

LOCKED OUT: HOW ALGORITHMIC TENANT SCREENING EXACERBATES THE EVICTION CRISIS IN THE UNITED STATES

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TABLE OF CONTENTS

Introduction.....	277
I. Housing in the United States.....	278
A. Why Renting is a Landlord’s Market.....	278
B. Tenant Screening Before Algorithms	279
C. Tenant Screening in the Age of Algorithms	281
II. Problems With Using Eviction Records in Tenant Scoring Algorithms	282
A. How Tenant Screening Algorithms Entrench Discrimination	282
B. How Tenant Screening Algorithms Hide Data Errors	285
II. Agency Inaction—Why?	286
A. Enforcing the Discriminatory Effects Standard of the Fair Housing Act	286
B. Enforcement of the Fair Credit Reporting Act (FCRA)	289
III. Regulatory Fixes and Beyond.....	292
A. How To Regulate Discriminatory Effects of Tenant Screening Algorithms	293
B. How To Ensure Accurate Data	297
Conclusion	299

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INTRODUCTION

The United States Census Bureau estimates that over nine million American households are currently behind on their rent.¹ That is just one signal that when the United States overcomes the COVID-19 crisis, it will have to deal with the eviction crisis that has been simmering for over a decade and has now boiled over due to hardships caused by the pandemic. These stark numbers have spurred new attention to the state of evictions in the United States and led to short term stop-gap measures, such as a raft of time limited eviction moratoria by state governments across the country.² In addition, the Centers for Disease Control and Prevention issued a national moratorium on evictions in September 2020.³ Unfortunately, the Supreme Court vacated the moratorium without hearing on August 26, 2021, meaning that millions of Americans can now be entered into the records of eviction courts around the country.⁴ In the age of big data, this record could stick with them for a long time, making it significantly harder to find a new place to live years after they paid their back rent and otherwise achieved stability.

This Note investigates a new trend in the rental market that will make it more difficult for those with eviction records to achieve housing security: the use of third-party tenant screening algorithms as the primary mode of determining whether to lease to a potential. Part One of this Note will briefly describe the current state of the rental housing market, how landlords have used data for tenant screening in the past, and how algorithms are changing the way tenant screening is conducted. Part Two will detail how this shift to algorithmic tenant screening will hurt applicants for housing by metastasizing discriminatory practices around locking out those with eviction records and making it harder to spot errors in the data used to make housing decisions. Part Three will review the authorities of the Department of Housing and Urban Development (HUD), the Federal Trade Commission (FTC), and the Consumer Financial Protection Bureau (CFPB). It will explore whether these agencies have the power to curb the worst outcomes of the shift to algorithmic tenant screening, and why they have thus far been unwilling or unable to do

¹ *Week 25 Household Pulse Survey: February 17 – March 1*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2021/demo/hhp/hhp25.html> [<https://perma.cc/7ZEL-U275>].

² For a comprehensive rundown of these policies throughout the U.S., see *COVID-19 Housing Policy Scorecard*, Eviction Lab, <https://evictionlab.org/covid-policy-scorecard/> [<https://perma.cc/9X2C-DZAC>].

³ *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19> [<https://perma.cc/T96A-RUUK>].

⁴ *Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485 (2021).

so. Part Four will survey regulatory and legal fixes to this issue and explore the unintended consequences some of these fixes might create.

I. HOUSING IN THE UNITED STATES

A. Why Renting is a Landlord's Market

Before exploring the tenant screening process, it is important to understand why landlords have the market power to screen tenants in the first place. Rental housing units, particularly in urban areas, have been scarce for decades, driven by low supply.⁵ In addition to the supply shortage, the demand for rental units has been increasing in the years following the 2008 financial collapse—caused in part by a homeownership bubble that burst—forcing the percentage of households who rent their homes to a fifty-year high in 2016.⁶ Today, over 54 million households rent their homes,⁷ compared to a 2005 low of 34 million rental households.⁸

The trend towards more Americans renting their homes, combined with the lack of growth in rentable housing stock, has made the market quite competitive.⁹ This means that whenever a rentable unit comes on the market, a landlord is likely to receive multiple applications for a lease, putting them in the powerful position of deciding which applicant to grant the lease. A landlord with multiple applicants can afford to be choosy;¹⁰ as long as they do not discriminate on the basis of a class protected by the Fair Housing Act or other legislation, they can take any information into account that they feel is relevant.¹¹

⁵ See Rob Collinson, *Rental Housing Affordability Dynamics, 1990–2009*, 13 CITYSCAPE 71, 78 (2011); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 114–15 (2017).

⁶ Anthony Cilluffo, A.W. Geiger, & Richard Fry, *More U.S. households are renting than at any point in 50 years*, PEW RSCH. CTR.: FACT TANK (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/> [<https://perma.cc/7GH3-VSV4>].

⁷ U.S. CENSUS BUREAU, *supra* note 1.

⁸ *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2020*, U.S. CENSUS BUREAU (Feb. 2, 2021, 10:00 AM), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/7EKL-F255>].

⁹ See Anna Reosti, “*We Go Totally Subjective*”: *Discretion, Discrimination, and Tenant Screening in A Landlord's Market*, 45 L. & SOC. INQUIRY 618, 620 (2020).

¹⁰ See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICHIGAN L. J. 1835, 1874 (2006). For an example of how demand effects screening criteria in employment, see Ben Casselman, *In a Tight Labor Market, Hiring Rules Loosen Up*, N.Y. TIMES, Sep. 6, 2019, at B1.

¹¹ The Fair Housing Act prohibits landlords from refusing to rent or giving worse rental terms to anyone “because of race, color, religion, sex, family status, or national origin.” 42 U.S.C. § 3604(a)-(b). It also outlaws discrimination based on handicap status. 42 U.S.C. §

The leverage that landlords have to decide who gets rental housing effects the most vulnerable population of Americans because home renters, as a population, tend to have lower incomes than home buyers.¹² In fact, the income disparity between renters and buyers has only increased during the pandemic, as more affluent urban renters have started buying homes outside of cities to have more space.¹³ In addition, the devolution of affordable housing to private actors over the second half of the twentieth century and continuing into the twenty-first century has made private landlords the gatekeepers between many Americans and a roof over their heads that they can afford.¹⁴

Finally, about half of all rental units turn over to new tenants every year.¹⁵ This affords landlords tremendous authority to decide, from year to year, who has an affordable roof over their head and who does not. This is why the information landlords use to make housing decisions is so important and why large-scale changes, such as the move to tenant screening algorithms from traditional background checks, must be analyzed for potential adverse effects.

B. Tenant Screening Before Algorithms

Industry associations created to protect the interests of landlords have pushed them to adopt standardized, transparent, and data driven selection criteria for prospective tenants to minimize risk of both property damage and legal liability.¹⁶ This push has been buoyed by the rise in availability of data

3604(f). Also of note, approximately three percent of all units are exempt from these restrictions. See 42 U.S.C § 3603(b)(2); James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 605, 606 (1999).

