

No. 22-30609

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

LOUISIANA FAIR HOUSING ACTION CENTER, INC.,

Plaintiff-Appellee,

v.

AZALEA GARDEN PROPERTIES, LLC,

Defendant-Appellant.

**On Appeal from the United States District Court
for the Eastern District of Louisiana**

**BRIEF OF NATIONAL FAIR HOUSING ALLIANCE, CENTER FOR
RESPONSIBLE LENDING, AND LOCAL FAIR HOUSING
ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF APPELLEE
AND AFFIRMANCE**

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to 5th Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae:

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December 23, 2022

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STATEMENT OF AMICI CURIAE¹

Amici are fair housing and fair lending advocacy organizations who have strong interests in ensuring that the doors of economic opportunity remain open to all people. They are concerned about the harm caused to the economy and society as a whole by overly broad criminal background bans like the one at issue in this case and the particular burdens these bans impose on families and communities of color. A Statement of Interest for each organization is presented in an addendum to this brief.

INTRODUCTION

Having a criminal history does not predict whether someone will be a good tenant. Indeed, there is no way to predict that. Nonetheless, housing providers like Defendant-Appellant Azalea Gardens Properties continue to rely on criminal history to screen out otherwise eligible tenants. Moreover, even if a history of some types of criminal convictions can be relevant to the rental application decision, a criminal history ban like the one here that does not take into account the nature of the crime committed, the age of the conviction, or other mitigating factors sweeps too broadly and excludes many qualified tenants from the housing market. In part for that reason, in the analogous employment context, at least 37

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

states and the District of Columbia have enacted “ban the box” laws prohibiting questions about criminal history on job applications, and employers have been abandoning blanket criminal background bans to give a second chance to qualified applicants with criminal records.

The rationale for doing away with blanket criminal background bans in the housing context is just as strong, if not stronger, because the effects of being denied housing can be catastrophic for people with criminal backgrounds and their families. In an already tight housing market, criminal background bans like the one used by Azalea Gardens are a significant barrier to people with criminal records and their families accessing safe, stable and affordable housing. While a safe place to live can provide a springboard to economic self-sufficiency and rehabilitation, excluding someone with a criminal record from the housing market can place them in a cycle of homelessness and incarceration that prevents them from participating in the economy and ultimately makes our communities less safe. And that cycle has a generational impact, affecting children who are denied stable housing because of a family member’s criminal background.

These effects of criminal background bans are felt hardest by those most likely to have contact with police and the criminal justice system, including Black and Latino people. Both groups are stopped, searched, and arrested at disproportionately higher rates than white people—despite data showing they

commit crimes at similar rates—and they are more likely than white people to be incarcerated and to receive longer prison sentences for the same crimes. As a result, they are overrepresented among the nearly one third of U.S. adults with criminal records. Indeed, nearly a quarter of Black adults and a third of Black men have a felony criminal conviction on their record, compared to just 8 percent of the adult population overall.

Rather than using a blanket criminal background ban that excludes qualified tenants from affordable housing and disproportionately denies housing to Black and Latino applicants, Azalea Gardens has a number of options for more tailored approaches that would still allow it to screen out risky applicants. To begin with, rather than a blanket ban—or even its written policy, which automatically denies everyone with a felony or with a misdemeanor more recent than 5 years—it could instead consider criminal history in context, looking at the age of conviction, the type of conviction, and other mitigating factors like involvement in community or family and access to resources like income or housing subsidies. And if Azalea Gardens did want to continue to ban people with certain convictions altogether, it could use a narrow list of specific types of convictions that are more likely to have an effect on someone’s success as a tenant, or it could focus on very recent convictions. Instead, it uses its blanket ban as a blunt tool to not only disqualify those tenants who may actually have poor outcomes, but also people who will be

excellent tenants and are relying on access to housing for the stability to build a better life.

ARGUMENT

I. **Blanket Criminal Background Bans Are a Poor Way to Screen Out Tenants Who Might Pose a Risk**

The approach that Azalea Gardens takes of screening out any applicant with a criminal background does not achieve its stated goal of screening out risky tenants. To the contrary, studies have repeatedly found that a criminal record is a poor indicator of whether someone will be a good tenant.² For example, although Azalea Gardens rejects anyone with a conviction, one study found that having a felony conviction that is over 5 years old or a misdemeanor conviction that is over 2 years old has no significant effect on the risk that the tenant will have a negative outcome.³ And because “there are no empirically validated tools predicting the risk of harm a rental tenant might present to other tenants and property,”⁴ a blanket ban based on past behavior unnecessarily prevents good tenants from having a fair shot at housing. Indeed, blanket criminal background bans are likely to sweep in people

² Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavior Health Disorders*, 60 J. Psych. Servs. 224-30 (Feb. 2009), <https://ps.psychiatryonline.org/doi/epdf/10.1176/ps.2009.60.2.224>; Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, Wilder Research (Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

³ Warren, *Success in Housing*, at 20.

