Chief Joseph H. Lumpkin, Sr.
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VIA U.S. MAIL

January 12, 2018

Dear Chief Lumpkin:

Everyone deserves a second chance. Preventing people who have served time in the criminal justice system from having a place to live violates that basic American principle, and does little to enhance public safety. To the contrary, preventing people who are formerly incarcerated from reintegrating into our society increases homelessness and recidivism, and ultimately causes more crime.

The criminal history screening policy promulgated by the Savannah-Chatham Metropolitan Police Department ("SCMPD") as part of its Crime Free Housing Program, which requires that landlords adopt it in order to be certified as "crime free," not only violates basic American principles and makes our community less safe, it also violates the Fair Housing Act. SCMPD must immediately revise the policy in order to comply with the law. We are also concerned, more broadly, with the fair housing implications of the Crime Free Housing Program, and we recommend that you take steps to address these concerns.

The Fair Housing Act ("FHA") prohibits SCMPD as well as landlords from engaging in even facially-neutral practices that have a disproportionately adverse effect on people of color, unless the practice is shown to be necessary to serve a substantial, legitimate, nondiscriminatory interest and that interest could not be served by a different practice with a less discriminatory effect. 24 C.F.R. § 100.500(a)–(b); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. ----, 135 S.Ct. 2507 (2015). The FHA also prohibits housing policies that are intentionally discriminatory. 42 U.S.C. § 3604.

We remind you that police action can give rise to liability under the FHA when police actions affect the availability or terms of private housing. *See, e.g.*, *Southend Neighborhood Imp. Ass'n v. St. Clair Cty.*, 743 F.2d 1207, 1209–10 (7th Cir. 1984) ("[C]ourts have construed the phrase 'otherwise make unavailable or deny' in subsection (a) to encompass mortgage 'redlining,' insurance redlining, racial steering, exclusionary zoning decisions, and other actions by *individuals or governmental units* which directly affect the availability of housing to

minorities.") (emphasis added); *Davis v. City of New York*, 902 F. Supp. 2d 405, 435–37 (S.D.N.Y. 2012) (municipality can be liable under FHA for discriminatory policing); *Cmty. Action League v. City of Palmdale*, No. CV 11-4817 ODW VBKX, 2012 WL 10647285, at *4–5 (C.D. Cal. Feb. 1, 2012) (same). What a landlord may wish to do on his or her own is an issue—and potential fair housing violation—for that landlord, but when SCMPD inserts itself into the process, the SCMPD can be liable for making housing unavailable on the basis of race or national origin or for discriminating in the terms, conditions, or privileges of housing. *See* 42 U.S.C. § 3604(a), (b).

I. Criminal History Screening Can Violate the Fair Housing Act

SCMPD instructs property owners and landlords through its crime-free training that "criminals" are "NOT a Protected Class," implying that barring individuals from housing based upon criminal history cannot violate the FHA. *See* Exhibit A. That statement is false and contradicts recent guidance from the United States Department of Housing and Urban Development ("HUD").

As noted above, the FHA bars claims with a disparate impact, that is, "practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale." *Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2513. HUD recently issued guidance that synthesizes this existing law to make clear that the Fair Housing Act and its disparate impact standard *do* apply to the use of criminal history information by providers or operators of housing. U.S. Dep't of Housing and Urban 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, Apr. 4, 2016,[1] ("HUD Guidance"); *see also Sams v. Ga W. Gate, LLC*, No. CV415-282, 2017 WL 436281, at *5 (S.D. Ga. Jan. 30, 2017) (denying motion to dismiss plaintiffs' FHA disparate impact claim based on barring individuals with criminal records from housing). The HUD Guidance states:

> Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

HUD Guidance 10.

Recent nationwide data show African Americans are arrested at a rate more than double their proportion of the general population and imprisoned at a rate about three times higher than their proportion of the general population. HUD Guidance 3–4 (citing statistics); *Sams*, 2017 WL

[1] https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf.

436281, at *5. The disparity in Georgia is also severe; in 2014, while 30.5% of Georgia's population was Black, 62% of those incarcerated in its prisons were Black.[2]

Accordingly, barring potential tenants based on their criminal history will disproportionately impact Black people, and any such exclusion must be justified by a substantial, legitimate, nondiscriminatory interest. The justification must be supported by evidence, and it cannot be hypothetical or speculative. 24 C.F.R. § 100.500(b)(2). Generally, the claimed justification for criminal history screening is the protection of other residents and the property. However, a policy of excluding potential tenants based on arrest records—as opposed to convictions—can never be necessary to achieve such an interest, since arrest records do not even constitute proof of any past criminal conduct. *See Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII), *aff'd*, 472 F.2d 631 (9th Cir. 1972); HUD Guidance 5.

