 ACT 108 TO COMPLY WITH HUD’S GUIDANCE AND MUST ENACT FAIR-HOUSING LEGISLATION TO ENSURE COMPLIANCE WITH THE *FAIR HOUSING ACT*.**

Both Wisconsin’s *Open Housing Act* and the Federal *Fair Housing Act* clearly prohibit housing discrimination on the basis of race. Unfortunately, neither the OHA nor the FHA comment on the pretextual use of criminal records<sup>109</sup> in housing discrimination. Although HUD attempted to recognize a cause of action for the disparate impact on racial minorities that the use of criminal records for housing decisions creates,<sup>110</sup> the 2016 Guidance is purely advisory.<sup>111</sup> Because any law which contributes, directly or indirectly, to housing segregation is in direct conflict with the FHA,<sup>112</sup> 2011 Act 108 must be repealed. To comply with the FHA’s mandate that all governments aggressively and affirmatively further access to fair housing, Wisconsin must enact legislation that will decrease statewide housing segregation by preventing landlords from pretextually using applicants’ criminal records to deny minorities’ housing applications.

Further, the Wisconsin state legislature must enact legislation to protect tenants who have been adversely impacted by 2011 Act 108’s immense bolstering of landlord rights<sup>113</sup> and massive disenfranchisement of tenants and those in need of housing. This Comment proposes three statutory schemes which could be enacted to aggressively and affirmatively further the goals of the Federal *Fair Housing*

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<sup>106</sup> Pettit, *supra* note 91.

<sup>107</sup> “Not in my backyard.”

<sup>108</sup> WIS. STAT. § 66.0104(2)(a) (2019-20).

<sup>109</sup> See Berry & Wiener, *supra* note 6, at 214.

<sup>110</sup> KANOVSKY, U.S. DEP’T HOUS. & URB. DEV., *supra* note 56, at 2-8.

<sup>111</sup> Goldstein, *supra* note 59, at 955-56.

<sup>112</sup> 42 U.S.C. § 3601; see 1 HOUS. DISCRIMINATION PRAC. MANUAL § 2.17, at 4 (2020) (explaining that HUD’s 2015 rule requires the government to take meaningful actions to replace segregated living patterns with truly integrated patterns).

<sup>113</sup> Siegel, *supra* note 81.

*Act*<sup>114</sup> and ensure that individuals who have interacted with the criminal justice system are not subject to blanket bans preventing them from obtaining housing. The first, and arguably easiest solution, would be for the legislature to repeal 2011 Act 108 thereby empowering municipalities to impose landlord-tenant regulations which are tailored to the specific needs of the municipality's community. Second, this Comment suggests that the legislature adapt the statutory limitations of criminal record consideration in the employment sector for use in housing decisions. Third, this Comment calls for the legislature to follow the lead of other states and municipalities across the country and enact a form of Fair Chance Housing Legislation.

### **Repealing 2011 Act 108 Empowers Local Governments to Enact Regulations of Landlord Consideration of Criminal History Tailored Specifically to the Community but Fails to Affirmatively Further the Goals of the *Fair Housing Act***

The conflict between 2011 Act 108's prohibition of municipal regulation of landlords and the asserted goals of the *Fair Housing Act*<sup>115</sup> and the *Open Housing Act*<sup>116</sup> renders it necessary to immediately repeal the Act. This will permit local governments to regulate local landlords' consideration of prospective tenants' criminal records in tenancy decision as is appropriate for the particular needs of the community. At a minimum, the repeal of 2011 Act 108 would return Wisconsin to compliance with the mandates of the FHA. It follows that the repeal would enable local and municipal governments within Wisconsin to choose to regulate landlords' consideration of prospective tenants' criminal conviction records in accordance with HUD's advisory Guidance. This would allow municipalities like Madison or Milwaukee, to enact strict regulations regarding the use of criminal history reports in tenancy decisions, while allowing villages, where such regulation may not be necessary, to decline to enact such regulation accordingly.

Although freeing local governments to create their own regulations would contravene 2011 Act 108's purported goal of ensuring uniformity of landlord-tenant regulation across the state,<sup>117</sup> there is little to no evidence showing 2011 Act 108 has in fact ensured uniformity in regulation statewide as the state legislature has failed to enact uniform regulations across the state.<sup>118</sup>

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<sup>114</sup> Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2189-91 (2013).

