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EVICTION CRISIS NOT AVERTED: CHALLENGING DISPARATE IMPACT IN THE SEARCH FOR HOUSING STABILITY DURING THE VIRGINIA RENT RELIEF PROGRAM'S EPILOGUE

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ABSTRACT

Historically, the Commonwealth of Virginia has experienced some of the highest eviction rates in the county, containing five of the top ten U.S. cities with the highest eviction rates. After experiencing scrutiny in the national news due to these rates, the Commonwealth enacted legislation which provided increased tenant protections and distributed the highest percentage of rental assistance funds in the country. It was once thought that the Virginia Rent Relief Program ("RRP") could be the solution to the eviction crisis, but now that the Program has ended, Virginia is once again experiencing an eviction crisis. Though thousands of households received RRP rental assistance to catch up on rent arrearages and avoid eviction, many tenants are still being forced to search for new housing because their landlords are refusing to renew their leases.

In a difficult housing market, these tenants can face eviction if they do not vacate by the end of their lease term. This practice has a disproportionate impact on minority communities, as most households that received assistance from RRP were households of color. This article evaluates the disparate impact standard in the context of tenant-screening policies and applies the disparate impact standard to the context of lease nonrenewal, arguing that tenants can establish a prima facie case of disparate impact to invalidate this discriminatory nonrenewal practice. However, recognizing the obstacles to initiating disparate impact litigation, this article explores other approaches for tenants, and the legal practitioners who advocate for them, to contend with tenant-screening policies and ease the burdens they may encounter when searching for new housing in the post-RRP era.

INTRODUCTION

In February 2022, Jill Oliver[1] and her landlord submitted an application to receive rental assistance from the Virginia Rent Relief Program ("RRP"). Several months passed, and Ms. Oliver's RRP application had not yet been approved, leaving her with a growing rent balance, an accumulation of late fees, and mounting concern.[2] Ultimately, in June of 2022, Ms. Oliver's landlord filed a civil eviction lawsuit, called a Summons for Unlawful Detainer, on the basis of unpaid rent. Luckily, prior to the first hearing of the Unlawful

[1] This excerpt is inspired by one of the author's clients whose name has been changed to maintain confidentiality. The client gave written permission for the authors to share her story, and she has reviewed and approved the excerpt.

[2] *See, e.g.*, Margaret Kavanagh, *Long wait periods reported for Virginia Rent Relief Program causing fears of losing homes*, WTKR, https://www.wtkr.com/investigations/long-wait-periods-reported-for-virginia-rent-relief-program-causing-fears-of-losing-homes (last updated Apr. 15, 2022).

Detainer, Ms. Oliver's RRP application was approved for approximately $9,000. This money would cover her unpaid balance and aid with future months of rent. The pending Unlawful Detainer was continued to provide additional time for Ms. Oliver's landlord to receive the funds from the Virginia Department of Housing and Community Development.[3] Once Ms. Oliver's landlord received the rental assistance funds, the Unlawful Detainer case was dismissed, and the case was eventually expunged from the court records.

Though Ms. Oliver received several thousands of dollars in rental assistance and caught up on her rent payments, she received a lease non-renewal notice from her landlord in September 2022. Ms. Oliver's landlord explained that her lease was not going to be renewed for a new term due to the several months when her rent was unpaid and/or late. Despite RRP's goal "to support and ensure housing stability across the commonwealth during the coronavirus pandemic," Ms. Oliver now faces uncertainty of where she will live next because she applied for RRP and had to wait several months for her application to be approved.[4] While it is ultimately a landlord's prerogative whether or not to renew a tenant's lease, tenants should not be thrown back into a realm of housing uncertainty simply for using the resources meant to support their housing needs during a public health crisis.

This article will argue that the disparate impact standard is one mechanism that can be used to challenge the emerging practice that is affecting the housing stability of Ms. Oliver and countless others and will propose action items for tenants and practitioners to help ensure housing stability amidst the end of the Rent Relief era. Section I will discuss RRP and the laws passed by the Virginia General Assembly that provided greater protections for tenants like Ms. Oliver who faced eviction due to nonpayment of rent during the COVID-19 pandemic. Section II will explore the unique difficulties that tenants experience when trying to find housing based on disparate impacts that result from certain tenant screening policies. This disparate impact theory will then be applied to the emerging practice of lease nonrenewal in Section III. Lastly, Section IV will set forth several ways for tenants, and the practitioners assisting them, to ease the burdens they may face in their search for new housing following the conclusion of RRP and the expiration of other pandemic-era

[3] *See, e.g.*, Scott P. Yates, *As Rent Relief Ends, Concern Grows for Pandemic-Impacted Roanoke Renters*, ROANOKE TIMES (June 1, 2022), https://roanoke.com/news/local/govt-and-politics/as-rent-relief-ends-concern-grows-for-pandemic-impacted-roanoke-renters/article_783d8572-dde0-11ec-9e8d-138d501d130c.html ("As long as tenants applied for relief, the judge usually extended their evictions cases to give more time for the money to show up.").

[4] *Virginia Rent Relief Program (RRP)*, VA. DEP'T OF HOUS. & CMTY. DEV., https://www.dhcd.virginia.gov/rmrp (last visited Nov. 17, 2022).

tenant protections.

I. BACKGROUND: THE BILLION DOLLAR VIRGINIA RENT RELIEF PROGRAM

RRP began on June 29, 2020, and was administered by the Virginia Department of Housing and Community Development ("DHCD").[5] Tenants were eligible for RRP if their income was at or below 80% of the area median income (AMI),[6] their rent was not over 150% of fair market value,[7] and they either experienced a loss of income[8] or an increase in expenses.[9] For those eligible, RRP could aid with "past due rent since April 1, 2020, current month's rent and three (3) months' prospective rent for eligible tenants."[10] Past due rent also included rent-related fees, such as late fees.[11]

The RRP application portal closed on May 15, 2022,[12] and ultimately the Program exhausted all available funding as of October 14, 2022.[13] Though RRP has ended, it provided invaluable assistance to families across Virginia.

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[5] *Virginia Rent Relief Program (RRP) Application Portal Closure Frequently Asked Questions (FAQS)*, VA. DEP'T OF HOUS. AND CMTY. DEV., https://www.dhcd.virginia.gov/virginia-rent-relief-program-rrp-application-portal-closure-frequently-asked-questions-faqs (last visited Nov. 17, 2022). RRP applications were processed and evaluated by DEVAL from the program's inception until December 1, 2021, and then were administered by Gov2Go after December 1, 2021. *See New Landlord/Tenant Rent Relief Program Portal*, N. VA. APARTMENT ASS'N (Oct. 29, 2021), https://nvaa.org/articles/New_Landlord_Tenant_Rent_Relief_Program_Portal (outlining the transition between the DEVAL RRP portal to the Gov2Go RRP portal).

