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**Re: Tenant Screening Request for Information,
Docket No. FTC-2023-0024**

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union Foundation (“ACLU”) in response to the Request for Information on Tenant Screening released by the Federal Trade Commission (“FTC”) and Consumer Financial Protection Bureau (“CFPB”), Docket FTC-2023-0024, on February 28, 2023.

For over 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than three million members, activists, and supporters, the ACLU is a non-profit, non-partisan, nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington D.C. for the right of every individual to access housing free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, national origin, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction.

For the last several years, the ACLU has engaged in a range of advocacy to end discriminatory tenant screening practices, particularly related to criminal and eviction record screening. The ACLU Racial Justice Program has challenged criminal record screening policies, which disproportionately lock out people of color from housing, in lawsuits resulting in significant settlements.¹ The ACLU Women’s Rights Project has advocated to end unfair eviction record screening policies, because of their disparate impact on Black women and their families, through litigation and policy advocacy.² These comments draw from these experiences to make the following points: FTC and CFPB should collaborate with each other and other agencies, including the U.S. Department of Housing and Urban Development (“HUD”), to conduct investigations into the tenant screening industry; issue regulations and/or guidance concerning the obligations of tenant screening companies under the FTCA, as well as tenant screening practices that may be unfair or deceptive under the FTCA; and issue guidance for tenant screening companies on complying with the Fair Credit Reporting Act (“FCRA”), including their disclosure obligations.

I. Criminal Records in Tenant Screening

a. Response to Question 17

Landlords and property managers obtain and use criminal records in a variety of ways to unfairly screen out potential tenants. The data that they rely on may contain records that are decades old, and include arrest records, juvenile records, and sealed and expunged records that should not serve as a basis to disqualify tenants.

For example, in Faribault, Minnesota, as part of its so called “crime-free” housing ordinance, the Faribault Police Department encouraged landlords to screen tenants by using information from Minnesota’s Bureau of Criminal Apprehension (“MBCA”), which contained data on criminal convictions for 15 years following completion of a sentence, and did not allow sorting for recent criminal history.³ A “full” criminal history report from MBCA included not only public information regarding convictions but also all arrest records and juvenile records.⁴

¹ See, e.g., *Jones v. City of Faribault*, No. 18-1643, 2021 WL 1192466, at *24 (D. Minn. Feb. 18, 2021) (denying the city’s motion for summary judgment on all claims save for one theory in an action challenging the city’s rental licensing ordinance including its crime-free housing program); *ACLU Wins Settlement to End Housing Discrimination Case*, ACLU (June 15, 2022), <https://www.aclu.org/press-releases/aclu-wins-settlement-end-housing-discrimination-case>; Rachel Goodman, *Savannah Police Suspend Its Discriminatory ‘Crime Free Housing Program*, ACLU (Feb. 1, 2018), <https://www.aclu.org/news/racial-justice/savannah-police-suspend-its-discriminatory-crime-free>; *HOME settles race discrimination lawsuit against Sterling Glen Apartments; settlement includes new application policy regarding criminal history*, ACLU of Virginia & ACLU (Aug. 6, 2019), <https://www.acluva.org/en/press-releases/home-settles-race-discrimination-lawsuit-against-sterling-glen-apartments-settlement>.

² *Smith v. Wasatch*, No. 2:17-cv-00501 (W.D. Wash. filed Mar. 30, 2017), <https://www.aclu.org/cases/nikita-smith-v-wasatch-property-management-inc-et-al?document=smith-v-wasatch-property-management-complaint>; Legislation Promoting Housing Opportunity and Mobility Through Eviction Sealing: Hearing on H. 16090 & S. 956 Before the Mass. J. Comm. on the Judiciary (May 9, 2023) (testimony of the ACLU and the ACLU of Massachusetts), https://www.aclum.org/sites/default/files/aclu_aclum_joint_testimony_-_ma_homes_act_-_5.9.23-3.pdf; New York Advisory Comm. to the U.S. Comm’n on Civil Rights (July 23, 2021) (testimony of the ACLU Women’s Rights Project), <https://www.aclu.org/how-evictions-result-intersectional-racial-and-gender-discrimination-testimony-sandra-s-park-senior>.

³ Decl. of Alejandro Ortiz in Supp. of Pls.’ Mot. For Sum. J., Ex. BH, Def.’s Response to Pls.’ Second Set of Requests for Admission (Sept. 3, 2020) at Nos. 7-8, *City of Faribault*, No. 18-1643, ECF Nos. 216, 219-7.

⁴ *Id.*, Ex. BJ/P810 at 4.