⁴ Calvin Johnson, *Tenant Screening with Criminal Background Checks: Predictions and Perceptions are not Causality*, Department of Housing and Urban Development (May 17, 2022), <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html>.

who do not have a criminal record at all because criminal background check reports often include errors, such as mis-categorizing an arrest as a conviction, failing to reflect when someone's conviction was overturned or they were exonerated, or containing information about a different person altogether.⁵

In the analogous employment context, at least 37 states and the District of Columbia have enacted “ban the box” laws prohibiting at least some employers from requesting information about criminal history on job applications.⁶ And Congress passed a law in 2019 prohibiting most federal agencies and contractors from requesting that information before a conditional offer is made.⁷ These laws have been popular for a reason: they have led to positive results for both employers and applicants.⁸ Studies have shown that employees with criminal backgrounds do as well or better than their counterparts without criminal records.⁹ For example, a 2018 study found that individuals with criminal records had a much longer tenure and were less likely to quit their jobs than other workers, and customer service employees with a criminal background were no more likely than others to leave for

⁵ Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, National Consumer Law Center (Dec. 2019), at 17, <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>.

⁶ Beth Avery and Han Lu, *Ban The Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, National Employment Law Project (Oct. 1, 2021), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

⁷ *Id.*

⁸ *Research Supports Fair-Chance Policies*, National Employment Law Project (Aug. 2016), at 4-6, <http://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>.

⁹ *Id.* at 4-5.

reasons of misconduct.¹⁰ And a 2021 survey of Human Resources professionals found that 85% reported that workers with criminal records performed their jobs about the same or better than workers without criminal records, 81% said that the quality of workers with criminal records was about the same or better than workers without records, and 75% thought that workers with a criminal record were just as or more dependable than workers without criminal records.¹¹

II. Denying Housing to Applicants with Criminal Backgrounds has a Detrimental Effect on the Economy and Society

That criminal backgrounds have no predictive power is particularly troubling in light of the serious negative consequences of criminal background bans, both for the economy as a whole and for the people denied housing because of them.

Excluding qualified people who would be successful tenants or employees is economically inefficient because it excludes from the housing or labor markets potential tenants who are otherwise qualified. In aggregate, people with criminal convictions face lost wages in excess of \$372 billion every year compared to what they would earn without their conviction, which in turn has negative ripple effects

¹⁰ Dylan Minor et al., *Criminal Background and Job Performance*, 7 IZA J. of Labor Policy 8:1, 8:2 (2018).

¹¹ *2021 Getting Talent Back to Work Report*, SHRM (May 2021), https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW_Report.pdf

on the whole economy.¹² One study found that excluding people with felony records or who had been incarcerated from jobs for which they were qualified increased the unemployment rate by nearly a percentage point and reduced U.S. gross domestic product in 2014 by between \$78 and \$87 billion.¹³

But the damage of these policies goes far beyond lost wages. People with criminal backgrounds are disproportionately low-income and thus already experience significant barriers to finding housing. That is particularly true for those who were recently incarcerated. Criminal background bans exacerbate the existing shortage of affordable housing by denying access even to those who can afford it.¹⁴ In one study of formerly incarcerated people and their families, 79 percent of survey respondents reported being ineligible for or denied housing due to their criminal conviction history or that of a family member.¹⁵ Rather than giving

¹² Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, Brennan Center (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>.

¹³ Cherrie Bucknor & Alan Barber, *The Price we Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, Ctr. for Econ. & Policy Research, (June 2016), <https://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

¹⁴ See Veronica Gaitán and Maya Brennan, *For Reentry Success and Beyond, Rental Housing Access Matters*, Urban Institute (Feb. 6, 2019), <https://housingmatters.urban.org/articles/reentry-success-and-beyond-rental-housing-access-matters> (describing how “Criminal background exclusions . . . are omnipresent throughout the country” and are a “critical” barrier to housing for formerly incarcerated people).

¹⁵ See Saneta deVuono-powell, et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design (Sept. 2015), at 26-27, <https://www.whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

someone with a criminal record a second chance, such bans leave people with criminal records and their families with few, if any, safe and affordable options for housing.¹⁶ Instead, they are forced to seek less stable forms of housing like staying with a family member or in a motel, or are left without housing altogether.¹⁷

The detrimental effects of criminal background checks in housing are underscored by data about the overrepresentation of people with criminal records among the population of people experiencing homelessness in the United States. Formerly incarcerated people are nearly 10 times more likely to be homeless than the general public.¹⁸ While the homelessness rate is highest among people who have recently been released from prison or jail, even people who have been living in the community for two years or more experience homelessness at a rate 4 times higher than the general public.¹⁹ In one study of men experiencing homelessness in Charlotte, North Carolina, 60% had a criminal record and nearly three quarters had