<sup>115</sup> 42 U.S.C. § 3601.

<sup>116</sup> WIS. STAT. § 106.50(1) (2019-20).

<sup>117</sup> Stein, *supra* note 85.

<sup>118</sup> *But see* Lisa Speckhard Pasque, *Changes to Wisconsin landlord-tenant laws since 2011*, CAP. TIMES (Feb. 7, 2018), <https://madison.com/ct/news/local/govt-and->

Dane County and the City of Madison have been among the most vocal opponents of 2011 Act 108.<sup>119</sup> Madison's opposition to 2011 Act 108 has been based in large part on the Act's invalidation of more than twenty-five local tenants' rights ordinances,<sup>120</sup> including regulations aimed at ensuring landlords used prospective tenants' criminal background reports appropriately in making housing decisions.<sup>121</sup> In Madison, the repeal of 2011 Act 108 would lead to the immediate reenactment of these provisions designed to protect its substantial population of residents living in apartments.<sup>122</sup>

Although Madison had the most substantial body of tenants' rights laws enacted in Wisconsin when 2011 Act 108 was enacted, it is likely that Madison would serve as an example for other municipal and local governments in Wisconsin seeking to ensure tenants are protected from discriminatory denials of housing on the basis of their criminal record.

However, without further action from the state's government or housing agencies within the state, the repeal of 2011 Act 108 will not ensure a statewide victory for the reduction of collateral consequences.<sup>123</sup> While a formerly incarcerated individual in Madison may be in a position to obtain secure housing under Madison's local regulations, the same formerly incarcerated individual in Racine County would not be ensured the same sense of stability in housing access.<sup>124</sup> There is no basis to conclude that the repeal of 2011 Act 108 alone would lead to statewide enactment of protections from housing discrimination for formerly incarcerated individuals and their families. Few municipalities outside of Madison have taken a position on whether there would be limitations on landlord consideration of criminal records in tenancy decisions.<sup>125</sup>

Ultimately, the FHA imposes an affirmative duty on federal and state governments to work toward the goal of integrated, accessible housing.<sup>126</sup> Repealing 2011 Act 108, without additional action, does

politics/changes-to-wisconsin-landlord-tenant-laws-since-2011/article\_57ffd931-afda-5385-a487-9a6882f8d85b.html.

<sup>119</sup> See Siegel, *supra* note 81.

<sup>120</sup> See Stein, *supra* note 58; Siegel, *supra* note 81.

<sup>121</sup> DANE CNTY., WIS. ORDINANCE §§ 31.03(1), (2), 31.10 (1998) (abrogated in part by Wis. STAT. § 66.0104).

<sup>122</sup> *Id.*

<sup>123</sup> A collateral consequence is a harm resulting from a conviction outside of the actual sentence imposed, such as limitations on an individual's voting rights, difficulties securing employment post-conviction, and blanket bans on gun ownership. Shristi Devu, *Trapped in the Shackles of America's Criminal Justice System*, 20 THE SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 217, 225-26 (2018).

<sup>124</sup> *Fair Housing*, CITY OF RACINE, <https://www.cityofracine.org/citydevelopment/fairhousing> (last visited Feb. 6, 2021).

<sup>125</sup> See DANE CNTY, WIS. ORDINANCE §§ 31.03(1), (2), 31.10 (abrogated in part by Wis. STAT. § 66.0104). *But see id.*

<sup>126</sup> This mandate has been interpreted to apply to state and local governments, in addition to entities subject to HUD regulation even though the Act is silent on the point. *See*

not meet the FHA's goal of "affirmatively furthering fair housing" because it would be indistinguishable from the same type of government inaction resulting in segregation and discrimination that the FHA sought to do away with.<sup>127</sup> As such, the repeal of 2011 Act 108 is a step in the right direction, but is unlikely to be sufficient to accomplish the goals of the FHA nor would it ensure any change to promote protections for formerly incarcerated individuals.