[6] *Virginia Rent Relief Program (RRP) Tenant Application Frequently Asked Questions (FAQS)*, VA. DEP'T OF HOUS. AND CMTY. DEV., https://dhcd.virginia.gov/rrp-tenant-faqs (last visited Mar. 1, 2023). Stimulus checks are excluded from the AMI calculation. *Id.*

[7] If rent exceeds 150% of fair market value, landlords can either lower the rent to 150% of fair market value or RRP will pay 150% of fair market value and leave the rest to be paid by other sources, so long as the landlord agrees not to evict for non-payment of rent for any months assisted by RRP. *Gov2Go Rent Relief Application Guide for Tenants*, VPLC HOUS. ADVOC., https://housing.vplc.org/wp-content/uploads/2022/05/Gov2Go-Comprehensive-Guide-final.pdf (last visited Nov. 17, 2022).

[8] Tenants were considered to have a loss of income if they were laid off, their place of employment closed, they experienced a reduction in hours of work, they had to stay home to care for children due to closure of day care and/or school, they had to stay home to care for children due to distance learning, they lost or experienced a reduction in child or spousal support, they were unable to find employment due to COVID-19, or they were unwilling or unable to participate in employment due to risk of illness from COVID-19. *Virginia Rent Relief Program (RRP) Tenant Application Frequently Asked Questions (FAQS)*, *supra* note 6.

[9] Tenants were considered to have an increase in expenses if they had an increase in childcare, medical, food, or utility expenses. *Virginia Rent Relief Program (RRP) Tenant Application Frequently Asked Questions (FAQS*), *supra* note 6.

[10] Virginia Rent Relief Program (RRP) Tenant Application Frequently Asked Questions (FAQS), supra note 6.

[11] *See id*. ("Any rent-related fees or expenses must be outlined in the lease agreement to be considered.").

[12] *See id*. (noting that the Virginia RRP application portal closed at 11:59 p.m. on May 15, 2022).

[13] *Virginia Rent Relief Program (RRP)*, *supra* note 4.

Since the program was established, more than one billion dollars were distributed to households in Virginia and 193,599 payments were made in rent and mortgage relief assistance.[14]

In conjunction with the assistance provided by RRP to respond to the COVID-19 pandemic, the Virginia General Assembly passed laws as part of the annual Budget Bill to afford additional protections to tenants at risk of eviction for nonpayment of rent. Most notably, the General Assembly passed House Bill 7001 ("HB 7001") during the 2021 Special Session II.[15] The protections in HB 7001 stipulated that landlords could not initiate eviction proceedings against eligible tenants[16] for nonpayment of rent without first providing specific notices to the tenants.[17] Nonpayment notices were required to include a disclosure of the landlord's mandatory obligation to apply for RRP:

> The written notice shall also inform the tenant that the owner, landlord, or owner's licensed agent shall apply for rental assistance on the tenant's behalf within 14 days of serving the notice on the tenant, unless the tenant pays in full, enters into a payment plan or informs the landlord that they have already applied for rental assistance. The landlord shall apply for rental assistance on behalf of the tenant no later than 14 days after serving the written notice on the tenant, unless they receive the full amount owed by the tenant or confirmation from the tenant that the tenant has applied for rental assistance before the 14th day, or they have entered into a payment plan with the tenant. If the tenant has applied for rental assistance, the landlord shall cooperate with the tenant's application, by providing all information and documentation required to complete the application, including but not limited to the W-9 form and any supporting affidavits.[18]

Landlords were precluded from initiating, maintaining, or advancing any legal proceedings to obtain possession of their rented premises until they

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[14] *Virginia Rent Relief at a Glance*, VA. DEP'T OF HOUS. & CMTY. DEV., https://www.dhcd.virginia.gov/sites/default/files/Docx/rmrp/rrp-infographic_0.pdf (last visited Feb. 23, 2023).

[15] H.D. 7001, 2021 Gen. Assemb., Spec. Sess. II (Va. 2021). Its predecessor, House Bill 5005 was substantially similar. *See* H.D. 5005, 2020 Gen. Assemb., Spec. Sess. (Va. 2020).

[16] HB 7001 restricted when landlords could terminate residential tenancies for nonpayment of rent to when the tenant "qualified for unemployment benefits or experienced a reduction in household income, incurred significant costs, or experienced other financial hardship during or due, directly or indirectly, to the coronavirus pandemic." H.D. 7001 § 16(a), 2021 Gen. Assemb., Spec. Sess. II (Va. 2021).

[17] H.D. 7001 § 16(a)(1), 2021 Gen. Assemb., Spec. Sess. II (Va. 2021) ("[T]he landlord shall… serve a written notice on the tenant that informs the tenant of the Virginia Rent Relief Program and provides the website address and statewide telephone number for that program. The written notice shall also provide information on how to reach 2-1-1 Virginia to determine whether there are any other available federal, state and local rent relief programs."). 2-1-1 Virginia is a free service that helps Virginians connect with local resources. *See 2-1-1 Virginia*, VA. DEPT. SOC. SERV.'S, www.211virginia.org (last visited Nov. 17, 2022).

[18] H.D. 7001 § 16(a)(2), 2021 Gen. Assemb., Spec. Sess. II (Va. 2021).

complied with these requirements. Additionally, landlords could not initiate eviction proceedings without waiting forty-five days from the submission of a completed application, giving the program time to review and approve the application.[19]

Unfortunately, the additional protections expired on June 30, 2022.[20] As of July 1, 2022, Virginia law once again permits landlords to provide only a five-day notice when rent is unpaid as opposed to the fourteen-day notice,[21] and there is no requirement to notify tenants of rental assistance options or to apply for rental assistance on their behalf.[22] With RRP winding down and the expiration of the laws put into place to protect tenants, Virginia courts are experiencing a flood of eviction cases.[23] As a result of less protection, more tenants will be at risk of eviction due to nonpayment of rent and will be forced to apply for housing elsewhere.[24]

II. COMPETING WITH DISPARATE IMPACT IN TENANT SCREENING

When RRP entered its epilogue and the sun set on the program's tenant-friendly companion laws,[25] Virginia courts saw a resurgence of eviction proceedings in which many tenants lost possession of their homes due to missed rental payments.[26] To make matters worse, Virginia, like many states, is experiencing an affordable housing shortage, making the rental market more

[19] *See id.* (adding that the deadline is fourteen days instead of forty-five days if the tenant has had prior rental relief applications).

[20] *See id.*

[21] VA. CODE § 55.1-1245(F) (2022) (effective from July 1, 2022, until the later of July 1, 2028, or seven years after the COVID-19 pandemic state of emergency expires); VA. CODE § 55.1-1245 (2022) (effective the later of July 1, 2028, or seven years after the COVID-19 pandemic state of emergency expires).

[22] Kelly Avellino, *'Eviction Tsunami:' Housing Advocates Fear Eviction Surge After Va. Pandemic Protections End June 30*, NBC12 (Apr. 6, 2022), https://www.nbc12.com/2022/04/06/eviction-tsunami-housing-advocates-fear-eviction-surge-after-va-pandemic-protections-end-june-30/ ("[A] major change will be that landlords will no longer be required to apply for the Virginia Rent Relief Program on behalf of their tenants who can't make payments.").