¹⁶ See Peter Leasure and Tara Martin, *Criminal Records and Housing: An Experimental Study*, 13 J Exp. Criminol. 527-535 (May 16, 2017) (explaining how, when formerly incarcerated people are shut out of the rental market, there are few other options available, leaving them homeless or dependent on friends and family to provide shelter)

¹⁷ *Id.* (describing how, in survey of formerly incarcerated people and their family members, 72 percent identified the unavailability of affordable housing as one of the most important barriers to securing stable housing); see also Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People with Criminal Convictions*, Center for American Progress (April 14, 2021), <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/> (explaining that criminal background checks for rental housing are one barrier that “contribute[s] to increased experiences with housing insecurity and homelessness” among people with criminal records).

¹⁸ See Lucius Couloute, *Nowhere to Go: Homelessness among Formerly Incarcerated People*, Prison Policy Initiative (August 2018), <https://www.prisonpolicy.org/reports/housing.html>.

¹⁹ *Id.*

been arrested at least once.²⁰ Moreover, an even higher proportion of formerly incarcerated people are living in unstable or “marginal” housing like a hotel or with family members, rather than in permanent or stable housing.²¹ For example, one study in Michigan found that parolees in that state moved an average of 2.6 times per year, greatly exceeding the definition of housing instability, which is moving once or more per year.²² And in another study of formerly incarcerated people, 58 percent of survey participants reported living with family members rather than on their own.²³

Homelessness and housing insecurity among people with criminal records come at a tremendous cost to our communities. Studies quantifying the cost of homelessness have concluded that a person experiencing chronic homelessness can cost taxpayers anywhere from \$30,000 to 100,000 per year.²⁴ And providing

²⁰ Carson Dean, *Criminal History among Homeless Men*, Men’s Shelter of Charlotte (Nov. 2011), http://www.mensshelterofcharlotte.org/wp-content/uploads/2014/01/Criminal_History_2011.pdf.

²¹ Couloute, *Nowhere to Go*.

²² Claire Herbert et al., *Policy Brief: Residential Instability among the Formerly Incarcerated*, National Poverty Center at the University of Michigan (April 2016), at 1-2, http://npc.umich.edu/publications/policy_briefs/brief42/policybrief42.pdf.

²³ deVuono-Powell, *Who Pays?* at 26.

²⁴ See National Alliance to End Homelessness, *Ending Chronic Homelessness Saves Taxpayers Money* (June 2017), <http://endhomelessness.org/wp-content/uploads/2017/06/Cost-Savings-from-PSH.pdf> (“A chronically homeless person costs the tax payer an average of \$35,578 per year”); United States Interagency Council on Homelessness, *Ending Chronic Homelessness in 2017* (2017), https://www.usich.gov/resources/uploads/asset_library/Ending_Chronic_Homelessness_in_2017.pdf (“Some studies have found that leaving a person to remain chronically homeless costs taxpayers as much as \$30,000 to \$50,000 per year”); *What is the Cost of Homelessness?*, Father

housing to currently unhoused people greatly reduces the costs that state and local governments must spend on social services. For example, after San Francisco provided supportive housing to just 2,000 people experiencing homelessness, the city's costs associated with dealing with homelessness declined by \$31.5 million.²⁵ And a 2014 study in Albuquerque, New Mexico found that providing housing to about 300 people saved the city \$3.2 million.²⁶ In short, renting to a person with a criminal background can reduce costs for taxpayers and free up municipal and state resources.

But the costs of denying housing to otherwise qualified people with criminal records do not end there. While access to stable housing has been shown to reduce

Joe's Villages (Mar. 8, 2022), <https://my.neighbor.org/what-is-the-cost-of-homelessness/> (describing how top homeless users of public services in San Diego cost tax payers nearly an average of \$111,000 per year); Malcolm Gladwell, *Million Dollar Murray*, New Yorker (February 5, 2006), <https://www.newyorker.com/magazine/2006/02/13/million-dollar-murray> (describing how one man experiencing homelessness and alcohol use disorder used about \$1 million dollars in public services over his 10 years of homelessness); Kathleen Miles, *Housing the Homeless Not Only Saves Lives—It's Actually Cheaper Than Doing Nothing*, HuffPost (Mar. 25, 2014), https://www.huffpost.com/entry/housing-first-homeless-charlotte_n_5022628 (describing study finding that program that housed 85 chronically homeless adults saved \$1.8 million in health care costs and reduced emergency room visits and days in the hospital by nearly 80 percent).

²⁵ See Jennifer Millman, et al., *Policy Analysis Report: Impact of Supportive Housing on the Costs of Homelessness*, City and County of San Francisco Board of Supervisors (May 31, 2016), <https://sfbos.org/sites/default/files/FileCenter/Documents/56020-Cost%20of%20Homelessness.pdf>.