### **Fair Chance Housing Legislation Would Align Wisconsin with the Current Trends in National Housing Law**

There is a growing nationwide consensus that legal regulations are necessary to decrease barriers to housing access for justice-involved individuals and their families.<sup>128</sup> In response to growing awareness of the need to impose legal regulations to remove these barriers, there has been a recent uptick in the enactment of "Fair Chance at Housing" legislation<sup>129</sup> across the nation. In 2017, Seattle became the first city in the United States to enact a measure aimed at reducing these barriers by prohibiting the use of criminal record background checks in landlords' screening of potential tenants. At least ten local and municipal governments throughout the United States have already enacted related "Fair Chance at Housing" legislative measures,<sup>130</sup> and dozens more are considering their own Fair Chance regulations in the near future.<sup>131</sup> Ensuring housing access for formerly incarcerated individuals has risen to a level of federal

Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2184 (2013) (noting that the secondary, affirmative purpose of the *Fair Housing Act* was intended to be extremely broad and powerful but has been largely untouched and unenforced since the Act's initial enactment).

<sup>127</sup> HOUS. DISCRIMINATION PRAC. MANUAL: DISCRIMINATORY HOUSING PRACTICES UNDER TITLE VIII – AFFIRMATIVELY FURTHERING FAIR HOUSING § 2.17 (2020).

<sup>128</sup> This has been seen at the federal level in particular through increasing efforts to improve prisoner reentry programs and alleviate the burdens of collateral consequences. Beginning in 2011, the Obama Administration began issuing guidance to undo the harms from the tough on crime era. See WEISS, *supra* note 16. This has been coupled with increasing studies indicating that the justice-involved population is increasingly saddled with stigmas. See also KANOVSKY, U.S. DEP'T HOUS. & URB. DEV., *supra* note 56.

<sup>129</sup> See *Learn More About Fair Chance to Housing Policies*, FAIR CHANCE HOUS. COAL., <https://fairchance4all.org/faq> (last visited Jan. 1, 2021).

<sup>130</sup> Fair Chance at Housing regulations have been enacted in Seattle, Washington; Portland, Oregon; Berkeley, California; Oakland, California; Minneapolis, Minnesota; Washington D.C.; Detroit, Michigan; Richmond, California; and Cook County, Illinois. *Comparison of National North Star Fair Chance Housing Laws*, JUST CITIES, 1, 2-5, [https://static1.squarespace.com/static/5d3a3edf4508ff00014b406f/t/5fd168448ba64b78df48a6f7/1607559237612/JustCities\\_FCH\\_PolicyComparisonChart.pdf](https://static1.squarespace.com/static/5d3a3edf4508ff00014b406f/t/5fd168448ba64b78df48a6f7/1607559237612/JustCities_FCH_PolicyComparisonChart.pdf) (last visited [DATE HERE]); Ellison and Bender, *Renter Protection Ordinance*, <https://lims.minneapolismn.gov/Download/2624/Renter%20Protections%20Ordinance.pdf> (last visited April 29, 2022); Baker & Ginger, *supra* note 33.

<sup>131</sup> Baker & Ginger, *supra* note 33.

concern. Fair Chance at Housing bills were introduced in both the House of Representatives and the Senate between 2018 and 2019.<sup>132</sup>

Seattle enacted its Fair Chance Housing (Seattle FCH) ordinance to further the city's goals of reducing discrimination, reducing recidivism, and promoting reintegration of justice-involved individuals.<sup>133</sup> The ordinance goes beyond HUD's recommendations and follows closely the "Ban-the-Box"<sup>134</sup> approach to consideration of a potential tenant's criminal background in housing decisions. In so doing, Seattle's FCH prohibits a landlord "from requiring disclosure, asking about, rejecting an applicant, or taking adverse action" against a prospective tenant on the basis of the applicant's interaction with the criminal justice system.<sup>135</sup> The Seattle FCH is widely lauded as the most progressive Fair Chance at Housing measure in the nation.

When the Seattle FCH was originally proposed, it was vehemently opposed by local landlords.<sup>136</sup> Landlords asserted that the Seattle FCH was illegitimate because it would: (1) deny landlords the opportunity to assess a prospective tenant's risk;<sup>137</sup> (2) decrease landlords' ability to assess a prospective tenant's character;<sup>138</sup> (3)

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<sup>132</sup> Both houses of Congress have introduced Fair Chance at Housing legislation following an approach requiring a factual inquiry into the specific circumstances surrounding the conviction. H.R. 3685, 116<sup>th</sup> Cong. (2019); S. 2076, 116<sup>th</sup> Cong. (2019).

