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## To “Otherwise Make Unavailable”: Tenant Screening Companies’ Liability Under the Fair Housing Act’s Disparate Impact Theory

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## NOTES

### TO “OTHERWISE MAKE UNAVAILABLE”: TENANT SCREENING COMPANIES’ LIABILITY UNDER THE FAIR HOUSING ACT’S DISPARATE IMPACT THEORY

*Shivangi Bhatia\**

*Tenant screening companies present information to housing providers on prospective tenants’ criminal and eviction histories in the form of background screening reports. These screening reports disproportionately impact racial and gender minorities. Two opposing views exist on whether courts should interpret the Fair Housing Act to cover the discriminatory practices and policies of tenant screening companies. Some believe that background screening reports are a vital part of the housing industry, while others criticize them for their inaccurate, misleading, and discriminatory nature. This Note proposes that, moving forward, courts should interpret § 3604(a) and § 3604(b) of the Fair Housing Act to allow for tenant screening liability. Looking to the Seventh Circuit’s decision in NAACP v. American Family Mutual Insurance Co., a broad interpretation of the Fair Housing Act that combats the disparate impact of background screening reports is in line with judicial precedent, the Act’s legislative history, and the U.S. Department of Housing and Urban Development’s administrative guidance.*

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#### INTRODUCTION

“Poor black men are locked up while poor black women are locked out.”<sup>1</sup> In 2017, African Americans and Hispanics accounted for 28 percent of the U.S. adult population but represented an overwhelming 56 percent of the

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1. MATTHEW DESMOND, MACARTHUR FOUND., POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 3 (2014), [https://www.macfound.org/media/files/HHM\\_Research\\_Brief\\_-\\_Poor\\_Black\\_Women\\_Are\\_Evicted\\_at\\_Alarming\\_Rates.pdf](https://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf) [<https://perma.cc/V5CV-QZ2J>].

prison population.<sup>2</sup> In 2016, 2.3 million evictions were filed in the United States, at a rate of four per minute.<sup>3</sup>

Incarceration and eviction have a tragic effect on the lives of people of color. Landlords regularly displace tenants in this demographic who have prior criminal or eviction records from their homes or blacklist them from future available housing units.<sup>4</sup> Housing providers often hire tenant screening companies to provide background reports on these prospective tenants.<sup>5</sup> Screening companies utilize public databases to collect information on a tenant's credit score, criminal history, and eviction records, among other information.<sup>6</sup> When creating these background reports, screening companies may provide the landlord with a recommendation or score.<sup>7</sup> A landlord typically relies on this guidance when determining whether to deny housing to a prospective tenant.<sup>8</sup>

Congress passed the Fair Housing Act<sup>9</sup> (FHA) to eliminate housing discrimination across America.<sup>10</sup> Congress intended the Act to be construed broadly<sup>11</sup> and did not specify which actors could be held liable for housing discrimination under the Act.<sup>12</sup> Courts and the U.S. Department of Housing and Urban Development (HUD) have taken the lead in defining the Act's boundaries. Federal courts have interpreted § 3604 of the FHA, a provision that establishes liability for actors who "make unavailable or deny" a

2. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RES. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/> [https://perma.cc/B8SM-G32M].

3. Terry Gross, *First-Ever Evictions Database Shows: 'We're in the Middle of a Housing Crisis'*, NPR (Apr. 12, 2018, 1:07 PM), <https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis> [https://perma.cc/W7FB-7QQV].

4. Merf Ehman, *Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies 2–5* (Sept. 2015) (unpublished manuscript), <https://www.nhlp.org/wp-content/uploads/Merf-Ehman-FH-DI-Claims-Based-on-Use-of-Criminal-and-Eviction-Records-Sept.-2015.pdf> [https://perma.cc/NP38-HN4S].

5. *Id.* at 2.

6. *Id.* at 3–5.

7. *Id.* at 2.

8. See Colin Lecher, *Automated Background Checks Are Deciding Who's Fit for a Home: But Advocates Say Algorithms Can't Capture the Complexity of Criminal Records*, VERGE (Feb. 1, 2019, 8:00 AM), <https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic> [https://perma.cc/RH63-T5C7].

9. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended in scattered sections of the U.S.C.).

10. 42 U.S.C. § 3601 (2018) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); see also *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015).

11. Ehman, *supra* note 4, at 7–8; see also *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994) ("Congress intended § 3604 to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class.").

12. See *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) ("By writing its statute in the passive voice—banning an outcome while not saying who the actor is, or how such actors bring about the forbidden consequence—Congress created ambiguity.").

dwelling to a protected class,<sup>13</sup> broadly to cover more than just housing providers. Since the late 1900s, federal courts, like the D.C. Circuit and Sixth Circuit, have held that the FHA's ambit extends beyond housing providers to insurance companies.<sup>14</sup> Most prominently, in *NAACP v. American Family Mutual Insurance Co.*,<sup>15</sup> Judge Frank H. Easterbrook of the Seventh Circuit concluded that when insurers redline<sup>16</sup> areas inhabited by a large number of racial minorities, they raise the cost of housing and "make [dwellings] unavailable" under § 3604(a) and face liability under § 3604(b) because they provide a "service" "in connection" with the sale or rental of a dwelling.<sup>17</sup>

This Note explores the opposing views on whether tenant screening companies should be liable under § 3604 of the FHA. It highlights two major federal district court decisions that have spoken on intermediary liability: *Frederick v. Capital One Bank (USA), N.A.*<sup>18</sup> and *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions, LLC*.<sup>19</sup> *Frederick* supports a narrow reading of § 3604 where tenant screening companies would not be liable,<sup>20</sup> while *CoreLogic* promotes a broad construction where they would be.<sup>21</sup> This divide is representative of a larger set of interpretive questions that the FHA has and will continue to confront,<sup>22</sup> with courts divided on

13. "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). "To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." *Id.* § 3604(b).

14. *See generally* *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm'n*, 24 F.3d 1008 (7th Cir. 1994); *Burrell v. State Farm & Cas. Co.*, 226 F. Supp. 2d 427 (S.D.N.Y. 2002); *Nat'l Fair Hous. All. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46 (D.D.C. 2002).

15. 978 F.2d 287 (7th Cir. 1992).

16. Redlining constitutes insurers charging higher rates or declining to write insurance for people who live in certain areas. *Id.* at 290.

17. *Id.* at 297–98.

18. No. 14-cv-5460, 2015 WL 5521769 (S.D.N.Y. Sept. 17, 2015).

19. 369 F. Supp. 3d 362 (D. Conn. 2019).

20. *Frederick*, 2015 WL 5521769, at \*2–3.

21. *CoreLogic*, 369 F. Supp. 3d at 370–75.

22. In 2019, HUD released a proposed rule that will severely disable disparate impact theory and create an algorithmic exception under the FHA. *See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 84 Fed. Reg. 42,854 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100). Under this exception, a defendant whose policies or practices involve the use of an algorithm is exempt from liability as long as the inputs in its algorithm are not "substitutes or close proxies" for protected characteristics. The rule also immunizes landlords from discrimination claims if they use an algorithmic tool developed and maintained by a recognized third party. The rule does not explicitly mention tenant screening companies, so it is unclear how the landscape of liability will shift once HUD publishes the final rule. It is vital that courts stick to federal judicial precedent, like *NAACP* and *CoreLogic*, that broadly interprets the FHA to cover a variety of intermediaries. *See* Andrew D. Selbst, *A New HUD Rule Would Effectively Encourage Discrimination by Algorithm*, SLATE (Aug. 19, 2019, 10:51 AM), <https://slate.com/technology/2019/08/hud-disparate-impact-discrimination-algorithm.html> [<https://perma.cc/AK7N-E9RJ>]; *see also* Morgan Baskin, *Trump Wants to Give Landlords Even More Power over People with Criminal Records*, VICE (Sept. 7, 2019, 11:00 AM), [https://www.vice.com/en\\_us/article/vb5bm3/trump-wants-to](https://www.vice.com/en_us/article/vb5bm3/trump-wants-to)

which parties the FHA should apply to. The two federal district court decisions presented in this Note, rendered by the Southern District of New York and the District of Connecticut respectively, do not represent binding national authority. This Note proposes a much-needed resolution that suggests a broad interpretation of § 3604, in accordance with the Seventh Circuit in *NAACP*, that holds tenant screening companies liable.

Part I provides an overview of the FHA and the role of tenant screening companies in the housing market. Most importantly, it explores how courts have treated housing intermediaries under the FHA, such as the Seventh Circuit in *NAACP*, which found insurance companies liable under § 3604.<sup>23</sup> Part II examines two opposing standpoints on whether tenant screening companies should be liable for their disparate impact under the FHA, specifically § 3604. Some proponents of tenant screening services point to the Southern District of New York's decision in *Frederick*<sup>24</sup> to urge courts to interpret § 3604 narrowly to only cover entities engaged in the sale or rental of a dwelling.<sup>25</sup> Meanwhile, critics of tenant screening services believe § 3604 extends to intermediaries, not just direct housing providers.<sup>26</sup> Their opinion is in accordance with another federal district court opinion, *CoreLogic*. Part II also explores the policies behind proponents' and critics' views.

Part III concludes that *CoreLogic*'s solution to hold tenant screening companies liable fits more squarely with *NAACP*'s interpretation of the FHA and accordingly proposes that courts hold tenant screening companies liable under § 3604. In *NAACP*, the Seventh Circuit put forth a compelling interpretation of intermediary liability under § 3604(a) and § 3604(b) that should extend to tenant screening companies.<sup>27</sup> Tenant screening companies have a disparate impact on both racial and gender minorities.<sup>28</sup> In order for future courts to comply with federal judicial precedent, the FHA's legislative history, and HUD's administrative guidance, it is imperative that they follow *NAACP*'s broad interpretation of § 3604 and the FHA generally.

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give-landlords-even-more-power-over-people-with-criminal-records  
[<https://perma.cc/TV7B-VWUS>].

23. See *supra* notes 14–17 and accompanying text.

24. *Frederick*, 2015 WL 5521769, at \*2–3.

25. Defendant CoreLogic Rental Property Solutions, LLC's Memorandum in Support of Its Motion to Dismiss at 9–10, *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019) (No. 3:18 Civ. 00705) [hereinafter *CoreLogic's Motion to Dismiss*]; see also Memorandum in Support of Experian Information Solutions, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint at 5, *Frederick*, 2015 WL 5521769 (No. 14-cv-5460) [hereinafter *Experian's Motion to Dismiss*]; Trans Union, LLC's Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Second Amended Complaint at 2, *Frederick*, 2015 WL 5521769 (No. 14-cv-5460) [hereinafter *TransUnion's Motion to Dismiss*].

26. Ehman, *supra* note 4, at 7–8; see also Arroyo v. CoreLogic, NAT'L HOUSING L. PROJECT (July 31, 2018), [https://www.nhlp.org/our-initiatives/arroyo-v-corelogic/#\\_ftnref12](https://www.nhlp.org/our-initiatives/arroyo-v-corelogic/#_ftnref12) [<https://perma.cc/5YGE-YRZX>].

27. *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297–301 (7th Cir. 1992).