²⁶ Carolyn Gonzales, *Study reveals cost benefits in housing the homeless*, Medical XPress (June 6, 2014), <https://medicalxpress.com/news/2014-06-reveals-benefits-housing-homeless.html>.

recidivism,²⁷ a lack of available housing options can place people with criminal records and their families in a cycle of homelessness and incarceration, which costs taxpayers more money and makes our communities less safe.²⁸ People experiencing homelessness have more contact with police and are more likely to be rearrested for violating laws that criminalize homelessness, such as bans on sleeping, sitting, or lying down in public, or on sleeping in cars.²⁹ Indeed, people who are experiencing homelessness are 11 times more likely to be arrested than those who are housed.³⁰ Likewise, people without housing end up being reincarcerated more frequently due to “technical” legal violations, such as missing important legal notices due to lacking a permanent address or not being able to afford fines.³¹ And “[v]iolations of other standard conditions of parole and

²⁷ See Jocelyn Fontaine et al., *Supportive Housing for Returning Prisoners: Outcomes and Impacts of the Returning Home—Ohio Pilot Project*, Urban Institute (Aug. 2012), <https://www.urban.org/sites/default/files/publication/25716/412632-Supportive-Housing-for-Returning-Prisoners-Outcomes-and-Impacts-of-the-Returning-Home-Ohio-Pilot-Project.PDF>;

²⁸ See Rebecca Vallas et al., *Removing Barriers to Opportunity for Parents with Criminal Records and their Children*, Center for American Progress (Dec. 2015) at 9, https://americanprogress.org/wp-content/uploads/2015/12/CriminalRecords-report2.pdf?_ga=2.8340081.214011696.1657129695-2105602745.1657129694 (“Safe, decent, and affordable housing . . . has powerful anti-recidivism effects for people with criminal histories.”).

²⁹ See, e.g., Rajan Bal et al., *Housing Not Handcuffs 2019*, National Law Center on Homelessness and Poverty (Dec. 2019) at 13, 42, 69, <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

³⁰ *Id.* at 50.

³¹ See Madeline Bailey et al., *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, Vera Institute for Justice (Aug. 2020) at 6, <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf> (“Local criminal legal processes are not designed to accommodate people without housing, and as a result, create more opportunities for people experiencing homelessness to be penalized at every stage”).

probation are simply unavoidable for people experiencing homelessness.”³² For example, people living outside cannot obey curfew restrictions, and reporting requirements can be difficult to manage for people without reliable transportation.³³

On the other hand, people with criminal records who have stable housing are less likely to reoffend or be rearrested. For example, one study of a program in Ohio that provided supportive housing to people with disabilities upon their release from prison found that participants in the program were 43 percent less likely to be rearrested and 61 percent less likely to be reincarcerated than a comparison group that was not provided with stable housing.³⁴

Not only does access to housing decrease the chances that a person with a criminal background will end up back in prison or jail, but it also provides a stable foundation from which they can find and keep employment and access necessary health care services like mental health care and substance abuse treatment, thus

³² *Id.*

³³ *Id.*

³⁴ See Jocelyn Fontaine et al., *Supportive Housing for Returning Prisoners: Outcomes and Impacts of the Returning Home—Ohio Pilot Project*, Urban Institute (August 2012), <https://www.urban.org/sites/default/files/publication/25716/412632-Supportive-Housing-for-Returning-Prisoners-Outcomes-and-Impacts-of-the-Returning-Home-Ohio-Pilot-Project.pdf>. In a study of incarcerated people by the Marshall Project about what would have kept them out of prison, access to affordable housing was one of the top answers. See Nicole Lewis et al., *What 2,392 Incarcerated People Think About #DefundThePolice*, Marshall Project (October 27, 2020), <https://www.themarshallproject.org/2020/10/27/what-2-392-incarcerated-people-think-about-defundthepolice>.

providing a platform for successful rehabilitation and reintegration. Access to stable housing is often a necessary prerequisite to finding employment.³⁵ Having a clean, safe, and secure place to live provides the stability and space to rest that is important for being able to show up to work every day. Indeed, being forced to move or losing housing has been found to increase a person's risk of losing their job.³⁶

The stigmas and realities of not having a stable place to live can make finding a job even harder than it already is for someone with a criminal background. For example, the first thing that many job applications ask for is a permanent address and contact information, which can be difficult or impossible to provide for someone moving in between housing situations or living on the street. Then, if someone is offered an interview, they may not have access to a place to keep and wash “business” clothing or to take a shower. And many people who lack stable housing also lack reliable transportation, making it hard for them to make it to a

³⁵ See Jocelyn Fontaine and Jennifer Biess, *Housing as a Platform for Formerly Incarcerated Persons*, Urban Institute (April 2012) at 8, <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF> (“For the formerly incarcerated in particular, housing instability is a barrier to sustain employment.”).