Furthermore, Faribault instructed landlords to ask potential tenants about whether they had ever been convicted of a crime regardless of the age or nature of the offense.⁵ Accordingly, Faribault's crime-free housing ordinance resulted in the unjust denial of housing to numerous potential tenants, including by encouraging landlords to deny housing based on alleged conduct that had no connection whatsoever to housing success (i.e., the ability to maintain housing stability and achieve positive housing outcomes⁶), conduct that occurred many years ago, and/or conduct that never resulted in a conviction. Moreover, the ordinance intentionally targeted the Somali community in Faribault, and disproportionately impacted Black Minnesotans, who are far more likely to have criminal records than their white counterparts, due to systemic racism in the U.S. criminal legal system, as described below.⁷ Despite the harms that these types of ordinances pose to people of color, including because of discriminatory criminal records screening requirements, many jurisdictions throughout the country continue to pass and maintain them and related programs.⁸

Increasingly, landlords obtain criminal records data from tenant screening services.⁹ These screening companies generally rely on databases of aggregated criminal record data, which are often plagued with various errors. For instance, reports may mistakenly retrieve criminal records from people with similar names, improperly include sealed or expunged records, omit critical information about how a case was disposed of or resolved, contain misleading or inaccurate information, and misclassify the offense reported.¹⁰ These errors are often impossible to correct, including because some screening companies fail to provide the underlying records to landlords, and some only produce a "risk" score, or overall recommendation.¹¹ Rather than making individualized assessments on an applicant's criminal history and considering any mitigating circumstances, as a commitment to fair housing requires, landlords often use criminal record information to deny housing to potential tenants based on *any* criminal history, including arrests,

⁵ *Id.*, Ex. BK.

⁶ Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, Wilder Research (Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf

⁷ See, e.g., *Jones v. City of Faribault*, No. 18-1643, 2021 WL 1192466, at *14 (D. Minn. Feb. 18, 2021) ("The Court finds that the confluence of racialized complaints leading up to the [crime-free ordinance's] enactment, the City's knowledge that the [o]rdinance would have negative effects on the Somali community, and the City's desire to eliminate low-rent housing downtown, create an inference that the City implemented the [o]rdinance because of its potential displacement of Black residents, not merely in spite of such effect.").

⁸ See, e.g., Liam Dillon, *Mandatory Evictions for Arrested Tenants Would Be Banned Under New State Bill*, L.A. TIMES (Feb. 18, 2023, 5:00 AM), <https://www.latimes.com/homeless-housing/story/2023-02-18/mandatory-evictions-for-arrested-tenants-would-be-banned-under-new-state-bill> (estimating "at least 147 cities and counties in California have enacted a crime-free housing law or advertise crime-free housing training for landlords").

⁹ See Abby Boshart, *How Tenant Screening Services Disproportionately Exclude Renters of Color from Housing*, HOUSING MATTERS (Dec. 21, 2022), <https://housingmatters.urban.org/articles/how-tenant-screening-services-disproportionately-exclude-renters-color-housing>.

¹⁰ Ariel Nelson, *Broken Records Redux: How Errors By Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing* (Dec. 2019), <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>; see also Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters* (May 28, 2020), <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters>.

¹¹ Kirchner & Goldstein, *supra* note 10.

old convictions, and low-level crimes.¹² As explained below, however, criminal history is not a predictor of housing success, and blanket exclusions of people with criminal histories are unjustified and discriminatory.

b. Response to Questions 14 and 18

Criminal records screening disproportionately harms people of color, especially Black and Latino renters, including because of the stark racial disparities that exist in the United States criminal legal system due to over-policing and systemic bias.¹³ For example, “Black people represent roughly 13 percent of the US population but account for roughly 27 percent of arrests.”¹⁴ Moreover, police are more likely to arrest Black people than white people for engaging in the same conduct, including for low-level offenses, like trespassing, disorderly conduct, consuming alcohol in public, lurking, and marijuana use.¹⁵

These harms exist despite the fact that criminal history is not a predictor of housing success, and there is no empirical evidence that justifies broad exclusions of people with criminal histories from housing.¹⁶ For example, a study including data from more than 10,500 households found that, at minimum, 11 of 15 criminal offense categories have no significant effect on housing outcomes (*i.e.* on the resident’s reason for move-out), and the effect of a prior criminal offense on a resident’s housing outcome declines over time and becomes insignificant.¹⁷

Indeed, with respect to criminal records screening, HUD has explained that “[h]ousing providers frequently employ policies or practices that exclude individuals with criminal involvement from housing,” which often result in discrimination against protected class groups, including Black communities, Latino communities, and individuals with disabilities because of

¹² Ortiz Decl., *supra* note 3 at Ex. BK (suggesting landlords deny applicants who have a criminal history); *see also Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 275–76 (D. Conn. 2020) (describing option that landlords have to automatically send adverse action letters to let applicants know their applications have been denied after the screening company finds “disqualifying records”); *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, No. 18-cv-705, 2020 WL 401776 (D. Conn. Jan. 24, 2020), at *1-2 (describing defendant’s policy of disqualifying applicants from tenancy based on criminal records and without individualized assessments of relevant mitigating information).