<sup>133</sup> *Seattle Bans the Use of Criminal History in Rental Decisions*, Seattle, Wash., Ordinance 125393, 131 HARV. L. REV. 1844, 1845 (2018); see also SEATTLE OFFICE OF C.R., FAIR CHANCE HOUS. ORDINANCE, SMC 14.09 (2018), [https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20FAQ\\_amendments%2006-21-18.pdf](https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20FAQ_amendments%2006-21-18.pdf).

<sup>134</sup> Ban the Box is a movement aimed at removing barriers to obtaining employment for the justice-involved population. Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1084 (2019). Ban-the-Box laws prohibit employers from inquiring about an applicant's criminal record until after an interview has been conducted or a job offer has been extended to an applicant. *Id.* This allows employers to evaluate an applicant's qualifications without the stigmas surrounding a criminal record. *Id.*

<sup>135</sup> SEATTLE OFFICE OF C.R., FAIR CHANCE HOUS. ORDINANCE, SMC 14.09 (2018), [https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20FAQ\\_amendments%2006-21-18.pdf](https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20FAQ_amendments%2006-21-18.pdf). The sole exception to the broad prohibition of consideration of criminal record is that a landlord is permitted, but not required, to check government sex offender registries so long as the application includes a written notice that this is the landlord's policy. *Id.*

<sup>136</sup> *E.g.*, Chong Yim v. City of Seattle, 451 P.3d 694 (2019) (A lawsuit filed by a group of landlords asserting that the Fair Chance at Housing Ordinance violated their state and federal rights to substantive due process and free speech.).

<sup>137</sup> Marco Brydolf-Horwitz, *Risk, Property Rights, and Antidiscrimination Law in Housing: Toward a Property-in-Action Framework*, 45 LAW & SOC. INQUIRY 871, 880-81 (2020). Landlords involved in the study frequently asserted that criminal records were a rational and legitimate way for landlords to protect themselves from financial loss and legal liability. *Id.*

<sup>138</sup> *Id.* at 881. Landlords repeatedly asserted that an individual's criminal record, or lack thereof, was a signal of a prospective tenant's character. *Id.* at 881-82. It follows, then, according to the landlords, that a criminal record was indicative of bad character, which supported the conclusion that individuals with a criminal record made bad tenants. *Id.*

unreasonably constrain landlords' property rights;<sup>139</sup> and (4) force landlords to assume responsibility for problems in the criminal justice system.<sup>140</sup> These arguments have not only been espoused in response to the Seattle FCH ordinance, but have been repeatedly raised in response to Fair Chance at Housing measures across the nation.

In Wisconsin, where nearly one hundred increasingly pro-landlord measures have been enacted statewide following the passage of 2011 Act 108,<sup>141</sup> the oft-repeated landlord concerns about Fair Chance at Housing legislation are likely to hold enough water to defeat any suggestion of a Fair Chance at Housing law as progressive as Seattle's FCH. However, not all currently enacted Fair Chance at Housing measures include a blanket prohibition on landlords' abilities to consider criminal backgrounds of prospective tenants.<sup>142</sup> An approach that does not fully prohibit landlords from using criminal background information in tenant screening processes may, therefore, be a feasible approach to addressing landlord discrimination against justice-involved individuals in Wisconsin.

In lieu of enacting a Ban the Box approach to criminal record checks in housing decisions, Wisconsin could enact legislation that would provide consistent guidance to landlords about how to appropriately consider criminal records in tenancy decisions. Advocates of decreasing barriers to housing for justice-involved individuals have suggested various limitations that would strike an appropriate balance between landlords' property rights and the importance of housing for successful reintegration of justice-involved individuals following their release. Popular limitations to landlords' use of criminal records in tenancy decisions include:

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<sup>139</sup> *Id.* at 884. Landlords asserted that the prohibition of background checks in tenant screening was an unreasonable restraint on their property rights because the criminal background check is a tool which allows a landlord to exercise property rights to exclude individuals from their property on the basis of risk posed. *Id.*

<sup>140</sup> *Id.* at 885. The Seattle FCH was viewed by landlords as requiring landlords to provide housing for "a needy population without compensation." *Id.* This, they asserted, was a job better left to the government as it was the government that created the problem in the first place. *Id.* Landlords brought suit asserting these alleged violations of their rights, but all arguments were soundly rejected by the Washington Supreme Court. *But see* Chong Yim v. City of Seattle, 451 P.3d 694 (2019).