[23] Edwin J. Viera, *Virginia Evictions on the Rise After Rent Relief Ends*, WILLIAMSBURG YORKTOWN DAILY (Aug. 12, 2022), https://wydaily.com/news/2022/08/12/virginia-evictions-on-the-rise-after-rent-relief-ends/.

[24] *See, e.g.*, Avellino, *supra* note 22.

[25] Viera, *supra* note 23.

[26] *See* Mark Robinson, *What the End of Rent Relief Means for Virginia Tenants*, WHRO (Aug. 30, 2022), https://whro.org/news/local-news/31835-what-the-end-of-rent-relief-means-for-virginia-tenants.

competitive.[27] Consequently, more tenants find themselves applying for housing and contending with tenant screening policies.

While commonplace tenant screening policies are not overtly discriminatory, they often produce discriminatory effects. For instance, an eviction judgment effectively disqualifies applications from consideration at many apartment complexes.[28] Yet such a policy of rejecting the applications of individuals burdened by an eviction judgment may produce a discriminatory effect on some communities. Research has shown that Black-majority neighborhoods have higher eviction rates than white-majority neighborhoods, and neighborhoods with larger populations of single mothers experience increased evictions.[29] A tenant screening policy that rejects the applications of individuals with an eviction on their record can have a discriminatory effect by excluding several Black applicants and female applicants from consideration. Such a discriminatory effect may be sufficient to support a claim of discrimination pursuant to the Fair Housing Act ("FHA"), which makes it unlawful to refuse to rent a dwelling to any person because of race or sex.[30] A violation of the FHA that is based on a discriminatory effect is said to have a "disparate impact." This disparate impact standard has been used to attempt to invalidate discriminatory tenant screening practices.

A. Overview of Disparate Impact

Only a few years ago, the Supreme Court ruled that disparate impact claims are cognizable under the FHA.[31] The disparate impact standard in the context of housing discrimination applies when an overtly neutral policy disproportionately impacts people in a protected class, even in the absence of intent to discriminate, and thus violates the FHA.[32] "[A] plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."[33] Thus, disparate impact claims under the FHA are analyzed under

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[27] Chris Arnold et al., *There's a Massive Housing Shortage Across the U.S. Here's How Bad it is Where You Live*, NPR (July 14, 2022), https://www.npr.org/2022/07/14/1109345201/theres-a-massive-housing-shortage-across-the-u-s-heres-how-bad-it-is-where-you-l; Robinson, supra note 26.

[28] Robinson, *supra* note 26.

[29] Carl Romer et al., *The Coming Eviction Crisis Will Hit Black Communities the Hardest*, BROOKINGS INST. (Aug. 2, 2021), https://www.brookings.edu/research/the-coming-eviction-crisis-will-hit-black-communities-the-hardest/; Benjamin Teresa et al., *The Virginia Eviction Reduction Pilot Program: Final Report on Phase* 1, RVA EVICTION LAB ii, 1-2 (Sept. 26, 2022), https://www.dhcd.virginia.gov/sites/default/files/Docx/verp/VERP-2020-final-report.pdf.

[30] 42 U.S.C. § 3604(a).

[31] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty's. Project, Inc., 576 U.S. 519, 545-46 (2015).

[32] *See Preliminary Analysis of HUD's Final Disparate Impact Rule*, NAT'L LOW INCOME HOUS. COAL. (Sept. 14, 2020), https://nlihc.org/resource/preliminary-analysis-huds-final-disparate-impact-rule.

[33] Inclusive Cmty's Project, Inc., 576 U.S. 524.

a three-part, burden-shifting framework.[34] First, "the plaintiff must demonstrate a robust causal connection between the defendant's challenged policy and the disparate impact on the protected class."[35] Then, the burden shifts to the defendant to "state and explain the valid interest served by their policies." Finally, the burden shifts again to the plaintiff "to prove that the defendant's asserted interests 'could be served by another practice that has a less discriminatory effect.'"[36] This burden-shifting framework was developed to establish a prima facie case of disparate impact "to avoid hailing defendants into court for racial disparities they did not create."[37]

B. Disparate Impact Caused by the Rent-To-Income Ratio

The disparate impact standard has been used to challenge rent-to-income ratio requirements during the tenant screening process. The standard rent-to-income ratio is 30% or less of an individual's monthly income, and "many landlords require tenants to demonstrate that their monthly income is at least three times the rent."[38] Tenants who spend more than 30% of their monthly income on rent are considered to be cost-burdened, and those who spend more than 50% of their income are considered severely cost-burdened.[39] The majority of low income households are cost-burdened,[40] so the rent-to-income ratio has a disparate impact on minority, lower income communities and thus violates their rights under the FHA.

In *Bronson v. Crestwood Lake Section 1 Holding Corporation*, two individuals challenged the rental policy of an apartment complex, Crestwood Lake, for refusing to consider the applications of persons whose income was not at least three times the rent of the apartment for which they were applying (referred to as the "triple income test").[41] The plaintiffs argued that Crestwood Lake's policy has a disproportionate and adverse impact on minority communities and therefore violated fair housing laws.[42] Employing the

[34] Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 424 (4th Cir. 2018).

[35] *Id.* The plaintiff must offer evidence to sufficiently show that the challenged policy caused the exclusion because of their membership in the protected class. Reyes, 903 F.3d 425.

[36] *Id.*

[37] *Id.* at 425. Moreover, the robust causality requirement ensures that "[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact…". Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 905 (5th Cir. 2019).

[38] *How Much To Spend on Rent [The Ideal Rent-to-Income Ratio]*, INTUIT MINT LIFE (Oct. 21, 2021),https://mint.intuit.com/blog/housing/how-much-should-you-spend-o rent/#:~:text=30%25%20is%20widely%20considered %20to,in% 20a%20healthy%20financial%20situation.

[39] *Id.*

[40] *Housing Needs by State: Virginia*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/housing-needs-by-state/virginia (last visited Nov. 17, 2022).

[41] Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 149 (S.D.N.Y. 1989). The plaintiff also challenged the apartment complex's policy of refusing to rent to Section 8 voucher holders. *Id.* For a discussion of challenges to said policy, *see infra* Section IV.