³⁶ See Matthew Desmond And Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, *Social Problems* (Jan. 11, 2016) at 1, <https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf>.

job even if they are offered one.³⁷ Further, housing instability is correlated with poor access to health care and increased hospitalizations,³⁸ while providing housing reduces hospitalizations and health care costs.³⁹ Thus, the simple step of allowing someone to access housing despite their criminal background can have a ripple effect into other areas of their life, setting them up for economic self-sufficiency and better health.

Criminal background bans do not just affect the person with the criminal background but their entire family. For example, one survey found that nearly one in five families faced eviction, were denied housing, or did not qualify for public housing once a formerly incarcerated family member returned.⁴⁰ Studies show that housing instability “can have harmful and long-lasting consequences for children.”⁴¹ Frequent moves can disrupt education, leading to worse academic

³⁷ Amanda Crowe, *Stereotype #2: Homeless people should just get a job*, The Human Impact (Feb. 6, 2020) <https://www.thehumanimpact.org/post/stereotype-2-homeless-people-should-just-get-a-job>; Stephen Baetz and Bill O’Grady, *Why Don’t you Just Get a Job? Homeless Youth, Social Exclusion and Employment Training*, in YOUTH HOMELESSNESS IN CANADA 243, 251 <https://homelesshub.ca/sites/default/files/attachments/15GAETZOGRADYweb.pdf>.

³⁸ See Kristen W. Reid et al., *Association between the Level of Housing Instability, Economic Standing and Health Care Access: A Meta-Regression*, 19 J. of Health Care for the Poor and Underserved 1212 (2008).

³⁹ See, e.g., Carolyn Gonzales, *Study reveals cost benefits in housing the homeless*, Medical XPress (June 6, 2014), <https://medicalxpress.com/news/2014-06-reveals-benefits-housing-homeless.html> (describing Albuquerque study finding that providing housing to people experiencing homelessness decreased hospital inpatient costs by 83.8% and outpatient costs by 39.1%).

⁴⁰ See Saneta deVuono-powell, et al., *Who Pays?*, at 9.

⁴¹ Center for American Progress, *Removing Barriers to Opportunity*, at 10.

outcomes.⁴² For example, low-income children who experienced residential instability before age 18 are less likely to complete high school, enroll in post-secondary education, or complete a degree compared to children who had stable housing during childhood.⁴³ And housing instability can negatively impact children's health, "affecting physical cognitive, social, and emotional development."⁴⁴ "Children who experience homelessness and housing instability are more likely to be separated from their parents, to experience hunger and lack of access to medical and dental care, to repeat a grade or drop out of high school, and to display emotional and behavioral problems such as anxiety and depression."⁴⁵ In short, "the barriers to housing faced by parents with criminal records not only stand in the way of housing stability in the short term but also can carry substantial, negative, and long-term consequences for children."⁴⁶

III. The Detrimental Effects of Criminal Background Bans Fall Disproportionately on Families of Color.

While society as a whole bears the costs of policies that have the unintended consequence of increasing chronic homelessness and recidivism, certain groups bear a larger share of the consequences of criminal background bans. In particular,

⁴² *Id.* at 11.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (citing Marci McCoy-Roth et al., *When the Bough Breaks: The Effects of Homelessness on Young Children*, Child Trends (February 2012), <http://www.childtrends.org/wp-content/uploads/2012/02/2012-08EffectHomelessnessChildren.pdf>).

⁴⁶ *Id.*

due to factors like over policing and pervasive inequalities in the legal system, Black people are disproportionately likely to have a criminal record. As of 2010, approximately 23% of Black adults and a staggering 33% of Black adult men had a felony conviction on their record, as compared to 8% of adults as a whole.⁴⁷

Racial disparities become apparent from the earliest stages of contact with the legal system. Black people made up over 26% of those arrested in 2019,⁴⁸ while they comprised only 14% of the U.S. population that year.⁴⁹ The percentage of Latino arrestees also exceeded their share of the population in 2019, though by a narrower margin.⁵⁰ But like a snowball gaining mass and momentum as it rolls downhill, the rates of disparity grow more exaggerated for both Black and Latino people at later points in the legal system. One 2013 study of men charged with felonies in 2000 found that Black defendants were 35% more likely, and Latino defendants 67% more likely, to be jailed pending trial than white defendants after factoring out

⁴⁷ Sarah Shannon, et al., *The Growth, Scope and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 *Demography* 1795 (Oct. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5996985/>.

⁴⁸ *Uniform Crime Reporting Program, Table 43, Arrests by Race and Ethnicity, 2019* (2019), Federal Bureau of Investigation, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43>.

⁴⁹ Christine Tamir, et al., *Facts about the U.S. Black Population*, Pew Research Center (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/>.

