

## The Case Against Rental Application Fees

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### ABSTRACT

*Rental application fees have become exceedingly common throughout the United States rental market, with housing seekers routinely paying anywhere from \$30 to over \$50 per adult just to apply for admission. These fees are typically justified as compensation for a landlord's costs in conducting background screening on applicants—though certain consumer rights abuses are common, such as imposing fees above the landlord's actual costs or extracting fees from applicants who are never actually considered for the housing.*

*While a single application fee may be slight in the context of rental housing that will cost hundreds or thousands of dollars per month, application fees can raise enormous barriers for renters with criminal history, past evictions, landlord-tenant debts, or other significant admission barriers. Not only may such households face the prospect of paying application fees repeatedly before being accepted as tenants, but they are also incentivized to steer themselves toward lower quality housing they perceive as less selective and hence less likely to deny admission. With extensive research showing the most significant barriers to obtaining rental housing are disproportionately common among certain protected classes, especially Black female-headed households, the practice of charging rental application fees appears likely to drive residential segregation.*

*This article highlights and explains the most significant problems that arise from rental application fees and suggests three key responses for fair housing and consumer advocates. First, the article describes various legislative approaches that states have taken to limit or prohibit rental application fees. This includes a discussion of so-called “portable tenant screening reports,” which a housing seeker can purchase one time and then theoretically use repeatedly until housing is secured. Second, the article identifies plausible legal theories advocates may pursue under existing laws to curb abuses around rental application fees and mitigate the effects on communities. Finally, the article identifies needed*

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*research, particularly around the collective impacts rental application fees appear to cause in steering nonwhite renters to lower-quality housing in areas of diminished opportunity, which could greatly strengthen the case for legislative action and support more far-reaching litigation remedies.*

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In September 2021, journalist Brian Goldstone posted a Twitter thread<sup>1</sup> about his recent experience assisting an Atlanta woman search for rental housing. “Each landlord charged a fee to apply,” Goldstone reported, with one requiring both a \$60 application fee as well as a “\$150 admin fee,” both collected in advance and both nonrefundable. Later in the thread, Goldstone described having met other Atlanta area “low-income families who spent over \$1200 on application fees and still weren’t approved for a single apartment.”<sup>2</sup>

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1. Brian Goldstone (@brian\_goldstone), TWITTER (Sept. 10, 2021, 10:42 AM), [https://twitter.com/brian\\_goldstone/status/1436339218930937858?s=20](https://twitter.com/brian_goldstone/status/1436339218930937858?s=20).

2. Brian Goldstone (@brian\_goldstone), TWITTER (Sept. 10, 2021, 2:42 PM), [https://twitter.com/brian\\_goldstone/status/1436399792041701376?s=20](https://twitter.com/brian_goldstone/status/1436399792041701376?s=20).

Renters from all over the United States responded to Goldstone's thread with their own anecdotes of expensive rental application fees. "We paid the \$150 admin fee and \$75 app fee," tweeted a renter from Charlotte, "twice after getting rejected at the first place."<sup>3</sup> A woman from Dallas and her partner "paid \$300 to apply to [their] apartment, \$50 per person and then [a] \$200 admin fee."<sup>4</sup> Another user described paying \$2,600 to apply to five different apartments in Louisville.<sup>5</sup> Still, another explained how he had "spent well over \$500 in non-refundable application fees while looking for an apartment" for himself and his wife.<sup>6</sup>

Many of the hundreds of commenters questioned why rental application fees should cost so much when a landlord's actual cost for obtaining background information on rental applicants is much lower, typically between about \$15 and \$40.<sup>7</sup> Yet the better question is why housing seekers should have to pay rental application fees at all—especially those who are ultimately not offered the housing.

Nonrefundable rental application fees, which roughly two-thirds of renter households pay when searching for new housing<sup>8</sup> and are nearly ubiquitous in markets where rental vacancies are scarce,<sup>9</sup> have been around long enough that few renters question them nowadays. Application fees have largely evaded scrutiny because the amount associated with a single application—about \$30-\$75 per applicant—tends to appear insignificant in the context of leasing a home for hundreds or thousands of dollars in rent per month.<sup>10</sup> But those who are denied admission forfeit the application fees and must pay again to apply elsewhere. For some renters, this results in a dynamic of risk and uncertainty that transforms the search for rental housing into a high-stakes wager. The transformation of rental applications into such a gamble undermines important public policies around economic resilience, efforts to combat housing insecurity and homelessness, expansion of equality and opportunity, and eradication of residential segregation.

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3. @equusjf, TWITTER (Sept. 11, 2021, 3:35 PM), <https://twitter.com/equusjf/status/1436775438102183941?s=20>.

4. @joyfulwretch, TWITTER (Sept. 11, 2021, 1:40 PM), <https://twitter.com/joyfulwretch/status/1436746543256776704?s=20>.

5. @hurlman81, TWITTER (Sept. 11, 2021, 1:02 PM), <https://twitter.com/hurlman81/status/1436736894788947969?s=20>.

6. @SidFinch, TWITTER (Sept. 12, 2021, 9:45 AM), <https://twitter.com/SidFinch/status/1437049697915518977?s=20>.

7. See Stephen Michael White, *How Much Does Tenant Screening Cost? Average Pricing Guide*, RENTPREP (June 15, 2021), <https://rentprep.com/landlord-tips/how-much-does-tenant-screening-cost/>.

8. Manny Garcia & Edward Berchick, *Renters: Results from the Zillow Consumer Housing Trends Report 2021*, ZILLOW (Aug. 10, 2021), <https://www.zillow.com/research/renters-consumer-housing-trends-report-2021-29863/> (finding that nationally 64% of renters pay application fees and the typical fee is \$50).

9. See, e.g., Candyd Mendoza, *Zillow lists renters most likely to pay application fees*, MORTG. PRO. AM. (Feb. 5, 2020), <https://www.mpamag.com/us/news/general/zillow-lists-renters-most-likely-to-pay-application-fees/212670> ("Tenants are more likely to pay application fees at higher rates in the competitive rental markets in urban and suburban areas.").

10. See Taylor Marley, *Rental Application Fees: A Landlord and Renters Guide*, TURBOTENANT (Aug. 12, 2019), <https://www.turbotenant.com/blog/rental-application-fees/>.

Policymakers should heed these adverse social consequences and take prompt action to restrict rental application fees—whether by limiting the amount and narrowing the circumstances in which rental application fees may be charged, or—better yet—by prohibiting them altogether as the states of Vermont and Massachusetts have already done.<sup>11</sup> In the meantime, advocates should seek opportunities for challenging rental application fees through litigation under existing consumer protection and fair housing laws.