[42] Bronson, 724 F. Supp. at 152.

burden-shifting framework, the *Bronson* court found that the plaintiffs established a prima facie case by demonstrating "that the challenged application policies utilized by the defendants do indeed have a substantial disparate impact on minority persons."[43] The plaintiffs presented statistical formulations to demonstrate that non-minority applications qualify at a rate of more than twice that of minority persons, and "the odds of being excluded by the triple income test are 2.5 times greater for minority persons."[44]

Once the burden shifted to the Bronson defendants to show that the challenged practice served legitimate and genuine business goals, the defendants argued that the triple-income requirement was necessary to ensure the payment of rent and provide protection in the case of a default.[45] The court deemed this justification to be insubstantial, as the defendants did not offer "any evidence to show that the challenged [policy is] reasonably necessary to insure payment of rent or that Crestwood has, in past experience, encountered losses or defaults as a result of accepting…tenants who fail to meet the triple income test."[46] Moreover, the court found that even if the triple-income test reflected prior experience with defaulting tenants, the plaintiffs provided sufficient third party assurances, such as extensive payment arrangements, so Crestwood Lake's concern about the tenants' default was not a legitimate justification to deny their tenancies.[47] Because the plaintiffs successfully established a prima facie case of disparate impact regarding Crestwood Lake's triple-income test, the court ordered the defendant to immediately offer the plaintiffs occupancy unless they could demonstrate legitimate, objective grounds for denying plaintiffs' applications, without regard to whether their income satisfied the triple-income test.[48]

Though Bronson was decided in 1989, tenants could likely make the same case against rent-to-income ratios today using the disparate impact standard. Presently, in Virginia, there is a shortage of affordable rental homes available to cost-burdened, low-income individuals who are spending more than 30%, and in some cases up to half, their income on housing.[49] Low-income Virginians face a significant obstacle by having to satisfy a rent-to-income ratio as part of the tenant application process.[50] Such a policy could have a

[43] *Id.* at 154.

[44] *Id.*

[45] Id. at 155.

[46] Id. at 156.

[47] Id. at 157.

[48] Id. at 159-60.

[49] Housing Needs by State: Virginia, supra note 40; cf. Arnold et al., supra note 27.

[50] See Christie Marra, How Upfront Fees Make Rental Housing Unaffordable, Va. Poverty L. Ctr. (Dec. 9, 2021), https://vplc.org/how-upfront-fees-make-rental-housing-unaffordable/. In the search for housing for which they qualify, low-income Virginians face an additional obstacle of having to pay numerous application fees. See id.

disproportionate and adverse effect on minority renters who are actively applying for housing.

C. Disparate Impact Caused by Criminal Background Checks

Many U.S. citizens reentering society post-incarceration struggle to find housing; one out of every ten people who leave incarceration experience homelessness.[51] There are several factors that lead to this increased risk of being unhoused. First, those on probation may have housing restrictions that prevent them from living with loved ones and make it difficult to find independent housing.[52] Additionally, it is often difficult for people with criminal records to find and keep employment. The majority of those who are able to find employment are only able to obtain low-wage jobs that are insufficient to meet the high cost of housing.[53] Lastly, many formerly incarcerated individuals are turned away by landlords who conduct criminal background checks and turn away applicants with criminal histories.[54] This criminal background check practice has been less successfully challenged in disparate impact litigation, but considering the high rates of homelessness among those who have been previously incarcerated, is an important practice to highlight.

The U.S. Department of Housing and Urban Development ("HUD") notes that "[e]nsuring resident safety and protecting property" are among the most "fundamental responsibilities of a housing provider."[55] Many landlords attempt to do this through conducting criminal background checks for tenant applicants. While ensuring resident safety and protecting property is a big charge, HUD has placed some limitations on how landlords can use criminal background checks.[56] First, landlords cannot have a blanket ban on all applicants with criminal histories. Landlords must be able to show that their application policies are "necessary to achieve a substantial, legitimate, nondiscriminatory interest."[57] While evaluations of applicant screening policies are

[51] Patricia McKernan, Homelessness and Prisoner Re-Entry: Examining Barriers to Housing, Volunteers of Am., https://www.voa.org/homelessness-and-prisoner-reentry (last visited Nov. 17, 2022).

[52] See Lucius Couloute, Nowhere to Go: Homelessness Among Formerly Incarcerated People, Prison Pol'y Initiative (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html.

[53] Stephen Metraux et al., Incarceration and Homelessness, 2007 Nat'l Symp. on Homelessness Rsch., 9-1, 9-9 (2007) (stating that many people emerging from prison have no savings, minimal education, and no immediate access to unemployment benefits, and that those who do have the skills and experience for employment still face a substantial barrier simply because their criminal history itself often restricts many employment opportunities).

[54] See Lynn M. Clark, Landlord Attitudes Toward Renting to Released Offenders, 71 Fed. Prob. J. Corr. Phil. & Prac. tbl.5 (2007) (showing results from a 2006 study that of over 550 landlords in Akron, Ohio, 66% stated that they do not accept applicants with criminal histories).

[55] U.S. Dep't of Hous. & Urb. Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of House and Real Estate-Related Transactions 4-5 (2016).

[56] Id. at 4.

[57] Id. at 6.

determined on case-by-case bases, policies that fail to consider how much time has passed since the conviction occurred, or do not take into account the nature and severity of crimes, are very unlikely to meet this burden.[58] Additionally, HUD has outlined that landlords cannot deny housing applicants based on arrest records alone.[59] HUD's rationale is that landlords cannot prove that such a ban actually protects the safety of residents or the property.[60]

However, even with these limitations, allowing landlords to deny housing to applicants due to prior criminal history impacts a large number of people in our country and has a disparate impact on people of color. Disparate impact analysis has traditionally been applied to criminal background checks in the context of employment.[61] For instance, a Pennsylvania court found that a policy preventing employment for anyone with a prior homicide conviction had a disparate impact on people of color.[62] However, at least one court has determined that a prima facie case of disparate impact can be established based on a landlord's criminal background screening policy.[63]

While Virginia courts have not directly addressed whether criminal background checks in tenant screening practices have a disparate impact on Black and Hispanic applicants, national statistics regarding incarceration rates by race make a compelling case. Approximately one-third of the U.S. population has some sort of criminal record.[64] Those who are Black or Hispanic are incarcerated at rates much higher than their white counterparts.[65] For example,

[58] Id. at 7.

[59] Id. at 5.

[60] Id.

[61] See, e.g., Mandala v. NTT Data, Inc., 975 F.3d 202, 206-207 (2d Cir. 2020). Compare Waldon v. Cincinnati Public Schools, 89 F. Supp.3d 944, 949 (S.D. Ohio 2015) (holding that the employees failed to establish a prima facie case that the state employment law had a racially disparate impact), with Lee v. Hertz Corp., 330 F.R.D 557, 561-62 (N.D. Cal. 2019) (holding that the African American job applicants established a prima facie case of disparate impact under Title VII).

[62] See El v. Se. Pa. Transp. Auth., 418 F.Supp. 2d 659, 673, 668-69 (E.D. Pa. 2005), aff'd on other grounds El v. Se. Penn. Transp. Auth., 479 F.2d 232 (3d Cir. 2007) (finding that plaintiff proved a prima facie disparate impact case under Title VII for a policy that resulted in him being fired for a forty-year-old homicide conviction).

[63] See Louisiana Fair Hous. Action CTR. v. Azalea Garden Props., LLC, slip op. at 5-6 (E.D. La. Apr. 2022) (denying defendant's motion to dismiss the disparate impact race claim since the plaintiff did allege "a prima facie case of disparate impact that includes a policy of the defendant, the criminal background policy, that predictably will cause a discriminatory effect"). See also Alexander v. Edgewood Mgmt. Corp., No. 15-01140, 2016 WL 5957673 at *4 (D.C. July 22, 2016) ("Given the demographics in the area and historical conviction rates, African Americans are statistically more likely to…be excluded by defendants' unpublished [criminal history] policy….[plaintiff] has alleged a plausible claim that such policies exceed the bounds of the law and may have a disparate impact on African Americans.").