Similarly, blanket, lifetime bans on individuals with prior convictions also cannot be necessary to protect residents or property. *See Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (blanket ban violates Title VII because court "[could not] conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed"); HUD Guidance 6. Instead, policies regarding prior convictions must be tailored so that they take into account "the nature and severity of an individual's conviction" and "the amount of time that has passed since the criminal conduct occurred." HUD Guidance 7. Moreover, limiting the use of criminal history information in housing decisions in this manner makes good sense. Because "many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing," such policies are necessary to reduce homelessness and facilitate reentry. *Id.* at 1.

II. SCMPD Requires Landlords Participating in the Crime Free Housing Program to Violate the Fair Housing Act.

The City of Savannah is aware that the Crime Free Housing Program that SCMPD runs for managers of rental properties raises fair housing concerns. The March 2017 Assessment of Fair Housing that the City submitted to HUD stated that the Crime Free Housing Program policy would be "forwarded to the city attorney for review in light of updated 2016 guidance" from HUD, that is, in light of the HUD Guidance.[3] Nonetheless, nearly a year later, SCMPD produced a policy in response to our Open Records Act request that straightforwardly fails to comply with that Guidance and with the FHA.

[2] The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons (2016), at 16, Table A. (citing United States Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Prisoner Statistics, 1978-2014 (2014)).

[3] City of Savannah, Assessment of Fair Housing 8, 12, 121. Mar. 2017 (rev. May 2017), http://www.savannahga.gov/DocumentCenter/View/10596.

While we commend SCMPD for working proactively to make life safer for Savannah's rental housing residents, SCMPD's current policy requires participating landlords to exclude potential tenants with a broad range of criminal histories, in violation of the Fair Housing Act. The "Criminal History Disqualification Standards" policy ("Criminal History Policy"), attached hereto as Exhibit B, *requires* landlords to reject applications for housing for the following reasons:

1. Any felony of a violent nature.
2. Any felony, of a non-violent nature, under ten (10) years.
3. Two or more felonies, of a non-violent nature, total.
4. Probation / parole, for a non-violent felony, within past ten (10) years.
5. Any misdemeanor conviction within past five (5) years.
6. Three or more misdemeanor convictions total.
7. Active parole / probation status.
8. Active warrants.
9. Sexual offender / predator registry requirement.

This policy is an extremely blunt instrument with which to protect the safety and quality of life in rental housing communities; the individuals it bans from housing are overwhelmingly those whose criminal histories do not indicate any threat of future dangerous conduct.

Many of the criminal history categories enumerated in the policy contain no limitation whatsoever on the duration of the housing ban. As a result, SCMPD would bar a participating landlord from housing a 75-year-old applicant with criminal history from when he was a teenager. He could be barred on the basis of a single violent felony conviction from fifty years ago (Category 1), or because of two non-violent felonies (Category 3) or three misdemeanor convictions (Category 6) that far in the past. Because research indicates that there is no tie between old convictions and recidivism, there can be no true safety-related justification for such exclusions. Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology and Pub. Pol'y 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

The categories that do contain limitations on the duration of the ban employ limits that are substantially overbroad. An individual who has been on probation or parole for a non-violent felony in the last decade (Category 4) may have committed her single crime fifteen years ago or more. A single non-violent felony conviction from nine years ago (Category 2) may stem from a set of circumstances so far in an individual's past as to be irrelevant. Again, because research does not support an elevated risk of crime once an individual's convictions are more than seven years in the past, these policies cannot be supported by justifications that rise beyond the hypothetical or speculative. *See* Kurlychek, *Scarlet Letters and Recidivism*. With respect to barring people from rental housing for five years on the basis of a single misdemeanor conviction (Category 5), including for example driving with an expired license, Ga. Code Ann.,

§ 40-5-20(a); § 40-5-121(a), there is simply no evidence tying the existence of such a conviction to any safety risk in the rental housing community.

Although the policy states that each exclusion category applies solely to convictions (and not, presumably, to arrests), Category 8, concerning "active warrants" by its very terms applies to a situation in which no conviction has occurred. An open warrant does not even signify that the applicant for housing has willfully absconded. In Georgia, a judge can issue a bench warrant when a person does not appear for a scheduled criminal court date, even when the only notice of that court date was mailed to his last known address and he no longer lives there. Ga. Code Ann. § 17-7-90(a). Excluding persons with active warrants, then, cannot be justified in terms of any demonstrable impact on the safety of residents or property.

Finally, it is not at all clear that there is a legitimate justification for excluding individuals currently on probation or parole from housing. *See Victor Valley Family Res. Ctr. v. City of Hesperia*, No. EDCV1600903ABSPX, 2016 WL 3647340, at *4 (C.D. Cal. July 1, 2016) (noting animus against probationers, unsupported by evidence of actual public safety threat they pose, likely to violate equal protection clause). Individuals on probation or parole are subject to heightened scrutiny by law enforcement. As a result, they may be *less* likely to commit crime than similar individuals not under supervision.

