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NOTE

THE HOUSING OPPORTUNITY TAX CREDIT

Brianna Joyner



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NOTE

THE HOUSING OPPORTUNITY TAX CREDIT

*Brianna Joyner**

It should come as no surprise that there are significant repercussions for having a criminal record. Criminal convictions can hinder voting rights, job selection, and even necessities such as housing.¹ This Article will explore the difficulties formerly Incarcerated persons (FIP) face when attempting to secure housing after incarceration. The first part of this Article will outline the social and economic implications of FIP homelessness and housing insecurity.² The second section will discuss how lower courts have acknowledged that crime-free housing ordinances and policies have a discriminatory effect on people of color in the housing market, yet FIPs are not recognized as a protected class. Third, the Article will examine why landlords are hesitant to rent to felons and how that impacts an FIP's access to housing. The fourth part will review the federal Work Opportunity Tax Credit and how states have implemented similar versions of their own. Finally, the Article will propose the Housing Opportunity Tax Credit, which offers a federal tax credit to landlords who rent to FIPs.

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¹ CHRIS UGGEN ET AL., SENT'G PROJ. LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION (Oct. 30, 2020) (stating that as of 2020, an approximately 5.17 million Americans are disenfranchised due to a felony conviction).

² See U.S. DEP'T HOUS. & URBAN DEV., 20410-0500, OFF. GEN. COUNS. GUIDANCE ON APPLICATION OF FAIR HOUS. ACT STANDARDS TO USE CRIM. REC. BY PROVIDERS OF HOUS. & REAL EST.-RELATED TRANSACTIONS 2 (2016) [hereinafter OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT]; see also *Collins v. AAA Homebuilders*, 333 S.E.2d 792, 792 (W. Va. 1985); *Fla. Fair Hous. All., Inc. v. Park East-West Ltd.*, 2020 U.S. Dist. LEXIS 159399, 1 (2020); 42 U.S.C. § 13661(c).

I. A LACK OF HOUSING CAUSES COMPOUNDING ISSUES FOR FIPs

After serving a sentence and rightfully being released from incarceration, returning to society should feel like a new beginning. However, for many FIPs, release is the start of an uphill battle. Research shows that 203 out of every 10,000 FIPs are homeless.³ Further, 570 FIPs out of every 10,000 are housing insecure.⁴ Obtaining adequate housing is a necessary step in the reentry process. Approximately 600,000 prisoners are released from prison each year with no place to live.⁵ A lack of housing can create a number of issues such as obtaining employment, avoiding recidivism, and access to healthcare to name a few.⁶ For example, the homeless population often experiences deficient access to healthcare.⁷ A driving cause for insufficient access to healthcare is that those who struggle to fulfill their basic needs see healthcare as immaterial to their survival.⁸ Consequently, people with housing instability are more likely to experience higher rates of acute health care utilization than those with reliable housing.⁹ Data shows that 13.9% of people encountering unstable housing and 32.2% of the actively homeless postponed receiving medications.¹⁰ Additionally, 30.7% of the unstably housed and 37.2% of the actively homeless reported that they did not have an ambulatory care visit within the last year.¹¹ To no surprise, people who suffer from housing insecurity are also less likely to be insured.¹² Unfortunately, when “[u]nder economic stress, people may choose to pay for more basic needs, such as housing and food, rather than for the direct and hidden costs of medical care, including medication, visit co-pays and transportation, child care or lost wages.”¹³ Furthermore, a lack of employment, which FIPs often face, can hinder access to healthcare.¹⁴

In addition to poor access to healthcare, formerly convicted individuals with housing hardships also struggle to find employment.¹⁵ In a study

³ Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html#recentlyreleased>.

⁴ *Id.*

⁵ Nazish Dholakia & Margaret DiZerega, *Released From Prison With No Place to Live*, VERA INST. (Aug. 2021), <https://www.vera.org/news/released-from-prison-with-no-place-to-live>.

⁶ See Kristin M. Ferguson et al., *Employment Status and Income Generation Among Homeless Young Adults: Results From a Five-City, Mixed-Methods Study*, 44 YOUTH & SOC’Y 385, 396 (2012); see Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism: Evidence from a Sample of People on Probation in San Francisco*, 47 CRIM. JUST. & BEHAV. 1097, 1098 (2020); see

examining homeless young adults across multiple states, researchers found that homelessness served as a major obstacle to obtaining employment.¹⁶ Unfamiliarity with the local job market, job searching, hiring procedures, and local transportation systems due to living a transient lifestyle were noted as impediments to employment.¹⁷ Many individuals living on the street do not have access to support networks needed to develop skills that are attractive to employers.¹⁸ Study participants also indicated that survival behaviors, including illegal activity, led to difficulties securing employment.¹⁹

Gainful employment, as well as housing, is often a requirement for parole and probation. Generally, having a criminal record is a major obstacle when seeking stable housing.²⁰ Without stable housing, FIPs are potentially left on the same streets where they were originally convicted. Without the security of basic needs, such as shelter, FIPs can easily resort to behaviors that originally led to their incarceration. Unsurprisingly, data suggests that a

Kristen W. Reid et al., *Association between the Level of Housing Instability, Economic Standing and Health Care Access: A Meta-Regression*, 19 J. HEALTH CARE FOR POOR & UNDERSERVED 1212, 1212–13 (2008).

⁷ Kristen W. Reid, Eric Vittinghoff & Margot B. Kushel, *Association Between the Level of Housing Instability, Economic Standing and Health Care Access: A Meta-Regression*, 19 J. HEALTH CARE FOR POOR & UNDERSERVED 1212, 1212–13 (2008).