¹² Low-income households make up over 40 percent of rental households compared to just under 20 percent of homeowner households. David Montgomery, *Who Owns a Home in America*, in *12 Charts*, Bloomberg: CityLab (Aug. 8, 2018, 10:22 AM), <https://www.bloomberg.com/news/articles/2018-08-08/who-rents-their-home-here-s-what-the-data-says> [<https://perma.cc/TEC7-E2E7>]; *America's Rental Housing 2017*, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., 10 (2017), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_americas_rental_housing_2017.pdf [<https://perma.cc/75DW-P2SR>].

¹³ See Heather Long, *2020 is the summer of booming home sales – and evictions*, THE WASH. POST (July 27, 2020, 2:05 PM), <https://www.washingtonpost.com/business/2020/07/27/housing-inequality-coronavirus/> [<https://perma.cc/D6CK-DTT4>].

¹⁴ Eva Rosen, *Rigging the Rules of the Game: How Landlords Geographically Sort Low-Income Renters*, 13 CITY & CMTY. 310, 311 (2014).

¹⁵ *U.S. Multifamily Research Brief*, CBRE (July 29, 2019), <https://www.cbre.us/research-and-reports/US-Multifamily-Research-Brief---Apartment-Turnover-Rate-Continues-to-Fall-July-2019> [<https://perma.cc/UD7Y-994F>].

¹⁶ See, e.g., Tristan R. Pettit, *Screening and Qualifying Prospective Tenants*, American Apartment Owners Association, <https://www.american-apartment-owners->

due to the Internet and government transparency edicts, giving landlords the possibility of collecting such metrics as salary, credit scores, criminal records, and eviction court appearances to use in their selection process.¹⁷ This type of information is seen as impartial and directly related to tenant performance, allowing landlords to lessen the possibility of legal liability for discrimination.¹⁸

At the beginning of this tenant screening revolution, landlords had to collect data themselves before making a final decision on applicants.¹⁹ This was time and cost intensive work for which landlords, many of whom only own a few rental units, lacked the expertise.²⁰ To fill the expertise gap, data brokers emerged, taking advantage of the increase in publicly available, digitized court records to create private databases of eviction and criminal court records tied to individuals across jurisdictions.²¹ Most landlords now look to these data brokers to help them navigate and streamline the process of tenant screening.²² These companies advertise themselves as “one-stop shops” for the tenant screening process and run criminal background checks, credit

association.org/tenant-screening-background-checks/wisconsin/screening-qualifying-prospective-tenants-2/ [https://perma.cc/F3PC-3TRD]; *Screening: Establishing Criteria*, CAL. APARTMENT ASS'N (Apr. 2019), https://caanet.org/kb/establishing-screening-criteria/ [https://perma.cc/533Z-78DA]; Kanayo Okwuraiwe, *In-depth Tenant Screening: One of the Best Risk Protection for Landlords*, LANDLORD TIPS (Dec. 2, 2020), https://landlordtips.com/detailed-tenant-screening [https://perma.cc/W258-7BN7].

¹⁷ See David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 7 (2008); Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1347 (2006).

¹⁸ Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 19 (2015).

¹⁹ Eric Dunn & Merf Ehman, *Rental Housing's Elephant in the Room: The Probable Disparate Impact of Unlawful Detainer Records*, 65 WASH. STATE BAR NEWS 35, 35 (2011).

²⁰ Kleysteuber, *supra* note 17, at 1347. Nearly half of all rental units are located on properties that contain fewer than five units, 78 percent of which are managed by individual landlords. In addition, 72 percent of rental properties are owned by individuals. U.S. DEP'T OF HOUS. & URB. DEV. PUB. AFFS., *HUD and Census Bureau Release Findings of Rental Housing Finance Survey*, No. 20-071 (June 3, 2020),

https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_071 [https://perma.cc/56KY-FJUY]; see also Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)*, 40 J. MARSHALL L. REV. 455, 474 (2006).

²¹ Desmond & Bell, *supra* note 18, at 19.

²² Lauren Kirchner & Matthew Goldstein, *The Landlord's Algorithm Says Scram*, N.Y. TIMES, May 31, 2020, at BU1; see also Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 323 (2010).

checks, and rental histories for potential tenants, then send the results to the landlord who can peruse the information before making a final decision.²³

When deciding to whom to rent a housing unit, landlords are mostly concerned with an applicant's ability to pay and how easy that person will be to deal with as a tenant.²⁴ Although both a criminal history and poor creditworthiness can be disqualifying factors in a tenant screen, of particular interest to landlords are eviction court records.²⁵ Interactions with eviction court, regardless of the reason for or the outcome of the case, signal to the landlord that the person in question may be a troublesome tenant, potentially costing the landlord time and money by asserting positive rights.²⁶ Landlords would generally prefer a tenant who has never interacted with eviction court and may reject prospective tenants that have a record regardless of the outcome of the case or how old the record is.²⁷

C. Tenant Screening in the Age of Algorithms

Although these data brokers have allowed landlords to outsource the collection of information, landlords still need to sort through data and create their own criteria for final lease decisions. Sorting through data and decision making not only takes time, but also creates an opportunity for landlords to use their discretion, which opens them up to the possibility of litigation.²⁸ As a further service to make the tenant screening process easier for landlords, data brokers have begun to market new scoring algorithms to their landlord clients as a replacement for the traditional background checks.²⁹ These algorithms amalgamate the background check data and present a single score indicating how safe it would be to rent to that person.³⁰ As an example, CoreLogic, one of the biggest data brokers in the tenant screening industry, now offers its customers a "SafeRent Score" which is marketed as a "statistically validated scoring model" which "evaluates potential renters using sophisticated data and

²³ See, e.g., *Resident Screening*, CORELOGIC, <https://www.corelogic.com/products/resident-screening.aspx> [<https://perma.cc/FU2J-47UB>].

²⁴ Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. UNIV. L. REV. 1667, 1677-80 (2008).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Kleysteuber, *supra* note 17, at 1347.

²⁸ Reosti, *supra* note 9, at 624.

²⁹ See *id.* at 622.

³⁰ These algorithms spit out a score mimicking a credit score. *Rental Property Solutions Scoring & Analytics*, CORELOGIC, <https://www.corelogic.com/solutions/scoring-and-analytics.aspx> [<https://perma.cc/S4CD-GH96>].

analytics” and presents an “indicator of lease performance for future residents.”³¹

While the exact inputs of these scoring algorithms are proprietary and protected by trade secret law, CoreLogic marketing materials make clear that eviction court records will land an applicant in the “Unlikely Candidate” score zone.³² The industry generally does not distinguish between eviction proceedings that end in judgements for the landlord and those that are dropped or won by the tenant because, as previously noted, some landlords view all interactions with eviction court as suspect, not only those that end in eviction.³³ Furthermore, many data brokers scrape eviction court data from municipal court indexes that do not include the outcome of the case, merely the names of any party involved, so algorithms must score applicants based solely on eviction court appearances rather than more nuanced data that is not available.³⁴ Thus, any contact with an eviction court is seen as a negative indicator of future lease performance, ultimately downgrading a potential tenant’s application and dooming their chances of success.³⁵

II. PROBLEMS WITH USING EVICTION RECORDS IN TENANT SCORING ALGORITHMS

Use of third-party tenant-scoring algorithms that include eviction records pose two unique problems for people seeking housing when compared to previous tenant screening processes. First, they entrench systems that lead to discrimination, making it harder for Black women in particular to receive a fair shot at housing. Second, they make it harder for applicants to catch errors in background check data, causing them to lose housing opportunities through no fault of their own. This Part will discuss each problem in turn.