Part I of this article discusses the methods by which residential landlords commonly determine which applicants to accept as tenants in the contemporary rental housing market, including the types of information accessed and the kinds of procedures and technology used in screening and reaching admission decisions. Part II explains the role of rental application fees in the admissions process, describing the typical amounts charged and the justifications given for the fees. Part III details a host of adverse public policy dynamics that flow from the widespread practice of charging rental application fees, including impacts both on individual households as well as the broader, collective implications of the practice. Finally, parts IV and V explore responses, both actual and theoretical, to the various policy difficulties that rental application fees pose. Specifically, part IV examines legislative measures that some jurisdictions have already taken to mitigate the problems associated with rental application fees, as well as considers other ideas that have not yet been enacted. Part V examines legal theories by which individuals, groups, or communities adversely impacted by rental application fees might seek redress under existing law.

## I. RENTAL ADMISSIONS SCREENING IN THE INTERNET AGE

Most residential landlords utilize some form of credit or background report in deciding whether to accept particular rental applicants as tenants.<sup>12</sup> Many tenant-screening companies offer background reports, specifically designed for rental housing admissions, that contain the categories of information residential landlords usually consider most relevant in evaluating prospective tenants.<sup>13</sup> This typically includes credit information (especially related to housing, such as rental debts or utility accounts), records of involvement in landlord-tenant litigation

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11. VT. STAT. ANN. tit. 9, § 4456a (West 2022); MASS. GEN. LAWS ANN. ch. 186, § 15B(1)(b) (West 2022).

12. See TransUnion SmartMove, *Low Turnover and Higher Rental Prices in 2017 Driving Profitable and Attractive Market for Landlords*, GLOBENEWSWIRE (Apr. 19, 2017), <https://www.globenewswire.com/news-release/2017/04/19/963170/0/en/Low-Turnover-and-Higher-Rental-Prices-in-2017-Driving-Profitable-and-Attractive-Market-for-Landlords.html> (“the majority of landlords (90%) conduct credit checks and criminal background checks on all of their potential renters. Approximately 85% of landlords review eviction reports for all applicants.”).

13. See Brian Carmody, *Best Tenant Screening Services*, INVESTOPEDIA, <https://www.investopedia.com/best-tenant-screening-services-5070361> (last updated Oct. 21, 2022).

(most often eviction cases), and criminal history materials.<sup>14</sup> In addition to—or often in lieu of—this background information, many tenant-screening companies offer analytical reports on applicants, usually in the form of computer-generated scores or recommendations of whether to accept or deny the applicant.<sup>15</sup>

To receive tenant-screening reports, a landlord must contract with a consumer reporting agency.<sup>16</sup> This process can be as simple as establishing an on-line account, or—particularly with larger, multifamily landlords—may entail the creation of an electronic portal specific to that landlord and integrated into the company’s property management software.<sup>17</sup> But once the necessary infrastructure is in place, the tenant-screening reports are ordered and generated electronically at the time of a rental application—generally either from an electronic webform the applicant completes and submits,<sup>18</sup> or from a landlord agent who enters information taken from a handwritten application form the prospective tenant fills out.<sup>19</sup>

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14. See CONSUMER FIN. PROT. BUREAU, MARKET SNAPSHOT: BACKGROUND SCREENING REPORTS, CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 5–6 (Oct. 2019), [https://files.consumerfinance.gov/f/documents/201909\\_cfpb\\_market-snapshot-background-screening\\_report.pdf](https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf) (“The analysis estimates that for 2019 there are 1,954 background screening companies”); *TransUnion Independent Landlord Survey Insights*, TRANSUNION (Aug. 7, 2017), <https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page>.

15. See Colin Lecher, *Automated Background Checks Are Deciding Who’s Fit for a Home*, THE VERGE (Feb. 1, 2019), <https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic>; Cyrus Farivar, *Tenant screening software faces national reckoning*, NBC NEWS (Mar. 14, 2021), <https://www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n1260975>; Lauren Kirchner & Matthew Goldstein, *How Automated Background Checks Freeze Out Renters*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>.

16. See 15 U.S.C. § 1681a(f) (“The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”).

17. Compare, for example, companies like TurboTenant and RentRedi that enable landlords to simply create an account and on-line dashboard and from there order screening reports at \$55 per applicant (TurboTenant) or \$35 per applicant (RentRedi), see *Tenant Screening Services*, TURBOTENANT, <https://www.turbotenant.com/tenant-screening/> (last visited Oct. 27, 2022); *Tenant-Screening*, RENTREDI, <https://rentredi.com/tenant-screening/> (last visited Oct. 27, 2022), with screening products directed at large multifamily landlords. RealPage, for example, offers “Artificial Intelligence (AI) Screening” that is integrated with the landlord’s property management software, see *Resident Screening*, REALPAGE, <https://www.realpage.com/apartment-marketing/resident-screening/> (last visited Oct. 27, 2022). Some other companies that deliver screening reports through similar high-volume portals directed at multifamily landlords include First Advantage, Saferent Solutions, and RentGrow. See *Tenant Background Check Services*, FIRST ADVANTAGE, <https://fadv.com/solutions/residential-tenant-background-checks/> (last visited Oct. 27, 2022); *Learn: Frequently Asked Questions*, RENTGROW, <https://www.rentgrow.com/learn-now/> (last visited Oct. 27, 2022); *Resident Screening*, SAFERENT SOLUTIONS, <https://saferentsolutions.com/resident-screening/> (last visited Oct. 27, 2022).

18. See, e.g., *How it Works*, TURBOTENANT, <https://www.turbotenant.com/how-it-works/> (last visited Oct. 27, 2022).

19. See, e.g., Kristi Mergenhagen, *Free Tenant Background Check Form*, RENTPREP (Dec. 2, 2016), <https://rentprep.com/screening-services/tenant-background-check-form/> (noting “[a] signed rental application (with consent) is even better than a tenant background check form because you get additional information from the tenant.”).

Upon receiving the rental application, the tenant-screening company will retrieve background information about the applicant—usually by searching any number of linked databases using personal identifiers from the application form (such as the prospective tenant’s name, date of birth, social security number, and current and former addresses).<sup>20</sup> Background information corresponding to the applicant’s identifiers will then be filtered using a “matching logic” to determine which pieces of information appear sufficiently likely to belong to the applicant that they should appear on the screening report.<sup>21</sup> The surviving items of information should then usually be filtered additional times to remove items that may be unlawful to report in the jurisdiction where from where the housing is located.<sup>22</sup>

Once these filtering processes are completed, the remaining information constitutes the applicant’s tenant-screening background file. For ease of reading and interpretation, the screening company will typically configure a report form with blank fields that the background information populates (e.g., so that eviction records appear in an “eviction records” field, criminal records in a “criminal history” grid, etc.).<sup>23</sup> Most often these reports are generated through fully automated processes, instantly compiled and transmitted back to the requesting landlord within seconds of the application.<sup>24</sup>