28. Ehman, *supra* note 4, at 3–5.

## I. THE FHA AND TENANT SCREENING COMPANIES: PROTECTING A TENANT'S RIGHT TO EQUAL ACCESS TO HOUSING

Congress created the FHA to eradicate discriminatory housing practices within the United States economy<sup>29</sup> and to “ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics.”<sup>30</sup> This Part provides relevant background on the FHA and the role that tenant screening companies play in the housing market—chief among them providing credit, criminal, and eviction histories of prospective tenants to housing providers. Part I.A explains the background of the FHA. It focuses on why Congress created the FHA, along with the two major theories underlying the Act: disparate treatment and disparate impact. Part I.B explores the role that tenant screening companies and background screening reports play in the housing context, namely in reporting a tenant's credit information, criminal history, and eviction data. Finally, Part I.C delves into how the FHA does not define which actors it applies to and how this issue has been handled by courts, like the Seventh Circuit, which have indicated that the Act broadly applies to intermediaries like insurance companies.

### A. *The FHA: Discriminatory Intent and Impact*

The FHA prohibits discrimination by direct housing providers and other entities against individuals based on race, color, religion, sex, familial status, and national origin.<sup>31</sup> HUD's Office of Fair Housing and Equal Opportunity investigates complaints under the FHA and oversees enforcement of the Act.<sup>32</sup> Section 3604(a) of the Act makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>33</sup> In accordance with Congress's intent to provide fair housing throughout the United States,<sup>34</sup> the U.S. Supreme Court and other federal courts construe the FHA's language broadly and as requiring “generous construction.”<sup>35</sup>

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29. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015).

30. *United States v. City of Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980).

31. *The Fair Housing Act*, U.S. DEP'T JUST. (Dec. 21, 2017), <https://www.justice.gov/crt/fair-housing-act-1> [<https://perma.cc/5BPZ-L4SL>]. In 2017, a federal court held that the term “sex” also encompasses discrimination based on sexual orientation and gender identity. *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017).

32. *See Housing Discrimination Under the Fair Housing Act*, U.S. DEP'T HOUSING & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/fair\\_housing\\_act\\_overview](https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview) [<https://perma.cc/HYT7-897H>] (last visited Apr. 12, 2020).

33. 42 U.S.C. § 3604(a) (2018) (emphasis added). Likewise, it is unlawful “to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” *Id.* § 3604(b).

34. *See id.* § 3601.

35. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972); *see also Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (holding that civil rights statutes should be read

FHA discrimination claims fall into two distinct categories: disparate treatment and disparate impact.<sup>36</sup> In disparate treatment claims, plaintiffs allege that a defendant's housing decision was motivated by discriminatory animus.<sup>37</sup> Disparate impact claims do not require a showing of discriminatory intent, but instead plaintiffs assert that a defendant's action or policy has or will have a disproportionate "adverse impact" against a group protected under the FHA.<sup>38</sup>

For disparate treatment claims, HUD and most, if not all, courts utilize the *McDonnell Douglas Corp. v. Green*<sup>39</sup> standard.<sup>40</sup> Under this standard, the plaintiff first has the burden of proving a prima facie case of discrimination.<sup>41</sup> If the plaintiff meets this burden, the defendant must then articulate a legitimate, nondiscriminatory reason for its actions.<sup>42</sup> If the defendant satisfies that burden, the plaintiff can still prevail by proving that the defendant's reasons are mere pretext.<sup>43</sup>

While disparate treatment claims typically follow the three-step, burden-shifting test articulated in *McDonnell Douglas*, circuit courts have struggled to agree on a uniform test for disparate impact theory.<sup>44</sup> In 2013, HUD created a disparate impact burden-shifting framework that courts should use.<sup>45</sup> Under HUD's regulations, a plaintiff must first establish a prima facie case by showing that the defendant's practice has or will have a discriminatory effect on a protected class.<sup>46</sup> The burden then shifts to the defendant to prove that the practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.<sup>47</sup> If the defendant satisfies its burden, the plaintiff can still prevail by proving that defendant's interests can be met through less discriminatory means.<sup>48</sup> Ultimately, if the plaintiff cannot make this showing, the defendant prevails.<sup>49</sup>

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expansively to fulfill their purpose); *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1022 (E.D. Pa. 1976).

36. Kaitlin A. Bridges, Note, *Justifying Facial Discrimination by Government Defendants Under the Fair Housing Act: Which Standard to Apply?*, 73 MO. L. REV. 177, 178 (2008).

37. *Id.*

38. *Id.* at 178–79; see also *NFHA Disparate Impact Information*, NAT'L FAIR HOUSING ALLIANCE, <https://nationalfairhousing.org/disparateimpact/> [<https://perma.cc/BE6V-Q2ZU>] (last visited Apr. 12, 2020). Typically, disparate impact theory has targeted exclusionary zoning, home insurance standards, screening devices used by landlords, and other areas. Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 107–08 (2015).

39. 411 U.S. 792 (1973).

40. *Id.* at 802–06; see, e.g., *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992); *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990).

41. *McDonnell Douglas*, 411 U.S. at 802.

42. *Id.*

43. *Id.* at 804.

44. See Rebecca Oyama, Note, *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, 203 (2009).

45. 24 C.F.R. § 100.500 (2020).

46. *Id.* § 100.500(c)(1).

47. *Id.* § 100.500(c)(2).

48. *Id.* § 100.500(c)(3).

49. *Id.* § 100.500(b)(1)(ii).

In 2015, the Supreme Court's *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*<sup>50</sup> decision imposed an additional step on plaintiffs making disparate impact claims.<sup>51</sup> There, the Court affirmed disparate impact liability as a theory under § 3604(a) and § 3605 of the FHA.<sup>52</sup> Justice Anthony Kennedy's opinion relied heavily on the logic of *Griggs v. Duke Power Co.*,<sup>53</sup> which had interpreted Title VII's language to encompass disparate impact claims.<sup>54</sup> Title VII makes it "an unlawful employment practice for an employer . . . [to] otherwise adversely affect [an employee's] status as an employee, because of such individual's race, color, religion, sex, or national origin."<sup>55</sup> Like the phrase "otherwise adversely affect" in Title VII,<sup>56</sup> "otherwise make unavailable . . . a dwelling" in FHA § 3604(a)<sup>57</sup> is a catchall phrase that signals "a shift in emphasis from an actor's intent to the consequences of his actions."<sup>58</sup> Because the FHA exists to combat housing discrimination and racial segregation,<sup>59</sup> Justice Kennedy opined that disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."<sup>60</sup>

While Justice Kennedy supported a broad and inclusive reading of the FHA, he also expressed concern that housing providers could be liable for racial disparities that they were not responsible for creating.<sup>61</sup> Accordingly, the Court held that, in addition to HUD's framework,<sup>62</sup> a plaintiff must produce statistical evidence in their prima facie case that demonstrates a robust causal connection between the defendant's practice and the discriminatory effect.<sup>63</sup> By creating this robust causality standard, the Court hoped that the valid interests of housing authorities and private developers would limit disparate impact liability.<sup>64</sup> That is, if housing authorities and

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50. 135 S. Ct. 2507 (2015).

51. *Id.* at 2522–23; see also MICHAEL W. SKOJEC & MICHAEL P. CIANFICHI, NAT'L MULTIFAMILY HOUS. COUNCIL & NAT'L APARTMENT ASS'N, DISPARATE IMPACT AND FAIR HOUSING: NEW DEVELOPMENTS LEGAL SUMMARY 3, 5–6 (2017), [https://www.naahq.org/sites/default/files/disparate\\_impact\\_and\\_fair\\_housing\\_developments-legal\\_summary-1017-final.pdf](https://www.naahq.org/sites/default/files/disparate_impact_and_fair_housing_developments-legal_summary-1017-final.pdf) [<https://perma.cc/4M9Y-9LNA>].

52. *Inclusive Cmty.*, 135 S. Ct. at 2518.

53. 401 U.S. 424 (1971).

54. *Inclusive Cmty.*, 135 S. Ct. at 2516–17 ("Before turning to the FHA, however, it is necessary to consider . . . other antidiscrimination statutes that preceded it.").

55. 42 U.S.C. § 2000e-2(a)(2) (2018) (emphasis added).

56. *Id.*

57. *Id.* § 3604(a).

58. *Inclusive Cmty.*, 135 S. Ct. at 2519.

59. See *id.* at 2522 ("[T]he FHA aims to ensure that . . . [housing authorities'] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.").

60. *Id.*

61. *Id.* at 2523.

62. See *supra* notes 45–49 and accompanying text.

63. *Inclusive Cmty.*, 135 S. Ct. at 2523.

64. *Id.* at 2522; see also Steven Cummings, Note, *Twiqbal, Inc.: Finding Disparate-Impact Claims Cognizable Under the Fair Housing Act and Raising Serious Concerns in the Process*, 80 ALB. L. REV. 381, 393 (2016/2017).

developers can prove that a policy is necessary to achieve a valid interest, then the Court will allow the defendants to maintain the policy.<sup>65</sup> Justice Kennedy found that policies have to constitute “artificial, arbitrary, and unnecessary barriers” to housing to invoke disparate impact liability.<sup>66</sup> Federal courts have aligned with this opinion and handed victories to housing providers when plaintiffs have not satisfied their prima facie burden in accordance with *Inclusive Communities*’s robust causality standard.<sup>67</sup>

*B. Tenant Screening and the Housing Market’s Reliance on Background Screening Reports*

Landlords increasingly use tenant screening companies to determine if a prospective tenant is qualified to reside in their property—or, more specifically, if an individual would make for a “good tenant” and would not be a future liability.<sup>68</sup> Although housing providers can pursue tenant background checks themselves, they typically employ tenant screening companies that can provide instant and extensive background information on a rental applicant.<sup>69</sup> Tenant screening companies dispense information on a tenant’s eviction history, credit score, criminal records, and civil litigation background.<sup>70</sup> In the past, more than 72 percent of housing providers have used a tenant screening company to screen tenants.<sup>71</sup> Some of these companies have online databases that provide landlords with instant access to a tenant report, while others offer specialized services in person.<sup>72</sup> These reports can cost between thirty-five and seventy-five dollars, and many housing providers have required applicants to cover the associated costs.<sup>73</sup>

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65. *Inclusive Cmty.*, 135 S. Ct. at 2522–23; see also Cummings, *supra* note 64, at 393 (“While the Court did not explicitly state that the notion of ‘prov[ing a policy] is necessary to achieve a valid interest’ was an affirmative defense, such an explicit statement would have been redundant.” (alteration in original) (quoting *Inclusive Cmty.*, 135 S. Ct. at 2523)).

66. *Inclusive Cmty.*, 135 S. Ct. at 2524 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

67. SKOJEC & CIANFICHI, *supra* note 51, at 8. By adopting *Inclusive Communities*’s robust causality standard, federal courts are protecting defendants. See Lauren Clatch, *Inclusive Communities and the Question of Impact: Pro-plaintiff?*, MINN. L. REV. (Dec. 8, 2016), <https://www.minnesotalawreview.org/2016/12/inclusive-communities-and-the-question-of-impact/> [<https://perma.cc/K6N2-M396>] (“Specifically, if the plaintiff cannot pass the hurdle of a prima facie case, the case is subject to motions to dismiss, essentially cutting the claim at its knees. A number of cases citing *Inclusive Communities* have been dismissed for failure to state a claim.”).

68. Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 322 (2010).

69. *Id.* at 323.

70. *Id.* at 320.

71. This data is based on a survey of property managers in Minneapolis and Saint Paul conducted by HousingLink. See HOUSINGLINK, TENANT SCREENING AGENCIES IN THE TWIN CITIES: AN OVERVIEW OF SCREENING PRACTICES AND THEIR IMPACT ON RENTERS 6, 31 (2004), [https://www.housinglink.org/Files/Tenant\\_Screening.pdf](https://www.housinglink.org/Files/Tenant_Screening.pdf) [<https://perma.cc/9QBV-SLNN>].

72. *Id.* at 18–19. These local agencies often distribute tenant information through fax or the internet. *Id.* at 18.

73. Dunn & Grabchuk, *supra* note 68, at 323.

A landlord may request that tenant screening companies include specific tenant criteria in their reports.<sup>74</sup> These criteria “range from amorphous judgments about an applicant’s desirability to formal admission policies that evaluate applicants across a wide spectrum of factors.”<sup>75</sup> When generating a report, a tenant screening company utilizes public records to pull a prospective tenant’s credit information, criminal history, and prior eviction and court records.<sup>76</sup> The report may also include open-ended “lifestyle information” regarding the tenant’s marital history, past property damage, pet ownership, and general reputation.<sup>77</sup> Instead of simply providing raw information on a tenant, many tenant screening companies take a more direct role and deliver a “score,” “approval,” or “recommendation” based on the data they obtain.<sup>78</sup> All of this information is retrievable upon the landlord’s request and formatted to provide an analysis of the tenant’s “potential as a liability.”<sup>79</sup> A tenant who has faced bankruptcy, prior eviction, or a felony conviction usually has the hardest time finding housing because of this process.<sup>80</sup>

The following subsections explore the specific data that tenant screening companies collect on prospective tenants. Part I.B.1 discusses how screening companies obtain and report tenant credit information. Part I.B.2 explains how tenant screening companies report criminal history. Part I.B.3 illuminates the process that tenant screening companies utilize to report a prospective tenant’s prior eviction history.

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74. See, e.g., Kasia Manolas, *Tenant Screening Checklist for Landlords*, AVAIL (Aug. 7, 2019), <https://www.avail.co/education/articles/tenant-screening-checklist-for-landlords> [<https://perma.cc/WEV3-HBB6>].

75. Dunn & Grabchuk, *supra* note 68, at 322.

76. See HOUSINGLINK, *supra* note 71, at 17.

77. Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239, 243 (1987).

78. Ehman, *supra* note 4, at 2; see, e.g., *Evans v. UDR, Inc.*, 644 F. Supp. 2d 675, 678 (E.D.N.C. 2009) (involving a tenant screening company that recommended that the landlord deny an application because of the applicant’s arrest and conviction record); see also *Tenant Screening*, RENTSCREENER, <https://www.rentscreeener.com/tenant-screening> [<https://perma.cc/7N9T-J4T3>] (last visited Apr. 12, 2020) (“We will take the results and compile a rent report with a grade and recommendation.”); *Tenant Verification Services from SmartMove*, TRANSUNION, <https://www.mysmartmove.com/SmartMove/tenant-verification-service.page> [<https://perma.cc/Y5BL-QDE2>] (last visited Apr. 12, 2020) (“TransUnion SmartMove’s tenant verification and screening services make choosing renters an efficient, simple, and cost-effective process. In fact, at the end of the tenant verification process, you’ll get a fully-customized leasing recommendation based on the amount of risk that you’re willing to allow in your tenants, as well as their credit report, Income Insights repor[t], eviction history, ResidentScore and background check.”).

79. See David J. D’Urso, *Tenant Screening Agencies: Implications for Landlords and Tenants*, 26 REAL EST. L.J. 44, 50 (1997).

80. These tenants are generally “categorically excluded.” Dunn & Grabchuk, *supra* note 68, at 323.

## 1. Background Reports and Credit Information

Consumer credit reports include information relating to individuals' credit worthiness to determine if they qualify for a dwelling unit.<sup>81</sup> Most credit reporting agencies, such as Equifax, TransUnion, and Experian,<sup>82</sup> collect financial data based on a consumer's interactions with lenders, credit card companies, and other financial institutions.<sup>83</sup> A tenant screening company usually secures the financial data from a credit reporting agency to include in its screening reports.<sup>84</sup> Equifax, TransUnion, and Experian also have screening arms that provide background reports containing a tenant's credit information, rental history, criminal records, and other similar background information to landlords.<sup>85</sup> Credit information can include a prospective tenant's personal information, such as their name, address, and social security number.<sup>86</sup> It can also contain the tenant's current and past credit accounts, information on companies that have pulled the tenant's credit report, and state and county records on the tenant's bankruptcies, tax liens, and past due accounts.<sup>87</sup>

## 2. Background Reports and Criminal History

Landlords commonly hire tenant screening companies to conduct comprehensive checks on a tenant's criminal history.<sup>88</sup> Four types of criminal records can show up on a screening report: arrest records, criminal court records, corrections records, and state criminal repository records.<sup>89</sup> Tenant screening companies' main sources of information for these records are executive branch criminal records repositories, courts and offices of court

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81. See, e.g., CAL. CIV. CODE § 1785.3(c)(3) (West 2000).

82. These are the three major credit bureaus. See *What Is a Credit Report and What Does It Include?*, EQUIFAX, <https://www.equifax.com/personal/education/credit/report/what-is-a-credit-report-and-what-does-it-include> [https://perma.cc/4FRW-JY8G] (last visited Apr. 12, 2020).

83. *What Is a Credit Report?*, CONSUMER FIN. PROTECTION BUREAU (June 8, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-report-en-309/> [https://perma.cc/43R4-LXYH].

84. See, e.g., Jennifer Henry, *Use a Tenant Screening Service That Pays Off*, EQUIFAX (June 16, 2014), <https://insight.equifax.com/use-a-tenant-screening-service-that-pays-off/> [https://perma.cc/PX5S-XGBM].

85. *Id.* (“[The Equifax Resident Screening] . . . program assembles and provides you with all available credit, rental history, employment verification and criminal record information from across the country.”).

86. See, e.g., *Your Credit Report*, FED. RES. BANK S.F., [https://www.hsh.com/pdf/uncle\\_sam/frb\\_sf/creditreport.pdf](https://www.hsh.com/pdf/uncle_sam/frb_sf/creditreport.pdf) [https://perma.cc/2RVG-94G6] (last visited Apr. 12, 2020).

87. *Id.*

88. Ehman, *supra* note 4, at 2–3.

89. Criminal records generally come from state criminal justice systems; as such, no truly “nationwide” criminal records database exists. Lynn Peterson, *Not All Criminal Records Checks Are Created Equal*, VIRTUAL CHASE (Mar. 2, 2005), [https://archive.virtualchase.justia.com/articles/archive/criminal\\_checks.html](https://archive.virtualchase.justia.com/articles/archive/criminal_checks.html) [https://perma.cc/Q6MF-VRRL]. Some screening companies conduct thorough searches of criminal records across the country. *Id.*

administration, and commercial information vendors.<sup>90</sup> For instance, a majority of screening companies in Minneapolis and St. Paul utilize the Minnesota Bureau of Criminal Apprehension database for information on tenants' arrests and convictions.<sup>91</sup> As is common practice, the tenant screening companies supplement this database information with county and federal records, reporting anything that they find.<sup>92</sup> Although most tenant screening companies search for criminal records in local databases or in jurisdictions where the tenant has lived, a few offer "50-state" background checks that comb through court criminal records nationwide.<sup>93</sup>

Sometimes, screening companies obtain information from a database only by searching a tenant's name and date of birth.<sup>94</sup> If the company discovers a criminal record, it may or may not research the circumstances surrounding the incident and report the final disposition data to the landlord.<sup>95</sup> For instance, a screening report may disclose that a previous landlord filed a criminal suit against the tenant but not that the charges were eventually dropped.<sup>96</sup>

### 3. Background Reports and Eviction Data

When property owners wish to remove a tenant, they can file a lawsuit to have the tenant evicted.<sup>97</sup> Generally, an eviction, or unlawful detainer, occurs when landlords terminate rental agreements with tenants who then fail to move out.<sup>98</sup> As part of a background check, landlords often obtain data on prospective applicants' prior eviction histories to determine if they will be suitable future tenants.<sup>99</sup> Tenant screening companies investigate if an applicant was ever a defendant in an eviction lawsuit and include this "eviction history report" as part of their full background check.<sup>100</sup> An eviction history report can include a case number, location, the plaintiff's

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90. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 179 (2008).

91. Law enforcement agencies report juvenile and adult felony and misdemeanor arrests to the Minnesota Bureau of Criminal Apprehension. HOUSINGLINK, *supra* note 71, at 20–21.

92. *See id.* at 21.

93. CMTY. LEGAL SERVS., INC. ET AL., TRANSITION PAPER FOR THE FEDERAL TRADE COMMISSION: IT'S TIME TO REGULATE THE BACKGROUND SCREENING INDUSTRY 8 (2008).

94. *See id.*

95. Stauffer, *supra* note 77, at 242; *see also* PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER LAW CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES 24 (2012), <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf> [<https://perma.cc/SJ6X-LA6H>].

96. *See id.*

97. *See, e.g., Termination of Tenancy*, TENANTS UNION WASH. ST., <https://tenantsunion.org/rights/termination-of-tenancy> [<https://perma.cc/CY98-J7ZT>] (last visited Apr. 12, 2020).

98. *Id.*

99. *See Eviction History Reports for Tenant Screening*, AM. APARTMENT OWNERS ASS'N, <https://www.american-apartment-owners-association.org/tenant-screening/eviction-history/> [<https://perma.cc/AM9U-3MZW>] (last visited Apr. 12, 2020).

100. *Id.*

identity, when the case was satisfied, judgment date, and judgment amount.<sup>101</sup>

When requesting a background screening report, a landlord may have the option of seeking state-specific or nationwide records.<sup>102</sup> Tenant screening companies can get their eviction data from court databases.<sup>103</sup> For example, in Washington, screening companies utilize the Superior Court Management Information System, a statewide electronic database, to obtain eviction information.<sup>104</sup> Some court administrative offices also sell court eviction case data to screening companies, knowing that it will be used to prepare tenant screening reports.<sup>105</sup>

When scouring statewide eviction databases, a tenant screening company may use a tenant's name, and sometimes address, to discover previous eviction records.<sup>106</sup> As with criminal history searches, this can be problematic because the background screening report likely includes almost no context on what actually occurred between the prospective tenant and their prior landlord.<sup>107</sup> Other details, such as who sued whom, which party prevailed in the legal dispute, whether the case settled, and whether the parties ultimately dropped the case, may be excluded.<sup>108</sup> If a tenant stopped paying rent for a legitimate reason—for instance, because the property was in uninhabitable condition—the report may only show that the tenant was involved in an eviction dispute and provide no further context.<sup>109</sup>

### C. Liability of Intermediaries Under the FHA: The Seventh Circuit in NAACP

The FHA is unclear about which specific actors it subjects to liability. The Act does not explicitly define the terms “make unavailable” or “service” in § 3604(a) and § 3604(b), respectively.<sup>110</sup> The Act bans discriminatory policies and practices but does not say which actors can be liable under the Act.<sup>111</sup> To combat the ambiguity Congress created,<sup>112</sup> courts have acknowledged that the term “make unavailable” “might extend to ‘other actors who, though not owners or agents, are in a position directly to deny a

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101. *Id.*

102. *Id.*

103. Ehman, *supra* note 4, at 4.

104. Dunn & Grabchuk, *supra* note 68, at 326.

105. *See, e.g.,* Weisent v. Subaqua Corp., No. 102108/07, 2007 WL 2140947, at \*1 (N.Y. Sup. Ct. July 5, 2007) (discussing how the state's Office of Court Administration was selling eviction case data to tenant screening bureaus).