¹³ *See, e.g.*, Susan Nembard and Lily Robin, *Racial and Ethnic Disparities Throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, Urban Institute (2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf>.

¹⁴ *Id.* at 4.

¹⁵ *See, e.g.*, *Picking Up the Pieces: A Minneapolis Case Study*, ACLU, <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces> (last visited Apr. 20, 2023); Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, NATURE HUMAN BEHAVIOUR, vol. 4, 736-745 (July 2020), <https://www.nature.com/articles/s41562-020-0858-1> (analyzing racial disparities in nearly 100 million traffic stops conducted across the country and finding that police stops and search decisions suffer from racial bias); Ezekiel Edwards, et al., *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf.

¹⁶ *See, e.g.*, Calvin Johnson, *Tenant Screening With Criminal Background Checks: Predictions and Perceptions Are Not Causality*, PD&R (May 17, 2022), <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html>.

¹⁷ Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, Wilder Research (Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

persistent disparities throughout the United States criminal legal system.¹⁸ Accordingly, “[u]sing criminal history to screen, deny lease renewal, evict or otherwise exclude individuals from housing” may be illegal under the Fair Housing Act (“FHA”).¹⁹ In particular, HUD’s guidance on criminal records screening makes clear that “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 is “unlawful under the [FHA] if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest. . . .”²⁰

HUD has also made clear that a policy or practice of exclusion based on prior arrests, or “a blanket prohibition on any person with any conviction record” without accounting for “when the conviction occurred, what the underlying conduct entailed,” or what the person has since done can *never* be necessary to serve a substantial interest.²¹ Instead, HUD instructs that any policy or practice with respect to criminal records screening should at the very least consider the nature, severity, and recency of a conviction, and provide for an individualized assessment of relevant mitigating information.²² Yet, as explained above, many landlords and property managers exclude prospective tenants based on arrest records, dated convictions, and low-level offenses, and fail to provide an individualized assessment of criminal records.

II. Eviction Records in Tenant Screening

a. Response to Question 22

Landlords and property managers unjustly screen out people with prior eviction records in myriad ways. They often communicate upfront that they will not rent to people with prior evictions. They may state they will not rent to people with evictions in their advertising and postings, and they may also include such statements when asking about eviction records in the application process.

Eviction record screening policies are frequently vague and broad, discouraging applications from many otherwise qualified applicants and rejecting many others. In our experience, landlords routinely use generic phrases like “no evictions,” which signal that they will reject any applicant who has previously faced eviction, regardless of whether the case was dismissed, occurred many years or even decades ago, or has since been sealed or expunged. These policies often make no distinctions between eviction filings, eviction judgments, different types of

¹⁸ Mem. from Demetria L. McCain, Principal Deputy Assistant Sec’y for Fair Hous. & Equal Opportunity to Off. of Fair Hous. & Equal Opportunity et al., *Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, HUD 2-3 (June 10, 2022), <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf> (hereinafter “HUD June 10, 2022 Memo”); Helen R. Kanovsky, *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*, HUD 3-4, 10 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHAANDCR.PDF (hereinafter “HUD Criminal Record Screening Guidance”).

¹⁹ HUD June 10, 2022 Memo, *supra* note 18, at 3; HUD Criminal Record Screening Guidance, *supra* note 18, at 10.

²⁰ HUD Criminal Record Screening Guidance, *supra* note 18, at 2.

²¹ *Id.* at 5–6.

²² *See id.* at 6–7.

judgments, and sealed cases. Given the expense of submitting an application,²³ applicants who see such a statement and had some prior involvement in an eviction case will rationally decide not to apply, even if there was no eviction judgment entered against them, their circumstances have changed, or their case was sealed.