⁵⁰ *Compare Table 43, Uniform Crime Reporting Program* (19.1% of arrestees for whom ethnicity provided were Hispanic) with Luis Noe-Bustamonte et al., *US Hispanic Population Reached New High in 2019, but Growth Slowed*, Pew Research Center (July 7, 2020), <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/> (Hispanics made up 18% of U.S. population in 2019).

offense seriousness and prior contacts with the legal system.⁵¹ In turn, defendants who were detained pending trial were more than twice as likely to plead guilty.⁵² And once Black and Latino defendants are convicted, they receive longer sentences and are more likely to end up incarcerated. A 2007 study of men charged with felony drug offenses between 1990 and 2002 in 65 urban counties throughout the nation found that after controlling for offense seriousness and prior criminal history, Black defendants were 34% more likely than white defendants to be sentenced to incarceration and to receive sentences that were 17% longer, while Latino defendants were 45% more likely than white defendants to be sentenced to incarceration and to receive sentences that were 35% longer.⁵³ As a result of these cumulative disparities, Black people were incarcerated at five times the rate of white people in 2020, while the ratio of Latino to white incarceration in 2020 was three to one.⁵⁴

The overrepresentation of Black and Latino people among the incarcerated population, and the high proportion of Black men with criminal convictions, can reinforce stereotypes that members of these groups are more likely to be engaged

⁵¹ John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 Social Science Research 1207 (2013).

⁵² *Id.* at 1215.

⁵³ Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. of Inst. of Justice and Int'l Studies 267, 277 (2007).

⁵⁴ E. Anne Carson, *Prisoners in 2020, Table 4*, U.S. Department of Justice, Bureau of Justice Statistics (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

in illegal behavior. But the data tells a more complicated story, beginning with asymmetries in police encounters. A study of New York’s now-infamous “stop and frisk” policy throughout the early 2000s found that Black people were more than twice as likely as white people to be stopped on the street by police, even after controlling for the level of crime in the neighborhood.⁵⁵ Moreover, the “hit rate” of these stops—the likelihood that stops would lead to discovery of drugs or other contraband and thus to an arrest—declined from 15% to 4% between 1998 and 2006, and was lower for Black people than for white people.⁵⁶

A more recent study of nearly 100 million traffic stops conducted by 21 state patrol agencies and 35 municipal police departments across the country found that Black drivers were less likely to be stopped after sunset, when the “veil of darkness” prevented officers from identifying them by race.⁵⁷ This same study found that traffic stops were more likely to lead to searches for contraband, on the basis of less evidence, for Black and Latino drivers than for white drivers.⁵⁸ This

⁵⁵ Jeffrey Fagan, et al., *Street Stops and “Broken Windows” Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS, Stephen K. Rice & Michael D. White, Eds., New York University Press (2010).

⁵⁶ *Id.*

⁵⁷ Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nature Human Behavior* 736, 736 (2020), <https://www.nature.com/articles/s41562-020-0858-1>.

⁵⁸ *Id.* at 739. These searches were more likely to lead to discovery of contraband when police searched the vehicles of white drivers than Black or Latino drivers, with the “hit rate” being significantly lower for Latino drivers.

tendency of Black and Latino drivers to be disproportionately stopped and searched by police explains, at least in part, why Black people have historically been arrested for drug crimes at much higher rates than white people despite data showing that Black and white people are roughly equally likely to use and sell drugs.⁵⁹

Once arrested, Black and Latino people face additional disadvantages, independent of the illegal acts leading to their arrest, that make them more likely to end up incarcerated. Many of these disadvantages stem from the fact that Black and Latino people, on average, have lower incomes and fewer assets than white people, and fewer people in their social networks with assets.⁶⁰ For example, Black and Latino arrestees are less likely to be able to afford bail, making them more likely to remain in detention while awaiting trial.⁶¹ They are also less likely to be able to hire a lawyer, making them disproportionately dependent on overworked

⁵⁹ *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Human Rights Watch (May 2000), <https://www.hrw.org/reports/2000/usa/index.htm>. See also Katherine Becket et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 *Criminology* 105 (2006), at 119 (finding that Black people comprised 47% of those selling crack cocaine but 79% of those arrested, while white people comprised around 41% of those selling crack but only 9% of those arrested).

⁶⁰ *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, Federal Reserve (Sep. 18, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html> (typical white family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family, where wealth is defined as difference between gross assets and liabilities).