106. Anne Machalinski, *The Dreaded Tenant Blacklist: What You Need to Know*, BRICK UNDERGROUND (Dec. 29, 2017, 10:30 AM), [https://www.brickunderground.com/blog/2014/05/tenant\\_blacklist](https://www.brickunderground.com/blog/2014/05/tenant_blacklist) [<https://perma.cc/AB94-EEPB>].

107. *Id.*

108. *Id.*

109. *Id.*

110. NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992).

111. *Id.*

112. *Id.*

member of a protected group housing rights.”<sup>113</sup> Similarly, federal courts have long validated the broad reach of the language in § 3604 by holding that it applies beyond housing providers to insurance companies.<sup>114</sup>

In a leading decision, *NAACP*, the Seventh Circuit held that insurance redlining practices violate the FHA.<sup>115</sup> The NAACP, its Milwaukee branch, and eight of its members (the “Plaintiffs”) commenced a suit against American Family Mutual Insurance Company (the “Defendant”) for its redlining practices in Milwaukee.<sup>116</sup> Redlining constitutes charging “higher rates or declining to write insurance for people who live in particular areas.”<sup>117</sup> The Plaintiffs asserted that these redlining practices were a form of racial discrimination that violated the FHA because the Defendant drew these lines to decline to insure areas with large minority populations.<sup>118</sup> The Plaintiffs further argued that when insurers redline areas with minorities, they raise costs and deny housing based on protected characteristics.<sup>119</sup>

In their complaint, the Plaintiffs claimed that three sections of the FHA addressed “insurance sold (or withheld) in connection with the purchase of a dwelling: 42 U.S.C. §§ 3604(a), 3604(b), and 3605.”<sup>120</sup> Judge Easterbrook, writing for the Seventh Circuit, held that the actions of insurance companies do not fit within the contours of § 3605.<sup>121</sup> Section 3605 of the FHA makes it unlawful for those engaging in real estate–related transactions, such as providing financial assistance with home ownership, to discriminate.<sup>122</sup> The court concluded that “[i]t would strain language past the breaking point to treat property or casualty insurance as ‘financial assistance’—let alone as assistance ‘for purchasing . . . a dwelling.’”<sup>123</sup>

However, the court did find merit in the Plaintiffs’ argument regarding § 3604.<sup>124</sup> Relying on § 3604(a), the Plaintiffs asserted that by refusing to write insurance policies or by setting a price too high, an insurer “make[s] a dwelling] unavailable” to a buyer.<sup>125</sup> The court agreed with this analysis because a lack of insurance leads to the denial of a loan, and thus, “no loan,

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113. *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995) (quoting *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994)).

114. *See, e.g., Burrell v. State Farm & Cas. Co.*, 226 F. Supp. 2d 427, 442 (S.D.N.Y. 2002) (finding it reasonable for the FHA to cover discrimination in the provision of insurance); *Nationwide Mut. Ins.*, 52 F.3d at 1360 (upholding the district court’s finding that insurance underwriting practices are covered under the FHA).

115. *NAACP*, 978 F.2d at 297–301.

116. *Id.* at 290.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 297.

121. *Id.*

122. The Act defines real estate–related transactions as “[t]he making or purchasing of loans or providing other financial assistance . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling.” 42 U.S.C. § 3605(b)(1)(a) (2018).

123. *NAACP*, 978 F.2d at 297 (quoting 42 U.S.C. § 3605(b)(1)(a)).

124. *Id.* at 297–98.

125. *Id.* at 297.

no house; lack of insurance thus makes housing unavailable.”<sup>126</sup> Regarding § 3604(b), the Plaintiffs asserted that property insurance is a “service” rendered “in connection” with the “sale or rental of a dwelling.”<sup>127</sup> The court agreed, finding that “[i]f the world of commerce is divided between ‘goods’ and ‘services,’ then insurers supply a ‘service.’”<sup>128</sup> The court held that “in connection” may be read broadly to serve the FHA’s purpose of removing obstacles that restrict equal access to housing.<sup>129</sup>

The court supported its analysis by holding that nothing in the FHA’s text permits it to reject the Plaintiff’s proposed readings.<sup>130</sup> Since the FHA does not define “make unavailable” or “service,” Congress created ambiguity<sup>131</sup> that has since been clarified with respect to insurance companies. Although other circuits, such as the Fourth Circuit in *Mackey v. Nationwide Insurance Cos.*,<sup>132</sup> have held that the FHA is inapplicable to insurance and that Congress disapproved of the Act reaching so far,<sup>133</sup> the *NAACP* court rejected this judicial interpretation.<sup>134</sup> In 1988, Congress passed amendments to the FHA that authorized HUD to carry out the Act.<sup>135</sup> According to the court, Congress gave this authorization of power knowing that present and future HUD secretaries believed that insurance redlining should be covered under § 3604.<sup>136</sup> Once Congress delegated this power, the secretary at the time used his new rulemaking powers to issue regulations “that include[d], among the conduct prohibited by [FHA] § 3604: ‘[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race.’”<sup>137</sup> Per the court in *NAACP*, § 3604 of the FHA should be construed according to the secretary’s interpretation because courts should respect an agency’s “plausible construction.”<sup>138</sup> The court found that § 3604 applied to the discriminatory denial of insurance and discriminatory pricing that precludes racial minorities from home ownership.<sup>139</sup>

Since *NAACP*, both HUD and other federal courts have taken the view that insurance redlining constitutes a violation of the FHA. In 2016, HUD refused to grant a safe harbor exemption to property insurers to disparate impact liability, explaining that such a categorical exemption would be inconsistent with the broad purpose and obligations of the FHA.<sup>140</sup> Similarly, the D.C.

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126. *Id.*

127. *Id.* at 298.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. 724 F.2d 419 (4th Cir. 1984).

133. *See generally id.*

134. *NAACP*, 978 F.2d at 298–301.

135. *Id.* at 300.

136. *Id.*

137. *Id.* (quoting 24 C.F.R. § 100.70(d)(4)).

138. *Id.*

139. *Id.* at 301.

140. Application of the Fair Housing Act’s Discriminatory Effects Standard to Insurance; Correction, 81 Fed. Reg. 69,012 (Oct. 5, 2016) (to be codified at 24 C.F.R. pt. 100); *see also*

Circuit,<sup>141</sup> the Southern District of New York,<sup>142</sup> and the Sixth Circuit<sup>143</sup> have all come out in support of *NAACP*, extending the application of the FHA beyond direct housing providers to insurance companies that deny coverage to minority populations.

## II. TO “OTHERWISE MAKE UNAVAILABLE”: SHOULD § 3604 OF THE FHA ENCOMPASS TENANT SCREENING LIABILITY?

There are two divergent views on whether tenant screening companies should face liability under the FHA. This Part discusses the distinct federal district court interpretations of § 3604 on which these views rely. Part II.A discusses the view held by tenant screening companies and their proponents—that tenant screening services are a vital part of the housing industry. Some supporters point to the Southern District of New York’s interpretation of § 3604 in *Frederick*<sup>144</sup> and argue that the clause contains a “sale or rental” requirement that precludes tenant screening company liability. Part II.B discusses the view held by critics of screening services—that tenant screening companies produce background reports that are inaccurate, misleading, and highly discriminatory. These critics believe that § 3604 should be interpreted in accordance with the District of Connecticut in *CoreLogic*, which broadly interpreted the “otherwise make unavailable” language in § 3604(a) to encompass tenant screening companies.<sup>145</sup>

Since each view finds support in a federal district court decision, there exists no nationally binding authority on the question of tenant screening company liability under the FHA. Therefore, discussion of the two interpretations is significant as future courts and HUD will likely grapple with whether tenant screening companies should be liable under § 3604.<sup>146</sup>

### A. Protecting Tenant Screening Companies from Liability Under § 3604

Proponents of tenant screening companies believe background screening reports are a vital part of housing and that the FHA should not apply to these screening companies. Part II.A.1 discusses proponents’ reliance on *Frederick*<sup>147</sup> to support a narrow interpretation of § 3604 that does not cover tenant screening companies. Part II.A.2 describes policy reasons that

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Amy M. Glassman, *HUD Issues Statement on Applicability of Disparate Impact Liability to Insurance Industry*, BALLARD SPAHR LLP (Oct. 10, 2016), <https://www.ballardspahr.com/alertspublications/legalalerts/2016-10-10-hud-issues-statement-on-applicability-of-disparate-impact-liability-to-insurance-industry> [<https://perma.cc/KLD5-P9CX>].

141. See generally *Nat’l Fair Hous. All., Inc., v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46 (D.D.C. 2002).

142. See generally *Burrell v. State Farm & Cas. Co.*, 226 F. Supp. 2d 427 (S.D.N.Y. 2002).

143. See generally *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995).

144. *Frederick v. Capital One Bank (USA), N.A.*, No. 14-cv-5460, 2015 WL 5521769, at \*2–3 (S.D.N.Y. Sept. 17, 2015).

145. *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362, 370–75 (D. Conn. 2019).

146. Courts and HUD are likely to grapple with this question in the future because of HUD’s most recent proposal to modify the FHA’s disparate impact theory. See *supra* note 22.

147. *Frederick*, 2015 WL 5521769, at \*2–3.

proponents point to when arguing why tenant screening services are beneficial—mainly that they prevent future tenant liability.