In recent years, many tenant-screening companies have added a third phase to the end of the report-generation process.<sup>25</sup> After compiling the background report, the screening company will apply additional algorithms that use the contents of the report either to calculate a numerical score or simply determine whether or not the applicant qualifies under the relevant landlord’s rental

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20. See *What is a tenant screening report?*, CONSUMER FIN. PROTEC. BUREAU (July 1, 2021), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-tenant-screening-report-en-2102/>; see also Brian Carmody, *Best Tenant Screening Services*, INVESTOPEDIA (July 4, 2022), <https://www.investopedia.com/best-tenant-screening-services-5070361> (describing business models for seven major tenant-screening companies); Nat’l Consumer L. Ctr., Comment Letter on the Financial Institutions’ Use of Artificial Intelligence, Including Machine Learning (July 1, 2021), <https://www.fdic.gov/resources/regulations/federal-register-publications/2021/2021-rfi-financial-institutions-ai-3064-za24-c-041.pdf>; *Tech, Bias, and Housing Initiative: Tenant Screening*, TECH EQUITY COLLABORATIVE (Feb. 23, 2022), <https://techequitycollaborative.org/2022/02/23/tech-bias-and-housing-initiative-tenant-screening/>.

21. See CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2021-03, CONSUMER REPORTING OF RENTAL INFORMATION 10–13 (2021) (discussing matching procedures in the preparation of tenant screening reports).

22. A number of states have their own laws which may restrict consumer reporting agencies, such as tenant-screening companies, from reporting information that would not be unlawful to include under the federal Fair Credit Reporting Act. See CONSUMER FIN. PROT. BUREAU, THE FAIR CREDIT REPORTING ACT’S LIMITED PREEMPTION OF STATE LAWS 2–3 (2022).

23. For examples of what tenant-screening report displays look like, see TEX PASLEY, HENRY OOSTROM-SHAH, & ERIC SIROTA, SCREENED OUT: HOW TENANT SCREENING REPORTS UNDERMINE FAIR HOUSING LAWS AND DEPRIVE TENANTS OF EQUAL ACCESS TO HOUSING IN ILLINOIS 5 (2021), <https://www.povertylaw.org/wp-content/uploads/2021/01/tenant-screening-final-report.pdf>, and TECH EQUITY COLLABORATIVE, *supra* note 20.

24. See Lauren Kirchner, *What Can You Do if Your Tenant Background Report Is Wrong?*, THE MARKUP (May 28, 2020), <https://themarkup.org/the-breakdown/2020/05/28/what-can-you-do-if-your-tenant-background-report-is-wrong>; see also TECH EQUITY COLLABORATIVE, *supra* note 20.

25. See PASLEY ET AL., *supra* note 23, at 4.

admission policy.<sup>26</sup> The screening company will then transmit the resulting score or determination to the housing provider.<sup>27</sup> A report containing the applicant's underlying background information may or may not accompany the score or recommendation.<sup>28</sup>

Landlords who purchase these kinds of decision-only or score-based analytical reports typically follow the rental decisions calculated by the screening algorithms.<sup>29</sup> After all, the promised advantages of such automated decisions include making admission practices more consistent and freeing landlords from the burden of reviewing and deciding upon applicants themselves;<sup>30</sup> deviating from the screening company's recommendations may vitiate these benefits and indeed defeat the purpose of obtaining such reports altogether.<sup>31</sup> And since landlords do not review, and may not even have access to, the underlying information upon which a denial of admission is based, they may hardly be in a position to reconsider or reverse an adverse recommendation anyway.<sup>32</sup> In this manner, rental

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26. See PASLEY ET AL., *supra* note 23, at 10–11; see also *Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362, 367 (D.Conn. 2019) (“Defendant marketed CrimSAFE as an ‘automated tool [that] processes and interprets criminal records and notifies leasing staff when criminal records are found that do not meet the criteria you establish for your community.’”); Brittany Benz, *Using Technology to Simplify the Tenant Screening Process*, APPFOLIO BLOG (Dec. 20, 2021), <https://www.appfolio.com/blog/tenant-screening/> (“With AppFolio’s built-in Tenant Screening all you have to do is press the ‘screen now’ button after an application is submitted and you’ll receive a comprehensive report shortly after. This includes summarized and detailed views of an applicant’s credit score, criminal history, eviction history, and income verification. AppFolio then calculates a result based on criteria and parameters that the client themselves set up[.]”).

27. See, e.g., *Conn. Fair Hous. Ctr.*, 369 F. Supp. 3d at 367 (“CrimSAFE uses an algorithm to interpret an applicant’s criminal record and provide housing providers with a decision on whether the applicant qualifies for housing.”).

28. See, e.g., *id.* (“The report provides no additional information such as the underlying records, the nature of the alleged crime, the date of the offense or the outcome of the case, if any.”); see also Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back From Tough Times*, CONSUMER REPS. (Mar. 11, 2021), <https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/> (“RealPage allows large landlords to choose not to show detailed underlying records in the reports that leasing agents see.”); PASLEY ET AL., *supra* note 23, at 11.

29. See HOUS. JUST. CTR., *OPENING THE DOOR: TENANT SCREENING AND SELECTION 19–20* (2021), <https://www.hjcmn.org/wp-content/uploads/2021/04/Tenant-Screening-Report.pdf>; see also Erin Smith and Heather Vogell, *How Your Shadow Credit Score Could Decide Whether You Get an Apartment*, PROPUBLICA (Mar. 29, 2022), <https://www.propublica.org/article/how-your-shadow-credit-score-could-decide-whether-you-get-an-apartment>.

30. See TONY KARELS, *AUTOMATED LEASE DECISIONS IMPROVE BACKGROUND SCREENING RESULTS & INSULATE STAFF FROM FAIR HOUSING ISSUES 3–4* (2012), <https://www.rentalhistoryreports.com/wp-content/uploads/sites/3/2016/04/Rental-History-Reports-White-Paper-Automated-Lease-Decisions-Improve-Screening-Results.pdf> (Listing the benefits of automated rental admission screening models “[m]aintain a consistent adherence and application of the company’s leasing guidelines” and “the initial training of new site and leasing staff can be reduced, as they are not required to be experts on the company criteria and comparing the raw data from a background check result against the denial factors.”).

31. *Cf.*, e.g., *SmartMove*, TRANSUNION, <https://www.transunion.com/product/smartmove> (last visited Oct. 27, 2022) (touting how landlords purchasing SmartMove reports “receive custom leasing recommendations in order to make quicker and better-informed decisions.”).