A. How Tenant Screening Algorithms Entrench Discrimination

Tenant screening algorithms entrench systems that lead to discriminatory effects by embedding the disparate impacts of the eviction court system of the United States into the scoring process. As famously documented by the work of Matthew Desmond, non-white communities—and especially Black women—disproportionately interact with the eviction court

³¹ CORELOGIC, *supra* note 23.

³² CORELOGIC, *supra* note 30.

³³ See Dunn & Ehman, *supra* note 19, at 35.

³⁴ See Lauren Kirchner, *Data Brokers May Report COVID-19-Related Evictions for Years*, THE MARKUP (Aug. 4, 2020), <https://themarkup.org/locked-out/2020/08/04/covid-evictions-renter-background-reports> [<https://perma.cc/7QHN-V6QY>].

³⁵ Dunn & Ehman, *supra* note 19, at 35.

system, even when accounting for lower home ownership rates.³⁶ In Desmond's case study, over half of all names on eviction court records were Black women, despite this population making up just twenty percent of the residents of the city studied.³⁷ While this type of study has not been done on a national level, there is no reason to believe this data could not be recreated in cities all over the United States.³⁸ More recent data suggests that non-white communities have continued to face disproportionately high eviction proceedings during the pandemic.³⁹

This disparity is not just seen when looking at evictions for inability to pay rent. A common practice for tenants when dealing with landlords who are unwilling to fix code violations is refusal to pay rent until the violations are fixed.⁴⁰ This action usually leads to eviction court proceedings where the code violation can be brought up as a defense. Data suggests that Black people are more likely to live in rental housing with code violations, and therefore may be more likely to interact with eviction courts in this way.⁴¹ These findings indicate that screening tenants based on their history with eviction courts will make it harder for non-white people in general, and Black women in particular, to get housing in the private market.

³⁶ The Desmond study—the most comprehensive study of evictions to date—looked at the city of Milwaukee and found that evictions are five times more likely in racially segregated Black neighborhoods compared to racially segregated white neighborhoods. In addition, in racially segregated Black neighborhoods, women are two and a half times more likely than men to be brought to eviction court. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 91, 98-99 (2012).

³⁷ *Id.* at 104; *Demographics & Data*, CITY OF MILWAUKEE, 15, <https://city.milwaukee.gov/ImageLibrary/Groups/cityDCD/planning/plans/Citywide/plan/Data.pdf> [<https://perma.cc/D5QD-7KXH>].

³⁸ *See, e.g.*, Peter Hepburn & Yuliya Panfil, *A Black Hole at the Heart of the Eviction Crisis*, N.Y. TIMES, Jan. 29, 2021, at A23.

³⁹ *See* Stefanos Chen, *New York Renters in Covid Hot Spots Are Four Times More Likely to Face Eviction*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/realestate/new-york-city-renters-evictions.html> [<https://perma.cc/X5JN-5AM4>]; Emily Lemmerman et al., *Preliminary Analysis: Who is Being Filed Against During the Pandemic?*, EVICTION LAB (Dec. 21, 2020), <https://evictionlab.org/pandemic-filing-demographics/> [<https://perma.cc/8GK2-6NP2>]; Sophia Wedeen, *Black and Hispanic Renters Face Greatest Threat of Eviction in Pandemic*, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV. (Jan. 11, 2021), <https://www.jchs.harvard.edu/blog/black-and-hispanic-renters-face-greatest-threat-eviction-pandemic> [<https://perma.cc/U7YP-ZQHJ>].

⁴⁰ This is a common option given by legal services organizations to tenants in this situation. *See, e.g.*, Marcia Stewart, *Tenant Options If Your Landlord Won't Make Major Repairs*, NOLO, <https://www.nolo.com/legal-encyclopedia/free-books/renters-rights-book/chapter7-5.html> [<https://perma.cc/87EN-FJ7T>].

⁴¹ *See* Eliza Berkon, *When Tenants Take on Landlords Over Bad Conditions: A Rent-Strike Explainer*, WAMU (Feb. 27, 2020), <https://wamu.org/story/20/02/27/when-tenants-take-on-landlords-over-bad-conditions-a-rent-strike-explainer/> [<https://perma.cc/4K6M-T7HU>].

Scoring algorithms do not cause this discrimination, but they do exacerbate it by standardizing the practice of treating all contact with eviction courts as undesirable to landlords. In effect, these algorithms are hiding the details of the eviction court interaction, obscuring from landlords any mitigating circumstances that might affect a decision on an applicant. Even when the goal is to be as objective as possible, when landlords have the power to weigh the information provided by data brokers themselves, they tend to make personal decisions about what their objective criteria are, and some of these criteria are based on case-specific information.⁴² For example, a landlord could overlook an eviction court record that involves another landlord they know to be corrupt or discount an eviction record based on the amount of time that has passed or the context surrounding the case. Furthermore, a landlord who does not own a unit with a code violation may ignore the eviction court record of a potential tenant whose only eviction court record is due to a dispute involving a code violation in their previous home. Tenant scoring algorithms ignore this unquantifiable context in favor of what it can know for all tenants, whether they have interacted with eviction courts.⁴³

By not taking contextual factors into account, the scoring algorithm reinforces the discriminatory effects seen in the eviction court records.⁴⁴ To appeal to the widest array of consumers and ensure landlords are satisfied with any tenant receiving a “Best Candidate” rating, these algorithms most likely will use strict standards for scoring tenants. These standards will likely exclude those with any eviction court history.⁴⁵ In essence, the data the algorithm sees as predictive of being an “Unlikely Candidate”—which would include those with eviction court records—is so racially skewed that it is acting as a proxy for protected classes.⁴⁶ The algorithms then present a single score to the landlord without any of the information that might be able to save the application in the eyes of the landlord. Since landlords will have multiple candidates for the unit, they are not likely to take the time to seek out mitigating circumstances and will instead simply accept the applicant with the highest score. In this way, the algorithms create an insurmountable barrier to

⁴² See Lynn Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 FED. PROB. 20, 23-24 (2007).

⁴³ Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671, 678-80 (2016).

⁴⁴ *Id.*, at 691-92.

⁴⁵ See, e.g., Lauren Kirchner, *When Zombie Data Costs You a Home*, The Markup (Oct. 6, 2020), <https://themarkup.org/locked-out/2020/10/06/zombie-criminal-records-housing-background-checks> [<https://perma.cc/954U-23NN>].

⁴⁶ See, e.g., CoreLogic, *supra* note 30.

entry for anyone who has interacted with the eviction court system and this barrier bakes in the disparate impact eviction courts have on Black women.⁴⁷

B. How Tenant Screening Algorithms Hide Data Errors

While tenant screening companies advertise having accurate records, detailed reporting has exposed how private databases are riddled with errors, as companies do not properly remove incorrect or incomplete data after extracting it from local records before adding it to their databases.⁴⁸ Furthermore, to avoid complaints from landlord customers for missing information, tenant screening companies err on the side of creating overinclusive files that create a misrepresentation of the applicant. Some of these errors include the reporting of dropped cases as if they were convictions, convictions which were expunged as if they were active records, and crimes committed by other people as if they were committed by the applicant – sometimes in states the prospective tenant has never set foot in.⁴⁹ These companies are not legally required to make the records they keep public, leaving prospective tenants and scholars blind to the extent of the problem, but reporting indicates that this type of misrepresentation affects hundreds of thousands of people each year, while companies are unwilling to change their practices to avoid such issues.⁵⁰

Due to this misrepresentation, landlords reject applicants based on erroneous eviction court data the applicant does not know about and will have trouble correcting. In the past, one way to correct this data was to ask the landlord who made the rejection for a copy of the tenant screening information. If applicants received this information, they could review the data themselves to locate inaccuracies. Then, tenants could petition the screening company that provided the report to have the information corrected. This was an arduous process for the prospective tenant, and the pace of the rental market meant that the unit could be rented before the issue was cleared up. In addition, just because the issue was cleared up with one company did not mean their files with other companies did not have similar mistakes, waiting to disqualify them from future units.

The use of tenant screening algorithms removes even this option, placing the screening information into a black box. Outside of the company that owns the algorithm, no one can see the information or challenge its accuracy. An applicant faced with a low score has no way of understanding

⁴⁷ See Mark MacCarthy, *Standards of Fairness for Disparate Impact Assessment of Big Data Algorithms*, 48 CUMB. L. REV. 67, 75-76 (2017).

⁴⁸ See, Kirchner, *supra* note 45.

⁴⁹ See, e.g., Kirchner & Goldstein, *supra* note 22.

⁵⁰ See, e.g., *id.*

why they received it, whether it is fair, or how to improve it. They cannot glean when information fed into the algorithm is false or petition to correct those mistakes. This place prospective tenants in a position where they are perpetually undesirable to landlords through no fault of their own and with no way to ameliorate their circumstances.

II. AGENCY INACTION—WHY?

The problems outlined in Part Two of this Note are issues Congress has ostensibly addressed and given power to the Executive Branch to mitigate. Specifically, the HUD is entrusted with regulating the market for private housing and making sure landlords do not use methods for choosing tenants that lead to discrimination. Similarly, both the FTC and the CFPB are entrusted with making sure companies that collect information such as eviction court records do so accurately and provide consumers access to information so they can challenge incorrect information. This Part examines the statutes that give these agencies regulatory power and explains why those agencies may be unwilling or unable to regulate tenant screening algorithms in a way that would prevent the issues discussed in Part Two.

A. Enforcing the Discriminatory Effects Standard of the Fair Housing Act

As shown in Part Two, the use of tenant screening algorithms leads to discriminatory effects, making it harder for people of color – and particularly Black women – to secure housing because of those populations' disproportionate interaction with eviction courts. Congress has given HUD the power to stop landlords from using methods for evaluating potential tenants that lead to discriminatory effects like the ones these algorithms cause. Unfortunately, the antidiscrimination mechanisms passed by Congress were written long before contemplation of the use of algorithms in the housing sphere. These provisions are not well suited to fighting discrimination stemming from algorithms. Both HUD regulations and recent Supreme Court rulings have made it even harder for HUD to take action to curb the use of algorithms, even when they are shown to lead to discriminatory outcomes. In addition, HUD regulations have not helped private actors use their self-help rights as much as they could, all but foreclosing this option in the age of algorithms.

Congress passed the Fair Housing Act (FHA) to prevent discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national

origin.”⁵¹ The language of the FHA is written to prohibit purveyors of housing from engaging in intentional discrimination as well as practices that lead to discriminatory effects.⁵² HUD has responsibility for administering the provisions of the FHA.⁵³ In theory, the FHA entitles HUD to order landlords to stop using any tenant screening algorithms that create discriminatory effects for a protected class.⁵⁴ In addition, the FHA provides for a private right of action, which would allow prospective tenants to bring suits under the FHA to force landlords to stop using tenant screening algorithms that are found to be discriminatory.⁵⁵

While the FHA was passed in 1968, HUD did not create a formal rule for regulating activities that cause unintentional discriminatory effects until 2013.⁵⁶ The 2013 rule sets up a three-part burden shifting test for determining if a landlord action has an illegally discriminatory effect under the FHA.⁵⁷ Under the test, the tenant must prove the practice in question predictably results in discrimination based on a protected class.⁵⁸ The landlord can defend the practice by proving that the practice is necessary to achieve a legitimate interest.⁵⁹ Finally, the tenant has the ability to show the interest can be achieved by less discriminatory means.⁶⁰ In the 2015 case *Texas Department of Housing and Community Affairs v. Inclusive Communities*, the Supreme Court signaled that it would interpret the necessity of a landlord’s use of a practice to pursue a legitimate interest broadly.⁶¹ Specifically, the Supreme Court stated the FHA was only concerned with “removing artificial, arbitrary, and unnecessary barriers” to housing.⁶²

In 2020, HUD issued a rule updating the 2013 rule which severely restricts the ability to mitigate the use of algorithms for tenant screening based on their discriminatory effects.⁶³ The 2020 rule – promulgated ostensibly to bring agency policy closer into step with the *Inclusive Communities* ruling –

⁵¹ 42 U.S.C. § 3604(b).

⁵² 42 U.S.C. §§ 3604(a), 3605(a). This language was interpreted by the Supreme Court as including a prohibition on actions leading to discriminatory effects in *Tex. Dep’t. of Hous. & Cmty. Affs. v. Inclusive Cmty.*, 576 U.S. 519, 533-34 (2015).

⁵³ 42 U.S.C. § 3608.

⁵⁴ 42 U.S.C. §§ 3608(c), 3610.

⁵⁵ 42 U.S.C. § 3613.

⁵⁶ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Tex. Dep’t. of Hous. & Cmty. Affs. v. Inclusive Cmty.*, 576 U.S. 519, 541 (2015).

⁶² *Id.*, at 543.

⁶³ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60288 (2020).

makes clear that landlords using tenant screening algorithms developed by third parties are safe from discriminatory effects suits regardless of the discriminatory effects of the algorithm if the algorithm is tested to be accurate.⁶⁴ Since all tenant screening algorithms are presumably accurate when tested on the training data used to create them,⁶⁵ this would exempt these algorithms from the FHA's discriminatory effects standard and shield any landlord that uses them from liability under the FHA. The future of this rule is uncertain; while it was entered into the Federal Register as a duly promulgated final rule, implementation of the rule has been paused by a nation-wide preliminary injunction.⁶⁶ In June of 2021, HUD issued a notice of proposed rulemaking which would rescind the 2020 rule and reinstate the 2013 rule, but it has not yet issued a final rule on the matter.⁶⁷

Regardless of the fate of the 2020 rule, tenant screening algorithms will pose enforcement problems under the 2013 rule and *Inclusive Communities*. As noted above, *Inclusive Communities* effectively eliminates the second part of the burden shifting analysis from the 2013 rule in all but the most egregious cases. The Supreme Court decided it should be a low bar for a landlord to prove the practice under scrutiny is necessary to achieve a legitimate interest. Thus, in part three, HUD would have to prove that the interest of predicting future lease performance can be done using a less discriminatory practice. This is a tall order without access to the mechanisms of the algorithm, which are protected by trade secret law. Even if HUD regulators were able to convince a judge to force a tenant screening company to give them the code base of the algorithm, the agency does not have the statistical expertise needed to determine the efficacy of the algorithm or the coding expertise or the resources needed to provide a less discriminatory method to compete with the algorithm.⁶⁸ These limitations may be a reason HUD regulators have not used their limited enforcement resources on this type of case.

⁶⁴ *Id.*

⁶⁵ Amal Joby, *What Is Training Data? How It's Used in Machine Learning*, Learn Hub (July 30, 2021), <https://learn.g2.com/training-data> [<https://perma.cc/3Q38-KFTS>].

⁶⁶ The rule briefly went into effect in October 2020, but a preliminary injunction was given one day later by District Court Judge Mastroianni. *Mass. Fair Hous. Ctr. v. HUD*, No. 20-11765-MGM, 2020 WL 6390143 (D. Mass. Oct. 25, 2020).

⁶⁷ *Reinstatement of HUD's Discriminatory Effects Standard*, 86 Fed. Reg. 33590, 33590 (2021).

⁶⁸ In addition, even if HUD regulators were able to bring in experts, it is very hard to prove the efficacy of the algorithms at issue because it is hard to prove a negative (i.e., prove that a person who receives a poor score would have performed just as well on a lease they were not offered compared to someone who scored higher and was also not offered the lease). See Barocas & Selbst, *supra* note 43, at 711-12.

Outside of HUD enforcement, tenants and housing rights activists have had a hard time using the FHA to effectively root out discrimination in housing even when landlords do not use third-party tenant scoring algorithms.⁶⁹ The Inclusive Communities ruling combined with trade secret law and a lack of technical expertise mean that third-party tenant scoring algorithms make it harder to effectively use the FHA to fight discrimination using private action as well.⁷⁰

HUD has tried in the past to help tenants by issuing guidance as to what types of information, if used by landlords, would constitute a practice with discriminatory effects that does not serve a legitimate purpose narrowly enough. For example, in 2016, HUD issued guidance that the use of criminal history in housing decisions must be narrow and targeted to avoid running afoul of FHA's discriminatory effects standards.⁷¹

Tenant screening algorithms render this guidance unhelpful because the guidance is targeted at landlords who are setting their own criteria based on tenant screening reports. The exact process and underlying data inputs of tenant screening algorithms are protected by trade secret law. Without access to the algorithm itself, it is impossible to prove that, for example, a particular algorithm is universally downgrading all tenants who have ever been arrested.⁷² Finding this information from these sophisticated companies is nearly impossible for private actors without government intervention, which has not been provided.

B. Enforcement of the Fair Credit Reporting Act (FCRA)

While tenant screening initially seems like the sole purview of HUD, the data contained in the screening algorithms is also the purview of financial regulators. Thus, both the FTC and the CFPB should play a role to play in preventing the widespread data errors hidden within tenant screening algorithms. Yet, like HUD, these regulators operate under a regime created long before the use of algorithms in the housing sphere was contemplated. The vagaries of how these laws apply to the algorithms created by tenant screening companies, along with the internal operations decisions of these regulators,

⁶⁹ Reosti, *supra* note 9, at 619.

⁷⁰ See Barocas & Selbst, *supra* note 43, at 711-12.

⁷¹ U.S. DEP'T OF HOUS. AND URBAN DEV., *The Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, at 336, (April 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [<https://perma.cc/M9WX-D9S3>].

⁷² Barocas & Selbst, *supra* note 43, at 710.

allow tenant screening companies to forego their legal obligations to ensure data accuracy without falling on the wrong side of an enforcement action.

Congress passed the FCRA to enable the executive branch to regulate the fairness and accuracy of the credit reporting industry.⁷³ This law was written primarily with employment and financial services in mind, and thus housing is not explicitly mentioned in the Act. At the time of passage, it was unclear whether tenant screening companies were included within the purview of the Act.⁷⁴ If outside the act's purview, it would have freed these companies from some regulation but also limited the information they could collect as part of the tenant screening process.⁷⁵ In the ensuing years, it has become clear that housing decisions are a permissible purpose. The FTC now clearly states in its guidance that landlords have "a legitimate business need for the information in connection with a business transaction that is initiated by the consumer."⁷⁶ This allows tenant screening companies to use eviction records in their tenant screening algorithms but also means these companies have certain obligations under FCRA.

Since tenant screening companies are considered credit reporting agencies under FCRA, they must allow individuals to review information collected without charge and reasonably investigate alleged inaccuracies in their data upon request, correcting any errors found through the investigation.⁷⁷ In addition, they have an obligation to use reasonable procedures to ensure the accuracy of the information they collect.⁷⁸ This means not just that the information be factually accurate, but also that it not be misleading or incomplete.⁷⁹

It is no secret that tenant screening companies are not meeting their obligations under FCRA. As detailed above, stories abound of easily catchable data errors and poor notice procedures.⁸⁰ Unfortunately, it has proven hard to enforce FCRA obligations on the tenant screening industry.⁸¹ This is for a diffuse set of reasons, outlined below.

⁷³ 15 U.S.C. § 1681.

⁷⁴ Anthony Rodriguez, *Tenant-Screening Agencies under the Fair Credit Reporting Act*, 39 CLEARINGHOUSE REV. 335, 336 (2005).

⁷⁵ 15 U.S.C. §§ 1681a-b.

⁷⁶ 16 C.F.R. Appendix to Part 600 – Commentary on the Fair Credit Reporting Act, 557.

⁷⁷ 15 U.S.C. §§ 1681g(a)(1), 1681i(a)(1)(A).

⁷⁸ 15 U.S.C. § 1681e(b).

⁷⁹ Persis Yu & Jillian McLaughlin, *Big Data: A Big Disappointment for Scoring Consumer Credit Risk*, NAT'L CONSUMER L. CTR., 23 (March 2014), <https://www.nclc.org/images/pdf/pr-reports/report-big-data.pdf> [<https://perma.cc/N8JB-9SMK>]. While other obligations exist, these are the obligations relevant to this piece.

⁸⁰ See, e.g., Kirchner and Goldstein, *supra* note 22; Kirchner, *supra* note 48.