1. Limiting § 3604 to the “Sale or Rental” of Housing: Southern District of New York in *Frederick*

In defending their right to create tenant background screening reports, some proponents claim that § 3604 of the FHA should be interpreted to apply only to those entities that directly refuse to sell or rent housing to tenants.<sup>148</sup> The Southern District of New York in *Frederick* appears to support this interpretation,<sup>149</sup> which some defendants use to argue that § 3604 of the FHA should be limited only to housing providers.<sup>150</sup>

In *Frederick*, Ezekiel Frederick filed claims against thirteen defendants,<sup>151</sup> contending that their practices caused a decrease in his credit score, which harmed his ability to obtain financing to purchase real estate.<sup>152</sup> Frederick alleged that the defendants targeted him for these practices based on his race and, accordingly, violated § 3604(a) of the FHA by “‘otherwise [making] unavailable’ to him a variety of housing opportunities.”<sup>153</sup> Each of the thirteen defendants filed a motion to dismiss Frederick’s FHA claim.<sup>154</sup>

The majority of the defendants in *Frederick*, including Capital One, regularly participate in credit reporting practices by selling consumer credit information.<sup>155</sup> Defendants TransUnion LLC and Experian Information Solutions, Inc. also separately, although not in this case, engage in background reporting by providing screening reports to housing providers.<sup>156</sup> In their motions to dismiss, Defendants TransUnion LLC and Experian Information Solutions, Inc. asserted that because they did not refuse to sell or rent housing to Frederick, the FHA was inapplicable to their credit reporting actions.<sup>157</sup>

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148. CoreLogic’s Motion to Dismiss, *supra* note 25, at 9–10; *see also* Experian’s Motion to Dismiss, *supra* note 25, at 5; TransUnion’s Motion to Dismiss, *supra* note 25, at 2.

149. *See Frederick*, 2015 WL 5521769, at \*2–3.

150. *CoreLogic*, 369 F. Supp. 3d at 372–73.

151. The thirteen defendants include: “Capital One Bank (USA) N.A. (‘Capital One’) and David Ginzburg; Anderson Financial Network Inc. (‘AFNI’) and Ronald Greene; Diversified Consultants Inc. (‘Diversified’) and Charlotte Zehnder; Midland Credit Management, Inc. (‘Midland’); Pinnacle Credit Services, LLC (‘Pinnacle’) and Tina Vincelli; Experian Information Solutions, Inc. (‘Experian’); TransUnion LLC (‘TransUnion’); IC System Inc. (‘ICS’); and the Fair Isaac Corporation (‘FICO’).” *Frederick*, 2015 WL 5521769, at \*1.

152. *Id.*

153. *Id.* at \*1–2 (quoting Second Amended Complaint at 35–37, *Frederick*, 2015 WL 5521769 (No. 14-cv-5460)).

154. *Id.* at \*1.

155. *See* Eric Volkman, *When Does Capital One Report Credit Utilization to Bureaus?*, ASCENT (Jan. 21, 2019), <https://www.fool.com/the-ascent/credit-cards/articles/when-does-capital-one-report-credit-utilization-to-bureaus/> [<https://perma.cc/4Z33-9H2T>].

156. They are credit reporting agencies that landlords rely on to secure background information on tenants. *See supra* Part I.B.I.

157. Experian’s Motion to Dismiss, *supra* note 25, at 5; *see also* TransUnion’s Motion to Dismiss, *supra* note 25, at 2.

The court examined § 3604(a) of the FHA, acknowledging that courts are required to give “generous construction” to the FHA.<sup>158</sup> When analyzing the FHA’s language, the court considered the argument that because the defendants did not refuse to sell or rent housing to Frederick, they were not liable under the Act.<sup>159</sup> District Judge Alison J. Nathan concluded that the defendants’ practices did not fall within the bounds of the FHA.<sup>160</sup> The court reasoned that a relationship between the challenged practice and the “sale or rental” of housing was absolutely necessary under § 3604 and that credit reporting practices were not intrinsically related to real estate transactions.<sup>161</sup> According to Judge Nathan, adopting Frederick’s claim that any injury to one’s credit score “otherwise make[s] unavailable” housing under § 3604 would improperly make all credit reporting disputes potential FHA violations.<sup>162</sup> The court believed that certain credit reporting practices, even if they affected one’s credit score and ability to obtain housing, were too far removed from the FHA’s “sale or rental” clause.<sup>163</sup> Per Judge Nathan, “[s]uch a broad construction of the FHA is not supported by the text, which primarily concerns the ‘sale or rental’ of housing, nor has it been adopted by any other court.”<sup>164</sup> The court granted each of the thirteen defendants’ motions to dismiss Frederick’s FHA claims.<sup>165</sup>

## 2. Tenant Screening Reports Are a Vital and Necessary Part of the Housing Market

In addition to advocating for their own narrow interpretation of the FHA, proponents of the screening process believe that tenant screening companies provide useful services to landlords and tenants.<sup>166</sup> They allow landlords to gain comprehensive information on a tenant while lowering the high costs associated with evictions and tenant misbehavior.<sup>167</sup> Many acknowledge that screening can raise issues of accuracy but point to the federal Fair Credit

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158. *Frederick*, 2015 WL 5521769, at \*2 (quoting *Hack v. President of Yale Coll.*, 237 F.3d 81, 87 (2d Cir. 2000)).

159. *See id.*

160. *Id.* at \*3.

161. *Id.* at \*2.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at \*3.

166. *See* Andrea Collatz, *The Top 11 Benefits of Online Tenant Screening*, TRANSUNION (Aug. 11, 2016), <https://www.mysmartmove.com/SmartMove/blog/top-11-benefits-online-tenant-screening.page> [<https://perma.cc/VXS9-BYUY>]; *The American Apartment Owners Association, the Largest Landlord Association in the Country Offers a Variety of Tenant Screening Services to Meet All Your Tenant Screening Service Needs*, AM. APARTMENT OWNERS ASS’N, <https://www.american-apartment-owners-association.org/tenant-screening-services> [<https://perma.cc/ZPF6-M5EG>] (last visited Apr. 12, 2020) [hereinafter *Tenant Screening Services*].

167. D’Urso, *supra* note 79, at 50–55.

Reporting Act<sup>168</sup> (FCRA), rather than the FHA, as the statute to police inaccurate entries.<sup>169</sup>

Tenant screening companies provide landlords with comprehensive background information on tenants before they enter into lease agreements with them.<sup>170</sup> They provide an instantly accessible service that is relatively effortless on the part of landlords.<sup>171</sup> This allows landlords to easily protect themselves from future liabilities including “lost rents, apartment repairs, [and] court costs.”<sup>172</sup> Tenant screening companies, such as the American Apartment Owners Association, advertise themselves as resources that landlords can use to “avoid renting to tenants who are unlikely to pay rent on time and may damage . . . [their] rental property.”<sup>173</sup> Apart from the varying benefits that these screening reports provide, they also reveal what information a tenant did not initially disclose in their application.<sup>174</sup> A full report has the ability to guarantee that a tenant who lied on their rental application does not enter a housing provider’s property.<sup>175</sup>

To proponents of screening companies, a background report on a prospective tenant’s criminal or prior eviction history is essential because “the propensity to commit a violent crime puts other tenants and neighbors at risk . . . [while] a prior eviction speaks volumes about a tenant.”<sup>176</sup> Inclusion of prior criminal and eviction data enhances the behavioral suitability of prospective tenants, meaning that they “will follow the rules, fulfill other nonfinancial obligations of the tenancy, and live harmoniously in the community.”<sup>177</sup> Likewise, reporting credit information ensures financial suitability, which determines if a tenant can meet their pecuniary obligations.<sup>178</sup>

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168. Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified as amended in scattered sections of 12, 15, and 31 U.S.C.).

169. D’Urso, *supra* note 79, at 63–68. “Among other things, the FCRA requires you to establish and follow ‘reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.’” *What Tenant Background Screening Companies Need to Know About the Fair Credit Reporting Act*, FED. TRADE COMMISSION (Oct. 2016), <https://www.ftc.gov/tips-advice/business-center/guidance/what-tenant-background-screening-companies-need-know-about-fair> [https://perma.cc/YJL8-HZ3E] (quoting 15 U.S.C. § 1681e(b) (2018)).

170. See Alex Hemani, *Due Diligence: It Applies Equally to Properties and Prospective Tenants*, FORBES (Aug. 27, 2019, 8:15 AM), <https://www.forbes.com/sites/forbesrealestatecouncil/2019/08/27/due-diligence-it-applies-equally-to-properties-and-prospective-tenants/> [https://perma.cc/RD73-36LD].

171. See Collatz, *supra* note 166.

172. D’Urso, *supra* note 79, at 44 n.2.

173. *Tenant Screening Services*, *supra* note 166.

174. See Kaycee Miller, *10 Reasons Why My Rental Application Was Denied*, RENTEC DIRECT (Jan. 4, 2017), <https://www.rentecdirect.com/blog/rental-application-denied/> [https://perma.cc/P5ZR-N8FP].

175. See *id.*

176. *Top 5 Reasons to Reject an Applicant*, AM. APARTMENT OWNERS ASS’N, <https://www.american-apartment-owners-association.org/tenant-screening/top-5-reasons-to-reject-an-applicant/> [https://perma.cc/TDZ8-3JRW] (last visited Apr. 12, 2020).

177. Dunn & Grabchuk, *supra* note 68, at 323.

178. *Id.* at 322.

Landlords and other housing providers also use tenant screening companies as an economical approach to limiting future liability.<sup>179</sup> Since landlords and housing providers invest significant time and money into renting property, they can use screening services to protect their financial investments.<sup>180</sup> An all-inclusive search can cost up to sixty-nine dollars, while a search of only court records costs around \$6.95.<sup>181</sup> Meanwhile, there are substantial costs associated with regaining possession of leased premises from an unruly tenant,<sup>182</sup> and eviction can cost between \$2500 and \$3500.<sup>183</sup> Filing an eviction requires a landlord to pay court costs, and a tenant may also default on rental payments during this time, which can average more than \$500 a month in states like New York.<sup>184</sup> If a court decides to proceed with an eviction hearing and not give the tenant another opportunity to settle things with the landlord, the landlord may have to hire a qualified attorney and a marshal for a forceful eviction.<sup>185</sup> If a landlord evicts a tenant for destroying the housing unit, then the landlord is liable for refurbishing the damaged apartment, which also prevents other tenants from occupying it in the meantime.<sup>186</sup>

Advocates of tenant screening services believe these expenses can be avoided by screening tenants.<sup>187</sup> These savings can then be used to improve tenants' quality of living.<sup>188</sup> If landlords offset the costs associated with eviction by using screening services, they can invest that money into improving their current tenants' apartments or lowering rental costs.<sup>189</sup> Tenants also benefit because screening companies can eliminate prospective tenants who are likely to lower the quality of the living environment.<sup>190</sup> Present occupants will not suffer from destructive cohabitants.<sup>191</sup> They will not endure as much damage or harassment, and their environment will be preserved.<sup>192</sup>

Although landlords and housing providers accept that screening services may have some shortcomings including reporting inaccurate data,<sup>193</sup> they argue that their free speech, property rights, and even personal safety could

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179. D'Urso, *supra* note 79, at 51.

180. Becky Bower, *Why Tenant Screening Is More Important Now Than Ever*, APPLYCONNECT (Oct. 19, 2017), <https://www.applyconnect.com/blog/tenant-screening-important-now-ever> [<https://perma.cc/N6V9-ATZX>].

181. D'Urso, *supra* note 79, at 51.

182. *Id.* at 51–55.

183. Collatz, *supra* note 166.

184. D'Urso, *supra* note 79, at 51–52 & n.48.

185. *Id.* at 52–53.

186. *Id.* at 54.

187. *Id.* at 50–51; Hemani, *supra* note 170.

188. D'Urso, *supra* note 79, at 55–57.

189. *Id.*

190. *Id.* at 56–57.