In 2012, for example, N. Smith’s landlord filed an eviction action against her.²⁴ Fortunately, Ms. Smith and her landlord worked out an agreement, and Ms. Smith was never evicted from her home. However, when Ms. Smith applied for another apartment three years later, she was denied housing based on the property management company’s blanket ban on prior eviction records. The ACLU, ACLU of Washington, Northwest Justice Project, and Virginia Poverty Law Center filed a federal lawsuit challenging this blanket screening policy on the grounds that it violated the Fair Housing Act’s prohibition against race, gender, and race/gender discrimination. In doing so, the ACLU highlighted research showing that, in King County, Black tenants are nearly four times more likely to have an eviction case filed against them compared to white tenants, and households headed by Black women are more than five times as likely to have an eviction case filed against them as their white counterparts. The case eventually settled in Ms. Smith’s favor.

Landlords who have “no eviction records” policies generally do not engage in any individualized assessment of the applicant. While HUD has instructed that “in evaluating rental history, housing providers should consider the accuracy, nature, relevance, and recency of negative information rather than having any negative information trigger an automatic denial[,]” as well as extenuating or mitigating circumstances like whether “an eviction was due to unexpected medical or emergency expenses, or a negative reference reflected bias,”²⁵ we have not seen this type of assessment applied in the overall housing market.

For example, we have not seen an eviction records screening policy where a landlord affirmatively states that they will consider mitigating circumstances when evaluating an application. This type of affirmative statement is important, as it signals to potential applicants that they should consider applying despite a prior eviction record because the landlord will examine their application. Second, it is rare that a landlord will consider mitigating circumstances even where applicants affirmatively advocate for themselves by attempting to explain the circumstances of the eviction record or how it should not be considered relevant to their current application. Research bears this out, as a recent study established that landlords assess harshly applicants with any sort of eviction record, failing to distinguish between those with prior eviction filings and those whose cases resulted in judgments.²⁶

²³ Wesley Masters, *Apartment Application Fees: Why You Pay Them and What They Cover*, Rent (Jul. 27, 2021), <https://www.rent.com/blog/apartment-application-fees/>; see also Luis Ferré-Sadurní, *\$500 to Apply for an Apartment? So Much for the \$20 Cap*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/nyregion/apartment-rental-application-fees.html>.

²⁴ *Smith v. Wasatch*, No. 2:17-cv-00501 (W.D. Wash. Mar. 30, 2017).

²⁵ Office of Fair Housing and Equal Opportunity (FHEO) *Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties*, HUD 6 (Apr. 21, 2022), at 6, <https://www.hud.gov/sites/dfiles/FHEO/documents/HUD%20Title%20VI%20Guidance%20Multifamily%20Marketing%20and%20Application%20Processing.pdf> (hereinafter “HUD Multifamily Guidance”).

²⁶ Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, HOUS. POL’Y DEBATE (Aug. 30, 2022), <https://www.tandfonline.com/doi/full/10.1080/10511482.2022.2113815>.

b. Response to Questions 14 and 23

There are substantial harms from considering eviction records in making housing decisions, particularly for communities of color, families with children, and Black and Latino women and their families.

Evictions are a racial and gender justice issue. Millions of tenants across the country have faced, and will face, the threat of eviction. Because of longstanding systemic income and wealth inequality in this country, Black households are more than twice as likely as white households to report that they are not currently caught up on rent payments.²⁷ Rent insecurity overwhelmingly burdens communities of color and women—and in particular, Black women, who are overrepresented in low-wage jobs and shoulder the majority of caregiving responsibilities.²⁸

With respect to eviction record screening, HUD has acknowledged that “non-white households may be more likely to face eviction actions, even for the same housing history as white counterparts.”²⁹ Indeed, Black and Latinx households are more likely than white households to rent their homes,³⁰ and they are consistently over-represented in households facing eviction.³¹ The Eviction Lab, a team of researchers committed to understanding the racial and gender disparities among evicted Americans, found that, based on data from 2012 to 2016, “[n]early one in four black renters lived in a county in which the black eviction rate was more than double the white eviction rate.”³² They also found that, among renters, women—especially Black and Latino women—faced higher eviction rates than men. The ACLU Data Analytics team analyzed the Eviction Lab’s national eviction data from 2012 to 2016 and found that, on average, Black women renters had evictions filed against them by landlords at double the rate of white renters (or higher) in 17 of 36 states, and they were more likely to have cases filed against them that are later dismissed.³³ Other research has shown that having children is the single greatest predictor of whether someone will face eviction.³⁴ Data released by the Urban Displacement Project at UC

²⁷ See U.S. Census Bureau, *Week 54 Household Pulse Survey: Table 1b. Last Month's Payment Status for Renter-Occupied Housing Units, by Select Characteristics (February 1 – February 13, 2023)*, <https://www.census.gov/data/tables/2023/demo/hhp/hhp54.html>.