⁸ *Id.*

⁹ *Id.* at 1213.

¹⁰ *Id.* at 1220.

¹¹ *Id.*

¹² *Id.* at 1223.

¹³ *Id.*

¹⁴ Jin Huang et al., *Job Loss and Unmet Health Care Needs in the Economic Recession: Different Associations by Family Income*, 104 AM. J. PUB. HEALTH 178, 178 (2014).

¹⁵ Ferguson et al., *supra* note 6, at 396.

¹⁶ *Id.*

¹⁷ *Id.* at 397.

¹⁸ *Id.* at 401.

¹⁹ *Id.* at 402.

²⁰ Jacobs & Gottlieb, *supra* note 6.

lack of stable housing may lead to recidivism.²¹ In a study analyzing the effect of housing instability on probation, researchers found that one in four participants had no stable housing at the beginning of their probation.²² Unfortunately, over half of the sample relapsed into criminal activity.²³ Researchers concluded that starting probation without stable housing increases the hazard of recidivism by 35% while being homeless increased the hazard of recidivism by nearly 50%.²⁴ Interestingly, housing instability was likely to increase risk of recidivism for property crimes, minor crimes, and revocations, but not for person or drug crimes.²⁵

Even so, research suggests that drug use is commonly considered a major risk for re-offending.²⁶ Unfortunately, the formerly convicted often return home to the same environment that was the initial catalyst that led to their incarceration.²⁷ Relapse is more probable when people come in contact with familiar triggers, such as a specific person or situation.²⁸

The Legislature has acknowledged how critically important housing is to an individual's return to society after incarceration. The Second Chance Act has been previously put forward to aid recently released individuals in their transition, which includes finding adequate housing.²⁹ In a committee report, which proposed the Second Chance Act, Andrew A. Pallito, Vermont Department of Corrections Commissioner, described housing as, "a critical cornerstone upon which people build, or rebuild, their lives. The lack of a suitable residence either prevents otherwise eligible incarcerated individuals from being released or, at best, significantly undermines their likelihood for

²¹ *Id.*

²² *Id.* at 1106.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1109.

²⁶ David Kirk, *The Association Between Residential Relocation and Re-Incarceration Among Drug-Dependent Former Prisoners*, 114 SOC'Y FOR THE STUDY OF ADDICTION 1389, 1389 (2019).

²⁷ *Id.*

²⁸ *Id.* at 1390.

²⁹ The Second Chance Act: Strengthening Safe and Effective Community Reentry, 111th Cong. Sess. 2 (2020).

successful transition to community life.”³⁰ Commissioner Pallito went on to offer, “as of August 2010, nearly 9% of Vermont’s inmates are currently remaining in prison primarily for lack of an approved residence.”³¹ If inmates are eligible for release, a lack of housing should not hinder them from returning to society.

COVID-19 has exacerbated a multitude of pain points in the criminal justice system, including reentry and housing. Shelters, which are understaffed and underfunded on a normal basis,³² are so overwhelmed that they cannot keep up or are forced to shut down altogether due to a lack of funding.³³ Prior to the pandemic, families that may have been willing to take in their recently released loved ones, are now hesitant because of possible exposure to the virus.³⁴ Fear amongst families is well-deserved, considering the sheer difficulty of social distancing and quarantine practices in overcrowded jails and prisons.³⁵ Mass incarceration has made way for intensive breeding grounds of the virus, so much so that “[m]ass incarceration added more than a half million cases in just three months.”³⁶ With the world two years in to the pandemic, one would assume that correction officials have had time to adjust and improve conditions inside jails and prisons for both staff and inmates. However, data has shown that most population drops over the past eighteen months are due to reduced

³⁰ *Id.* at 23.

³¹ *Id.*

³² See Wendy Sawyer, *Who’s Helping the 1.9 Million Women Released from Prisons and Jails Each Year?*, PRISON POL’Y INITIATIVE (July 2019), <https://www.prisonpolicy.org/blog/2019/07/19/reentry/> (discussing the significant number of women released from prison each year without adequate resources to facilitate their reentry).

³³ Wanda Bertram, *Returning from Prison and Jail is Hard During Normal Times—It’s Even more Difficult During COVID-19*, PRISON POL’Y INITIATIVE (Sept. 2020), <https://www.prisonpolicy.org/blog/2020/09/02/covidreentry/>.

³⁴ Terry-Ann Craigie & Ames Grawert, *COVID-19 Has Made Reentry and Life After Prison Even Harder*, BRENNAN CENTER FOR JUSTICE (Feb. 2021), <https://www.brennancenter.org/our-work/research-reports/covid-19-has-made-reentry-and-life-after-prison-even-harder>.

³⁵ EQUAL JUST. INITIATIVE, *COVID-19’s Impact on People in Prison* (Apr. 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

³⁶ Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL’Y INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/virus/>.

prison admissions and not increased releases, despite health officials calling for decarceration.³⁷ For FIPs who have been released, their families may be reluctant to immediately house them out of fear of contacting the virus. Thus, newly released prisoners are left to find shelter elsewhere.

As outlined, a lack of housing for FIPs can create a host of issues that affect their sobriety, rehabilitation, community relationships, loved ones, and mental health. More so, current legislation exacerbates opportunities for discrimination.