⁶¹ Bernadette Rabuy and Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, Prison Policy Initiative (May 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

public defenders whose high caseloads limit the time they can spend with each client.⁶² Studies have shown that criminal defendants with public defenders or other court-appointed lawyers are also more likely than those with private counsel to be detained pending trial.⁶³

Implicit bias within the legal system, which mirrors the same biases in society writ large, also plays a role in explaining why Black and Latino people tend to experience worse outcomes than white people once they enter that system. For reasons dating back to explicit racist laws in the Reconstruction era that caused Black people to be arrested and incarcerated at disproportionate rates for crimes like “walking at night,” a “statistical discourse” linking race to criminality has become deeply entrenched within the American popular imagination.⁶⁴ One 2010 study found that white people overestimated the proportion of burglaries, illegal drug sales and juvenile crimes committed by Black people by 20% to 30%,⁶⁵

⁶² *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics (Nov. 2000), <https://bjs.ojp.gov/press-release/indigent-defense-services-large-counties-1999-defense-counsel-criminal-cases> (reporting that 77% of Black inmates in state prisons had court-appointed lawyers compared to 73% of Hispanic inmates and 69% of white inmates).

⁶³ Besiki Kutateladze, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 *Criminology* 514, 529 (2014).

⁶⁴ Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Evidence Brief (May 2018) at 3, <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (quoting Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, Harvard Univ. Press (2011)).

⁶⁵ *Id.*

whereas Latino people are often stereotyped as “foreigners,” “immigrants,” or “gang members” who are “hot-tempered and prone to violence.”⁶⁶

Prosecutors, judges, and others involved in the legal system are not immune from these biases. Indeed, given the high volume of cases they handle and the fact that they have limited information about the defendants who appear before them, the temptation to fall back on the “perceptual shorthand” of race and ethnicity as a proxy for culpability and dangerousness is difficult to resist, especially when such biases operate beneath the level of conscious awareness.⁶⁷

Finally, high-profile examples of wrongful convictions have made plain that the criminal justice system is not infallible and sometimes arrives at outcomes that are not just. Because of the overrepresentation of Black people within that system, as well as for other more race-specific reasons like the unreliability of cross-racial identifications, Black people are disproportionately represented among the ranks of the formally exonerated. Indeed, a study of 3200 people on the National Registry of Exonerations compiled through August of 2022 found that 53% of those on the list were Black.⁶⁸ These imbalances were especially pronounced for certain types of crimes, with Black people 19 (nineteen) times more likely to be falsely

⁶⁶ Kutateladze, *Cumulative Disadvantage*, at 520.

⁶⁷ *Id.* at 519.

⁶⁸ Samuel R. Gross, et al., *Race and wrongful Convictions in the United States 2022* (September 2022), <https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf>.

convicted of a drug offense than white people.⁶⁹ And because not every wrongful conviction results in a formal exoneration, these statistics likely undercount the number of innocent Black people who will be stigmatized for the rest of their life with the brand of a criminal conviction.

These stigmatizing effects are particularly pernicious for Black men because of the common cultural trope associating Black men with dangerousness and criminality, a trope which—by having a criminal conviction—they realize they will be confirming.⁷⁰ But social stigma is not limited to the person with the criminal record; it carries over to their families as well.⁷¹ And the trauma of having a currently or formerly incarcerated parent adversely affects children’s health and harms their educational prospects, consequences that fall disproportionately on Black children.⁷²

Black and Latino families also face a particularly heavy economic toll in the wake of a family member’s criminal conviction. Multiple studies have shown that

⁶⁹ *Id.*

⁷⁰ Mary C. Murphy et al., *The Long Reach of Prejudiced Places? Stereotype Expectations and Motivation to Pursue Education Among Previously- and Never-Incarcerated Black Men*, 19 *Self and Identity* 456 (2020).

⁷¹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* New Press (2010), at 166.

⁷² Leila Morsy and Richard Rothstein, *Mass Incarceration and Children’s Outcomes*, Economic Policy Institute (Dec. 2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/> (noting that Black children are six times more likely to have a parent who is currently or formerly incarcerated, and that parental incarceration is linked to a host of negative health and educational outcomes).

after controlling for other variables, Black and Hispanic job applicants with criminal convictions are less likely to be hired than white applicants with criminal convictions.⁷³ And Black children are also more likely to experience housing instability and homelessness due to the criminal background of a parent than are white children with a formerly incarcerated parent.⁷⁴

Thus, when Azalea Gardens chose to adopt a policy that denied housing to anyone with a criminal background, that policy choice did more than just harm society as a whole for the reasons discussed in part II above. It also created a burden that will fall more heavily on the backs of Black and Latino people—both those with criminal backgrounds and their children who suffer the economic and stigmatizing effects of such policies along with their parents.

IV. More Tailored, Less Discriminatory Alternatives Are Available to Screen for Potentially Dangerous Tenants.

There are much more narrowly tailored approaches that housing providers like Azalea Gardens could take to ensure they are not renting to risky tenants while also not excluding qualified tenants. For example, studies have shown that factors

⁷³ Scott Decker et al., *Criminal Stigma, Race, Gender and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*, Ariz. St. U. (January 2014) (finding that the negative effect of a criminal conviction on employer call-back rates was particularly strong for both Black men and women who applied for jobs in person instead of applying online).