²⁸ Emma Singh, *6 Ways States' Response to COVID-19 Centers Gender and Racial Justice*, Nat'l Women's Law Ctr. (Aug. 4, 2020), <https://nwlc.org/blog/6-ways-states-response-to-covid-19-centers-gender-and-racial-justice/>.

²⁹ HUD Multifamily Guidance, *supra* note 25, at 7.

³⁰ See Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RES. CTR. (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/>.

³¹ See Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color*, CTR. FOR AM. PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/article/pandemic-exacerbated-housing-instability-renters-color/>; Timothy A. Thomas et al., *The State of Evictions: Results from the University of Washington Evictions Project*, U.C. BERKELEY EVICTION RSCH. NETWORK, <https://evictionresearch.net/washington/> (last updated Jan. 6, 2020); *Evictions in Philadelphia: A Data & Policy Update*, REINVESTMENT FUND (Oct. 2019), <https://www.reinvestment.com/insights/evictions-in-philadelphia-a-data-policy-update/>.

³² Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, EVICTION LAB (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/>.

³³ Sophie Beiers, Linda Morris & Sandra Park, *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU (Jan. 10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color>.

³⁴ See Bryce Covert, *Why Landlords Target Mothers for Eviction*, NEW REPUBLIC (Mar. 16, 2021), <https://newrepublic.com/article/161578/landlords-target-mothers-eviction-crisis-covid>.

Berkeley—a group aiming to identify neighborhoods with the highest risk of displacement and eviction across 53 metropolitan areas with populations larger than one million people—reveals that 73% of Black renters live in neighborhoods with a high risk of eviction.³⁵

The filing of an eviction action triggers a cascading sequence of harmful events. Multiple studies have shown that Black, Latino, and women renters are disproportionately exposed to the many documented negative consequences of eviction, from job loss, mental and physical health issues, material hardship, and even homelessness.³⁶ The use of eviction record screening policies only exacerbate these harms, by making families more vulnerable to homelessness and to landlords who might take advantage of a desperate situation to charge more for rent, leave tenants in sub-standard housing conditions, or force tenants to endure sexual harassment or demands for sexual activity.³⁷ For domestic violence survivors, eviction record screening policies heighten their insecurity, as it may be difficult for them to obtain housing independent of abusive partners.³⁸ Low-income, single mothers and families are at particular risk of eviction and most likely to then be locked out of future housing, as well as the opportunities that accompany it, due to their eviction records.³⁹

Because eviction records can follow people for years, many tenants will avoid a case at all costs.⁴⁰ Rather than exercising their legal rights, many tenants endure horrible and unlawful living conditions to avoid bearing the effects of a scarlet “E.” Others choose to comply with unlawful lease termination notices and leave their home, rather than have an eviction filed against them, even when they have legal defenses or counterclaims they could bring.

Thus, eviction record screening policies contribute to growing racial, gender, income, and social inequality.

³⁵ See *Housing Precarity Risk Model*, U.C. BERKELEY URB. DISPLACEMENT PROJECT, <https://www.urbandisplacement.org/maps/housing-precarity-risk-model/> (last updated July 13, 2021).

³⁶ See Matthew Desmond et al., *Evicting Children*, 92 Social Forces 303 (2013), <https://academic.oup.com/sf/article-abstract/92/1/303/2235762?redirectedFrom=fulltext> [https://perma.cc/BQ8C-2VZU].

³⁷ See, e.g., Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing: Pilot Study Results*, 83 Mo. L. Rev. (2018), <https://scholarship.law.missouri.edu/mlr/vol83/iss3/>.

³⁸ *Indigo Real Estate Servs. v. Rousey*, 151 Wn. App. 941, 151 Wash. App. 941, 215 P.3d 977 (Wash. Ct. App. 2009); see also Cydney Gillis, *Renter wins rights to edit unlawful eviction record*, Real Change (Sept. 10, 2009), <https://www.realchangenews.org/news/2009/09/10/renter-wins-right-edit-unlawful-eviction-record>; Jenny Kutner, *Domestic violence victims can be evicted for calling police*, Mic (Oct. 7, 2020), <https://www.aol.com/2016-07-14-domestic-violence-victims-can-be-evicted-for-calling-police-21432355.html>.

³⁹ Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MacArthur Foundation (Mar. 2014), https://www.macfound.org/media/files/hhm_-_poor_black_women_are_evicted_at_alarming_rates.pdf.

⁴⁰ Sandra Park, *Unfair Eviction Screening Policies Are Disproportionately Blacklisting Black Women*, ACLU (Mar. 30, 2017), <https://www.aclu.org/blog/womens-rights/violence-against-women/unfair-eviction-screening-policies-are-disproportionately> [https://perma.cc/RQ4U-JJHJ].