II. BACKGROUND OF THE FAIR HOUSING ACT AND DISPARATE IMPACT CLAIMS

Unfortunately, the Fair Housing Act (FHA) has often been deployed as a tool to carryout similar types of discrimination it was designed to prohibit. The Fair Housing Act prescribes, “it shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”³⁸ Individuals with criminal records are not a protected class.³⁹ Pursuant to the U.S. Department of Housing and Urban Development (HUD), FIPs are not explicitly protected by the FHA, but violations can occur if housing providers unjustifiably create criminal-based housing restrictions that affect a particular race or national origin.⁴⁰ A violation will also arise when a housing provider treats applicants with similar criminal history differently because of their race or another protected characteristic.⁴¹ Despite likely discriminatory consequences, § 807(b)(4) of the FHA states that housing providers will not

³⁷ Emily Widra, *Data Update: As the Delta Variant Ravages the Country, Correctional Systems Are Dropping the Ball (Again)*, PRISON POL’Y INITIATIVE (Oct. 2021), https://www.prisonpolicy.org/blog/2021/10/21/october2021_population/.

³⁸ Fair Housing Act of 1968, 42 U.S.C. § 3604(b).

³⁹ *Id.*

⁴⁰ U.S. DEP’T HOUS. & URBAN DEV., *supra* note 2, at 2.

⁴¹ *Id.*

be held liable for excluding individuals convicted of certain drug crimes specified by the Act.⁴²

A policy or practice that restricts housing on the basis of criminal history and has a disparate impact on individuals of a protected class is unlawful if it “is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.”⁴³

In order to bring a disparate impact claim, the claimant must show that their landlord’s policy produces a disparate impact.⁴⁴ Disparate impact is a mechanism that addresses landlord policies that give rise to systemic inequality in housing.⁴⁵ Disparate impact claimants can challenge policies that needlessly discriminate and exclude individuals from housing opportunities for illegitimate reasons such as having a criminal record.⁴⁶ However, statistics indicate that certain groups of people are already disproportionately affected by the justice system even without a formal disparate impact showing.⁴⁷

While African Americans make up only 13.4% of the population in the United States,⁴⁸ African Americans comprise 38.3% of the prison population.⁴⁹ Hispanics make up 30.5% of the prison population⁵⁰ while representing only 18.9% of the U.S. population.⁵¹ Research indicates that

⁴² Hooks & Sawyer, *supra* note 36, at 8.

⁴³ *Id.*

⁴⁴ *Id.* at 3.

⁴⁵ Press Release, U.S. Dep’t Hous. and Urb. Dev., HUD Proposes Restoring Discriminatory Effects Rule, HUD No. 21-107 (June 25, 2021).

⁴⁶ *Id.*

⁴⁷ See U.S. CENSUS BUREAU, *Quickfacts* (2021), <https://www.census.gov/quickfacts/fact/table/US/RHI125219>.

⁴⁸ *Id.*

⁴⁹ FED’L BUREAU OF PRISONS, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Oct. 8, 2022).

⁵⁰ FED’L BUREAU OF PRISONS, *Inmate Ethnicity*, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp (last updated Oct. 8, 2022).

⁵¹ Hooks & Sawyer, *supra* note 36.

people of color are disproportionately more likely to be subject to policing.⁵² A showing of disparate impact appears redundant considering the discrimination these groups face on an everyday basis. As racial minorities often face undue discrimination in the criminal justice system, housing policies that outright reject applicants with criminal records creates a default disparate impact on racial minorities.

This information is even more alarming considering that African Americans constitute 47% of the 1,900 exonerations listed in the National Registry of Exonerations.⁵³ Disproportionate treatment by race is especially pronounced when it comes to drug-related criminal issues. The National Registry of Exonerations states African Americans are approximately five times more likely to go to prison for drug possession than White people.⁵⁴ Data also shows that innocent African Americans are twelve times more likely to be wrongly convicted of drug crimes than innocent White people.⁵⁵

The Fair Housing Act states, “Nothing in this title prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).” Thus, housing providers will not be held responsible for rejecting individuals convicted of certain drug crimes.⁵⁶

Incidentally, African Americans do not abuse drugs drastically more than other racial groups in America.⁵⁷ Because there are five times as many White people in America compared to Black people, the majority of drug users in America are White.⁵⁸ Still, African Americans “are up to 57 times

⁵² 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/>.

⁵³ Maurice Possley et al., *Race and Wrongful Convictions in the United States*, NAT’L REGISTRY OF EXONERATIONS 1 (2017).

⁵⁴ *Id.* at 16–17.

⁵⁵ *Id.*

⁵⁶ Fair Housing Act of 1968, 42 U.S.C. § 807(b)(4).

⁵⁷ Graham Boyd, *The Drug War is the New Jim Crow*, ACLU (July/Aug. 2001), <https://www.aclu.org/other/drug-war-new-jim-crow>.

⁵⁸ *Id.*

more likely than whites to be incarcerated for drug crimes.”⁵⁹ According to Vox, the “1986 Anti-Drug Abuse Act created a 100 to 1 disparity between the amount of crack cocaine that triggers a federal mandatory minimum sentence versus powder cocaine. Five grams of crack mandated a five-year sentence—500 grams of powder cocaine was required to trigger the same sentence.”⁶⁰ Despite the majority of crack users being White, Black Americans were seven times more likely to be sent to prison for crack offenses between 1991 and 2016.⁶¹ In addition, Black people were sent to prison forty months longer on average than White offenders.⁶² The War on Drugs has created a plethora of long-lasting repercussions for Black Americans, including banning them from housing for crimes for which other groups are not punished nearly as long.