<sup>141</sup> Cary Spivak & Mary Spicuzza, *Some Wisconsin lawmakers double as landlords – and have passed laws that undermine renters' rights*, MILWAUKEE J. SENTINEL (June 14, 2019, 5:00 AM), <https://www.jsonline.com/story/news/investigations/2019/06/14/Wisconsin-lawmaker-landlords-change-rental-laws-not-favor-tenants-renters-rights/1210327001/>; *see also* Lisa Speckhard Pasque, *Changes to Wisconsin landlord-tenant laws since 2011*, CAP. TIMES (Feb. 7, 2018), [https://madison.com/ct/news/local/govt-and-politics/changes-to-wisconsin-landlord-tenant-laws-since-2011/article\\_57ffd931-afda-5385-a487-9a6882f8d85b.html](https://madison.com/ct/news/local/govt-and-politics/changes-to-wisconsin-landlord-tenant-laws-since-2011/article_57ffd931-afda-5385-a487-9a6882f8d85b.html).

<sup>142</sup> Portland, for example, has enacted a Fair Chance at Housing ordinance which allows landlords to either limit how far back they may look at an applicant's criminal background history or conduct and individualized assessment of the circumstances of the individual's criminal history. JUST CITIES, *supra* note 130, at 2-5; *See also* McCann, *supra* note 96.

- (1) shortening the lookback period to three years or less;<sup>143</sup>
- (2) specifying the types of convictions that could permit an adverse decision;<sup>144</sup>
- (3) prohibiting the consideration of arrests that did not culminate in a conviction;<sup>145</sup>
- (4) requiring individualized assessments of applicants' conviction histories;<sup>146</sup>
- (5) adopting a case-by-case decision-making approach;<sup>147</sup>
- (6) prohibiting blanket bans on renting to individuals on probation or parole;<sup>148</sup> and
- (7) restricting the use of criminal record databases to only those which are regulated and deemed accurate.<sup>149</sup>

By repealing 2011 Act 108 and replacing it legislation providing consistent guidelines for landlords' use of criminal background checks in housing decisions, Wisconsin would ensure that its government is working toward ensuring fully integrated housing.

### **The State Legislature Should Adapt the "Substantially Related" Approach from State Employment Law as a Fair Chance at Housing Measure**

A different, less progressive form of Fair Chance at Housing legislation is a readily viable option for Wisconsin despite the vast amounts of pro-landlord regulations already enacted statewide. In fact, Wisconsin has already enacted "Fair Chance" legislation to regulate employers' consideration of applicants' conviction records in making employment decisions.<sup>150</sup> In considering a job applicant's conviction record, an employer must determine whether the circumstances of the conviction are substantially related to the

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<sup>143</sup> Jacqueline Altamirano Marin, Erica Crew, & Margaret diZerega, *Looking Beyond Conviction History: Recommendations for Public Housing Authority Admissions Policies*, VERA INST. OF JUST. (Apr. 2021), <https://www.vera.org/downloads/publications/looking-beyond-conviction-history.pdf>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Lin, *supra* note 35, at 1.

<sup>150</sup> Wisconsin law prohibits employers from requesting information about an applicant's arrest record unless there is a pending charge related to the arrest and the pending charge is *substantially related* to the circumstances of the job applied for. FAIR EMPLOYMENT ACT, WIS. STATS. § 111.335(2) (2019-20). Wisconsin law further prohibits employers from refusing to employ individuals on the basis of a conviction record unless the employer can prove the circumstances of the conviction are *substantially related* to the circumstances of the particular job. *Id.* at § 111.335(3).