III. Use of Algorithms in Tenant Screening

a. Response to Question 45

Housing discrimination has evolved along with new and expanding uses of technology,⁴¹ including tenant screening algorithms.⁴² These systems purport to make predictions about who will be a successful tenant by analyzing large amounts of data. To evaluate tenants, these systems pull in credit scores, legal records, previous housing history, and other information from data brokers, traditional credit agencies, people search databases, and other sources. Too often, these technologies amplify and exacerbate existing racial, gender, disability, economic, and intersectional inequities in accessing housing. As highlighted in a recent report by the CFPB, these systems are prone to algorithmic errors and discrimination, which disproportionately impact Black and Latino/a applicants, with devastating effects for consumers' ability to access housing.⁴³ Indeed, bias is often baked into the outcomes the algorithms are asked to predict. For example, algorithms that attempt to predict risk often use "arrest" as a proxy for "likelihood to compromise safety in housing." Given the realities of disproportionate and unjust policing of communities of color, as discussed above, the idea that an arrest can indicate a future housing safety risk, is inherently biased, and indeed violates HUD's guidance that consideration of arrest records can never serve a substantial interest in this context.

Likewise, bias exists in the data used to train the AI—data that is often discriminatory or unrepresentative for people of color, women, or other marginalized groups—and can rear its head throughout the AI's design, development, implementation, and use. For example, if an algorithm is given "successful tenant" profiles comprised entirely of men within a particular income bracket with the goal of having the algorithm learn to evaluate future tenants, it will learn to look for characteristics common to that demographic when evaluating new tenants and potentially exclude people who fall into other demographic categories or who have other life experiences, possibly including protected classes. And because of the black box nature of these systems and insufficient notice to impacted people when they are utilized, it is often difficult or impossible for people to learn about housing discrimination in these systems. This is particularly true with respect to tenant screening companies that generate a "score" or recommendation for an applicant.⁴⁴ As the CFPB has found, some tenant screening companies use a proprietary scoring model or algorithm to classify a renter as more or less "risky"; landlords often receive these scores with limited access to the underlying records or information on which an assessment is based; and

⁴¹ See, e.g., Patrick Sisson, *Housing discrimination goes high tech*, Curbed, Dec. 17, 2019, <https://archive.curbed.com/2019/12/17/21026311/mortgage-apartment-housing-algorithm-discrimination>; Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era* (Nov. 2019), <https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf>.

⁴² See, e.g., Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times*, Consumer Reports, March 11, 2021, <https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times/>.

⁴³ *Consumer Snapshot: Tenant background checks*, Consumer Financial Protection Bureau (Nov. 2022), at 21, [Consumer Snapshot Tenant Background Checks 11.15.22 ver 508 \(consumerfinance.gov\)](https://www.consumerfinance.gov/consumersnapshots/tenant-background-checks).

⁴⁴ See, e.g., *Conn. Fair Hous. Ctr. V. CoreLogic Rental Property Solutions, LLC*, 478 F. Supp. 3d 259, 275–76 (D. Conn. 2020) (explaining that the property management company at issue does not disclose the basis for the applicant's denial, except to inform them that the denial is based on the relevant company's screening report).

applicants rarely receive their scores and are not informed about how they are calculated or used in making housing decisions.⁴⁵ Accordingly, landlords often fail to provide individualized assessment of potential tenants and instead rely on these algorithmically generated scores or recommendations, and applicants do not have access to underlying negative information to explain or correct the rampant errors described above.

IV. FTC and CFPB Authority to Address Discriminatory Screening Practices

a. Response to Questions 21 and 30

The FTC has a central role to play in addressing discrimination in tenant screening practices through its authority to prevent unfair and deceptive acts or practices. Section 5 of the Federal Trade Commission Act (“FTCA”) prohibits “unfair or deceptive acts or practices in or affecting commerce.”⁴⁶ Under the FTCA, an act or practice is unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁴⁷ To this end, the FTC is “empowered and directed to prevent” landlords, housing providers, and other companies from engaging in such practices.⁴⁸

Discrimination in tenant-screening policies and practices is inherently unfair under the FTCA. First, the above responses discuss in detail the ample evidence of the “substantial injury” and harms caused by criminal and eviction record screening policies—including exacerbating existing racial and gender disparities in housing access, particularly for Black and Latino women, other people of color, and families with children. Such discrimination often results in lifechanging consequences for tenants, including limiting access to safe and secure housing, employment, financial security, and healthcare.