Researchers examined police conduct in Springfield, Missouri from 2012-2016. Data stated that there were not only major disparities in the rates African Americans were stopped by police but also that they were more likely to be searched and arrested than anticipated.⁶³ However, the higher rate of stops did not yield more findings of contraband.⁶⁴ In a 2019 study, researchers surveying over one-hundred million traffic stops in the United States found that police were more likely to pull over and search Black and Latino drivers, even though the study suggested that White drivers were more likely to possess contraband.⁶⁵ Similarly, data recovered from a study examining 4.5 million traffic stops across one hundred North Carolina police departments found that Blacks and Latinos were more likely to be searched than Whites even though White individuals were more likely to possess

⁵⁹ *Id.*

⁶⁰ Gabby Birenbaum, *The EQUAL Act Would Finally Close the Cocaine Sentencing Disparity*, VOX (Mar. 2021, 2:10 PM), <https://www.vox.com/2021/3/19/22336224/equal-act-cocaine-sentencing-disparity-war-on-drugs>.

⁶¹ Shannon Mullen et al., *Crack vs. Heroin: An Unfair System Arrested Millions of Blacks, Urged Compassion for Whites*, ASBURY PARK PRESS (June 17, 2020, 5:27 AM), <https://www.app.com/in-depth/news/local/public-safety/2019/12/02/crack-heroin-race-arrests-blacks-whites/2524961002/>.

⁶² *Id.*

⁶³ Balko, *supra* note 52.

⁶⁴ *Id.*

⁶⁵ *Id.*

contraband.⁶⁶ Despite the obvious racial disparities in the justice system, which create lasting repercussions for FIPs, the FHA does not acknowledge the formerly incarcerated as a protected class. This notion has been reinforced by several judicial decisions.

III. JUDICIAL ACQUIESCENCE OF HOUSING DISCRIMINATION AGAINST THE FORMERLY CONVICTED

The judiciary has expanded equal protections based on classifications such as religion and sex but has deemed FIPs an unprotected class. In *Collins v. AAA Homebuilders*, where the plaintiff sought to recover punitive damages and an injunction against the defendant landlord for refusing the plaintiff's application based on the existence of a criminal record,⁶⁷ the court held that a "private landlord may consider all factors, including criminal convictions, which may affect the health, safety, or welfare of other tenants. . . ."⁶⁸ The court further held that ex-convicts were not a protected class and therefore could not recover.⁶⁹

In *Florida Fair Housing Alliance, Inc. v. Park East-West Ltd.* the plaintiff alleged that the defendant violated the FHA through an illegal practice of denying applicants with felony convictions.⁷⁰ The court found that no such illegal practice existed when the plaintiff was told, "he 'probably' would be denied housing as a convicted felon," because, "'probably' nonetheless implies that the tester's application would be considered and potentially approved even if there was a greater likelihood that the application may ultimately be denied."⁷¹ Thus, even if a landlord gives an applicant with a criminal record the slightest impression that they will accept their application, that is enough to avoid liability.

⁶⁶ *Id.*

⁶⁷ *Collins v. AAA Homebuilders*, 333 S.E.2d 792, 792 (W. Va. 1985).

⁶⁸ *Id.* at 793.

⁶⁹ *Id.* at 794.

⁷⁰ *Fla. Fair Hous. All., Inc. v. Park East-West Ltd.*, No. 20-21976-Civ, U.S. Dist. LEXIS 159399, at *2 (S.D. Fla. Sept. 1, 2020).

⁷¹ *Id.* at *9.

A number of plaintiffs have brought the same types of discrimination before courts; however, courts refuse to grant relief. Courts have acknowledged and admonished that denial of housing applications due to racial discrimination can be masked under the FHA's criminal history policy. In *Jackson v. Tryon Park Apartments*, the plaintiff, a Black male with a felony conviction, sought relief under disparate impact theory after being denied housing due to his criminal record.⁷² In order to allege disparate impact, the plaintiff must establish, "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."⁷³ The plaintiff argued that New York's guidance on housing eligibility based on criminal history resulted in, "denial of housing opportunities at a disproportionate rate for African Americans and minorities."⁷⁴ Accordingly, the court held that the plaintiff survived summary judgment and had alleged a plausible claim for relief.⁷⁵

In *Sams v. Georgia West Gate, LLC* the plaintiffs, again survived summary judgement on disparate impact issues.⁷⁶ They claimed the defendant's rule barring residency from any individual who had certain felony or misdemeanor convictions within the past ninety-nine years violated the Fair Housing Act and their equal protection rights.⁷⁷ The court found that the defendants, "imposed rules upon the tenants at Westgate that were not imposed at Defendants' other complexes where non-African Americans resided" and thus, the plaintiffs had a sufficient claim for disparate impact.⁷⁸ Defendants' motion to dismiss the plaintiff's disparate impact was denied as

⁷² *Jackson v. Tryon Park Apts., Inc.*, No. 18-CV-06238, 2019 U.S. Dist. LEXIS 12473, at *1-2 (W.D.N.Y. Jan. 25, 2019).

⁷³ *Id.* at *8.

⁷⁴ *Id.* at *9.

⁷⁵ *Id.* at *15. In other words, the plaintiff has put forth enough evidence to show that there is an actual dispute of facts in which a factfinder could differ on. Thus, the proceedings will move forward to either trial or settlement.

⁷⁶ *Sams v. GA West Gate, LLC*, No. CV415-282, 2017 WL 436281, at *1, *4-5 (S.D. Ga. Jan. 30, 2017).

⁷⁷ *Id.* at *1-3.

⁷⁸ *Id.* at *4.

the court acknowledged that “African Americans are twice as likely to have criminal convictions as are Caucasians,”⁷⁹ and thus the “99-year criminal history policy adversely affects African Americans because it adversely applies to Defendants’ African American tenants.”⁸⁰ Accordingly, the court acknowledged that African Americans are disproportionately discriminated against in the criminal justice system, and therefore they are adversely affected by criminal history bans on housing applications.

In *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions, LLC*, the tenant plaintiff brought suit against a consumer-reporting agency specializing in tenant screening used by the plaintiff’s potential residence.⁸¹ The defendant used a program called CrimSAFE, which analyzed criminal records and informed housing providers if an applicant did not meet the provider’s background requirements.⁸² The defendant produces a report which does not contain any “underlying records, the nature of the alleged crime, the date of the offense or the outcome of the case if any.”⁸³ Instead, the report only states whether the applicant is disqualified from housing due to their criminal record.⁸⁴ The plaintiff, who had been disqualified was only arrested for retail theft a few years prior and the charge was later withdrawn.⁸⁵ The court found that the plaintiffs had sufficiently alleged disparate treatment based on race because the defendants did not inquire further after CrimSAFE determined that the plaintiff was disqualified.⁸⁶ The plaintiff also alleged sufficient facts on their racial disparate impact claim, stating that “this policy has a disproportionate impact on minorities because they are significantly more likely to be arrested, charged, and indicted,” which “results in a disproportionate number of housing denials for minorities.”⁸⁷ Thus the plaintiff was able to proceed to

⁷⁹ *Id.* at* 5.

⁸⁰ *Id.*

⁸¹ Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, 369 F. Supp. 362, 366 (D. Conn. 2019).

⁸² *Id.* at 367.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 367–68.

⁸⁶ *Id.* at 377.

⁸⁷ *Id.* at 378.

trial on disparate impact and disparate treatment claims. Lower courts have clearly come to the conclusion that minorities are disproportionately impacted by the justice system and therefore are likely to be adversely affected by criminal bans on housing. However, the legislature has chosen not to expand the definition of a protected class. Despite the ongoing discrimination and the disproportionate encounters with the justice system that Black and Hispanic people face, courts and the legislature have been reluctant to deem FIPs a protected class.

IV. HOW THE FORMERLY INCARCERATED ARE DISCRIMINATED AGAINST IN HOUSING MARKET

Historically, landlords have been given broad discretion in choosing whether to take on a formerly convicted individual as a tenant. Landlords have the power to deny an “applicant admission to the program or to federally assisted housing” for engaging in, “criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees.”⁸⁸ Landlords can easily access an applicant’s criminal history by utilizing commercial background services.⁸⁹ Some landlords are increasingly hesitant to rent to tenants with a criminal conviction because of potential civil liability. In *Kline v. 1500 Massachusetts Avenue Apartment Corporation* the plaintiff was assaulted and robbed in the hallway of her apartment building.⁹⁰ The court held that the appellee landlord had an implied contractual obligation to take reasonable protective measures.⁹¹ As a result, the landlord had breached its duty to provide protection to the plaintiff with reasonable care.⁹² In other words, the landlord failed to provide the plaintiff with a reasonable amount of safety expected in a landlord-tenant relationship.

⁸⁸ 42 U.S.C. § 13661(c).

⁸⁹ See Anna Reosti, “We Go Totally Subjective”: Discretion, Discrimination, and Tenant Screening in a Landlord’s Market, 45 L. & SOC. INQUIRY 618, 622 (2020).

⁹⁰ *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 480 (1970).

⁹¹ *Id.* at 486.

⁹² *Id.*

In a study examining 485 landlords in New York, researchers found that only 43% of landlords were willing to rent to applicants with a criminal record.⁹³ Despite the general fear amongst landlords, courts have historically held that landlords do not have a duty to protect tenants against the criminal activities of third parties unless there is a contractual obligation to do so, or the act was a foreseeable harm that the landlord failed to prevent.⁹⁴ Research suggests that municipal programs that render housing uninhabitable after drug raids may be a partial cause of landlord fear.⁹⁵ Landlords do not want to lose out on profits, and subsequently, they cultivate policies that adversely affect FIPs.⁹⁶ Furthermore, landlords may worry that renting to FIPs may tarnish their reputation.⁹⁷ If potential applicants learn that a certain housing provider rents to former criminals, they may be disparaged from using that provider.⁹⁸

In an effort to combat local crime, other communities have followed suit and instituted crime-free housing ordinances. In *Jones v. City of Faribault*, the plaintiffs brought suit against the City of Faribault for violation of the FHA, arguing that the ordinance, motivated by racial and national origin-based animus, made it difficult for the Black and Hispanic community to procure housing.⁹⁹

The Ordinance at issue included a Crime-Free Housing program stating, [P]ersons residing in rental dwelling units who engage in disorderly conduct or cause nuisance conditions create an unacceptable environment for others living in close proximity, thereby threatening the public safety and welfare

⁹³ Douglas N. Evans & Jeremy R. Porter, *Criminal History and Landlord Rental Decisions: A New York Quasi-experimental Study*, 15 J. EXPERIMENTAL CRIMINOLOGY 21, 30 (2015).

⁹⁴ Tracy A. Bateman & Susan Thomas, Annotation, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R. 5th 207, 241 (1996).

⁹⁵ Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 70 FED. PROBATION 20, 21 (2007).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Jones v. City of Faribault*, No. 18-1643, 2021 U.S. Dist. LEXIS 36531, *18-19 (D. Minn. Feb. 18, 2021).

of the community.”¹⁰⁰ Additionally, it mandates that “[l]andlords must comply with four elements to retain rental licenses” including that the landlord must [a]ctively pursue the eviction of the tenants or termination of the lease with the tenants who violate the terms of the lease and/or the crime free/drug-free housing lease addendum.”¹⁰¹ Despite denying the parties’ cross motion to all parties, the court held that plaintiffs survived summary judgment and provided sufficient evidence to allege that the defendants has created a ban in renting to FIPS based on racial discrimination.¹⁰²

Crime-free housing ordinances have clearly been weaponized to discriminate against Black and Hispanic community members. In addition to their discriminatory effect, the ordinances may perpetuate *de facto* segregation. Deborah Archer writes, “[a]ccordingly, the ordinances will predictably reinforce and perpetuate segregation in surrounding communities by exiling people of color, forcing them to seek housing in already segregated communities, and recreating conditions in those communities that are among the drivers of systemic segregation.”¹⁰³ Black and Hispanic people will find it increasingly difficult to secure housing in predominantly White neighborhoods, which are the primary users of crime-free housing ordinances.