191. *Id.*

192. *Id.*

193. See Jeff Hamann, *Screening with Tech: What You Need to Know*, MULTI-HOUSING NEWS (May 30, 2019), <https://www.multihousingnews.com/post/screening-with-tech-what-you-need-to-know/> [<https://perma.cc/3TJC-7CV9>].

be jeopardized by legislation that attempts to restrict their access to background reports.<sup>194</sup> Pointing to the FCRA and state laws that ensure the precision of background screening reports, one practitioner claims that the screening service regime can be properly monitored through existing legislation that already applies to their services.<sup>195</sup> For example, the FCRA contains provisions that prevent companies from reporting inaccurate consumer data and information that infringes on a consumer's privacy interests.<sup>196</sup> State legislation in California similarly limits tenant information in reports to a specific time frame and contains provisions for fixing inaccuracies.<sup>197</sup>

### *B. Imposing Liability on Tenant Screening Companies Under § 3604*

This section discusses how critics of tenant screening background reports believe the FHA should be interpreted. Part II.B.1 explores critics' reliance on *CoreLogic*<sup>198</sup> to support a broad interpretation of § 3604 that covers housing intermediaries. Part II.B.2 highlights critics' policy arguments that tenant screening services are harmful. Critics argue that screening creates misleading, inaccurate, and discriminatory reports that harm racial and gender minorities.

#### 1. Extending the FHA's "Otherwise Make Unavailable" Language: District of Connecticut in *CoreLogic*

Critics believe that tenant screening companies should comply with and face disparate impact liability under the FHA and interpret § 3604 broadly to encompass intermediary liability beyond those who directly sell or rent housing to tenants. *CoreLogic* illustrates this interpretation of § 3604, and critics use it to argue for screening liability under the FHA.<sup>199</sup>

In 2016, Carmen Arroyo requested that WinnResidential, the manager of her apartment complex, transfer her to a two-bedroom unit so that her son could live with her.<sup>200</sup> Arroyo consented to CoreLogic conducting a tenant

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194. See Andrew Keshner, *A New Seattle Housing Law Forbids Landlords from Checking Tenants' Criminal History—but Does It Go Too Far?*, MARKETWATCH (Dec. 30, 2018, 2:59 PM), <https://www.marketwatch.com/story/a-new-seattle-housing-law-forbids-landlords-from-checking-into-tenants-criminal-history-but-does-it-go-too-far-2018-12-26> [https://perma.cc/54K7-J25X].

195. D'Urso, *supra* note 79, at 63–68.

196. 15 U.S.C. § 1681 (2018).

197. D'Urso, *supra* note 79, at 66.

198. Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362, 370–75 (D. Conn. 2019).

199. See Baskin, *supra* note 22; see also Madeline Byrd & Katherine J. Strandburg, *CDA 230 for a Smart Internet*, 88 FORDHAM L. REV. 405, 418–19 (2019); Patrick Sisson, *Housing Discrimination Goes High Tech: How Algorithms, Ad Targeting, and Other New Technologies Threaten Fair Housing Laws*, CURBED (Dec. 17, 2019, 6:12 PM), <https://www.curbed.com/2019/12/17/21026311/mortgage-apartment-housing-algorithm-discrimination> [https://perma.cc/TA8M-2W34].

200. *CoreLogic*, 369 F. Supp. 3d at 367.

screening check for her son.<sup>201</sup> Defendant CoreLogic is a tenant screening company that searches databases and sells reports to landlords.<sup>202</sup> CoreLogic's screening products include CrimSAFE, which provides housing providers with a final decision on whether the applicant qualifies for their housing unit.<sup>203</sup> After CoreLogic screened Arroyo's son using CrimSAFE, it informed WinnResidential that he was disqualified from tenancy based on unspecified criminal records.<sup>204</sup> Arroyo's son was not told at the time why he was disqualified and could not move in.<sup>205</sup> He had never been convicted of a crime;<sup>206</sup> he had once been charged with retail theft, but the charge was eventually withdrawn.<sup>207</sup>

In *CoreLogic*, the court specifically focused on the CoreLogic's liability under the FHA.<sup>208</sup> The plaintiffs claimed that CoreLogic violated the FHA because it discriminated based on race when it denied housing to Arroyo's son based on his criminal record.<sup>209</sup> CoreLogic moved to dismiss the FHA claims on grounds that the FHA applies only to housing providers, not tenant screening companies, and that its policies do not have a sufficient nexus to the denial of housing to be covered.<sup>210</sup> Judge Vanessa L. Bryant first acknowledged that the language of the FHA is broad and must be carried out "by a generous construction."<sup>211</sup> She highlighted HUD's guidance, which concluded that "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."<sup>212</sup> Since HUD's guidance only applied to housing providers, she used this interpretation as a guide to evaluate the FHA claim.<sup>213</sup>

Judge Bryant rejected CoreLogic's argument that it could not be liable under the FHA because § 3604 only applies to "individuals who deal directly with prospective buyers or tenants and are in control of the housing-related decisions."<sup>214</sup> The court found that the absence of explicit language providing for tenant screening company liability under the FHA was not

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201. *Id.*

202. *Id.*

203. *Id.* "The report listed a 'CrimSAFE result' which stated that disqualifying records were found. Based on these facts, the [c]ourt [found] that CrimSAFE disqualif[ied] applicants for housing if the applicant was arrested but not convicted of a crime even though many years had passed since the arrest." *Id.* (citations omitted).

204. *Id.*

205. *Id.*

206. *Id.* at 367–68.

207. *Id.* at 368.

208. *Id.* at 370.

209. *Id.*

210. *Id.* at 372, 380.

211. *Id.* at 370; *see also supra* Parts I.A, I.C.

212. *CoreLogic*, 369 F. Supp. 3d at 371.

213. *Id.*

214. *Id.* at 372.

determinative.<sup>215</sup> The court drew support from the Second Circuit<sup>216</sup> in *Francis v. Kings Park Manor, Inc.*,<sup>217</sup> which extended liability under the FHA to landlords who knew and failed to stop tenant-on-tenant harassment, explaining “that it has ‘never required every last detail of a legislative scheme to be spelled out in a statute itself—especially a civil rights statute.’”<sup>218</sup> In *Mitchell v. Shane*,<sup>219</sup> the Second Circuit found that a listing agent could be liable under § 3604 even though he was not a housing provider.<sup>220</sup> The *CoreLogic* court concluded that entities other than housing providers could be liable under the FHA.<sup>221</sup>

When CoreLogic pointed to *Frederick*, “claiming that the case rejected an ‘attempt to expand the reach of the FHA beyond those providing housing,’”<sup>222</sup> the court distinguished *Frederick* from the case at hand.<sup>223</sup> The *Frederick* court required that the challenged practice be related to real estate transactions.<sup>224</sup> Here, CoreLogic’s practice of screening potential tenants on an impermissible basis and disqualifying them without further reasoning caused the housing denial.<sup>225</sup> Judge Bryant determined that CoreLogic’s screening practices related to real estate transactions because they determined who was qualified to live in a housing unit—specifically, WinnResidential.<sup>226</sup>

In construing § 3604 to apply to housing intermediaries such as tenant screening companies, the court reasoned that restricting the Act to housing providers would allow providers to use intermediaries to make discriminatory choices on their behalf, thereby contravening the purpose of the FHA.<sup>227</sup>

## 2. Inaccurate, Misleading, and Discriminatory: The Growing Problems of Screening Services

In addition to their preferred interpretation of the FHA, critics of tenant screening services refer to a variety of policy reasons that demonstrate why background screening reports are problematic. Chief among them is their

215. *Id.* at 374.

216. *Id.* at 373–75.

217. 944 F.3d 370 (2d Cir. 2019), *reh’g granted* 949 F.3d 67 (2d Cir. 2019). Similarly, most federal courts construe the FHA broadly. *See, e.g.*, Ga. State Conference of the NAACP v. City of LaGrange, 940 F.3d 627, 632 (11th Cir. 2019) (refusing to read a temporal limitation into the language of the FHA); Fahnbulleh v. GFZ Realty, LLC, 795 F. Supp. 2d 360, 364 (D. Md. 2011) (holding a landlord liable under the FHA for tenant-on-tenant sexual harassment).

218. *CoreLogic*, 369 F. Supp. 3d at 374 (quoting *Francis*, 944 F.3d at 378).

219. 350 F.3d 39 (2d Cir. 2003).

220. *Id.* at 49–50.

221. *CoreLogic*, 369 F. Supp. 3d at 373–75.

222. *Id.* at 372–73 (quoting CoreLogic’s Motion to Dismiss, *supra* note 25, at 9).

223. *Id.* at 373.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 375.

inaccurate, misleading, and discriminatory nature.<sup>228</sup> Background screening reports often include numerous errors<sup>229</sup> and bar minorities from housing,<sup>230</sup> including those whose past criminal and eviction histories do not reflect their ability to be good future tenants.<sup>231</sup> The algorithms that these background reports use may not be based on explicit minority status, but critics believe the data that screening companies seek is inherently biased.<sup>232</sup>

Critics highlight tenant reports' two main "information-related problems: errors (mismatching) and omitted or misleading information."<sup>233</sup> Since verifying tenant information is more expensive than collecting it, tenant screening companies might not check if the information they collect is accurate.<sup>234</sup> Mismatching is common because screening companies primarily use a tenant's name when searching databases.<sup>235</sup> This can result in a "false positive," where a screener may report a criminal record that belongs to "a different person of the same or similar name."<sup>236</sup> A false positive can be especially common when the screener fails to notice available data indicating differences between the two names, such as date of birth or a middle name.<sup>237</sup> Human error exacerbates these inaccuracies. In 2013, the Harvard Legal Aid Bureau revealed that MassCourts, a court electronic case system, incorrectly displayed eviction judgments against tenants, who had none, in 10 percent of cases.<sup>238</sup> Screening companies that receive bulk data from databases and do not update it<sup>239</sup> mistakenly include expunged records and omit final dispositions.<sup>240</sup> Reports can list tenants' evictions or criminal

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228. Ehman, *supra* note 4, at 3–5; see also Valerie Schneider, *Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing*, 53 U. RICH. L. REV. 923, 939 (2019); Stauffer, *supra* note 77, at 259–65.

229. Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1358–61 (2007).

230. See Ehman, *supra* note 4, at 3–5.

231. Stauffer, *supra* note 77, at 261 ("The mere fact that tenants' names appear in a court proceeding does not mean that they were at fault or are poor rental risks, and yet their names will appear in the screening service's files, giving landlords the impression that these tenants have broken the law.").

232. See *id.*

233. Kleysteuber, *supra* note 229, at 1358.

234. Stauffer, *supra* note 77, at 244.

235. Kleysteuber, *supra* note 229, at 1358.

236. CMTY. LEGAL SERVS., INC. ET AL., *supra* note 93, at 7.

237. *Id.* ("In another 'mismatch' case, the commercial background screener searched the database of the Administrative Office of Pennsylvania Courts for a client with a common name. It reported 18 different criminal cases against our client—none of which was his. The screener failed to examine the year of birth connected with each case; almost none of the defendants were even born in the same decade as our client! This case illustrates why searches by name only should never be permitted.").