32. *Cf.* PASLEY ET AL., *supra* note 23, at 11 (observing that screening companies typically charge more for reports containing the recommendations, scores, or other analytical information).

admission decisions are often effectively “outsourced” to the third-party screening companies—a practice of “treating every applicant the same” that many landlords erroneously believe shields them from possible fair housing liability.<sup>33</sup>

## II. ROLE OF RENTAL APPLICATION FEES IN THE HOUSING ADMISSION PROCESS

Landlords that contract with tenant-screening companies to receive background reports and admission recommendations typically pay for the screening on either a per-report basis or a subscription basis (e.g., to subscribe to the screening agency’s data for a month, year, or other period of time). Rental application fees traditionally arose as a means of offsetting a landlord’s out-of-pocket costs for obtaining these reports, and in most markets, the prevalent scheme underlying rental application fees has been for landlords to pass only their actual fees on to housing applicants.<sup>34</sup>

Beyond recovering expenses, however, rental application fees also serve other purposes. Probably the most significant is to deter certain kinds of unwanted applicants from applying.<sup>35</sup> One category of rental applicants landlords often seek to avoid consists of those persons who are not sufficiently interested in the housing such that time spent showing them a unit or processing an application is viewed as a waste.<sup>36</sup> Colloquially known as “tire-kickers,” these might include people considering the property in question among other possible options, or maybe even tenants satisfied with their current housing with no firm or immediate plans to move. Along with other impediments, such as burdensome documentation requirements or explicit signals or tacit indications of disinterest, a rental

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33. See HOUS. JUST. CTR., *supra* note 29 (“While some landlords believe exceptions to their screening standards are warranted in some circumstances, others fear exercising discretion exposes them to claims that they are treating tenants differently. Until the recent introduction of disparate impact analysis into the tenant screening and selection conversation, ‘treating everyone the same’ was a longstanding approach to fair housing compliance within the industry.”); see also KARELS, *supra* note 30, at 2 (suggesting that the use of automated decision tools reduces a landlord’s exposure to fair housing liability because “placing the responsibility of assessing candidate worthiness on the site level staff often times leads to subjective interpretation of the information and poor or inconsistent application of the criteria[.]”).

34. See Stephen Michael White, *A Landlord’s Guide to Rental Application Fees (50 States)*, RENTPREP (Aug. 13, 2020), <https://rentprep.com/tenant-screening-news/the-landlord-guide-to-charging-rental-application-fees/> (“Rental application fees are intended to cover the cost of processing the rental application. Specifically, the fees are most often used to cover the cost of screening tenants through background checks and credit reports.”).

35. See Andrea Collatz, *The Do’s and Don’ts of Rental Application Fees*, TRANSUNION SMARTMOVE (June 5, 2018), <https://www.mysmartmove.com/SmartMove/blog/dos-donts-collecting-rental-application-fees.page> (“keep in mind if you don’t accept an application fee, you run the risk of spending time (and money) on an applicant that isn’t truly interested or who doesn’t meet your screening criteria”).

36. See White, *supra* note 34, at 11 (rental application fees have become the standard in the industry because they keep potential tenants from applying to properties they do not have any real interest in. Not only is the fee used to pay for the screening, but it also helps to ensure that those applying to rent the property are serious about their interest.).



application fee could decrease the likelihood that semi-serious applicants would choose to go through the full screening process.<sup>37</sup>

Landlords also commonly seek to deter applications from persons the landlord is unlikely to want as tenants. Typically, the most significant barriers to rental housing admission are unpaid debts to past landlords, involvement in prior eviction cases, and criminal history.<sup>38</sup> Significant rental application fees deter people with such impediments from applying to properties they perceive as unlikely to accept them because of such reasons. “In most cases,” one industry-side blogger wrote, “the tenants that know they have evictions or criminal records that will appear on their background checks will not pay to have [a housing provider] find this information and disqualify them.”<sup>39</sup>

Another ulterior purpose of rental application fees is as a means of financial gain. Particularly in markets where demand and competition for rental units are high and multiple prospective tenants may apply for the same vacancy, a landlord can profit by collecting fees from all the interested applicants but only purchasing screening reports for some (often just one)—a practice frowned upon—if begrudgingly acknowledged by some in the residential leasing industry.<sup>40</sup> In recent years, residential landlords in some markets have begun regularly collecting additional amounts, such as “administrative fees” (supposedly, compensation “for the landlord or agent taking the time to do your application all while holding the apartment off the market”) or “move-in fees” (supposedly a charge for the landlord “to make slight changes and touch-ups to the apartment before you move in [such as] repainting, touching up the carpet, changing the locks or power washing the patio”) on top of the background check reimbursement.<sup>41</sup>

### III. ADVERSE PUBLIC POLICY IMPACTS OF RENTAL APPLICATION FEES

No matter one’s views as to the legitimacy of the various reasons for which a landlord might impose a rental application fee, there is no question that such fees

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37. See, e.g., Kasia Manolas, *Pre-Screen Tenants to Save Time*, AVAIL (Jul. 2, 2021), <https://www.avail.co/education/guides/complete-guide-to-tenant-screening/pre-screen-tenants-to-save-time> (recommending landlords use a screening fee to deter unwanted applicants: “If the screening fee is too expensive for a tenant, or they don’t want to authorize a credit or background check, then they likely won’t reach out.”).

38. See TRANSUNION, *supra* note 14.

39. See White, *supra* note 34.

40. See Tony Drost, *Are Landlords Profiting from Application Fees?*, FIRST RATE PROP. MGMT. BLOG (Nov. 21, 2018), <https://www.boiseproperty.management/blog/are-landlords-profiting-from-application-fees/>; see also Robert McCain, *How and Why to Collect Application Fees*, AM. APARTMENT OWNERS ASS’N BLOG (Dec. 12, 2008), <https://www.american-apartment-owners-association.org/property-management/latest-news/how-and-why-to-collect-application-fees/> (“Application fees are not meant to be a profit center. The fact that some landlords used application fees as profit centers resulted in the legislature adding [limitations] to the Landlord/Tenant Laws of many states.”).

41. See Ashley Singleton, *What Does an Admin Fee Cover in Your Apartment Application?*, APARTMENT GUIDE (Mar. 2, 2021), <https://www.apartmentguide.com/blog/admin-fee-apartment-application/>; see also Martin Scott, *How to Avoid Hidden Rental and Application Fees as a Renter*, AVAIL (Aug. 23, 2022), <https://www.avail.co/education/articles/how-to-avoid-hidden-rental-fees-and-application-fees-as-a-renter>.

present a host of public policy challenges. Beginning with perhaps the simplest and most straightforward of these problems, rental application fees increase the cost and difficulty of obtaining housing. This increased cost and complexity inhibits efforts to promote housing stability and combat homelessness.

While the same might be said of rent or any other housing-related charge, a person who pays rent receives a certain benefit in return—specifically, the use and occupancy of premises for a period of time. A person who pays a rental application fee receives only a *chance* to lease a home. If that chance does not materialize, the applicant comes away with nothing of value.

A rejected applicant must typically then pay a subsequent fee to apply for housing elsewhere. Where the subsequent application is close in time after the first, this fee will usually pay for the creation of a new tenant-screening report with contents largely duplicative of the previous report. Hence, even if one views a failed chance at housing as being fair consideration for a rental application fee, the cost of those successive chances is inflated by the serial creation of duplicative screening reports.