Housing provides newly released prisoners the stability needed to focus on other integral aspects of reentry, such as employment and compiling with the terms of their release.¹⁰⁴ Many FIPs are not able to meet the conditions needed by most landlords such as stable employment and references from previous housing providers.¹⁰⁵ These barriers may lead to homelessness for

¹⁰⁰ *Id.* at *14.

¹⁰¹ *Id.*

¹⁰² *Id.* at *69.

¹⁰³ See Deborah Archer, *You Can’t Go Home Again: Racial Exclusion Through Crime-Free Housing Ordinances*, AM. CONST. SOC’Y (Nov. 2019), <https://www.acslaw.org/wp-content/uploads/2019/11/Racial-Exclusion-Through-Crime-Free-Housing-Ordinances.pdf>.

¹⁰⁴ Valerie A. Clark, *Predicting Two Types of Recidivism Among Newly Released Prisoners: First Addresses as “Launch Pads” for Recidivism or Reentry Success*, 62 CRIME & DELINQ. 1364, 1366 (2016).

¹⁰⁵ *Id.* at 1367.

FIPs.¹⁰⁶ Researchers performing a national survey found that 9% of inmates experience some form of homelessness the year before their incarceration.¹⁰⁷ Research has also shown a correlation between homelessness and recidivism.¹⁰⁸ Based on forty-nine individuals returning to New York City, researchers found that parolees released to homeless shelters were seven times more likely to flee from supervision than counterparts who did not go to homeless shelters.¹⁰⁹ Individuals who are unable to secure their own housing, but are able to stay with family members, may still be at risk for recidivism. In a study examining prison reentry in Chicago, researchers from the Urban Institute found that 12% of individuals reported that they lived with a family member after their release,¹¹⁰ however, some reported that they were living with individuals who could potentially threaten their chances of a successful integration.¹¹¹ According to findings, “11 percent lived with someone who had been in prison, 3 percent lived with someone who used illegal drugs, and 15 percent lived with someone who often drank to the point of intoxication.”¹¹² In the Cleveland sample from the same study, individuals had similar reports. Researchers found that “21 percent lived with someone who had been in prison, 15 percent with someone who often drank to the point of intoxication, and 10 percent with someone who used illegal drugs.”¹¹³ Living with individuals engaging in illegal activities combined with substance abuse could seriously diminish the prospects of a successful re-entry.

¹⁰⁶ See Ferguson et al., *supra* note 6, at 385 (discussing how homeless youths have a lower chance of finding employment the longer they have been living on the streets).

¹⁰⁷ Clark, *supra* note 104, at 1370.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Nancy G. La Vigne et al., *Chicago Prisoners' Experiences Returning Home*, URB. INST. 16 (Dec. 2004), <https://www.urban.org/sites/default/files/publication/42831/311115-Chicago-Prisoners-Experiences-Returning-Home.PDF>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Christy A. Visher & Shannon M.E. Courtney, *Cleveland Prisoners' Experience Returning Home*, URB. INST. 16 (Sept. 2006), <https://www.urban.org/sites/default/files/publication/42966/311359-Cleveland-Prisoners-Experiences-Returning-Home.PDF>.

V. USING THE WORK OPPORTUNITY TAX CREDIT AS A MODEL

Despite the many obstacles that the formerly convicted face when attempting to obtain housing, lawmakers have instituted legislation to lessen the burden. The Work Opportunity Tax Credit (WOTC) was established in 1996 to incentivize employers to hire members of groups who face discrimination in obtaining employment.¹¹⁴ Amongst these groups are convicted felons.¹¹⁵ In order to be a “qualified ex-felon,” the employee must be hired within one year of being convicted or hired within one year of being released from prison for the felony.¹¹⁶ The WOTC has seen lasting results. A study performed by the New York State Department of Labor found that the WOTC program resulted in “reduced expenditures on public service programs for recipients who move into jobs.”¹¹⁷ Researchers estimate that savings on public assistance are twice the cost of the WOTC subsidy because participants are less reliant on welfare and government assistance.¹¹⁸

There are obvious limitations to the WOTC as only certain FIPs qualify.¹¹⁹ Those who do not seek employment within a year from their release date will lose the incentive for potential employers to hire them.¹²⁰ Those who are convicted of misdemeanors will not be able to take advantage of the WOTC either.¹²¹ The WOTC is not available to employers who rehire formerly convicted employees.¹²² The typical maximum amount that an employer can claim is \$2,400, but amounts can vary depending on the type

¹¹⁴ See CONG. RSCH. SERV., R43729, THE WORK OPPORTUNITY TAX CREDIT (2018).

¹¹⁵ *Id.* at 2.

¹¹⁶ *Id.*

¹¹⁷ Katherine English, *Conflicting Approaches to Addressing Ex-Offender Unemployment: The Work Opportunity Tax Credit and Ban the Box*, 93 IND. L.J. 513, 524 (2018).

¹¹⁸ *Id.* at 524.