238. Esme Caramello & Annette Duke, *The Misuse of MassCourts as a Free Tenant Screening Device*, BOS. B.J., Fall 2015, at 15, 16.

239. See YU & DIETRICH, *supra* note 95, at 21 ("Bulk data dissemination is the practice in which public sources, often the courts, sell their data on a wholesale basis to the consumer reporting agencies. The problem arises when background screening agencies fail to update these records properly.").

240. *Id.* at 21–26. Sometimes background check companies report that charges were filed against tenants but do not report if they were convicted (i.e., the case's final disposition). *Id.*

disputes without stating whether they were actually evicted or convicted, prevailed in court, or settled with their landlord.<sup>241</sup> Even a tenant's lawsuit against a former negligent landlord may appear in their report, making future landlords think that the tenant violated the law.<sup>242</sup>

Critics of screening services also highlight that background screening reports have a disparate impact on racial minorities.<sup>243</sup> "Because racial bias exists within both the criminal justice system and the housing market, minorities find it especially difficult to secure housing after an arrest or conviction."<sup>244</sup> African Americans are arrested at rates 2.5 times higher than whites.<sup>245</sup> Even though African Americans and Hispanics combined make up around 28 percent of the U.S. population, almost 60 percent of the sentenced prison population is African American or Hispanic.<sup>246</sup> In 2017, there were 1549 African American prisoners for every 100,000 African American adults and 823 Hispanic prisoners for every 100,000 Hispanic adults, compared to 272 white prisoners for every 100,000 white adults.<sup>247</sup> This inequality also exists along gender lines; the imprisonment rate of African American women (260 per 100,000) is more than twice that of white women (91 per 100,000).<sup>248</sup>

Scholars show that the several million American families facing eviction every year follow similar racial and gender trends.<sup>249</sup> Women and people of color are evicted at higher rates and are disproportionately impacted by eviction history reports.<sup>250</sup> In 2012, New York City courts experienced about eighty evictions per day for tenants' failure to pay rent.<sup>251</sup> According to scholar Matthew Desmond, Hispanic renters living in predominantly white neighborhoods are twice as likely to be evicted for missing rent than other

at 24. People may appear to have pending charges against them when in fact those charges have been dropped or reduced. *Id.*

241. Kleysteuber, *supra* note 229, at 1360.

242. Stauffer, *supra* note 77, at 261.

243. Schneider, *supra* note 228, at 925–27.

244. *Id.* at 936–38.

245. *Id.* at 926.

246. Gramlich, *supra* note 2.

247. This means that African Americans were imprisoned at a rate nearly six times higher than their white counterparts. *Id.* Similarly, in 2013, 4347 per every 100,000 African men and 1755 per every 100,000 Hispanic men were incarcerated, compared to 678 per every 100,000 white men. Rebecca J. Walter et al., *One Strike to Second Chances: Using Criminal Backgrounds in Admission Decisions for Assisted Housing 1–2* (Sept. 6, 2016) (unpublished manuscript), [https://www.researchgate.net/publication/316448453\\_One\\_Strike\\_to\\_Second\\_Chances\\_Using\\_Criminal\\_Backgrounds\\_in\\_Admission\\_Decisions\\_for\\_Assisted\\_Housing](https://www.researchgate.net/publication/316448453_One_Strike_to_Second_Chances_Using_Criminal_Backgrounds_in_Admission_Decisions_for_Assisted_Housing) [<https://perma.cc/7LVU-ULNV>].

248. Walter et al., *supra* note 247 (manuscript at 2).

249. Les Christie, *Rents Are Soaring—and so Are Evictions*, CNN MONEY (Oct. 29, 2014, 7:12 PM), [https://money.cnn.com/2014/10/29/real\\_estate/evicted/](https://money.cnn.com/2014/10/29/real_estate/evicted/) [<https://perma.cc/FP5C-GXEC>]; see also Emily Badger & Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html> [<https://perma.cc/Y57W-QWQN>].

250. Ehman, *supra* note 4, at 5.

251. Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 117 (2016).

“habitual, late-rent payers.”<sup>252</sup> Likewise, low-income African American<sup>253</sup> and Hispanic women are evicted at higher rates than men, and single mothers face a very high risk of eviction as well.<sup>254</sup> African American women specifically face greater rates of eviction because of low wages and gender dynamics.<sup>255</sup> One study illustrates that single mothers face more evictions because landlords are more likely to evict families with children.<sup>256</sup> The use of evictions among landlords has created an “[e]viction [e]conomy” . . . in which eviction of the poor is not exceptional, but rather the norm, part of landlords’ business models and poor people’s way of life.<sup>257</sup>

Some may believe that landlords have the ultimate power to decide whether to deny housing. In reality, tenant screening companies create inaccurate, misleading, and discriminatory reports that determine a landlord’s tenant selection.<sup>258</sup> Scholar Eric Dunn argues: “The companies that offer these tools frame them as recommendations for landlords, which they can override. . . . If the machine calculates a failing decision, . . . there’s little other basis for a landlord to come to a different conclusion, especially if the landlord isn’t provided the complete history.”<sup>259</sup>

### III. INTERPRETING § 3604 TO COMBAT THE DISCRIMINATORY IMPACT OF TENANT SCREENING COMPANIES

In light of the two diverging views articulated in Part II, this Part argues that state and federal courts should hold tenant screening companies liable under both § 3604(a) and § 3604(b) of the FHA. Specifically, this Part suggests that courts should follow the interpretation of § 3604 put forth by the Seventh Circuit in *NAACP*. Tenant screening companies are inherently similar to insurance companies, and their policies and practices should likewise be covered by § 3604(a) and § 3604(b) of the FHA. The spirit of *NAACP*, coupled with the Supreme Court’s view that the FHA is to be construed broadly,<sup>260</sup> demands that courts interpret the FHA to combat screening companies’ disparate impact. Of the two camps discussed in Part II, *CoreLogic* is most in line with the Seventh Circuit in *NAACP*.

252. *Id.* at 144.

253. “[W]omen from black neighborhoods in Milwaukee represented only 9.6 percent of the population, but [they accounted for] 30 percent of the evictions.” DESMOND, *supra* note 1, at 1.

254. Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 25 (2015).

255. See DESMOND, *supra* note 1, at 1. “This study, based on an in-depth look at evictions in Milwaukee, Wisconsin, finds that women’s nonconfrontational approach with landlords and their tendency to dodge the issue are two reasons why women from black neighborhoods in Milwaukee represented only 9.6 percent of the population, but 30 percent of the evictions.” *Id.*

256. *Id.* at 1–2.

257. David A. Dana, *An Invisible Crisis in Plain Sight: The Emergence of the “Eviction Economy,” Its Causes, and the Possibilities for Reform in Legal Regulation and Education*, 115 MICH. L. REV. 935, 935 (2017).

258. Lecher, *supra* note 8.

259. *Id.* Eric Dunn is the litigation director of the National Housing Law Project. *Id.*

260. See *supra* note 35 and accompanying text.

Part III.A urges courts to follow the interpretation articulated in *NAACP*, which held that intermediaries should be liable under the FHA.<sup>261</sup> Part III.B discusses the policy reasons that necessitate making the FHA applicable to tenant screening companies. Part III.B also reaffirms the discriminatory nature of background screening reports and discusses how the FHA's text and congressional intent support a broad reading. Each section addresses and attempts to assuage the opposing sides' concerns.

*A. Following NAACP: Interpreting § 3604(a) and § 3604(b) to Cover Tenant Screening Companies' Disparate Impact*

Currently, two district court opinions support each respective side's notion of tenant screening liability. Those who believe screening reports are a vital part of the industry point to *Frederick's* interpretation of § 3604 and propose that the FHA should only apply to those who participate in the "sale or rental" of housing, i.e., direct housing providers.<sup>262</sup> In contrast, those who criticize background screening reports point to *CoreLogic* to argue that tenant screening companies should be held liable under § 3604.<sup>263</sup> Moving forward, courts should not only hold screening companies liable under the FHA but also utilize the Seventh Circuit's interpretation in *NAACP* to do so.

Of the two positions presented in Part II, *CoreLogic's* interpretation is more in line with *NAACP*. Even so, courts should rely more heavily on *NAACP's* interpretation of § 3604. While the District of Connecticut does argue for a generous and broad reading of the FHA, the Seventh Circuit's opinion in *NAACP* truly encompasses the need for intermediary liability and, as follows, tenant screening liability under both § 3604(a) and § 3604(b). The Seventh Circuit articulates an interpretation of the FHA that federal courts and administrative law have both come to support.<sup>264</sup> As such, it is helpful to turn to *NAACP* for an interpretation that will support screening company liability.

In *NAACP*, the Seventh Circuit focuses on two aspects of the FHA when discussing property insurance liability: § 3604(a) and § 3604(b).<sup>265</sup> First, the Seventh Circuit reads "[to] otherwise make unavailable" in § 3604(a) expansively and concludes that the denial of property insurance can indirectly lead to the denial of housing.<sup>266</sup> The role that insurance companies play in the housing arena is analogous to the role that tenant screening companies play. When a tenant screening company creates a background screening report, it provides information on a prospective tenant and a score that indirectly determines if housing will be made available to that tenant. Just as denial of insurance likely leads to denial of a prospective tenant's

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261. *See supra* Part I.C.

262. *See supra* Part II.A.1.

263. *See supra* Part II.B.1.

264. *See supra* Part I.C.

265. *See supra* Part I.C.

266. *See supra* Part I.C.

application, a screening report with criminal or eviction history also likely leads to denial of a housing application.

Second, under § 3604(b), the Seventh Circuit concludes that property insurance is a “service” provided in connection with the “sale or rental of a dwelling.”<sup>267</sup> In the world of commerce divided between “goods” and “services,” tenant screening is also a “service.” Landlords employ tenant screening companies to learn and synthesize information about prospective tenants and provide a complete picture of the applicant.<sup>268</sup> As the Seventh Circuit concluded, “in connection” may be read broadly to carry out the goal of removing obstacles to minorities’ ownership of housing.<sup>269</sup> A generous reading of § 3604(b) that includes tenant screening company liability is equally beneficial in removing the many obstacles that background screening reports present for racial and gender minorities.

Proponents of tenant screening services may have issues with this interpretation because much of the Seventh Circuit’s reasoning in *NAACP* relies on HUD’s position that § 3604 includes property insurance liability.<sup>270</sup> While HUD has never explicitly acknowledged tenant screening liability under the FHA, it has highlighted that the Act is broad and covers housing intermediaries.<sup>271</sup> As the court in *NAACP* and the Supreme Court have suggested, courts should give deference to this view.<sup>272</sup> As such, the proponents’ argument that the FHA is limited to direct housing providers is inherently flawed. Similarly, their reliance on *Frederick* contradicts federal precedent and HUD’s perspective of the FHA. By emphasizing a “sale or rental” requirement in § 3604,<sup>273</sup> *Frederick* risks narrowing the scope of the FHA to housing providers and contravenes the FHA’s purpose.