Landlords who need not cover the costs of screening tenants have diminished incentives to minimize those costs—such as by making admission decisions based on portable screening reports<sup>42</sup> or reports recently prepared in connection with applications to other properties, alternatives that provide landlords the information they seek at reduced or even zero cost. Shifting screening costs to applicants through application fees prevents this customary market dynamic from helping control screening costs. Instead of favoring the low-cost producer, the market rewards screening companies for collecting repeated fees for duplicative single-use reports.

Prospective tenants who pay rental application fees to landlords seldom have any way of verifying that the amount of the fee matched the cost of the report to the landlord, as a number of states require.<sup>43</sup> A few tenant-screening products, such as RentRedi and TurboTenant, allow for rental applicants to pay the screening company directly (to have a report sent to the landlord)—which at least enables tenants to know that a report was run and how much the report cost.<sup>44</sup> But only a handful of tenant-screening companies offer this option, and do not even necessarily require it—TurboTenant, for example, tells landlords “[t]he majority

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42. Portable tenant-screening reports, discussed below, is a concept in which a screening report containing an applicant’s basic background information is created and kept current for a limited time (often 30 days), during which the report may be accessed repeatedly by successive potential landlords without payment of a separate fee.

43. *See, e.g.*, WASH. REV. CODE ANN. § 59.18.257(1)(b) (West 2022) (authorizing landlord to “charge a prospective tenant for costs incurred in obtaining a tenant screening report”); MINN. STAT. ANN. § 504B.173, subd. 2(b) (West 2022) (“landlord must return any amount of the applicant screening fee that is not used for” obtaining background reports); CAL. CIV. CODE § 1950.6(b) (West 2022) (“The amount of the application screening fee shall not be greater than the actual out-of-pocket costs of gathering information concerning the applicant[.]”).

44. *See, e.g.*, *How it Works for Tenants*, RENTREDI, <https://rentredi.com/tenant-screening/> (last visited Oct. 27, 2022); *see also* TURBOTENANT, *supra* note 17.

of landlords have the tenant pay the \$55 fee to cover the screening report. But if you've already collected a fee or just want to pay it yourself, you have that option too."<sup>45</sup>

Even verifying that a screening report was run can be difficult for an applicant who pays the fee to the landlord; the Fair Credit Reporting Act requires an "adverse action notice" be given to a rejected applicant whenever a consumer report (such as a tenant-screening report) is used in connection with a denial of housing.<sup>46</sup> In theory, the adverse action notice contains information the tenant can use to obtain a copy of the tenant-screening report from the company that provided it to the landlord—which should list each person (including prospective landlords) who procured a report about that person within the previous year.<sup>47</sup> But if a landlord rejects an application without providing an adverse action notice,<sup>48</sup> a tenant cannot verify whether a report was run unless the tenant happens to know which of the roughly 2,000 tenant-screening companies the landlord uses.<sup>49</sup> While rental applicants commonly lack insight into the landlords' actual screening costs and sometimes into whether a report was even run,<sup>50</sup> only when a landlord provides the actual reason(s) for denial can a tenant be reasonably assured the application was actually considered. But the federal adverse action notice provision does not require disclosure of the reasons for denial,<sup>51</sup> and only a handful of state and local laws impose such obligations.<sup>52</sup>

In markets where landlords are able to impose "administrative fees" or other additional application charges on top of reimbursement for out-of-pocket screening costs, the potential profits from screening new tenants may even incentivize lease termination and eviction. For example, in September 2021, an advocate from Montana reported that a property management firm in her state had received

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45. See *TURBOTENANT*, *supra* note 17.

46. See 15 U.S.C. § 1681m(a).

47. See 15 U.S.C. § 1681g(a)(3) (requiring certain disclosures to consumers); 15 U.S.C. § 1681m(h)(5) (outlining required contents of adverse action notices).

48. Note the Fair Credit Reporting Act (FCRA) may not allow private suits to enforce the adverse action notice requirement. See 15 U.S.C. § 1681m(h)(8)(A). *But cf.* *Barnette v. Brook Rd., Inc.*, 429 F. Supp. 2d 741, 749 (E.D.Va. 2006) (finding because of scrivener's error in FCRA "that the limitation in § 1681m(h)(8) should read 'subsection' rather than 'section,' thereby applying solely to subsection (h) and not eliminating the private right of action for violations of the remainder of § 1681m.").

49. CONSUMER FIN. PROT. BUREAU, MARKET SNAPSHOT: BACKGROUND SCREENING REPORTS, CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 4 (2019), [https://files.consumerfinance.gov/f/documents/201909\\_cfpb\\_market-snapshot-background-screening\\_report.pdf](https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf) ("The analysis estimates that for 2019 there are 1,954 background screening companies.").

50. See, e.g., Marin Scott, *How to Avoid Hidden Rental and Application Fees as a Renter*, AVAIL (Aug 23, 2022), <https://www.avail.co/education/articles/how-to-avoid-hidden-rental-fees-and-application-fees-as-a-renter>.

51. See 15 U.S.C. § 1681m(a).

52. See, e.g., WASH. REV. CODE ANN. § 59.18.257(1)(c) (West 2022) ("If a prospective landlord takes an adverse action, the prospective landlord shall provide a written notice of the adverse action to the prospective tenant that states the reasons for the adverse action."); see also PHILA., PA., CODE § 9-1108(4) (2022) (stating that it is unlawful housing practice "to reject an application for rental housing without providing the applicant a written or electronic document setting forth a plain statement of all reasons for the denial of the application.").

over 100 applications, for which it collected \$50 each, for a single vacancy—or over \$5,000 in application fees to re-let a single unit.<sup>53</sup> The potential to collect two or three times the monthly rent for an apartment through the application and admission process may create an incentive to repeat the screening and leasing process as often as possible, so as to maximize such profits.<sup>54</sup> This could induce landlords to decline renewal of expiring leases, shorten lease terms, or more quickly pursue eviction over minor lease violations or delinquencies that have been resolved.

Probably the most significant policy impact, however, is that charging rental application fees has discriminatory effects by race and color and possibly along other protected class lines. Renters who are Black, Indigenous, and people of color (BIPOC) are more likely to be denied admission due to criminal history, as—despite similar rates of crime commission with whites—they are arrested, convicted and incarcerated at rates disproportionate to their share of the overall population.<sup>55</sup> An increasing body of evidence shows that Black women, especially those with children, disproportionately experience eviction,<sup>56</sup> and multiple studies have shown how various forms of credit scoring and credit history-based decision-making tend to disadvantage people and communities of color as well.<sup>57</sup> Research by Zillow.com found that Black and Latinx renters must typically submit 50% more rental applications in a housing search than the typical white or

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53. Email from Amy Hall, Att’y, Mont. Legal Servs. Ass’n, to Hous. Just. Network (Sept. 20, 2021, 7:17 PM) (on file with author and Nat’l Hous. L. Project).