This list of problems with the current Criminal History Policy is not exhaustive. It suffices, however, to make clear that the policy must immediately change in order to comply with the law.

III. SCMPD Must Change Its Policy In Order to Address the Housing Needs of Residents with Criminal Records and to Comply with the FHA.

In addition to violating the law, the current Criminal History Policy is contributing to the problem of homelessness in Savannah. Hundreds, if not thousands, of Savannah rental units are located within properties that participate in SCMPD's Crime Free Housing Program. Barring everyone with the wide range of criminal history covered by the Criminal History Policy from securing housing in this substantial portion of the affordable rental housing in Savannah ensures that some of these individuals will become homeless. Indeed, the Chatham Savannah Authority for the Homeless notes increasing levels of homelessness in recent years, and it particularly notes that citizens released from prisons and jails are contributing to the increase. Chatham Savannah Authority for the Homeless, Chatham County Homeless Statistics.[4]

Accordingly, SCMPD must revise the Policy so that it better serves Savannah's needs. **SCMPD should immediately cease requiring landlords to engage in criminal history screening through the Crime Free Program or through any other means.** This shift is necessary to limit SCMPD's liability for criminal history screening that landlords conduct in violation of the FHA.

To the extent that SCMPD continues to discuss criminal history screening of tenants with landlords or property managers, it must inform them that they risk fair housing liability for

[4] http://homelessauthority.org/statistics-on-savannah-homelessness.html

performing overbroad screening. (And, of course, it must remove language from its materials suggesting that "criminals" are "NOT a Protected Class." Exhibit A.) SCMPD should provide landlords with fair housing guidelines for criminal history screening, similar to those contained within the HUD Guidance, so that they understand that barring potential tenants based on criminal history violates the law if it is not provably related to the protection of other residents or the property.

IV. Additional Concerns

Records disclosed in response to our recent Open Records Act Request reveal several additional policies and practices that raise substantial fair housing concerns. We bring several of those to your attention briefly here:

- SCMPD apparently mails an Arrest Notification Letter (attached hereto as Exhibit D) to landlords and property managers at some 250 rental properties in the event one of their tenants is arrested. Because, as described above, an arrest alone cannot be considered evidence that an individual engaged in criminal conduct, SCMPD should discontinue this practice, which will inevitably lead to adverse housing consequences for families based on arrests alone.

- The Spanish and English versions of the criminal history questionnaire distributed by SCMPD are significantly different. Unlike the English language version (Exhibit C), the Spanish language version (Exhibit E) asks for the Social Security Number of the prospective tenant, and it also asks about dismissed charges and probationary sentencing. To comply with the FHA, SCMPD must make these forms consistent. As currently drafted, they appear to subject people seeking housing to different screening policies based upon their race, ethnicity, and/or national origin.

- The Crime Free Housing Program handbook for landlords describes a domestic violence incident in which a wife calls police when her armed husband is threatening to kill her. (Exhibit F). The handbook states that the property manager of this complex had not done her job because the police had been called to the apartment twice before and the manager had not evicted him on that basis. Eviction based on domestic violence-related calls to the police can violate constitutional guarantees and federal law, including the Fair Housing Act and the Violence Against Women Act. *See, e.g.*, *Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md*., 756 F.2d 986, 994 (4th Cir. 1985) (First Amendment protects the right to seek assistance from law enforcement); *Forro Precision, Inc. v. Int'l Bus. Mach. Corp.*, 673 F.2d 1045, 1060 (9th Cir. 1982) (same); *Bd. of Trustees of Vill. of Groton v. Pirro*, 58 N.Y.S.3d 614, 620–21 (N.Y. App. Div. 2017) (holding same in context of ordinance penalizing tenant victims of domestic violence for calls to police); *Dickinson v. Zanesville Metropolitan Housing Authority*, No. 2:12-CV-01024, 2013 WL 5487101 (S.D. Ohio Sept. 30, 2013) (adverse action against victim of domestic violence violates FHA); *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. 2005) (same), *Meister v. Kansas City, Kansas Housing Authority*, No. 09-2544-EFM, 2011 U.S. Dist. 2011 WL 765887 (D. Kan. 2011) (adverse action violates FHA and VAWA); HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of

Domestic Violence (September 13, 2016)[5]; HUD Office of Fair Housing & Equal Opportunity, Memorandum on assessing claims of housing discrimination against victims of domestic violence under the Fair Housing Act (Feb. 9, 2011)[6]. SCMPD must edit this guidance to make completely clear that landlords may not evict or take other adverse action against *the victim of domestic violence* in this scenario.

* * * *

Please contact Sean Young at (678) 981-5295 with any questions. We are available to meet and discuss how you plan to address these urgent concerns.

Sincerely,

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[5] https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf

[6] https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF