



December 5, 2016

Office of the Richmond City Council
440 Civic Center Plaza
Richmond, CA 94804

Dear Richmond City Council Members:

As a group of organizations committed to fighting racial injustice, protecting the civil rights of our state's most vulnerable communities, and advocating on behalf of formerly incarcerated individuals seeking housing we write in strong support of the Fair Chance Access to Affordable Housing ("Fair Chance") Ordinance pending before the council now. We strongly urge you to include this ordinance on your December 6 agenda for a first reading and vote for final adoption before the end of this year.

The Fair Chance Ordinance will ensure stable and affordable housing for formerly incarcerated individuals in Richmond as they navigate the reentry process by eliminating the use of "blanket bans" and other exclusionary restrictions against rental applicants with criminal records. Such restrictions have a clear and unlawful discriminatory effect on African-American and Latino applicants by transferring the racial injustices of the criminal justice system into the affordable housing market. They also create a chilling effect, discouraging potential tenants from applying for tenancy in the first place. Eliminating such obstacles is not only sound policy for the city of Richmond, but is also required by law under the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (FHA) and the California's Fair Employment Housing Act (FEHA), California Government Code § 12955.

I. "Blanket bans" and other exclusionary policies against individuals with criminal records have a disparate impact on African-American and Latino applicants

The Fair Chance Ordinance would promote civil rights by restricting "blanket bans" and other policies that have a disparate impact on minority applicants, particularly African-Americans and Latinos.

"Blanket bans" are policies enforced by housing providers that categorically prohibit anyone with a criminal record from renting or living in a property even if the applicant is otherwise eligible. These bans have become increasingly common due to greater accessibility of inexpensive background checks via the internet and more frequent coordination between housing providers and local law enforcement. Other policies restrict eligibility through: reliance on arrest

records; unreasonable lookback periods for criminal history; an overbroad set of criminal activity including non-violent, non-drug related convictions; and failure to account for mitigating circumstances in someone's criminal history, including the seriousness of the actual underlying offense.¹ "Blanket bans" and similar restrictions block the path to safe, permanent, and affordable housing for many otherwise qualified and deserving people without regard to the nature of the past crime or an individual's successful rehabilitation.

Many Richmond housing providers use such onerous restrictions in their tenant selection policies and during the applicant screening process. For example, one affordable housing provider in the city prohibits anyone with two or more misdemeanors at any point in their lifetime from securing a unit even if the applicant meets all other eligibility requirements. Another automatically excludes any applicant with a prior felony, without regard for how old a conviction is or the nature of the felony. Therefore, an applicant with a non-drug related or non-violent felony, such as copyright infringement, tax evasion, or vandalism—even from 20 years ago—would be categorically denied housing at that particular property. Other affordable housing providers in Richmond similarly fail to consider mitigating circumstances such as the nature, extent or seriousness of an applicant's prior criminal history, and remoteness of time of a prior conviction.

Such policies have a clear and unlawful disparate impact on minority applicants, particularly African-Americans and Latinos who are disproportionately represented in the criminal justice system. By excluding otherwise eligible applicants on the basis of criminal record, these policies reproduce criminal justice inequities caused by racially biased policing and prosecutions in the affordable housing market.

Disproportionate rates of conviction and incarceration of specific minority groups as compared to white individuals are well-documented nationally. African-Americans and Latinos, at 58% of the nation's more than 2.3 million prisoners, are overrepresented in the criminal justice system.² In 2014, African-Americans constituted approximately 36% of the total prison population, but only 12% of the general population.³ Similarly, Latinos comprise 22% of the prison population, but only 17% of the general population.⁴ This is in contrast to whites who comprise 62% of the general population, but only 34% of the prison population.⁵ African-American men are six times more likely to be incarcerated than white men, and Latino men are almost three times more likely to be incarcerated than white men nationally.⁶

¹ Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Sargent Shriver National Center on Poverty Law (2015).

² U.S. Department of Housing and Urban Development, *Office of Gen. Counsel Guidance on Application of FHA Standards to the Use of Criminal Records by Providers of Housing Real Estate-Related Transactions* (April 4, 2016) ("HUD Guidance").

³ *Id.*

⁴ *Id.*

⁵ *Id.*; these racial disparities persist across categories of crime, such as drug possession.

⁶ The Sentencing Project, *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* (2013); see also U.S. Department of Justice, *Bureau of Justice Statistics Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001* (2003).

The race disparities that permeate the national criminal justice system similarly infect the criminal justice system here in California and locally in Contra Costa County. Although African-Americans constitute only 5.7% of the total state population, they represent nearly 29% of the total California prison population.⁷ This makes California's Black-to-white incarceration ratio one of the highest in the country. Data recently presented to Contra Costa's Public Safety Commission by the county administrator's office shows race disparities that are even more disproportionate than those at the national level. Although African-Americans make up only 10% of residents in the county, they represent 28% of all bookings, 30% of those on adult probation, and 40% of those sent from state prisons to Contra Costa County jails under California's prison realignment plan.⁸ Research and anecdotal evidence shows that these race disparities in the criminal justice system result from implicit and explicit racial biases in policing⁹ as well as a lack of educational and economic opportunities for these groups.¹⁰

Meanwhile, the number of people released from prison and local jails every year has increased as jail and prison populations have increased—from 300,000 in 1980 to more than 2.3 million in the United States today. Each year, 700,000 inmates are released back into their communities and over 95% of all current inmates will be released at some point.¹¹ Given the high rate of incarceration, the constant release of inmates, and the racial disparities in the criminal justice system, releasees are inevitably disproportionately and overwhelmingly African-American and Latino.

The bottom line is clear: more people have criminal convictions than ever before and those people are disproportionately African-American and Latino, both nationally and locally here in Richmond. This means that both African-Americans and Latinos are much likelier than whites to be barred from housing by “blanket bans” or onerous policies against renting to those with criminal records.¹²

⁷ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (2016).

⁸ February 29, 2016 Special Meeting, Contra Costa County Public Protection Committee, “Contra Costa County Data on Race in Criminal Justice”

http://64.166.146.245/agenda_publish.cfm?id=&mt=ALL&get_month=2&get_year=2016&dsp=ag&seq=779.

⁹ See e.g., *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010*, ACLU Foundation of Massachusetts (October 2014); *Balancing the Scales of Justice: An Exploration into How Lack of Education, Employment, and Housing Opportunities Contribute to Disparities in the Criminal Justice System*, ACLU of Northern California and The W. Haywood Burns Institute (2013); “Berkeley coalition says police stops show racial bias,” *Berkleyside* (September 29, 2015) <http://www.berkeleyside.com/2015/09/29/berkeley-coalition-says-police-stops-show-racial-bias/>.

¹⁰ See e.g., *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council*, The W. Haywood Burns Institute for Juvenile Justice, Fairness & Equity (June 2015); *Balancing the Scales of Justice: An Exploration into How Lack of Education, Employment, and Housing Opportunities Contribute to Disparities in the Criminal Justice System*, ACLU of Northern California and The W. Haywood Burns Institute (2013).

¹¹ Ann E. Carson, U.S. Department of Justice, *Prisoners in 2014*, BJS Bulletin (September 2014).

¹² These same racially disparate impacts have been found in the employment context where employers have often used similar “blanket bans” against hiring individuals with criminal records. The United States Equal Employment Opportunity Commission issued guidance to employers nationwide to address these racial disparities. See generally, U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance*, No. 915.002 (April 25, 2012).

If adopted, the Fair Chance Ordinance will mitigate this harmful racially disparate impact by prohibiting tenant selection policies and practices that categorically deny applicants based on criminal record and requiring greater consideration of mitigating circumstances. Specifically, section 7.110.050 prohibits affordable housing providers from considering: prior arrests, participation in diversion programs, dismissed convictions, juvenile convictions, anything less than a misdemeanor, and convictions more than two years old at the time of application. These critical limitations increase the likelihood that individuals with criminal records, especially overrepresented African-American and Latino applicants, will secure affordable housing.

II. Disparate impact racial discrimination caused by exclusionary housing policies violates the federal Fair Housing Act and California state law

The racially disparate impact of “blanket bans” and other onerous restrictions as described above violates both the federal Fair Housing Act (FHA) and California state law.¹³ The Fair Chance Ordinance will bring current Richmond affordable housing providers with such policies and practices into compliance with the law.

The FHA was enacted to remove “arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics.”¹⁴ Such “impermissible characteristics” include race. Specifically, it is unlawful to discriminate against any one in “the terms, conditions, or privileges of sale or rental of a dwelling...because of race.”¹⁵ Under the law, neutral housing practices and policies that have a disparate impact on the basis of race or color are prohibited unless they are necessary to achieve a legitimate business purpose that cannot be satisfied through a less discriminatory alternative practice.¹⁶ Recently, the United States Supreme Court reaffirmed that the FHA prohibits neutral housing policies and practices that have disproportionate effects on federally protected classes such as race.¹⁷

“Blanket bans” and other exclusionary policies, including policies currently used by certain Richmond providers, are unlawful under the FHA. As discussed above, such bans have a disparate impact on African-Americans and Latinos due to the well-documented race disparities in the criminal justice system.¹⁸ Furthermore, any legitimate safety concerns that Richmond

¹³ Under California’s Fair Employment and Housing Act (FEHA) it is unlawful to deny housing on the basis of race. The law prohibits both intentional and disparate impact discrimination. The state statute uses the same exact analysis and considerations as the FHA. In other words, policies that have a disparate impact on the basis of race under the FHA will also be unlawful under FEHA. Cal. Govt. Code. § 12955; *see also Walker v. City of Lakewood*, 272 F.3d 1114, 1131 n.8 (9th Cir. 2001).

¹⁴ 42 U.S.C. § 3601; *see also, Llanos v. Estate of Coehlo*, 24 F.Supp.2d 1052, 1056 (E.D. Cal. 1998).

¹⁵ 42 U.S.C. § 3604(b).

¹⁶ *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194-1195 (9th Cir. 2006).

¹⁷ *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Projects, Inc.*, 506 U.S. ___, 135 S. Ct. 2507 (2015).

¹⁸ A formal statistical analysis would likely show that within the pool of potential qualified applicants for affordable housing in Richmond, African-Americans and Latinos are disproportionately disadvantaged relative to whites by exclusionary housing policies and onerous restrictions based on criminal record—policies and practices currently used by several Richmond housing providers. In other words, an expert could use demographic information to compare the relative rates of criminal record-based exclusions for each group within the pool of applicants that would otherwise qualify for affordable housing in Richmond to prove the racially disparate impacts of the policies

housing providers offer to justify such policies can be satisfied through less discriminatory policies, such as those required by the Fair Chance Ordinance.¹⁹ Providing individualized consideration to each potential resident's circumstances and desirability as a tenant rather than categorically prohibiting applicants with criminal records allows a housing provider to consider safety, but in a far less racially discriminatory manner. Such individualized considerations are used by responsible housing providers nationwide.

Guidance recently released by the United States Department of Housing and Urban Development (HUD) emphasizes that "blanket bans" and other exclusions based on criminal record will have a disproportionate and negative effect on African-Americans and Latino applicants due to race disparities in the criminal justice system and therefore violate the FHA.²⁰ This guidance also emphasizes that "blanket bans" are never necessary to achieve the legitimate interest of promoting safety on a property.

Despite the fact that "blanket bans" and similar exclusions are unlawful and violate HUD's guidance, housing providers nationwide and locally continue to enforce such restrictions. As a result, some housing providers have found themselves subject to litigation. For example, a recent lawsuit in New York City challenges a private rental company's use of a "blanket ban" against anyone with a criminal record.²¹ Another filed in Washington D.C. challenges three affordable housing providers' restrictions which categorically denied housing to an individual with a non-violent, non-drug related misdemeanor.²²

The Fair Chance Ordinance will bring Richmond affordable housing providers into compliance with the FHA and analogous California law and decrease the harmful and exclusionary policies that disparately impact African-American and Latino housing applicants.

III. "Blanket bans" and exclusionary policies against individuals with criminal records may constitute intentional racial discrimination

Although "blanket bans" and other restrictive tenant selection policies are considered neutral policies that have a disparate impact on minority applicants, these same policies are sometimes used intentionally to discriminate against those same groups. Such exclusionary policies can be based on racially discriminatory stereotypes about those with criminal records and used in a pre-textual manner to intentionally exclude minority applicants and residents. In other words, the racially disparate impact of such policies is sometimes so large and obvious, and the less discriminatory policy so easy to adopt, that a discriminatory intent can be inferred. If Richmond

used by affordable housing providers in the city. This analysis combined with other national and local statistics offer strong evidence of racially disparate impact under the FHA. *See* HUD Guidance, page 3, *supra* note 3.

¹⁹ Under the FHA, a defendant will have the opportunity to show that a policy that has a discriminatory effect nevertheless serves a legitimate and nondiscriminatory interest. However, if there are less discriminatory ways to achieve that same legitimate interest, then the defendant's policies will be considered unlawful. *See Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194-95 (9th Cir. 2006).

²⁰ *See generally*, HUD Guidance, *supra* note 3.

²¹ *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp.*, United District Court for Eastern District of New York, Case No. 1:14-cv-6410 (filed Oct. 30, 2014).

²² *Alexander v. Edgewood Management Corp.*, United States District Court for District of Columbia, Case No. 1:15-cv-01140 (filed July 16, 2015).

housing providers are aware that people with criminal records are disproportionately African-American, they likely understand the negative impact such a policy has on the racial make-up of their properties. This understanding makes it easy to deliberately use facially neutral policies to intentionally discriminate against minority applicants. By adopting the Fair Chance Ordinance, the city of Richmond will be a leader in combatting this kind of intentional race discrimination in the affordable housing market.

IV. The Fair Chance Ordinance is necessary public policy to support the reentry and reintegration process for all formerly incarcerated individuals

We urge the Council to adopt this ordinance not only because of the harmful and unlawful racially disparate effects of current policies and practices, but also because doing so aligns with the City's commitment to support reentry and the integration of all formerly incarcerated individuals and parolees into the community. As mentioned in the text of the ordinance itself, a recent survey of 100 formerly incarcerated Richmond residents found that only 53% had stable housing within a year-and-a-half of their release.²³ Well-documented research supports the connection between accessible housing and decreased likelihood of recidivism.²⁴ Experts have described housing as the "linchpin" holding the reentry process together.²⁵ Without safe and secure affordable housing, all formerly incarcerated individuals are less likely to find economic stability and more likely to become homeless. We commend the City of Richmond for the steps it has already taken to remove barriers faced by people coming home from prison or jail and encourage the City to take this critical next step by dismantling barriers to affordable housing.

V. Success of the Fair Chance Ordinance depends upon effective enforcement

Once adopted we urge the Council to take all necessary steps to fully and effectively enforce the ordinance. We are particularly pleased to see the inclusion of section 7.110.070 which outlines critical next steps in enforcement and implementation, including the identification of an Appeals Process officer, outreach to current housing providers, resources for enforcement, a system for addressing violations, and a public reporting requirement. These enforcement requirements ensure that the Fair Chance Ordinance is not simply symbolic, but actually improves access to affordable housing in-practice.

We also strongly urge the City to appoint a hearing officer to manage the Fair Chance appeal process and devote additional staff time to implement other aspects of the ordinance. We hope the City will work closely with advocates and organizations including Safe Return Project to develop Implementation Guidelines and work on an evaluation report for the first year of the ordinance.

We also encourage the City to build on best practices of other cities who have recently adopted similar ordinances. The City of San Francisco recently issued a first-year report with lessons-learned and policy recommendations based on their Fair Chance Ordinance which went

²³ See § 7.110.030(c).

²⁴ See e.g., Caterina Gouvis Roman and Jeremy Travis, *Taking Stock: Housing, Homelessness and Prisoner Re-Entry*, Urban Institute (2004).

²⁵ Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2009).

into effect in August 2014.²⁶ We hope that Richmond will adopt many of the suggested best practices as it implements this ordinance.

We commend the City of Richmond for its continued efforts to remove barriers faced by people returning home from incarceration, including the establishment of the Reentry Success Center and adoption of the “Ban the Box” ordinance which removed similar “blanket bans” in the employment context. We appreciate all efforts made by current Council members to work with community advocates and experts to finalize the Fair Chance Ordinance for Council review. If adopted, the ordinance will make Richmond a leader nationwide in efforts to increase secure and affordable housing for individuals with criminal records.

Finally, we remain deeply concerned that current policies and practices used by Richmond housing providers in the screening of applicants with criminal records have clear and unlawful discriminatory effects on African-American and Latino applicants who are already disproportionately represented in the criminal justice system and now in the affordable housing market too. However, we are hopeful that adoption of the Fair Chance Ordinance will provide African-American, Latino, and all applicants with criminal records a fair chance at realizing their civil right to safe and secure housing.

Sincerely,

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²⁶ *Fair Chance Ordinance: First Year Report*, San Francisco Human Rights Commission (January 2016), <http://sf-hrc.org/sites/default/files/HRC%20Fair%20Chance%20Report%20FINAL.pdf>.

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