Second, given the ubiquity of these discriminatory tenant screening policies, and the power imbalances baked into the landlord-tenant relationship, such injuries are far from reasonably avoidable by consumers themselves. Applicants for housing cannot reasonably choose whether a landlord or property manager uses criminal or eviction record screening policies or algorithmic tools, and may be wholly unaware of if or how their prior criminal or eviction history is evaluated during the application process. As discussed above, many tenants may be unaware of the information or underlying records that a landlord is reviewing, given the “black box” nature of these tenant-screening policies and practices. This is particularly true when landlords and property managers rely on tenant screening algorithms, which are often developed and implemented by a third-party vendor. Thus, tenants cannot reasonably avoid these injuries, thereby warranting the FTC’s use of its full authority in preventing them.

Third, there are no “countervailing benefits to consumers or to competition” that outweigh the harms from discrimination in housing. Such discrimination not only harms the individuals and communities against whom adverse decisions are made, but also erodes the efficiency and fairness of systems and institutions. Indeed, discriminatory tenant screening policies only further entrench existing disparities and force individuals from marginalized backgrounds to accept sub-standard

⁴⁵ *Consumer Snapshot: Tenant background checks*, *supra* note 43, at 21.

⁴⁶ 15 U.S.C. § 45(a)(1).

⁴⁷ *Id.*

⁴⁸ 15 U.S.C. § 45(a)(1).

housing and endure unlawful and often dangerous conditions. Strengthening protections against such policies would benefit all consumers.

Critically, an act or practice may be unfair where a business fails to assess and mitigate reasonably foreseeable harms from the act and practice.⁴⁹ Assessments must be holistic and consider the potential risks to consumers,⁵⁰ especially in light of the context in which the act or practice will take place, including the role and capacity of third parties,⁵¹ such as a landlord using tenant screening software. Similarly, if there is evidence that a particular practice is causing harm, businesses must take steps such as implementing policies, procedures, and technical measures to appropriately limit the harm.⁵² The harms from discriminatory tenant screening are well documented, yet there is no evidence that tenant screening companies or landlords are either assessing the harms posed by their acts and practices or working to mitigate those harms.

In addition, tenant screening may constitute a deceptive practice when it is premised on factors unrelated to housing success. Under the FTCA, an act or practice is deceptive if “there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.”⁵³ The FTC has found that claims about the effectiveness of a product must be “substantiated when made — that is, “persons or individuals making such claims must have a reasonable basis for” them.⁵⁴ Thus, tenant screening that purports to advance housing success without substantiation for that claim may run afoul of the FTCA as a deceptive practice.

Similarly, CFPB plays a major role in protecting tenants against discriminatory and harmful policies and practices. CFPB is charged with enforcing the FCRA, which a critical tool for protecting tenants.⁵⁵ To this end, CFPB has issued advisory opinions and guidance concerning compliance with FCRA’s obligations, including, but not limited to, ensuring that tenant screening companies follow reasonable procedures to ensure accuracy of consumer reports and to exclude certain information from consumer reports.⁵⁶ In addition, CFPB has published valuable research concerning tenant screening services based on data from industry and academic research, legal cases, and its own market monitoring, in which is addressed challenges that create or reinforce inequities for tenants from marginalized backgrounds.⁵⁷

⁴⁹ FTC Policy Statement on Biometric Information and Section 5 of the Federal Trade Commission Act (2023); Complaint, *In re Upromise, Inc.*, FTC File No. 1023116 (Mar. 27, 2012) (failure to test tool before distributing it to customers).

⁵⁰ Complaint, *In re Lenovo, Inc.*, FTC File No. 1523134 (Dec. 20, 2017) (failure to assess security vulnerabilities); Complaint, *In re SettlementOne Credit Corp.*, FTC File No. 0823208 (Aug. 17, 2011) (same).

⁵¹ Complaint, *In re Upromise, Inc.*, FTC File No. 1023116 (Mar. 27, 2012) (failure to assess service provider’s development of software).

⁵² *FTC v. Equifax, Inc.*, No. 1:19-cv-03297-TWT (N.D. Ga. July 22, 2019); Complaint, *In re Lookout Services, Inc.*, FTC File No. 1023076 (June 15, 2011).

⁵³ FTC Policy Statement on Deception (1983).

⁵⁴ FTC Policy Statement on Biometric Information and Section 5 of the Federal Trade Commission Act (2023); accord FTC Policy Statement Regarding Advertising Substantiation (1984), appended to *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

⁵⁵ 12 U.S.C. §§ 5481, 5492.