Alternatively, proponents may argue that utilizing the *NAACP* interpretation exposes tenant screening companies to too much liability. To appease these concerns, courts could provide more flexibility under HUD’s disparate impact theory for tenant screening companies that comply with the FCRA and do not provide final guidance to landlords. Most screening companies create background reports with a final score or recommendation.<sup>274</sup> They take it upon themselves to determine who is suitable to live in a housing unit, and landlords normally abide by this guidance.<sup>275</sup> For instance, the *CoreLogic* court took issue with the fact that

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267. *See supra* Part I.C.

268. *See supra* Part I.B.

269. *See supra* Part I.C.

270. *See supra* Part I.C.

271. *See supra* Part I.C.

272. *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992) (“[I]ndeed long before the [HUD] Secretary had the power to issue regulations and adjudicate complaints under Title VIII, the Supreme Court declared that the [HUD] Secretary’s views about the meaning of that statute are entitled to ‘great weight.’”); *see also* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) (“We are told that this is the consistent administrative construction of the Act. Such construction is entitled to great weight.”).

273. *See supra* Part II.A.1.

274. *See supra* Part II.B.2.

275. *See supra* Part II.B.2.

the defendant's background report recommended that the landlord deny housing.<sup>276</sup> If screening companies eliminate this component from their reports *and* fully comply with the FCRA's accuracy requirements, then courts could give leeway when determining if a screening company truly made housing unavailable under § 3604(a) or furnished a service that was in connection to the sale or rental of a dwelling under § 3604(b). Specifically, future courts could consider the precautions taken by tenant screening companies when determining if plaintiffs have met their burden of establishing a prima facie case under HUD's disparate impact framework.<sup>277</sup>

*B. Necessity, Text, and Precedent Support Tenant Screening Liability  
Under § 3604 of the FHA*

Tenant screening companies have a negative effect on the lives of racial and gender minorities.<sup>278</sup> These screening companies have a lot of power because housing providers often rely on their background reports. Landlords may seem to control the ultimate housing decision, but in a world where landlords receive thousands of applications, they typically follow any recommendation that a tenant screening company provides.<sup>279</sup>

This score or recommendation is usually determined by an algorithm that does not consider the unique circumstances of a prospective tenant's credit, criminal, or eviction history.<sup>280</sup> Because criminal convictions and evictions do not equally impact all populations within this country, these algorithms tend to disproportionately affect minorities.<sup>281</sup> To combat this impact, it is necessary to create a strong foundation for holding tenant screening companies liable under the FHA, specifically § 3604.

Although tenant screening companies must comply with the regulations set forth in the FCRA,<sup>282</sup> they should also face liability under the FHA's disparate impact theory. The FCRA attempts to limit the number of inaccuracies that are contained in background screening reports, but nothing in the statute targets the discriminatory impact of these reports.<sup>283</sup> While the FCRA creates a space for liability when screening companies include misleading or inaccurate information, it does not allow an aggrieved minority plaintiff to seek relief for the disparate impact created by tenant screening background reports.<sup>284</sup>

276. *See supra* Part II.B.1.

277. *See supra* Part I.A.

278. *See supra* Part II.B.2.

279. *See supra* Part II.B.2.

280. *See supra* Part II.B.2.

281. *See supra* Part II.B.2.

282. Lisa W. Schifferle, *Screening Tenants?: Check Out the FTC's New Guidance*, FED. TRADE COMMISSION (Nov. 28, 2016, 10:04 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2016/11/screening-tenants-check-out-ftcs-new-guidance> [https://perma.cc/FZN9-NSVY].

283. *See id.*

284. *See id.*

Congress created the FHA to ensure a housing market free of discrimination, and it is one of the strongest federal laws available to support equal access to housing.<sup>285</sup> Taken together, the FCRA and the FHA can be used to prevent discrimination while also targeting the inaccurate and misleading information that screening companies present in background screening reports.

Holding tenant screening companies liable under the FHA is consistent with congressional intent and the language of § 3604. When writing the Act, Congress created significant ambiguity and left it to courts to decide which actors the Act should apply to.<sup>286</sup> Section 3604 and other sections of the FHA only clarify which types of practices, not actors, the FHA covers.<sup>287</sup> Congress wrote the Act in the passive voice and banned certain outcomes: “to refuse,” “to discriminate,” and “to make print or publish.”<sup>288</sup> The Act does not say *who* the actor is or *how* they bring about such an outcome.<sup>289</sup> Congress has remained silent as courts have taken the lead in defining the Act’s boundaries. Courts, such as the Seventh Circuit, have utilized this grant of power to hold insurance companies liable under the Act.<sup>290</sup> It is time that courts also interpret § 3604 of the FHA to hold tenant screening companies liable for their discriminatory background screening reports.

Additionally, judicial precedent and administrative guidance support a broad reading of the FHA that covers tenant screening companies. In *Inclusive Communities*, the Supreme Court affirmed the existence of the disparate impact theory to bar practices that have a disproportionate impact on protected categories.<sup>291</sup> The Court also acknowledged the broad nature of the FHA.<sup>292</sup> Other federal courts have similarly read the Act’s language expansively.<sup>293</sup> For example, in *CoreLogic*, the District of Connecticut highlighted that the absence of language in the FHA implicating intermediary liability is not determinative.<sup>294</sup> In 2019, the Eleventh Circuit held that utility providers who discriminate *after* an individual has acquired a housing unit can also be held liable under the FHA’s § 3604(b) because “[t]he [FHA] statute does not contain any language limiting its application to discriminatory conduct that occurs prior to or at the moment of the sale or rental.”<sup>295</sup> These decisions all extend the Act to actions taken by housing intermediaries. Construing the FHA to cover tenant screening companies is

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285. *See supra* Part I.A.

286. *See supra* Part I.C.

287. *See supra* Part I.C.

288. *See* 42 U.S.C. § 3604(a)–(c) (2018).

289. *See supra* Part I.C.

290. *See supra* Part I.C.

291. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015).

292. *Id.* at 2525.

293. *See supra* Part I.C.

294. *See supra* Part II.B.1.

295. *Ga. State Conference of the NAACP v. City of LaGrange*, 940 F.3d 627, 632 (11th Cir. 2019).

in accordance with state and federal courts' broad and generous constructions of the Act.<sup>296</sup>

Furthermore, HUD, an administrative agency that has been given significant deference by both Congress and the Supreme Court in construing the FHA, has limited the harm that past criminal convictions and records can have on tenants.<sup>297</sup> In 2016, HUD released guidance that acknowledged the disparate impact that criminal background checks have on prospective tenants and held that "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."<sup>298</sup> Although the guidance spoke only to landlords, and not tenant screening companies, who utilize criminal history data,<sup>299</sup> expanding the FHA to cover tenant screening liability falls in line with HUD's interpretation of the Act. Tenant screening companies include criminal history in their reports and usually include a final disposition based on such records.<sup>300</sup> HUD's concern with the disparate impact of criminal arrest records can be best addressed by reading the Act generously and expansively.

Tenant screening companies have a disparate impact on minority populations.<sup>301</sup> Racial and gender minorities—two protected classes under the FHA—are more likely to experience criminal convictions and evictions than their white and male counterparts.<sup>302</sup> This disproportionate impact is not just limited across racial or gender lines; it is an *intersectional* problem that significantly targets African American and Hispanic women as well.<sup>303</sup> One way to equalize the housing economy and ensure minorities' access to housing is to have the FHA apply to the practices of both direct housing providers and housing intermediaries, namely tenant screening companies.

As explained in Part II.A, landlords rely on screening services to conduct comprehensive checks on prospective tenants and provide safe environments for their current tenants.<sup>304</sup> Housing providers will likely push back on adopting a broad interpretation of the FHA because it limits their ability to access cost-effective screening resources. However, adopting screening

296. See Parts I.A, I.C.

297. U.S. DEP'T OF HOUS. & 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 2 (2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/C256-FPSV>].

298. *Id.* at 10.

299. *Id.* at 2.

300. See *supra* Part II.B.2.

301. See *supra* Part II.B.2.

302. See *supra* Part II.B.2.

303. See *supra* Part II.B.2; see also Sandra Park, *Unfair Eviction Screening Policies Are Disproportionately Blacklisting Black Women*, ACLU (Mar. 30, 2017, 1:15 PM), <https://www.aclu.org/blog/womens-rights/violence-against-women/unfair-eviction-screening-policies-are-disproportionately> [<https://perma.cc/CL4Q-84M2>].

304. See *supra* Part II.A.2.

liability under the FHA will not limit landlords' abilities to prevent future tenant liabilities in their units.

Expanding the FHA to explicitly cover screening companies would not prevent landlords from using screening reports and screening tenants; however, the FHA, like the FCRA, would place limitations on what information can be included. To ensure compliance with the FHA, tenant screening companies would not be able to use search criteria that are "proxies" for race and gender, such as criminal history and eviction data.<sup>305</sup> Not only does this information disproportionately impact certain populations but it is often not useful criteria or data.<sup>306</sup> Tenant screening companies could still include information on credit scores, employment history, and other data that does not have a disparate impact on protected categories under the FHA.

Moreover, as discussed in Part II.B.2, criminal and eviction histories are typically outdated and inaccurate and do not paint a full picture of a prospective tenant.<sup>307</sup> Often, the background screening report presents information that is twenty to thirty years old or a conviction that a court ultimately dismissed because the charge against the tenant was unfounded.<sup>308</sup> Eliminating the use of criteria that has a disparate impact will allow for more accurate screening reports to limit tenant liability. If screening companies create accurate reports that do not have a disparate impact, critics will likely trust them and the services they provide. Even landlords are hesitant to potentially violate the FCRA or FHA.<sup>309</sup> If a background screening report is accurate and nondiscriminatory, housing providers will not have to worry as much about an aggrieved tenant pursuing an FHA-based case against them.

#### CONCLUSION

Landlords and other housing providers increasingly use tenant screening companies to gain information on prospective tenants. This reliance usually leads to the disproportionate exclusion of racial and gender minorities from housing. Specifically, tenant screening companies create background reports that have a disparate impact on protected categories under the FHA. By including criminal and eviction histories in their reports, tenant screening companies disproportionately target those minorities who most often face prison time or displacement from their homes. To combat this disparate impact, it is imperative that tenant screening companies face liability for their actions under the FHA—specifically under the Act's disparate impact theory. Courts can best achieve this result by construing § 3604 of the FHA broadly so that the section extends past housing providers to housing intermediaries. The Seventh Circuit in *NAACP* and other federal courts, such as the District

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305. *See supra* Part II.B.2.

306. *See supra* Part II.B.2.

307. *See supra* Part II.B.2.

308. *See supra* Part II.B.2.

309. *See* Lucas Hall, *Beware of the Top 10 Fair Housing Mistakes*, LANDLORDOLOGY (May 9, 2017), <https://www.landlordology.com/top-10-fair-housing-mistakes/> [<https://perma.cc/UD4H-RLPQ>].

of Connecticut in *CoreLogic*, provide a reliable interpretation for courts to follow. When it comes time for other state and federal courts to determine if tenant screening liability exists under the FHA, they should follow the generous construction of § 3604(a) and § 3604(b) articulated in judicial precedent, the FHA's legislative history, and HUD's administrative guidance.