¹¹⁹ I.R.S., *Work Opportunity Tax Credit*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> (last updated Oct. 22, 2021) (stating that the WOTC only applies to qualified ex-felons).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

of work.¹²³ More so, research has shown that a large population of employers are not claiming the WOTC for their qualified employees.¹²⁴

A study of the WOTC's two largest groups, TANF recipients and food stamp youth, showed that few employers claimed the WOTC tax credit after hiring people from these targeted groups.¹²⁵ The study suggested that employers may be hesitant to hire WOTC groups because they fear that they will not reap the full benefit of the 40% tax credit if the employee does not reach the needed 400 hours.¹²⁶ Additionally, only a minority of employers of a WOTC group were aware of employment tax incentives.¹²⁷

In an effort to mitigate the existing issues with the WOTC, some states have adopted similar tax credits of their own. Maryland formerly established the Pilot Program to “provide incentives to business entities to encourage the long-term employment of qualified ex-felons.”¹²⁸ In exchange for hiring former felons, the state allocated fidelity bonds and tax credits to the business.¹²⁹ The employer may claim 30% of up to the first \$6,000 of wages paid to the employee during the first year of employment;¹³⁰ and 20% of up to the first \$6,000 of wages paid to the employee during the second year of employment.¹³¹

In Iowa, employers can receive a 65% deduction for wages paid for the first twelve months of employment by certain individuals, not to exceed

¹²³ Sarah Hamersma, *The Effects of an Employer Subsidy on Employment Outcomes: A Study of the Work Opportunity and Welfare-to-Work Tax Credits*, 24 J. POL'Y ANALYSIS & MGMT. 498, 500 (2005).

¹²⁴ *Id.* at 510; Sarah Hamersma, *The Bare Minimum*, N.Y. TIMES (Mar. 8, 2007), <https://www.nytimes.com/2007/03/08/opinion/08hamersma.html>.

¹²⁵ LINDA LEVINE, CONG. RSCH. SERV., WORK OPPORTUNITY TAX CREDIT (WOTC) AND THE WELFARE-TO-WORK (WTW) TAX CREDIT 11 (2005).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ M.D. ADMIN. RELEASE 39: LONG-TERM EMPLOYMENT OF QUALIFIED EX-FELONS TAX CREDIT (2012), https://www.marylandtaxes.gov/forms/Tax_Publications/Administrative_Releases/Income_and_Estate_Tax_Releases/ar_it39.pdf.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

\$20,000 per individual.¹³² The Illinois Income Tax Act awarded employers 5% of qualified wages for one or more Illinois residents who are qualified ex-offenders.¹³³ The total credit allowed for each qualified ex-offender cannot exceed \$600 for all taxable years.¹³⁴ The Illinois tax credit broadens the definition of a qualified ex-offender as it does not limit the definition to felons.¹³⁵

VI. PROPOSING A FEDERAL HOUSING TAX CREDIT FOR LANDLORDS WHO RENT TO FIPS

Tax incentives have long been used as an alternative to more direct forms of legislation. For example, the Earned Income Tax Credit (EITC) was established in 1975 to help low- to moderate-income workers and families secure a tax break.¹³⁶ The credit received depends on the recipient's income, marital status, and number of children.¹³⁷ Because the EITC is designed to encourage work, the more money a qualified individual makes, the higher the credit will be. The tax benefit will continue increasing until it reaches the maximum threshold. Research indicates that the EITC has been widely successful. Improvements to infant and maternal health and increasing Social Security income are just some of the benefits associated with the EITC.¹³⁸

Often, families that qualify for the EITC also take advantage of the Child Tax Credit (CTC). The CTC was enacted in 1997 with the goal of

¹³² IOWA ADMIN. CODE R. 701-40.21 LONG-TERM EMPLOYMENT OF QUALIFIED EX-FELONS TAX CREDIT (2008), <https://www.legis.iowa.gov/docs/iac/rule/11-19-2008.701.40.21.pdf>.

¹³³ 35 ILL. COMP. STAT. 5/216 (2022).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *The Earned Income Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit> (last updated Dec. 10, 2019).

¹³⁷ *Id.*

¹³⁸ *Chart Book: The Earned Income Tax Credit and Child Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/federal-tax/chart-book-the-earned-income-tax-credit-and-child-tax-credit> (last updated May 24, 2016) [hereinafter *Chart Book*].

counteracting costs associated with raising children.¹³⁹ Families can receive a maximum of \$2,000 per child.¹⁴⁰ The CTC has proven to be incredibly useful to low-income families. It is estimated that the CTC has alleviated poverty for twelve million people, including 5.8 million families.¹⁴¹ In addition, the CTC has been shown to bolster school performance, enhance college enrollment, and increase overall earnings.¹⁴² The success of the EITC and CTC are evidence that tax is not only capable of carrying out social justice aims but can be an incredibly powerful tool in effectuating those goals.

In order to combat the ongoing stigma and difficulties FIPs face when attempting to secure housing after being released from incarceration, I argue that Congress should adopt a federal tax credit given to landlords who rent to those that have been convicted. The Housing Opportunity Tax Credit (HOTC) would be available to landlords who rent to individuals previously incarcerated for both misdemeanors and felonies. Unlike the WOTC, which only applies to ex-felons, the HOTC would include individuals with both misdemeanor as well as felony convictions because generally, any conviction can prevent an individual from obtaining housing.¹⁴³ Limiting the tax credit only to those with a felony conviction would unreasonably restrict an entire class of individuals in need of shelter.

While the WOTC is only available to formerly convicted felons for up to one year after release, the HOTC will be available for up to ten years after the individual's release. In December of 2021, Michigan adopted a resolution, to "urge Congress to support legislation to strengthen the Workforce Opportunity Tax Credit."¹⁴⁴ The Michigan legislature argued that

¹³⁹ *Policy Basics: The Child Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/federal-tax/the-child-tax-credit> (last updated Dec. 10, 2019).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Chart Book*, *supra* note 138.