⁵⁶ 15 U.S.C. §§ 1681c, 1681e; *see also* Consumer Financial Protection Bureau, *Fair Credit Reporting; Name-Only Matching Procedures*, 12 C.F.R. Pt. 1022 (Nov. 10, 2021), <https://www.govinfo.gov/app/details/FR-2021-11-10/2021-24471>.

⁵⁷ *Consumer Snapshot: Tenant background checks*, *supra* note 43, at 21.

Accordingly, we respectfully recommend the following: FTC and CFPB should collaborate with each other and other agencies, including HUD, to conduct investigations into the tenant screening industry; issue regulations and/or guidance concerning the obligations of tenant screening companies under the FTCA, as well as tenant screening practices that may be unfair or deceptive under the FTCA; and issue guidance for tenant screening companies on complying with the Fair Credit Reporting Act (“FCRA”), including their disclosure obligations.

The FTC should consider it an unfair and deceptive practice for landlords and screening companies to categorically exclude people from housing based on criminal records and eviction records. At minimum, screening companies and landlords must assess their products for foreseeable harms and take organizational and technical steps to mitigate those harms. Further, screening companies and landlords must substantiate a significant link between any factors they consider and the likelihood of negative housing outcomes (*e.g.*, lease violations for behavior, leaving without notice, and non-payment of rent), and provide for individualized assessment. The burden of assessment and substantiation of the connection between screening criteria and negative housing outcomes must be on screening companies and landlords rather than on housing applicants and their families. As described above, the broad use of criminal and eviction records to exclude people from housing causes substantial injury to applicants and society as a whole and has no basis in predicting negative housing outcomes. As such, the FTC should prohibit any policies or practices—including by tenant screening companies and their algorithms—that consider arrest records, eviction filings, or sealed and expunged records in evaluating applicants for housing because these policies are inherently unfair.⁵⁸ Similarly, any policies or practices that fail to consider the nature, recency, severity, and circumstances of a conviction or eviction judgment are inherently unfair and must be prohibited.⁵⁹

Moreover, algorithmically generated scores or other eligibility determinations by tenant screening companies should not be permitted to supersede individual assessment of applicants by landlords. Instead, tenant screening companies must provide landlords with sufficiently detailed information to independently assess whether applicants for housing will be good tenants. Landlords and property managers, in turn, should not deny applicants based on algorithmically generated scores or other eligibility determinations, and must provide tenants with the underlying records and reports on which their determinations are based so that applicants have the opportunity to explain or correct that information.

Further, the FTC and CFPB must work to develop new federal regulations to ensure that tenant screening companies do not produce false or discriminatory reports. Tenant screening companies should be required at minimum to disclose the variables they are considering in evaluating applicants, the datasets from which they are gathering information, how they are using that information to assess applicants, and how their algorithms are trained. Such information is necessary in order to allow for agency enforcement under both the FTCA and FCRA and for individuals harmed by these tools to seek redress. Additionally, algorithmic discrimination and

⁵⁸ See, *e.g.*, HUD 2016 Guidance at 5 (explaining why consideration of arrest records can never serve a substantial, legitimate, nondiscriminatory interest).

⁵⁹ See *id.* at 6 (explaining that a blanket prohibition on any person with a conviction record cannot prove that such a policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest).

error are best assessed by independent evaluators and as part of holistic efforts to evaluate algorithmic systems throughout their lifecycle, from their development and deployment and after they are put into use to monitor their real-world functioning. For additional information on recommendations for federal regulations of algorithmic tools, see the ACLU's Comment to the FTC on Commercial Surveillance.⁶⁰

V. Conclusion

Unfair and discriminatory tenant screening practices are pervasive through the rental housing market, and particularly impact Black and Latino families, including those headed by women. We appreciate the work that the FTC and CFPB have already begun to do and urge you to conduct investigations into the tenant screening industry; issue guidance concerning the obligations of tenant screening companies under the FTCA, as well as tenant screening practices that may be unfair or deceptive under the FTCA; and issue guidance for tenant screening companies on complying with the FCRA, including their disclosure obligations.

The ACLU appreciates the opportunity to submit comments. Please feel free to contact Sandra S. Park (spark@aclu.org) or Linda S. Morris (lindam1@aclu.org), ACLU Women's Rights Project, or Amanda M. Meyer (amandam@aclu.org), ACLU Racial Justice Program, with any questions.

Sincerely,

American Civil Liberties Union

⁶⁰ ACLU, *Comment to Federal Trade Comm'n on Commercial Surveillance ANPR, R111004* (Nov. 21, 2022), <https://www.aclu.org/letter/aclu-comment-commercial-surveillance-anpr-r111004>.