circumstances of the particular position.<sup>151</sup> Put differently, before an employer takes adverse action on the basis of a conviction, the employer must first undertake a factual inquiry into the circumstances surrounding the conviction to determine whether it is likely the circumstances of the particular position would bring out the applicant's tendency for the particular behavior.<sup>152</sup> Before taking an adverse action against the applicant an employer must be certain that there is more than a tenuous relationship between the conviction and the duties of the particular position sought by the applicant.<sup>153</sup>

The substantial relationship requirement as used in employment decisions is equally applicable to the use of criminal history records in tenancy decisions.<sup>154</sup> In the context of housing decisions, the substantial relationship inquiry would be best framed as a factual inquiry into whether the circumstances of the prospective tenant's conviction are substantially related to the circumstances arising through the responsibilities of tenancy.<sup>155</sup> While this would not entirely eliminate the possibility of an adverse housing decision being made on the basis of a criminal conviction, a substantial relationship requirement strikes a balance between the justice-involved population's interest in accessing stable housing<sup>156</sup> and landlords' right to exercise discretion in making tenancy decisions.<sup>157</sup> A landlord, therefore, may only make an adverse decision on the basis of a criminal conviction when there is a legitimate, business-related reason supporting the exercise of discretion.<sup>158</sup>

The prevailing practice regarding criminal background checks in Wisconsin appears to be a simple search of the Wisconsin Circuit Court Access (WCCA) website for actions involving prospective tenants.<sup>159</sup> This particular manner of conducting a criminal record

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<sup>151</sup> Cree, Inc. v. Lab. & Indus. Rev. Comm'n, 2021 WI App 4, 395 Wis. 2d 642, 953 N.W.2d 883, *rev'd*, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837.

<sup>152</sup> *Wisconsin: Employer Failed to Show Applicant's Convictions were Substantially Related to the Job*, 37 NO. 2 TERMINATION OF EMP. BULL. NL 11, 2.11 (Feb. 2021) [hereinafter *Substantial Relation*].

<sup>153</sup> *Arrest and Conviction Record*, DEP'T OF WORKFORCE DEV. <https://www.dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm#:~:text=State law protects workers from,substantially related to the employment> (last visited Feb. 4, 2021).

<sup>154</sup> Several municipalities have already enacted Fair Chance at Housing regulations requiring a fact-specific inquiry be conducted prior to a landlord's decision to taking adverse action.

<sup>155</sup> See KANOVSKY, U.S. DEP'T HOUS. & URB. DEV., *supra* note 56.

<sup>156</sup> *Substantial Relation*, *supra* note 152.

<sup>157</sup> *Id.*

<sup>158</sup> KANOVSKY, U.S. DEP'T HOUS. & URB. DEV., *supra* note 56; WIS. STAT. § 111.335(2) (2019-20).

<sup>159</sup> There is little to indicate that this practice has changed substantially following the issuance of the HUD 2016 Guidance, which was met with resistance in Wisconsin. Debbi Conrad, *HUD's New Take on Tenant Screening Standards: Coping with the new restrictions for criminal arrests and convictions*, WIS. REAL EST. MAG. (May 5, 2016), <https://www.wra.org/WREM/May16/HUD;Pettit>, *supra* note 91.

background check has been proscribed in employer conducted criminal background checks.<sup>160</sup> The WCCA only provides the most basic information of a criminal matter.<sup>161</sup> The use of WCCA in making an adverse housing decision supports a reasonable inference that landlords' decisions are based on little more than the mere existence of a prospective tenant's criminal record.<sup>162</sup> It is unclear how such blanket ban policies comport with the FHA's goal of increasing access to housing for all citizens.

Admittedly, requiring landlords to conduct a fact-specific inquiry into the circumstances underlying a conviction will increase tenant screening costs and the time a landlord must spend in evaluating a tenant's application. These additional expenditures associated with a substantial relationship requirement may be avoided, however, by simply declining to inquire into a prospective tenant's possible criminal background.<sup>163</sup> Landlords' insistence upon criminal background checks in tenant screening is purported to ensure the safety of other tenants.<sup>164</sup> This purported purpose has yet to be validated.<sup>165</sup> There is no indication that a prospective tenant's past wrongdoing is a predictor of future wrongdoing.<sup>166</sup> It is exceptionally unlikely that tenancy decisions made without a criminal background check will decrease the safety of other tenants.<sup>167</sup> What belies these generalized beliefs that individuals with a criminal record pose a threat to the safety of a community are exactly the type of stigmatization on the basis of group membership<sup>168</sup> that the *Civil Rights Act*, including the FHA, sought to combat.