¹⁴³ See *Corelogic*, 369 A.3d at 367–68 (plaintiff claiming that his retail theft charge prevented him from obtaining housing).

¹⁴⁴ H.R. Res. 198, 101 Leg., 1st Reg. Sess. (Mich. 2021).

strengthening the WOTC would aid groups that have been disproportionately impacted by the pandemic and alleviate hiring costs for business owners.¹⁴⁵

The ten-year time period would enable individuals to find adequate housing and prevent recidivism. During this period, individuals would have the opportunity to build a rapport with their housing provider(s). A decade of credibility would make the search for housing easier after the tax credit is no longer available to incentivize a potential landlord.

Examining a sample set, researchers found that “an estimated 68% of released prisoners were arrested within three years, 79% within six years, and 83% within, nine years.”¹⁴⁶ Twenty-five percent of FIPs do not have a high school diploma, GED, or a college degree.¹⁴⁷ Twenty-seven percent of FIPs are unemployed,¹⁴⁸ which is even more detrimental, considering a main contributor to recidivism is poverty.¹⁴⁹ Alleviating housing insecurity and homelessness may help FIPs successfully reintegrate into society. Procuring housing may lead to employment, permanent sobriety, and halt recidivism.¹⁵⁰

The HOTC will be capped at \$30,000 per tenant over a ten-year period. The amount of money received by the landlord would correspond to the years the individual has spent outside of incarceration with adequate housing. For example, landlords who house individuals in year one would reap the most tax benefit. Landlords who house individuals in their tenth cycle will receive the least tax benefit.

The tax credit can only be initiated once. For example, if an individual reoffends and is sentenced to two years after completing their first year, the individual will not be able to pause the HOTC until he or she returns back to

¹⁴⁵ *Id.*

¹⁴⁶ Mariel Alper et al., *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period*, BUREAU JUST. STAT. (2005–2014) 1, 1 (2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

¹⁴⁷ Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (Oct. 2018), <https://www.prisonpolicy.org/reports/education.html#:~:text=We%20find%20that%20a%20quarter,in%20lieu%20of%20traditional%20diplomas>.

¹⁴⁸ *Id.*

¹⁴⁹ See Clark, *supra* note 104, at 1372.

¹⁵⁰ See *id.* at 1366; see Kirk, *supra* note 26; see Jacobs & Gottlieb, *supra* note 6.

society. Those two years of tax incentives will be permanently lost. This encourages individuals to make the most of the tax credit and the opportunities available to them.

Contrary to the WOTC, the HOTC would apply to individuals who become incarcerated and return to the same living quarters. In the event that a potential landlord is dissuaded from renewing a lease to an individual who becomes incarcerated the landlord may be incentivized to welcome the tenant back as they will be able to collect a tax credit.

A potential \$30,000 per individual may seem like a substantial amount of money to some, however the average cost per prison inmate is approximately \$33,000. In some states the costs rise over \$50,000.¹⁵¹ Unfortunately, \$2,400 may not be enough in the minds of ample employers to take on the preconceived risks and stigma of hiring the formerly convicted, especially when considering the unemployment rate amongst FIPs.¹⁵² The HOTC offers a significantly larger reward, which could encourage landlords to disregard their pre-conceived notions and house FIPs. By offering a considerable financial benefit to landlords, society and taxpayers are more likely to reap the intended benefit.

Some may argue that FIPs could be better helped by deeming them a protected class. Taking such actions may have greater impact on FIPs if successful, however, a tax incentive can serve as a more immediate solution. A tax benefit may be perceived as less politically polarizing and could be seen as advantageous to those otherwise against declaring FIPs a protected class. The HOTC has the capacity to align typically opposing political objectives, which could lead to increased support and an expedited legislative passing. Ultimately, FIPs would be able to receive the help they so desperately need.

¹⁵¹ *Prison Spending in 2015*, VERA, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Mar. 27, 2022).

¹⁵² See Couloute, *supra* note 147.

VII. CONCLUSION

A lack of housing has widespread consequences for FIPs. Without housing, simple tasks such as obtaining employment and receiving healthcare become increasingly difficult.¹⁵³ In addition, already serious impediments to re-entry, such as substance abuse issues, become exacerbated by homelessness and housing insecurity.¹⁵⁴ Most notably, a lack of housing should not be a barrier to release.¹⁵⁵ Once an individual has served their sentence, they should not be held simply because they do not have access to proper housing. Unfortunately, Black and Hispanic people are often most impacted by the consequences of incarceration as they are adversely discriminated against in justice system.¹⁵⁶ Regardless of the fact that lower courts have acknowledged that minorities can be unjustly affected by housing bans on criminal records, the legislature has yet to deem FIPs a protected class.¹⁵⁷ Without added protections, housing providers will continue to discriminate against FIPs. To combat further prejudice that would inhibit FIPs from obtaining housing, the HOTC will encourage landlords to provide housing to FIPs through a tax incentive. While the consequences of incarceration do not stop at the prison gate, they can certainly be mitigated through proper measures.

¹⁵³ See Reid et al., *supra* note 6; see Ferguson et al., *supra* note 6.

¹⁵⁴ See Kirk, *supra* note 26, at 1389–90.

¹⁵⁵ STAFF OF S. COMM. ON THE JUDICIARY, 111TH CONG. REP. ON SECOND CHANCE ACT 23 (Comm. Print 2010).

¹⁵⁶ See Balko, *supra* note 52.

¹⁵⁷ OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT, *supra* note 2.