54. The method by which a landlord would profit through this practice is likely to refrain from screening or conduct only partial screenings of some applicants, or screening only the most-desired applicant first (and retaining other fees if that applicant is accepted). *See* Drost, *supra* note 40; *see also* McCain, *supra* note 40 (“Application fees are not meant to be a profit center. The fact that some landlords used application fees as profit centers resulted in the legislature adding [limitations] to the Landlord/Tenant Laws of many states.”). Yet as of 2009, only 13 states had imposed any limits whatsoever on application fees. *See* Marley, *supra* note 10.

55. *See, e.g.*, ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 6–11 (2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>; *see also* ELIZABETH HINTON ET AL., VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 1–2 (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

56. Peter Hepburn et al., *Racial and Gender Disparities among Evicted Americans*, EVICTION LAB (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/>; Catherine Lizette Gonzalez, *Women of Color Living in Poverty Face Highest Risk of Eviction*, COLORLINES (Apr. 9, 2018, 2:13 PM), <https://www.colorlines.com/articles/study-women-color-living-poverty-face-highest-risk-eviction>; TIMOTHY A. THOMAS ET AL., THE STATE OF EVICTIONS: RESULTS FROM THE UNIVERSITY OF WASHINGTON EVICTIONS PROJECT § 4.5 (2020), <https://evictionresearch.net/washington/why.html> (finding “Black adults are evicted 5.5 times more than Whites in King County [and] 6.8 times more in Pierce [County.]”).

57. *See generally* U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY (FHEO) GUIDANCE ON COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT IN MARKETING AND APPLICATION PROCESSING AT SUBSIDIZED MULTIFAMILY PROPERTIES 6 (2022); *see also* Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here’s How*, THE GUARDIAN (Oct. 13, 2015, 10:14 PM), <https://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why>.

Asian renter—and that 38% of Black and Latinx renters must submit five or more applications, compared with 21% of white renters.<sup>58</sup>

Paying successive application fees considerably more often than members of other racial groups is not the only way this phenomenon harms BIPOC renters. Since BIPOC renters are more likely to have the kinds of background information that dooms a rental application, the people whom rental application fees deter from applying to certain properties are more likely to be people of color, and possibly women or families with children. Such deterrence can be expected to steer such renters to lower quality properties where they perceive higher chances of admission.<sup>59</sup> Though the question has yet to be academically interrogated, this dynamic likely drives residential segregation—or, at the very least, inhibits neighborhood integration.

#### IV. LEGISLATIVE SOLUTIONS TO THE POLICY PROBLEMS RENTAL APPLICATION FEES POSE

The preferred way to resolve the various public policy concerns rental application fees pose would be through targeted legislation. Rental application fees are not an especially difficult problem to solve, with at least three promising legislative approaches available.

##### *A. Prohibiting Rental Application Fees*

The simplest and most resolute solution to harms associated with rental application fees is a straight prohibition, such as those the states of Vermont and Massachusetts (as well as the United Kingdom) have enacted.<sup>60</sup> Note the clarity of Vermont's prohibition is critical to the success of that law; Massachusetts prohibits application fees through the less direct manner of listing the permissible charges a landlord may collect “prior to the commencement of any tenancy,” and omitting application fees from that list.<sup>61</sup> Though this provision effectively prohibits landlords from collecting application fees, in Massachusetts many rental properties are leased through realtors—who are regulated under a different code and may impose fees on rental housing applicants so long as the applicant agrees to the fee in writing.<sup>62</sup> A clear and comprehensive ban like Vermont's, however, substantially eliminates all the problems rental application fees impose on renters and communities.

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58. Garcia & Berchick, *supra* note 8.

59. See, e.g., Ryan Leonard, *Why Every Landlord Should Charge Rental Application Fees*, WOLFNEST PROP. MGMT. BLOG (Apr. 9, 2019), <https://www.wolfnest.com/blog/why-every-landlord-should-charge-rental-application-fees> (“Deter Unqualified Renters: Sometimes the rental application fee can serve as a qualifying process by itself. This ultimately saves you time by weeding out potential tenants who don't think they will qualify before they even fill out the application.”).

60. See VT. STAT. ANN. tit. 9, § 4456a (2022) (“A landlord or a landlord's agent shall not charge an application fee to any individual in order to apply to enter into a rental agreement for a residential dwelling unit.”); MASS. GEN. LAWS ch. 186, § 15B(1)(b) (2022); see also Tenant Fees Act 2019, c. 4 (UK), <https://www.legislation.gov.uk/ukpga/2019/4/contents/enacted/data.htm>.

61. See MASS. GEN. LAWS ch. 186, § 15B(1)(b) (2022).

62. See 254 MASS. CODE REGS. 7.00(3) (2016).

Prohibiting application fees has no drawbacks for renters. Landlords will likely oppose such a prohibition on the claim that allowing prospective tenants to apply without paying fees will cause landlords to incur costs (whether financial or in terms of lost time and effort) associated with “tire-kickers.”<sup>63</sup> The validity of this concern is suspect; searching for rental housing is often a laborious and time-consuming activity for renters, and there is little incentive to apply at properties in which a person is not sincerely interested. Vermont has prohibited application fees for more than twenty years, and there do not appear to be any studies or other reports of less-than-serious rental applicants imposing significant costs on landlords in that state. Though some landlords might conceivably be inconvenienced in this manner from time to time, requiring landlords to absorb this incidental cost associated with the business of leasing housing appears well justified by the societal benefits in improving access to housing, consumer protection, and reduction of discrimination and segregation.

Landlords also have ample other means of deterring “tire-kickers.”<sup>64</sup> Simply requiring applicants to fill out a written application may deter some. Running a tenant-screening report can entail a “hard inquiry”<sup>65</sup> of the applicant’s credit report, which can lower the person’s FICO score;<sup>66</sup> informing applicants of this possibility may also deter marginally interested applicants. In almost every jurisdiction most landlords may collect a reasonable “holding deposit” from applicants—an amount of money taken in return for removing a dwelling unit from the market during the application process; should an applicant choose without a good reason not to lease the unit after being approved, the landlord may retain the holding deposit in compensation.<sup>67</sup> Indeed, holding deposits are common in many rental markets already.<sup>68</sup> Eliminating rental application fees from those

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63. See Kristi Mergenhausen, *Automated Pre-Screening Tenants Saves Time: RentPrep Guide*, RENTPREP (Feb. 15, 2022), <https://rentprep.com/tori-vs-harry/automate-prescreening-process-tenant-applicants-2/> (“Tenant pre-screening refers to any process that ensures all tenant applicants who fill out a rental application are thoroughly informed on the rent, property policies, and other key parts of the rental process. Often, applicants submit their forms without being fully prepared or qualified to rent the property. This leads to wasted time and money for everyone involved. By pre-screening tenants, you can limit the number of wasteful applications that you receive.”).