Not only will Fair Chance at Housing legislation alleviate the burden of housing-related collateral consequences for justice-

<sup>160</sup> The use of WCCA in conducting background checks is discouraged due to the lack of specific information available on the database. Kramer et al., *Think Twice Before Using CCAP*, WIS. HOUS. ALL., <https://housingalliance.us/think-twice-before-using-CCAP> (last visited Feb. 2, 2021).

<sup>161</sup> *Id.* In a 2017 report, the WCCA oversight committee made several recommendations to prevent inappropriate uses of information on WCCA, including revising the "executive summary" of disposition to present more clearly when a conviction is obtained for a less charge than the original charges brought. WIS. CIR. CT. OVERSIGHT COMM., FINAL REPORT 6-7, (Nov. 2017), <https://www.wicourts.gov/courts/committees/docs/wccafinalreport2017.pdf>.

<sup>162</sup> "Now HUD is telling landlords that they will need to become social workers . . . and try to determine if an applicant who was convicted . . . has been rehabilitated . . . None of this information is available on [WCCA]. You will only get this information from the actual file." Pettit, *supra* note 91.

<sup>163</sup> Kramer et al., *supra* note 160.

<sup>164</sup> Brydolf-Horwitz, *supra* note 137, at 881, 883, 888, n.7.

<sup>165</sup> This purpose was outright rejected by HUD in its 2016 Guidance. See Goldstein, *supra* note 59, at 952-53.

<sup>166</sup> Brydolf-Horwitz, *supra* note 137, at 881.

<sup>167</sup> Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, WILDER RSCH. 12, 23 (2019), [https://www.wilder.org/sites/default/files/imports/AEON\\_HousingSuccess\\_CriminalBackground\\_Report\\_1-19.pdf](https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf).

<sup>168</sup> Berry & Wiener, *supra* note 6, at 213.

involved individuals and their families, but it will also benefit society as a whole. Ensuring fair housing access for justice-involved individuals is linked to an increase in public safety,<sup>169</sup> decreases in homelessness,<sup>170</sup> and decline in poverty rates<sup>171</sup> to name a few. Ensuring housing access for the justice-involved through Fair Chance at Housing legislation will ensure that Wisconsin's housing policies are aligned with the goals of the FHA.

## CONCLUSION

Barriers to housing access for the justice-involved population are among some of the most severe collateral consequences of a criminal conviction. Due to pervasive stigmas about individuals with criminal conviction records, blanket ban policies against renting to prospective tenants who have a criminal record are pervasive. Without governmental prohibition of these discriminatory measures, the justice-involved population is stuck on the peripheral of society. The ramifications for these individuals, their families, and society are severe. The Wisconsin state legislature has passively permitted these policies to continue in municipalities statewide while further empowering landlords.

The ramifications of these policies can be stopped. Wisconsin has already enacted Fair Chance legislation in the employment context. The statutory substantial relationship requirement from the Fair Employment Act translates seamlessly into the housing context. To remedy the harms inflicted upon the justice-involved population, the Wisconsin legislature must enact a Fair Chance at Housing regulation requiring landlords to consider whether a prospective tenant's criminal conviction is substantially related to the responsibilities of tenancy before making an adverse rental decision. Through Fair Chance at Housing legislation, Wisconsin can once again align itself with the *Fair Housing Act* and work toward reducing statewide segregation.

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<sup>169</sup> Christopher Moraff, "*Housing First*" Helps Keep Ex-Inmates Off the Streets (and Out of Prison), NEXT CITY (July 23, 2014), <https://nextcity.org/daily/entry/housing-first-former-prisoners-homelessness>.

<sup>170</sup> Berry & Wiener, *supra* note 6, at 213.

<sup>171</sup> Robert E. Rubin, *The Smart Way to Help Ex-Convicts, and Society*, N.Y. TIMES (June 3, 2016), <https://www.nytimes.com/2016/06/03/opinion/how-to-make-mass-incarceration-end-for-good.html>.