⁷⁴ Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, *Ann. Am. Acad. Pol. Soc. Sci.* 651 (2014), at 77.

such as whether there are children or other adults in the household, the tenant's income or the amount of their housing voucher or subsidy, the tenant's housing history, their record of rehabilitation, and the tenant's age are all factors that affect housing outcomes as much or more than criminal history.⁷⁵ Thus, looking at the whole picture of an applicant's situation—not just their criminal record—can give a housing provider a better sense of whether that person is likely to be a good tenant. As the Department of Housing and Urban Development (HUD) has explained, “individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account.”⁷⁶

And, at the very least, because many types of convictions, including those for minor drug-related offenses, minor public order offenses, and driving offenses, and those for misdemeanor convictions that are over two years old and for felony convictions that are over five years old have no value in predicting housing outcomes,⁷⁷ housing providers should consider the age and nature of the conviction

⁷⁵ Warren, *Success in Housing*, at 16.

⁷⁶ *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*, U.S. Department of Housing and Urban Development (Apr. 4, 2016) at 7, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (hereinafter “HUD 2016 Guidance”).

⁷⁷ Warren, *Success in Housing*, at 19-20.

when deciding whether to exclude tenants due to criminal background. Again, that is consistent with HUD guidance that denying housing to people with criminal convictions without regard to the age or nature of the conviction does not pass the test of being “necessary to achieve a substantial, legitimate nondiscriminatory interest.”⁷⁸ Likewise, in the analogous employment context, courts and the Equal Employment Opportunity Commission have said that employers must take into account at least “the nature of the crime” and “the time elapsed” since the conviction.⁷⁹

In short, because the fact that someone has a criminal record in of itself does not reliably predict their housing outcomes, and because there are other less discriminatory and more narrowly tailored methods to screen out risky tenants, blanket bans like the one implemented by Azalea Gardens should not be used.

CONCLUSION

For the foregoing reasons, the Court should affirm the certified order with regard to the disparate impact race claim.

December 23, 2022

Respectfully submitted,

/s/Shelby Leighton

⁷⁸ HUD 2016 Guidance at 4.

⁷⁹ *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, U.S. EEOC (Apr. 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

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ADDENDUM: STATEMENTS OF INTEREST OF AMICI

The National Fair Housing Alliance (NFHA) is a national organization dedicated to ending discrimination and ensuring equal opportunity in housing for all people. Founded in 1988, NFHA is a consortium of 167 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals. NFHA strives to eliminate housing discrimination and ensure equal housing opportunities for all people through leadership, homeownership, credit access, tech equity, education, member services, public policy, community development, and enforcement initiatives. Relying on the Fair Housing Act and other civil rights laws, NFHA undertakes important enforcement initiatives in cities and states across the country and participates as amicus curiae to further its goal of achieving equal housing opportunities for all.

The Center for Responsible Lending (CRL) is a non-partisan, nonprofit research and policy advocacy organization working to promote financial fairness and economic opportunity for all, end predatory lending, and close the racial wealth gap. CRL has extensive experience in consumer protection legal issues, including supporting strong state and federal consumer protections.

Founded in 1996, the Fair Housing Council of Greater San Antonio (FHCOGSA) is dedicated to promoting fair housing and eliminating discrimination in real estate sales, mortgage lending, homeowners insurance, and housing rentals.

FHCOGSA fields complaints of housing discrimination, undertakes investigations of discriminatory conduct, and, when necessary, takes appropriate enforcement action. FHCOGSA also educates housing consumers about their rights under applicable fair housing laws and educates housing providers about their obligations. FHCOGSA services 35 counties in Texas.

The Greater Houston Fair Housing Center (GHFHC) serves the Houston metropolitan area and is dedicated to the elimination of housing discrimination and the expansion of housing opportunities to all persons. Since 1999, the GHFHC has been a full service, community-based organization providing housing discrimination services to the metropolitan Houston area.

The North Texas Fair Housing Center (NTFHC) serves 12 counties in North Texas and its mission is to actively support and promote fair housing through education and advocacy to ensure that all persons have the opportunity to secure the housing they desire and can afford, without discrimination based on their race, color, religion, gender, national origin, familial status, disability or other characteristics protected by law. NTFHC is a private non-profit organization that engages in a variety of programs and activities to further its mission of promoting fair housing including housing counseling, education and outreach, housing discrimination complaint investigation and enforcement.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Brief of Amici Curiae with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 23, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Shelby Leighton
Shelby Leighton

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 6,416 words, including footnotes and excluding the Addendum and the parts of the brief exempted by Rule 32(f). . This brief complies with the typeface and typestyle requirements of Rule 32(a) and Fifth Circuit Rule 32.1 because it has been prepared using Microsoft Office Word and is set in 14-point Times New Roman font.

December 23, 2022

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