⁸¹ The FTC has only issued two enforcement actions on tenant screening companies over the last four years for data mismanagement. The first was a \$3 million fine to RealPage in 2018

FCRA relies on enforcement through both government regulators and through private action.⁸² The law is set up so that any person can request the data associated with their file, point out an error, and get it fixed. The emphasis on private action to solve the problem of data errors within FCRA is an outgrowth of its time. FCRA was written when three companies – Equifax, Experian, and TransUnion – dominated the credit reporting market.⁸³ When there were only three companies in the market, an individual would at most have to make three appeals to remove a data error from their files. CFPB now estimates that the screening industry includes about 2,000 companies.⁸⁴ This makes the self-help mechanisms of FCRA hard to access in a useful way, as an individual must dispute errors at each company separately.

The ineffectual private action for error spotting within the diffuse market of tenant screening puts greater pressure on CFPB and FTC regulators to do the job of making sure these companies are fulfilling their data integrity obligations. These regulators oversee policing a vast array of credit reporting agencies and must create priorities for investigations given their limited budgets. These agencies have decided to prioritize enforcement action against companies that pose the biggest threat to consumers due to their market share or the number of consumer complaints received.⁸⁵ The decision to prioritize based on market share has deprioritized action against tenant screening companies that exist in a more diffuse market.⁸⁶ In addition, the CFPB prefers to use its supervisory authority rather than its enforcement authority to correct poor compliance with FCRA.⁸⁷ Since CFPB only has supervisory authority

for using “wild-card” searches to collect data. *FTC v. RealPage*, No. 3:18-cv-02737-N (N.D. Tex. Oct. 16, 2018). The second was a \$4.25 million fine to AppFolio in 2020 for “careless practices” in handling data. *U.S. v. AppFolio*, No. 1:20-cv-03563 (D. D.C. Dec. 8, 2020). Both companies make over \$45 million annually from their tenant screening business.

⁸² 15 U.S.C. §§ 1681n-o, s.

⁸³ Pauline T. Kim & Erik A. Hanson, *People Analytics and the Regulation of Information under the Fair Credit Reporting Act*, 61 ST. LOUIS U. L. J. 17, 26 (2016).

⁸⁴ *Market Snapshot: Background Screening Reports*, CONSUMER FIN. PROTECTION BUREAU 4 (Oct. 2019), https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf [<https://perma.cc/SHP2-G8GC>].

⁸⁵ 77 Fed. Reg. 42872, 42889.

⁸⁶ Perversely, the decision to prioritize based on complaints received may also deprioritize investigations into tenant screening companies. Since companies fail to comply with FCRA notice procedures, housing applicants are not made aware of their rights under FCRA and do not receive information about the data underlying the tenant screening algorithms or the ways to dispute data errors. This may lead to fewer complaints to the CFPB which would deprioritize investigations.

⁸⁷ U.S. Gov’t Accountability Off., GAO-19-459, *Consumer Reporting Agencies: CFPB Should Define Its Supervisory Expectations*, 33 (July 2019).

over companies that collect financial information, this might be another reason the tenant screening companies are falling through the cracks.⁸⁸

Finally, the lack of CFPB guidance may be causing legitimate confusion among tenant screening companies. FCRA does not define what constitutes a reasonable procedure to assure maximum accuracy or what constitutes a reasonable investigation of a consumer dispute.⁸⁹ CFPB has signaled practices that do not comply with these obligations through its supervisory actions.⁹⁰ Again, CFPB only has supervisory authority over the collection of financial information, so even good faith tenant screening companies may be genuinely confused about what guidance applies to maintaining eviction court data. What is more, some companies continue to attempt to claim they are not subject to FCRA because the algorithms they produce are not subject to the special regulations put on credit scores.⁹¹

III. REGULATORY FIXES AND BEYOND

As discussed above, tenant screening algorithms based on eviction records are error-prone and lead to discrimination. Current regulations do not sufficiently curb these ills and thus there is a clear need for action by Congress to control this new technology while it is still in its infancy. Still, it is unclear what the most effective approach is. There are several possible ways to think about regulation of this technology. To mitigate discrimination, one option is to bar the use of eviction court data in housing decisions. This could be done by sealing eviction court proceedings or by keeping them public but restricting their use. A less disruptive option could be to regulate the algorithms and their use similarly to the way credit scores are currently regulated. To mitigate data errors if eviction court records are still being used, a national database of these cases could be used. Each of these options individually has potential drawbacks, but by using them in combination, we can create an ecosystem

⁸⁸ 12 C.F.R. § 1090.104(b). This supervisory authority was created as part of the Dodd-Frank Act, which concerned itself primarily with banking institutions. Another outgrowth of the Act relevant to this discussion is its regulations on credit scores within FCRA. Specific obligations exist for companies that create credit scoring algorithms that tenant screening companies do not have to follow for their algorithms. This is because the language of these provisions—added to FCRA as part of the Dodd-Frank Act—define algorithmic scoring for purposes of the Act narrowly in terms of use in debt related activities. 15 U.S.C. § 1681g(f)(2)(A).

⁸⁹ U.S. Gov't Accountability Off., *supra* note 87, at 34.

⁹⁰ Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, and National Credit Union Administration, *Interagency Statement Clarifying the Role of Supervisory Guidance* (Sept. 11, 2018).

⁹¹ See Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 YALE J. L. & TECH. 148, 184 (2016).

where needed information is shared with the landlord while mitigating potential discrimination and centering the individual applicant within the application process.

A. How To Regulate Discriminatory Effects of Tenant Screening Algorithms

As explained above, tenant screening companies use eviction court data in their algorithms in a way that leads to discriminatory effects. In addition, current fair housing legislation and regulation are not effective in combatting those effects. There are two methods that can be used to prevent this discrimination from occurring or at least mitigating it. One option is banning the use of the information outright. This would prevent the data from being used at all and thus should stop the discrimination. This action, however, may have unintended consequences. The other option is moving to a new regulatory model that stems discriminatory effects by auditing the screening algorithms more directly.

The argument for banning the use of eviction court data in landlord decision making starts with the concept that the eviction court system in the United States is so incurably racist that the only way to reduce the disparate impacts of interaction with eviction courts is to remove all indirect impacts of that interaction. With that in mind, some advocate for the sealing of eviction court proceedings to keep this information from data brokers to begin with. Others would like to keep eviction court records open but ban their use for housing decisions.

The movement to seal eviction court records has gained popularity during the pandemic, with some municipalities passing laws requiring eviction court records to be sealed and some such proposals moving through state legislatures.⁹² These proposals have gained traction in part by appealing to the idea that those adversely affected by the pandemic will have trouble finding housing for years as this data circulates through the tenant screening system.⁹³

Proponents of this action do not see why people should be punished for past inability to pay rent when they attempt to rent a new home. Removing eviction court records from the public sphere would force the creators of tenant screening algorithms to look elsewhere for information to predict future lease performance. After all, it is the ubiquitous availability of these court records that has allowed tenant screening companies to build algorithms from this information in the first place. Furthermore, as previously noted, eviction court is sometimes the only avenue for a tenant to deal with unresponsive landlords

⁹² As an example, the District of Columbia recently created emergency legislation sealing all eviction proceedings. DC Code § 42-3505.09.

⁹³ Kirchner, *supra* note 34.

when living conditions become uninhabitable. Sealing eviction court records would make it safer for tenants to fight uninhabitable conditions without reputational blowback caused by algorithms that capture these court appearances.⁹⁴

The drawback of sealing eviction court records is that it eliminates the access of this information to the public at large. Nonprofit and academic researchers rely on eviction court data for research that informs policy makers and the public alike. Remember that the only reason we know Black women are disproportionately hurt by eviction court proceedings is because of academic analysis of those records.⁹⁵ If court records are sealed, academics will have a harder time researching the depths of the eviction crisis and nonprofit watchdogs will be unable to study the effects of government housing policy on eviction rates.

Sealing these records will also be a problem for housing advocacy nonprofits. Tenants seek relief from bad actor landlords in eviction court, allowing these organizations use eviction court records to target interventions, organize tenants, and call out bad actor landlords. Some organizations have started creating public eviction maps to help tenants avoid landlords that commonly bring eviction suits.⁹⁶ All of this good work will be much more difficult if not impossible if eviction court records are sealed. Sealing of eviction court records will allow bad landlords to continue their practices with less chance of being discovered. For these reasons, despite the privacy benefits, sealing all eviction court records is too broad an approach for this issue. Governments should instead look for more targeted approaches that will not interfere with the benefits of open records.

Due in part to the downside of completely sealing eviction court records, fair housing advocates have also pushed for an approach that would leave eviction court records public but would ban their use for housing decisions. This type of approach is modeled after “ban-the-box” or BTB laws which prevent companies from taking criminal records into account when making employment decisions.⁹⁷ Recently, there has been a push for BTB to be extended to the housing sphere, and some jurisdictions have passed laws that would put similar restrictions on landlords when making tenant selection

⁹⁴ Strahilevitz, *supra* note 24, at 1678.

⁹⁵ Desmond, *supra* note 36.

⁹⁶ For example, JustFix, a tenants’ rights group in New York City, offers a free and open tool “to research your building and landlord. It provides crucial information about code violations, evictions, rent stabilized apartments, and property ownership.” *Who Owns What*, JUSTFIX, [https://whoownswhat.justfix.nyc/en/?utm_source=orgsite&utm_medium=productcta? \[https://perma.cc/9J3V-6VZY\]](https://whoownswhat.justfix.nyc/en/?utm_source=orgsite&utm_medium=productcta? [https://perma.cc/9J3V-6VZY]).

⁹⁷ Monica Solinas-Saunders & Melissa J. Stacer, *An Analysis of “Ban the Box” Policies through the Prism of Merton’s Theory of Unintended Consequences of Purposive Social Action*, 41 CRITICAL SOCIO. 1187, 1188 (2015).

decisions.⁹⁸ The next logical step is to further expand this type of legislation to eviction court records.⁹⁹

The theory for BTB legislation is the same as for sealing these court records, but since the laws would only target their use in certain contexts, it would allow eviction court records to remain open for use by academics and nonprofits. Unfortunately, research from BTB legislation in the employment world suggests there are unintended consequences to this type of legislation. There is some evidence, for example, that when employers are denied access to criminal records, information they consider important to the hiring process, they will seek out proxy measures which disadvantage Black men regardless of criminal background.¹⁰⁰ Extrapolating this to the housing context, it is possible that tenant screeners motivated to use eviction court information in their screening processes will find proxy measures that lead tenant screening algorithms to become worse for Black women, not more equitable.¹⁰¹ In this way, BTB for eviction court records, while well-intentioned and laudable for avoiding the government transparency problems of record sealing, is still problematic.

Given the possible drawbacks of banning the use of eviction court records for tenant screening algorithms, regulators need purpose-built regulations to oversee algorithms. This targeted legislation can aim to mitigate the worst outcomes of the use of these algorithms while providing landlords with the information they feel they need to make appropriate decisions. This includes government auditing of algorithms and providing applicants with ample opportunities to both understand their scores and supplement their applications with information that would put them in a better light than the algorithmic score before a final decision is made.

As a starting point, we can look to the design of the laws and regulations that govern the financial sector. Where the housing world has tenant screening algorithms, the financial sector has credit scores. Credit

⁹⁸ See, e.g., Cook County, IL Code of Ordinances 42-38. Many of these ordinances limit the use of criminal records rather than eliminating them. For example, in Minneapolis a landlord can still exclude a prospective tenant if they were ever convicted of manufacture or distribution of a controlled substance. Minneapolis Code of Ordinances 12 § 244.2030.

⁹⁹ This type of legislation is not popular but has been passed in one state and at least one municipality. New York State does not allow landlords to take any eviction court records into account when making decisions. N.Y. Real Property Law § 227(f). St. Paul, Minnesota only allows landlords to consider eviction actions lost by the applicant that took place within three years of the application. City of Saint Paul Leg. Code XIX § 193.04(b)(3).

¹⁰⁰ See Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMPORARY CRIM. JUST. 276, 283, 288 (2004).

¹⁰¹ It is unclear what these proxy measures would be, though they may include factors like location of previous address or car repossession history.

scores face similar troubles with entrenching systems of racism.¹⁰² The information underlying this report is also seen as similarly relevant to the power brokers that use the scores to help make decisions. In the wake of the 2008 financial crash, the Dodd-Frank Act updated both the FCRA and the Equal Credit Opportunity Act (ECOA) to more directly regulate credit scores and the algorithms used to create them.¹⁰³ Implementing these regulations in the housing context would go a long way to creating a more equitable housing environment.

First, we need a set of auditing standards for tenant screening algorithms. The CFPB has put forward regulations under ECOA that create standards for algorithms used to create credit scores.¹⁰⁴ Among these requirements, credit scoring algorithms must be created using data from a representative sample of applicants, statistically validated as predictive before being put into use, and periodically re-validated for its predictive ability.¹⁰⁵ As mentioned above, the CFPB has supervisory authority over this type of private action and thus regulators can directly supervise the validation of these algorithms. This type of regulation in the tenant screening context would allow the regulators more direct access to the algorithms used by tenant screening companies and could insure they are performing as advertised. The new standards for these algorithms could also include limits to the variance of scores based on protected classes, forcing the creators of algorithms to make decisions that limit the disparate impact of these algorithms while maintaining accuracy.

Second, the transparency of applicant scores must be improved. Under FCRA, an individual is entitled to know not only their credit score but also a list of key factors adversely affecting their score.¹⁰⁶ This type of regulation in the housing context would demystify the algorithms for individuals, allowing them to both understand what information is detrimental to the score and to get out ahead of any poor scores. This empowerment is important, but it still places too much onus on housing seekers rather than regulators.