[64] See Sur. of State Crim. History Info. Sys., U.S. Dep't of Just. 1 (2012), https://www.ojp.gov/pdffiles1/bjs/grants/244563.pdf; see also U.S. Dep't of Hous. & Urban Dev., supra note 55, at 3.

[65] U.S. Dep't of Hous. & Urb. Dev., supra note 55, at 2.

as of November 2022, 38.4% of U.S. inmates were Black,[66] while the most recent census indicates that only 12.4% of the U.S. population is Black.[67] HUD has acknowledged that the national statistics regarding incarceration rates of people of color are sufficient grounds for HUD to investigate complaints that challenge criminal history policies in tenant screenings.[68]

III. ASSISTING TENANTS: THE CASE FOR DISPARATE IMPACT IN LEASE NON-RENEWALS

A discriminatory practice is emerging in residential housing in Virginia where landlords are declining to renew the leases of tenants who received rental assistance from RRP, thereby denying them the ability to remain in current housing. Recall from the beginning of this article that Jill Oliver relied on RRP to assist her with rent payments for several months, and then proceeded to make timely payments. Nevertheless, her landlord served her with a lease termination notice and explained that it was because of the frequency of late payments, which resulted from the months she waited for her rent relief application to be reviewed and approved. Such a practice has a discriminatory effect on minority community members, as communities of color received a larger percentage of RRP funding compared to their white counterparts.[69] While Ms. Oliver's landlord may not have had discriminatory

[66] Inmate Race, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Nov. 12, 2022).

[67] Nicholas Jones et al., Improved Race and Ethnicity Measures Reveal U.S. Population Is Much More Multiracial: 2020 Census Illuminates Racial and Ethnic Composition of the Country, U.S. Census Bureau (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html. While a deep dive into why significantly higher rates of people of color are incarcerated exceeds the scope of this article, it is important to note that this discrepancy is not happenstance, but is the result of years of racist policing practices. For a list of studies that touch on the impacts of racial profiling in our police force, see Radley Balko, There's Overwhelming Evidence that the Criminal Justice System is Racist: Here's the Proof., Wash. Post (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Policing.

[68] U.S. Dep't of Hous. & Urban Dev., supra note 55, at 3-4. HUD based this declaration on statistics from 2013 and 2014, stating: Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population. Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population. In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population. In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.

[69] Margaret Barthel, Virginia Rent Relief Program Will Stop Accepting Applications On Sunday, DCist (May 12, 2022), https://dcist.com/story/22/05/12/virginia-rent-relief-deadline-apply/.

intent, the newfound policy violates Virginia Fair Housing law as it disparately impacts minority communities in violation of the FHA.

A. Establishing a Prima Facie Case

Tenants who have been denied housing due to participating in RRP are likely able to establish a prima facie case of disparate impact due to the discriminatory effect such a policy has on minority tenants. RRP sought to promote rental assistance in "historically economically disadvantaged communities," and data collected by the program shows that of those applicants who identified their race, Black households accounted for 60% of RRP recipients and Hispanic or Latinx households accounted for roughly 10% of RRP recipients,[70] while white households accounted for 19% of those RRP recipients.[71] Approximately 70% of households that received assistance from RRP belong to a minority group, a stark contrast from the general population of Virginia, which is almost 70% white.[72] The policy of denying tenants who received RRP assistance the ability to continue to reside in their current homes will predictably cause a discriminatory effect on minority households.

Once the burden shifts to Virginia landlords to present legitimate justifications for the lease non-renewal policy, they may, like the defendants in Bronson, argue that the non-renewal policies implicating the receipt of RRP funding are "designed to do nothing more than advance [the] legitimate and genuine business goal of maximizing the probability of collecting rent."[73] Virginia landlords may argue that they adopted the lease non-renewal policy due to "prior experience with defaulting tenants" resulting from tenants being late on rent payments for several consecutive months while waiting for their application to be approved. However, past default is not a sufficient indicium of future default. RRP was designed as a temporary program to provide stability and to give tenants a resource to catch up on missed payments. It is contrary to the intent of the program to put tenants' housing at risk by allowing landlords to opt not to renew tenants' leases if the tenants received RRP assistance.[74]

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[70] HB854 Statewide Housing Study - Current Efforts, Future Needs, New Strategies, Va. Hous. & Va. Dep't of Hous. & Cmty. Dev. (Jan. 2022), https://dmz1.dhcd.virginia.gov/HB854/pdf/hb854-full-report-print.pdf; Barthel, supra note 69. ("[T]he statewide program focused on serving low-income people and communities of color, who were especially hard hit by the public health crisis and the economic slowdown that came with it…black households made up 60% of the recipients, and 10% of households were Hispanic or Latino.").

[71] Virginia Rent Relief At A Glance, supra note 13.

[72] See QuickFacts - Virginia, U.S. Census Bureau (July 1, 2021), https://www.census.gov/quickfacts/fact/dashboard/VA/PST045221 (stating that the population of Virginia in 2021 was approximately 68.8% white).

[73] Bronson, 724 F.Supp. at 156.

[74] See Va. Rent Relief Program (RRP), supra note 4.

If a landlord meets their burden by providing a legitimate justification for the lease non-renewal policy, the burden will once again shift to the tenant to prove there are other practices a landlord could implement that would have a less discriminatory effect.[75] Possible alternatives include some of the assurances explored in Bronson, such as requiring all that all tenants pay a security deposit equal to one month's rent to be collected in the event of default, permitting a co-signer with a higher gross income, or agreeing to have certain payment arrangements as conditions of a renewed lease agreement.[76] Landlords could also simply proceed with traditional eviction proceedings in the event of a default. Due to the shortage of affordable rental housing,[77] it is likely that many landlords employing this discriminatory policy will have a substantial waiting list and would have little difficulty finding a new tenant should an existing tenant default on a renewed lease.[78]

B. Juxtaposition to Section 8 Voucher Litigation

Available disparate impact case law demonstrates challenges to landlords' refusal to rent to Section 8 voucher holders.[79] Tenants have been largely unsuccessful in challenging policies whereby a landlord refuses to rent to Section 8 voucher holders due to the voluntary nature of the program.[80] In *Knapp v. Eagle Property Management Corporation*, a prospective tenant alleged that several landlords discriminatorily refused to rent to her because of her race and because she was a recipient of assistance under the Section 8 housing voucher program.[81] The Seventh Circuit ultimately concluded that the landlords were not liable for racial discrimination under the disparate impact theory because "no principle way exists to distinguish [non-participating] owners from those who have agreed to accept Section 8 tenants" without discriminating against landlords who chose to participate in the program.[82] "The actions of both non-participating and participating owners have the same impact on minorities and to hold only the latter liable for racial discrimination for that conduct would deter them from joining or remaining involved in the

[75] Reyes, 902 F.3d at 424.