64. See *id.*

65. See Brianna McGurran, *What Is a Hard Inquiry and How Does It Affect Credit?*, EXPERIAN (Nov. 5, 2019), <https://www.experian.com/blogs/ask-experian/what-is-a-hard-inquiry/> (“While a hard inquiry will stay on your credit report for two years, it will usually only impact your credit for a few months. Too many hard inquiries in a short time could make it look like you’re seeking loans and credit cards that you may not be able to pay back.”).

66. See Adam Hayes, *What is a FICO Score*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/ficoscore.asp> (last updated Feb. 9, 2021) (“A FICO score is a credit score created by the Fair Isaac Corporation (FICO). Lenders use borrowers’ FICO scores along with other details on borrowers’ credit reports to assess credit risk and determine whether to extend credit.”).

67. See *Holding Deposits for Rental Property*, JUSTIA, <https://www.justia.com/real-estate/landlord-tenant/information-for-tenants/choosing-a-place-to-rent/holding-deposits/> (last visited Oct. 27, 2022).

68. The legality of replacing holding deposits with non-refundable “administrative fees” likely varies extensively according to the nuances of state law and is beyond the scope of this article.

jurisdictions would be unlikely to have any discernable effect on the frequency by which non-serious prospects apply to rental properties.

Shifting the cost of screening rental applicants to landlords is also more just for the reason that rental admission screening only benefits landlords. Rental applicants receive nothing of value from admission screening; at best the landlord finds nothing to disqualify them, and at worst the screening will cause an application to be denied (and the screening fee forfeited). Application fees are not often framed as a charge that a consumer pays for a chance at being denied the opportunity to lease an apartment, but that is precisely what the fees amount to.

In other words, since the landlord is the only party who benefits from tenant screening, the landlord ought to be the one to pay for it. Landlords may claim doing so would cause rents to increase, but this contention incorrectly assumes landlords will not generally charge as much rent for their dwelling units as the market will bear, but instead some modest premium over their actual costs.<sup>69</sup> Forcing landlords to absorb an expense they alone desire and incur has no effect on the market value of the premises, only the amount of the landlord's profit.

#### *B. Allowing Application Fees Only to Applicants Who Are Accepted*

A second legislative approach to rental application fees is to allow landlords to charge such fees only to applicants who are accepted as tenants. Though somewhat more complicated than a straightforward prohibition, this approach significantly advances most of the same public policy objectives as a ban—though it does not fulfill them entirely. From a consumer protection standpoint, applicants still have minimal insight into the amount of the application fees compared with the landlord's actual costs—so the possibility of overcharging remains. Yet an applicant faces no risk of being charged an application fee without receiving an opportunity to lease the housing, so at least an applicant receives actual value in return for the payment. The possibility that the landlord might decide to reject an applicant restores some incentive to avoid unnecessary screening costs, and a landlord cannot profit from a vacancy by charging application fees to multiple applicants who are not then offered the housing.

Such a scheme would also reduce the deterrent impacts of application fees, though by how much could depend significantly on the mechanics of the law. Preferably, the measure would prohibit a landlord from collecting an application fee until the prospective tenant was offered the dwelling unit, effectively making the application fee part of the initial payment due at the start of a lease. Since a rejected applicant would never owe or tender a fee, this approach would likely eliminate application fees as a deterrent to those who fear rejection based on adverse background information.

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69. See generally *What really determines rents and house prices?*, PROPERTYGEEK, <https://www.propertygeek.net/blog/determines-rents-house-prices/> (last updated Mar. 13, 2017) (“market rents are determined by two main factors: local wage levels, and the balance of supply and demand”).

Landlords might argue that, without an up-front fee, some prospective tenants could be offered housing (thus becoming liable for the application fee)—yet then decline the offer and be reluctant to tender the fee. Whether this would happen often enough to pose a significant concern appears unlikely, though ultimately unknown. An alternative that eliminates this problem would be allowing landlords to collect the application fees up front, then give refunds to applicants whom they later turn down. But these added steps create opportunities for housing seekers to experience delays in receiving their refunds, bleed costs for services such as check-cashing fees, or not receive the refunds at all. The deterrent effect of application fees could remain significant if applicants come to expect long delays or lack confidence their money will be returned.

### *C. Prohibiting Application Fees When Portable Screening Reports Are Available*

Multiple companies now enable housing seekers to purchase so-called portable tenant screening reports—that is, background reports prepared about those consumers themselves, which the screening company uploads to a secure, password-protected website.<sup>70</sup> By sharing that password with a housing provider, a rental applicant can provide access to that screening report at zero additional cost. For a single fee, the screening company will maintain the report for a specified duration—usually thirty days—within which time the person could, in theory, use that password to apply at an unlimited number of properties without paying an additional fee. In practice, however, few landlords offer to waive application fees and use portable screening reports instead—perhaps in part because of the persistent myth that applicants can tamper with the contents.<sup>71</sup>

The use of portable tenant screening reports could offer yet another practical solution to the problems posed by duplicative screening fees. But tenants have little incentive to purchase portable reports when landlords will not accept them. Were jurisdictions to prohibit landlords from charging rental application fees to applicants who provide access to portable reports, then housing seekers could avoid duplicative fees. As of now, only New York prohibits landlords from charging screening fees to tenants who have portable screening reports available.<sup>72</sup>

Since rental applicants select which portable screening reports to purchase, landlords may oppose such laws because the particular portable report an

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70. See, e.g., MY SCREENING REPORT.COM, <https://www.myscreeningreport.com/> (last visited Oct. 27, 2022); *Online Rental Applications Frequently Asked Questions*, ZILLOW, <https://www.zillow.com/z/rental-manager/rental-applications-faq/> (last visited Oct. 27, 2022); see also *Share Applications with Other Landlords*, AVAIL, <https://support.avail.co/hc/en-us/articles/115004087294-Share-Applications-with-Other-Landlords> (last visited Oct. 27, 2022).

71. See Nicho Mauricio, *What is a Comprehensive Reusable Tenant Screening Report?*, POPLAR HOMES (Jul. 21, 2022), <https://www.poplarhomes.com/rental-property-management/what-is-a-comprehensive-reusable-tenant-screening-report/>; see also *Dispelling the myths of the portable tenant screening report*, MOCO, INC. (June 20, 2016), <https://www.moco-inc.com/blog/dispelling-the-myths-of-the-portable-tenant-screening-report/>.