Third, the relationship between the landlord and applicant must be personalized. If a lender rejects a consumer's credit application, they must provide to the applicant the specific reasons the adverse action was taken.¹⁰⁷

¹⁰² See Jeremy B. Bernerth, *Demographic Variables and Credit Scores: An empirical study of a controversial selection tool*, 20 INT'L J. OF SELECTION AND ASSESSMENT 242, 244 (2012).

¹⁰³ Since they were written in 2008, these laws include a better understanding of how algorithms work compared to the laws currently governing tenant screening algorithms, which were written in the 1960s and 1970s.

¹⁰⁴ 12 C.F.R. § 1002.2(p)(1).

¹⁰⁵ 12 C.F.R. §§ 1002.2(p)(1)(i)-(iv).

¹⁰⁶ 15 U.S.C. § 1681.g(f)(1)(C).

¹⁰⁷ 15 U.S.C. § 1691(d).

Then the lender must consider any information the consumer presents as an indication that the information the lender is considering does not accurately reflect the consumer's credit worthiness.¹⁰⁸ In the housing context, this type of regulation would force landlords to have a conversation with applicants and allow them to show why a screening algorithm is not reliable by producing letters of recommendation, pay stubs from a new job, or other information that the algorithm might not take into account. This works in concert with the above policy recommendation, since it gives the applicant the ability to directly refute the score they received after understanding the key factors behind that score.

Finally, the evaluation process must be slowed to allow time for such regulatory fixes to work. In the credit world, a bank can always reverse a lending decision once new information has been gathered by the applicant. The housing market moves much quicker, and a rental unit is not a fungible commodity like a loan. Without protections, a unit will be rented before a prospective tenant can gather mitigating information and present it to the landlord. To prevent this, a landlord should be required to rent a unit to the first applicant that meets their rental criteria, and to hold the unit for a set number of days if, upon notification of adverse action, the prospective tenant claims the information used does not appropriately reflect their probable future performance as a renter. This will give the applicant time to gather mitigating information and present it to the landlord before the landlord moves onto other applicants.

B. How To Ensure Accurate Data

The above regulatory plan deals with the issues of discriminatory impact, but algorithmic scores based on incomplete or misleading data could still haunt housing seekers. Currently data on evictions is collected haphazardly, if at all, by municipal court systems.¹⁰⁹ The fact that no easily accessible public database exists for eviction information drives data brokers to create their own private databases, reaping massive profits by repackaging public but hard to access data, and in the process manipulating it in untold ways.¹¹⁰ As discussed above, these databases used for tenant screening are hard to check for accuracy. While efforts have been made by nonprofits to create a public database of evictions, it is hard to accomplish and maintain

¹⁰⁸ 12 C.F.R. § 202.6(b)(6)(ii).

¹⁰⁹ Adam Porton et al., *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 31 HOUS. POL'Y DEBATE 1, 2 (2021).

¹¹⁰ See Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L. J. 1361, 1415 (2016).

without large resources.¹¹¹ The federal government can fight against this private capture of public information by creating a database to house such information.¹¹² This would have two advantages: it would standardize information collected, and it would provide a recourse for correcting errors in the collected records.

The highest profile scheme of this kind has been the Eviction Crisis Act, put forward by a bipartisan group of four Senators.¹¹³ The Act details exactly what information would be collected in a proposed database including demographic information for both the landlord and tenant and procedural data on the case including reason for filing, affirmative defenses of tenants, and the outcomes of the case.¹¹⁴ If enacted, the list of data points to be collected will act as a structure for courts which will help to standardize eviction court records across the country and help ensure accuracy.

The Act does not provide for a mechanism for individuals to contest and correct their records in the proposed national database. This would be critical to ensure accuracy. As discussed above, one of the faults with the FCRA is that an individual must go to each tenant screening company individually to contest errors, something impossible to accomplish given the number of tenant screening companies in operation. For a national database to be an effective tool, a system must be in place whereby a person can view their entries in the database and petition for corrections of any errors. This would create a one stop shop for those seeking to correct errors in their files. With this type of correction system in place, a national database promises to mitigate errors and omissions of data that destroy the chances of some people to gain housing.

This type of database would also be great for researchers studying evictions and nonprofit watchdogs tracking government policy and landlord action, providing a uniform and routinely updated dataset to work from with fewer data errors and more complete information.

Another consideration with a national eviction database is privacy for the people whose data is housed within it. Evictions are very emotional and socially stigmatized events. Most people do not want one of the worst days of their life to be encoded into a national database for all to see. A statute authorizing the centralization of this data would need to be crafted carefully to monitor who has access to the individualized data. To make this database

¹¹¹ Eviction Lab hosts the most complete database, which only currently extends from 2000-2016 and is far from complete. *Map and Data*, EVICTION LAB, <https://evictionlab.org/map/#/2016?geography=states&type=er> [<https://perma.cc/T2SZ-RHJE>].

¹¹² See Hepburn and Panfil, *supra* note 38.

¹¹³ Eviction Crisis Act of 2019, S. 3030, 116th Cong. (2019). Pennsylvania has successfully implemented a version of this statewide for criminal records. Kirchner, *supra* note 46.

¹¹⁴ Eviction Crisis Act of 2019, *supra* note 113.

useful for landlords, tenant screening companies must have access to the full database. To correct errors on their own files, individuals must have access to their own files. All other access to the data should be in the form of properly anonymized datasets and should only be accessible to academic and nonprofit researchers.¹¹⁵ Still, if the data within the database remains open to the public through the various court systems, it is possible that the data itself would be seen as public information and would therefore be vulnerable to a Freedom of Information Act request.¹¹⁶

This type of law would not work in a vacuum, as it merely creates better data for tenant screening algorithms without mitigating their discriminatory use. In fact, if this was pursued without other regulations, it might make it even harder to bring FHA suits for discriminatory effects. Combined with the measures described above, however, it is a powerful tool that will make it harder for misleading data to sneak into tenant screening algorithms and cause people to lose access to housing.

CONCLUSION

Tenant screening algorithms pose a major threat to federal regulatory regimes that have been put in place to make private housing more equitable. These regimes have been inadequate to ensure access to housing for all people, but they have acted as an important backstop against blatant discrimination. With the rise of tenant screening algorithms, these regulatory regimes will no longer be able to provide that backstop. Through hiding misinformation, entrenching protocols that lead to racist outcomes, and circumventing federal protections, these tenant screening algorithms will make housing in America less equitable and hamstring any potential regulatory response under current law. Therefore, action is needed now, before the private housing industry fully adopts these algorithms. It is important that the action taken does not hamper the ability of the public to receive important information or impair a landlord's ability to protect their property from actual threats. At the same time, emphasis should be placed on providing a framework where prospective tenants are empowered in the application process and that everyone has a shot at housing.

¹¹⁵ This type of language can be found in the Census Act. 13 U.S.C. § 9(a).

¹¹⁶ See Kwoka, *supra* note 110, at 1429. Under the Freedom of Information Act, a person's personally identifiable information is protected but only if they have a bone fide privacy interest in the information. 5 U.S.C. §§ 552(b)(6), 552(b)(7)(c). If the information were still publicly available through a local court system, the person would not have a privacy interest in the information.