[76] Bronson,724 F.Supp. at 156-57.

[77] See Kate Masters, Virginia Needs at Least 200,000 More Affordable Rental Units, Report Finds, Va. Mercury (Dec. 14, 2021), https://www.virginiamercury.com/2021/12/14/virginia-needs-at-least-200000-more-affordable-rental-units-report-finds/.

[78] See Bronson, 724 F.Supp. at 156.

[79] "The Housing Choice Voucher (HCV) Program, formerly known as Section 8, receives federal funding from the U.S. Department of Housing and Urban Development (HUD) to administer a rental voucher program to qualified low-income persons and families." Housing Choice Vouchers, Rich. Redev. & Hous. Auth., https://www.rrha.com/housing/hcv/ (last visited Nov. 17, 2022).

[80] See, e.g., Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1275-76 (7th Cir. 1995).

[81] Id.

[82] Id. at 1280.

program."[83] Given that landlord participation in the Section 8 Program is voluntary, courts have routinely refused to apply the disparate impact standard to the decision not to rent to Section 8 voucher recipients.[84]

In contrast, the decision to refuse to continue to rent to RRP recipients should be subject to disparate impact liability since participation in RRP was not voluntary. HB 7001 explicitly created a mandatory requirement for landlords to apply for RRP.[85] Declining to allow a disparate impact claim to proceed would be inconsistent with Congressional intent to provide assistance through the Emergency Rental Assistance program[86] and the Virginia General Assembly's intent to require landlords to apply for RRP.[87]

However, though factually dissimilar from existing case law, pursuing disparate impact litigation presents significant obstacles, especially given the novelty in FHA cases and in Virginia case law. For that reason, this article presents other avenues through which prospective tenants and practitioners assisting them can increase the likelihood of being approved for new housing.

IV. ASSISTING APPLICANTS: ADVOCACY AND POLICY CHANGES

RRP proved invaluable for so many Virginians, but as the program concludes, more families will be forced to search for new housing.[88] As prospective tenants across the Commonwealth submit applications for housing, they may encounter some, if not all, of the aforementioned obstacles. To increase the likelihood of having their applications approved, prospective tenants and their advocates can challenge application denials, expunge eligible crimes and unlawful detainer summons, and contest discriminatory tenant screening policies. Additionally, based on the success of RRP in keeping Virginians housed, Virginia lawmakers ought to use RRP as a model for post-pandemic

[83] Id.

[84] See id. See also Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998); Graoch Associates #33 Ltd. P'ship v. Louisville & Jefferson Cnty. Metro. Hum. Relations Comm'n, 430 F.Supp.2d 676, 680 (W.D. Ken. 2006).

[85] H.D. 7001, supra note 15 (noting the landlord "shall" apply for rental assistance within fourteen days).

[86] Emergency Rental Assistance Program, U.S. Dep't of the Treasury, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program (last visited Nov. 17, 2022) (explaining that "the Emergency Rental Assistance program makes funding available to assist households that are unable to pay rent or utilities").

[87] See Governor Northam Announces $524 Million in New Funding for Virginia Rent Relief Program, Va. Dep't of Hous. & Cmty. Dev. (Feb. 16, 2021), https://www.dhcd.virginia.gov/governor-northam-announces-524-million-new-funding-virginia-rent-relief-program; see also H.D. 7001, supra note 15.

[88] See Robinson, supra note 26.

legislation and advocate for the return of tenant-friendly laws.

A. Challenges to Denials to Rental Applications

New to Virginia law is a provision outlining the rights and responsibilities of tenants and landlords with respect to applications for tenancy. Virginia Code § 55.1-1245(I) provides that certain landlords are precluded from taking any adverse action "against an applicant for tenancy based solely on payment history or an eviction for nonpayment of rent" during the COVID-19 pandemic.[89] If a landlord does deny an application for tenancy, the landlord is obligated to provide the applicant with "written notice of the denial and of the applicant's right to assert that his failure to qualify was based upon payment history or an eviction based on nonpayment of rent," which the tenant must respond to within seven days.[90] If the applicant does dispute their failure to qualify for tenancy, "and the landlord relied upon a consumer or tenant screening report, the landlord shall make a good faith effort to contact the generator of the report to ascertain whether such determination was due solely…" to payment or eviction history.[91]

Tenants may dispute an application denial, but it is also important for tenants to dispute any errors on their tenant screening report if the information is incorrect or outdated.[92] If the tenant screening report includes a credit report, tenants may also dispute errors with the credit reporting company.[93] Tenants may be able to avoid the denial of their rental applications, and consequently avoid being subjected to a long and arduous search for housing, by disputing erroneous denials and ensuring all information in a tenant screening report is accurate.

B. Expungement of Crimes

To mitigate the impact of criminal history on their housing search, tenants can petition the court to expunge all eligible parts of their criminal record. To expunge means "to remove, in accordance with a court order, a criminal history record or a portion of a record from public inspection or normal access."[94] Expungement of criminal records does not address the disparate impact of landlords denying tenant applicants based on criminal history, but

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[89] Va. Code § 55.1-1245(I)(1) (2022).

[90] Id. at § 55.1-1245(I)(2).

[91] Id.

[92] *What Should I do if my Rental Application is Denied Due to a Tenant Screening Report?* CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-should-i-do-if-my-rental-application-is-denied-due-to-a-tenant-screening-report-en-2105/ (last updated July 1, 2021) (noting that the Fair Credit Reporting Act protects a tenant's right to be informed if their application was rejected due to information in a tenant screening report).

[93] *Id.*

[94] 6 VA. ADMIN. CODE § 20-120-20 (2022).

does lessen the number of tenant applicants subject to these discriminatory policies.

Currently, the only criminal records that can be expunged in Virginia are those in which (1) the individual was acquitted, (2) the Commonwealth chose not to prosecute the individual, (3) the charges against the individual were dismissed without a finding of guilt or evidence sufficient for a finding of guilt, or (4) the crime was committed by someone else who used the individual's identity.[95] These requirements allow for only a very narrow section of criminal history to be expunged.

However, positive changes to expungement laws are scheduled for 2025. During the 2021 Special Session I, the Virginia General Assembly decided to allow expanded criminal record sealing throughout the Commonwealth, taking effect on July 1, 2025.[96] Sealing, slightly different than expungement, means to "restrict[] [the] dissemination of criminal history record information . . . including any records relating to an arrest, charge, or conviction" and "prohibit[] [the] dissemination of court records related to an arrest, charge, or conviction, unless such dissemination is authorized by a court order . . . ."[97] The expansion in 2025 will include the automatic sealing of certain misdemeanor convictions, misdemeanor non-convictions, and crimes committed by someone else who used the individual's identity.[98] Virginia will join forty-three other states that seal misdemeanor convictions.[99]

Additionally, this new law will allow for petition-based sealing of convictions for all misdemeanors, class 5 and 6 felonies, and all felonies punishable as larceny, minus any DUI related offenses or offenses involving domestic assault and battery.[100] While this expansion fails to extend to a significant number of crimes, it will nevertheless make many criminal histories across the Commonwealth inaccessible to landlords. For this reason, it is important that any rental applicants who qualify for expungement or sealing of all or part of their criminal record take advantage of that opportunity to avoid being

[95] VA. CODE §§ 19.2-392.2(A)(1)-(2), (B) (2022).

[96] H.D. 2113, 2022 Gen. Assemb., Spec. Sess. I (Va. 2021).

[97] VA. CODE § 19.2-392.5(A) (2022).

[98] H.D. 2113, *supra* note 96. *See* VA. CODE § 19.2-392.6(B) (2022) for eligible misdemeanor offenses; VA. CODE § 19.2-392.6(C) (2022) (misdemeanor offenses are only eligible after seven years have passed and if the individual has not been convicted of any new crimes in those seven years).

[99] *Expungement and Sealing of Criminal and Court Records*, VA. STATE CRIME COMM'N, 2 (Nov. 15, 2021), http://vscc.virginia.gov/2021/Nov15/VSCC%202021%20Expungement%20and%20Sealing%20Presentation.pdf.

[100] *Id.* (requiring that there are no new convictions for seven years for misdemeanors or ten years for felonies, that rehabilitation is demonstrated if the crime is drug or alcohol related, that there are no more than two other petition-based record sealings for the individual, and there is manifest injustice to the individual (slide 6)).

subjected to a possibly discriminatory policy.

C. Expungement of Summons for Unlawful Detainer Cases

In addition to the expungement and sealing of criminal records, Virginia tenants can now also take advantage of the expungement of previously dismissed and nonsuited unlawful detainers. In the 2020 Session, the Virginia General Assembly passed SB 640, which took effect on January 1, 2022.[101] Now, Virginians can petition to expunge all unlawful detainers that result in dismissal by the court after thirty days have passed.[102] Virginians can also expunge all unlawful detainers that were nonsuited by the plaintiff after six months have passed.[103] It is common for landlords to check eviction records prior to accepting a rental applicant as a tenant, so removing prior unsuccessful eviction attempts from an applicant's record will likely make it easier to find housing.[104]

D. A Model Policy for Considering Criminal Histories

Lawyers who are apprised of tenant screening policies with intensive criminal background check requirements and harsh prohibitions against tenants with criminal histories can take action to prevent it. For example, the ACLU; the ACLU of Virginia; and Relman, Dane & Colfax, PLLC modeled such action in a lawsuit brought against the owners of the Sterling Glen apartment complex in Chesterfield County in 2019.[105] The owners categorically denied tenant applicants who have felony convictions or certain misdemeanor convictions, including anyone whose adjudication was withheld or deferred, or

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[101] *SB 640 Unlawful Detainer; Expungement of Actions, Effective Date*, VA.'S LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB640 (last visited Nov. 17, 2022) (outlining the legislative history of SB 640); VA. CODE § 8.01-130.01 (2022) (codifying SB 640).

[102] *See* VA. CODE § 8.01-130.01 (2022) (stating that an expungement petition may be filed once the recommencement period has expired); *Petition for Expungement or Unlawful Detainer*, VA.'S JUD. SYS. (Jan. 2022), https://www.vacourts.gov/forms/district/dc425.pdf ("If this petition is filed less than 30 days after the SUMMONS OF UNLAWFUL DETAINER was dismissed, this court will not act on this matter until the time for filing a motion for a new trial pursuant to Virginia Code § 16.1-97.1 and the time for ruling on such motion has expired.").

[103] *See* VA. CODE § 8.01-130.01 (2022) (stating that an expungement petition may be filed once the recommencement period has expired); VA. CODE § 8.01-229(e)(3)(2022) (noting that the recommencement period for nonsuited civil actions is six months).

[104] *See* Brian Carmody, *Best Tenant Screening Services*, INVESTOPEDIA, https://www.investopedia.com/best-tenant-screening-services-5070361 (listing "The Seven Best Tenant Screening Services of 2022" (last updated Nov. 14, 2022); all but one of the listed screening services noted their evaluation of prior evictions); *see also* Stephen M. White, *How to Look Up Evictions (and Prevent Disastrous Rentals!)*, RENTPREP, https://rentprep.com/evictions/how-to-look-up-evictions/ (advising landlords of the importance of looking at applicants' eviction records, and outlining how to find eviction records) (last updated May 2020).

[105] *See HOME of Virginia, Inc. v. Wisely Properties, LLC and Multifamily Management Services, Inc.*, ACLU OF VA., https://www.acluva.org/en/cases/home-virginia-inc-v-wisely-properties-llc-and-multifamily-management-services-inc (last visited Nov. 17, 2022) (summarizing the lawsuit filed against Sterling Glen Apartments for its discriminatory application policies).

who was actively on probation or parole.[106] The lawsuit was brought on the grounds that this categorical denial of tenant applicants with any felony conviction and certain misdemeanor convictions disproportionately affected Black people, intentionally discriminated against Black people, and could not be justified as protecting safety or property.[107] While this lawsuit settled and did not make it to the courtroom, the settlement agreement included a new criminal background screening policy that the ACLU of Virginia says "should serve as a model for the rental housing industry."[108]

This "model" policy seems to carefully walk the line of acknowledging that "[e]nsuring resident safety and protecting property" are among the most "fundamental responsibilities of a housing provider,"[109] while also recognizing how difficult it is for those with criminal histories to find rental housing.[110] The new Sterling Glen policy only takes into consideration the following specific offenses: property offenses, major drug offenses, fraud offenses, major violent offenses against persons, and sex offenses.[111] Additionally, those convictions will only be considered if they have occurred in the five years before the application.[112] Moreover, the Sterling Glen policy will not consider "arrests, charges, expunged convictions, convictions reversed on appeal, vacated convictions, offenses where adjudication was withheld or deferred, pardoned convictions, and sealed juvenile records" or "whether the

[106] Complaint for Injunctive & Declaratory Relief & Damages at ¶ 31, Housing Opportunities Made Equal of Virginia, Inc. v. Multifamily Management Servs., Inc., (2019); Complaint for Injunctive & Declaratory Relief & Damages at ¶ 33, Housing Opportunities Made Equal of Virginia, Inc. v. Multifamily Management Servs., Inc., (2019).

[107] *See* Complaint for Injunctive Relief & Damages at ¶ 7–8, 10, 29–32, Housing Opportunities Made Equal of Va., Inc. v. Wisely Props., LLC (E.D. Va. 2019) (discussing Defendant's tenant application, which expressly states that individuals with felony convictions will be rejected as tenants; stating the specific reasons why the criminal background check may result in a potential tenant's application; stating that an application may be rejected even absent a conviction if an applicant has criminal charges where adjudication has been withheld or deferred; explaining how Defendants' Criminal Records Policy disproportionately impacts Black applicants; claiming that research shows that "protecting safety and property does not justify a blanket criminal records policy"; providing that the actual intent of the Criminal Records Policy was to discriminate against Black people attempting to become tenants; detailing specific violations of the Fair Housing Act by defendant; demonstrating how the defendant's discrimination violates specific sections of the Virginia Fair Housing Law).

[108] Jennifer Safstrom & Tony Dunn, *Lawsuit Settlement Leads to Model Policy for Housing Providers*, ACLU OF VA. (Aug. 6, 2019), https://www.acluva.org/en/news/lawsuit-settlement-leads-model-policy-housing-providers.

[109] U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 55, at 4-5.

[110] *Sterling Glen Criminal History Policy*, WISELY PROPERTIES. & MULTIFAMILY MGMT. SERVICES, INC. 1 (Aug. 5, 2019), https://www.acluva.org/sites/default/files/field_documents/2019.08.05_sterling_glen_criminal_background_policy.pdf.

[111] *See id.* (adding that "[t]hese categories were identified because they involve conduct by a person whose tenancy may present a current direct threat of harm to others or the risk of substantial damage to the property of others").

[112] *Id.* at 2.

applicant is on probation or parole."[113]

The ACLU of Virginia has noted that this new policy "is narrowly tailored to only consider categories of offenses that are related to community or property safety," only considers "conduct related to an individual's qualifications as a tenant," and ensures that "people are not needlessly and permanently penalized for prior conduct."[114] The ACLU of Virginia identifies the ability for individual applicant input as the most important aspect of the policy: if an applicant has a prior conviction that will be flagged and considered in the criminal screening process, the applicant can provide more information, such as "the facts or circumstances surrounding the criminal conduct," "good conduct since the offence occurred," and "evidence of rehabilitation efforts" that will be assessed on a case-by-case basis before a decision is made on the application.[115] While this model policy does not prevent landlords from considering criminal background history, it at least significantly limits the impact that criminal background screenings would have on rental applicants with criminal histories.

E. Using RRP as a Model in Future Legislation

While difficult or impossible to quantify with certainty, RRP surely prevented a significant number of evictions. The graph below, taken from the Legal Aid Justice Center's website, paints a clear picture of how impactful RRP likely was on eviction filings.[116]

[113] *Id.*

[114] Safstrom & Dunn, *supra* note 108.

[115] *Id.* (noting that "[m]ost importantly, the policy assures individualized consideration for every applicant with convictions for specific types of felonies."); *Sterling Glen Criminal History Policy*, *supra* note 110 (adding that "[t]hese categories were identified because they involve conduct by a person whose tenancy may present a current direct threat of harm to others or the risk of substantial damage to the property of others").

[116] *Virginia Eviction Tracker*, LEGAL AID JUST. CTR., https://www.justice4all.org/eviction2022/ (last updated Oct. 31, 2022).

Source: Daniel Bernstein, Madeline Youngren, Sarah Abdelhadi, Ranya Ahmed. Civil Court Data Initiative. Legal Services Corporation, 2021. • Created with Datawrapper

Due to the COVID-19 pandemic, there were likely many factors at play impacting how many evictions took place. However, the role that RRP played in the lowered rate of evictions cannot be ignored after RRP distributed over one billion dollars to Virginian households over the course of 193,599 total payments.[117] For example, one might speculate that during the pandemic, landlords sought to give tenants grace and simply filed less evictions out of the kindness of their hearts. While that was likely the case for some landlords at the beginning of the pandemic, landlords often rely on rent payments to cover expenses for the property they own, and it is unlikely that many landlords would have been willing to continue to extend that grace for the over two-year duration of the pandemic.[118]

During 2021 when many Americans gained access to the COVID-19 vaccine, and many desired to get back to some kind of normalcy, the eviction filing rates in Virginia did not spike back up to "normal" eviction filing rates.

[117] *Virginia Rent Relief At a Glance*, *supra* note 14.

[118] *See* Kristen Broady et al., *An Eviction Moratorium Without Rental Assistance Hurts Smaller Landlords, Too*, BROOKINGS INST. (Sept. 21, 2020) https://www.brookings.edu/blog/up-front/2020/09/21/an-eviction-moratorium-without-rental-assistance-hurts-smaller-landlords-too/ (stating that "without rental income, a significant number of noncorporate, 'mom and pop' landlords—who may be coping with their own unemployment or additional expenses related to the Covid-19 pandemic—will also struggle to pay their mortgages, utilities bills, property taxes, maintenance costs, and other property-related expenses"); *see also* Catherine Reed, *29 Insightful Landlord Statistics – 2022*, FLEX (Apr. 18, 2022) https://getflex.com/blog/landlord-statistics/ (stating that "[o]n average, individual landlords reported $34,217 in rental income in 2018. However, they also reported $23,679 in deductible expenses on average, not including depreciation.").

Instead, eviction filing rates remained significantly below average. In 2021, the month with the highest eviction filing rate was August, with 4,550 evictions filed.[119] However, looking to the eviction filing rates of the five years prior to the pandemic, the lowest eviction filing rate during that period was during April of 2019, when 10,493 evictions were filed—more than twice the amount of evictions filed during any month in 2021.[120] It is also noteworthy that eviction filing rates did not begin to steadily increase, on their way back to "normal" eviction filing rates, until around the time that the RRP portal closed, in May of 2022.[121]

Therefore, while difficult to quantify exactly how influential RRP was in preventing evictions in Virginia during the first years of the pandemic, there is clearly a strong correlation. The pandemic created many emergency and crisis situations that led to potential housing insecurity; however, such emergencies and crises are not isolated to the pandemic, as emergency and crisis situations create housing insecurity across Virginia daily. With the RRP program, Virginia modeled that it could successfully support its citizens in need and keep them housed. Virginia ought to continue down this path of support by enacting a long-term rental relief program, similar to RRP, that will assist Virginians experiencing housing insecurity due to non-pandemic emergency and crisis situations for years to come.

CONCLUSION

As the lease terms end for those who received RRP during the COVID-19 pandemic, it is likely that many will have the same experience as Ms. Oliver, hunting for new housing in a difficult housing market because their landlord refuses to renew leases of tenants who received RRP.[122] This will, without a doubt, have a disproportionate impact on minority communities, as approximately 70% of households that received RRP were households of color.[123] This discriminatory landlord practice likely violates the FHA,[124] but because this argument has not yet been addressed by Virginia courts, practitioners assisting tenants and rental applicants must take multiple approaches to

[119] *Virginia Eviction Tracker*, LEGAL AID JUST. CTR., https://www.justice4all.org/eviction2022/ (last updated Oct. 31, 2022).

[120] *Id.*

[121] *Id.; Virginia Rent Relief Program (RRP), supra* note 4 (stating that stimulus checks are excluded from the AMI calculation).

[122] Robinson, *supra* note 26.

[123] Barthel, *supra* note 69 (stating that "[RRP] focused on serving low-income people and communities of color, who were especially hard hit by the public health crisis and the economic slowdown that came with it…black households made up 60% of the recipients, and 10% of households were Hispanic or Latino.").

[124] Complaint for Injunctive Relief & Damages, *supra* note 106 at ¶ 2-3.

support their clients' housing needs. The Jill Olivers of the Commonwealth deserve to be fought for.

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