72. See N.Y. REAL PROP. LAW § 238-a(1)(b) (McKinney 2022) (“the landlord, lessor, sub-lessor or grantor shall waive the fee or fees if the potential tenant provides a copy of a background check or credit check conducted within the past thirty days.”).



applicant has available may lack a type of information the landlord considers important, or come from a company the landlord does not trust. But state legislatures could ensure portable reports offer at least a minimum set of basic components through establishing statutory definitions for what constitutes a portable screening report. Washington State, for example, passed a law in 2016 defining “comprehensive reusable tenant screening reports” as a tenant screening report prepared at the applicant’s direction within thirty days, “made available directly to a prospective landlord at no charge,” and containing the applicant’s credit report, criminal history, eviction history, employment verification, and address and rental history.<sup>73</sup> Maryland enacted a similar law in 2021,<sup>74</sup> and California in 2022.<sup>75</sup> And prohibiting rental application fees would not obligate landlords to actually utilize or even review a portable report—a landlord could still order and use whichever screening reports the landlord prefers at the landlord’s own expense.<sup>76</sup>

Prohibiting application fees for applicants with portable reports incentivizes landlords to use portable reports instead of paying unnecessarily for duplicative information (as tenants currently do). This in turn could attract even more tenant screening companies to offer portable screening reports. Either way, such a law would substantially alleviate the burden of repeat application fees, and the associated sociological impacts, on tenants and families.

## V. LITIGATION APPROACHES TO RENTAL APPLICATION FEES

State legislatures and city councils should ideally take proactive steps to mitigate and prevent the problems associated with rental application fees through legislation. But rental application fees may already be amenable to challenges under some existing consumer protection laws—whether because landlords charge excessive amounts, collect fees without actually considering applications, or engage in other deceptive or exploitative practices associated with the application fees. Charging rental application fees likely violates anti-discrimination laws as well—both because the fees are charged disproportionately more often to Black and Latino renters, and because of the probable steering effects rental application fees produce. Advocates should seek out and make use of strategic

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73. WASH. REV. CODE ANN. § 59.18.030(4) (West 2022). The terms “criminal history” and “eviction history” are also defined under the Washington statute. *See* WASH. REV. CODE ANN. § 59.18.030(5), (11) (West 2022). The Washington law limits rental application fees to a landlord’s actual screening costs and requires landlords to disclose whether they accept comprehensive reusable tenant screening reports, but does not prohibit a landlord who rejects the portable reports from charging application fees for the cost of obtaining a different report. *See* WASH. REV. CODE ANN. § 59.18.257(b) (West 2022).

74. MD. CODE ANN., REAL PROP. § 8-218 (West 2022).

75. *See* A.B. 2559, 2021-22 Assemb., Reg. Sess. (Cal. 2022) (to be codified at CAL. CIV. CODE § 1950.1).

76. Such a law should also prohibit landlords from denying or treating an applicant less favorably for using a portable screening report.

opportunities to curb egregious abuses associated with rental application fees, and potentially challenge the use of such fees altogether where possible.

*A. Challenging Rental Application Fees as Unfair or Deceptive Consumer Practices*

Most states have adopted consumer protection statutes which, despite great local variation in specific details and text, generally prohibit “unfair or deceptive acts or practices in the conduct of trade or commerce.”<sup>77</sup> “Deceptive” practices generally mean those being likely to mislead,<sup>78</sup> while “unfair” practices tend to be those which are exploitative or anti-competitive, whether or not any deception is involved. Consumers injured by such unfair or deceptive practices can typically bring actions for damages and attorney fees under such statutes, and often also seek injunctive relief designed to protect other consumers from the same misconduct.

As discussed above, rental application fees tend to be exploitative and produce a series of deleterious public policy consequences. The specific manner and procedures by which they are imposed may also be confusing or deceptive to consumers. Note that rental application fees are specifically authorized by statute in some jurisdictions, and presumably not amenable to consumer protection act challenges insofar as the fees charged comport with the statutory authorization.

1. Excessive or Illusory Application Fees

Numerous reported decisions have held that fees charged to consumers violated state consumer protection acts where the business collecting the fee either did not perform any service to justify the fee, or where the consumer received nothing in return.<sup>79</sup> Many of the common methods landlords use to pad their revenues through the collection of rental application fees can be objectively characterized as deceptive or unfair in this way. For example, representing to a prospective tenant that an application fee covers only the landlord’s out-of-pocket costs for a background check is deceptive when the fee exceeds those costs,<sup>80</sup> or when no

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77. Donald M. Zupanec, *Practices forbidden by state deceptive trade practice and consumer protection acts*, 89 A.L.R. 3d 449, §2(a) (1979).

78. See *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. Dist. Ct. App. 2006); *Harty v. Underhill*, 710 S.E.2d 327 (N.C. Ct. App. 2011).

79. See, e.g., *People ex rel. Hartigan v. Knecht Servs., Inc.*, 575 N.E.2d 1378, 1387 (Ill. App. Ct. 1991) (upholding consumer protection violations against plumbing company that charged for services that were not rendered, charged for service people that were not needed or not present, defendants were in superior bargaining position and used intimidation to collect payment, and where defendants charged excessively high prices).

80. See, e.g., *McKell v. Washington Mut., Inc.*, 49 Cal. Rptr. 3d 227, 241 (Cal. Ct. App. 2006) (claim that bank led “borrowers to believe it is charging them for the cost of certain services it provides, when in reality it is charging them substantially in excess of such costs” stated a claim for unfair business practices).

actual background check is purchased.<sup>81</sup> Retaining any application fee at all is deceptive when the applicant has no meaningful chance at the vacancy—as might occur, for instance, where a landlord receives multiple applications and leases the premises to one applicant without ever considering others.

A handful of states have responded to these specific abuses by restricting the amount of application fees to the landlord's actual cost in obtaining background information (hence a landlord who never actually screens an application has actual costs of \$0).<sup>82</sup> But enforcing such laws can be challenging because a rental applicant usually only knows how much the landlord charged her to apply—but not how much the landlords paid to obtain the background information.<sup>83</sup> Other such laws avoid this problem by limiting screening fees to a flat amount, even though that cap may not track the landlord's costs exactly.<sup>84</sup>

Depending upon its specific wording, a law intended to prevent landlords from charging excessive rental application fees can also have a negative unintended consequence of effectively authorizing rental application fees up to a specified amount even if other circumstances might reveal those fees to be objectively unfair or unreasonable. In Virginia, for instance, a 2008 law capped application fees at \$50—but that \$50 charge is “exclusive of any actual out-of-pocket expenses paid by the landlord to a third-party performing background, credit, or other pre-occupancy checks on the applicant.”<sup>85</sup> As originally intended, this law imposed a reasonable limit on the amount landlords could bill applicants for

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81. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965) (“It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price even if the offered price represents the actual value of the product and the purchaser is receiving his money’s worth.”); *Green v. Morgan Properties*, 73 A.3d 478 (N.J. 2013) (lease clause obligating tenant to pay fixed sum for attorney fees in the event of a summary eviction lawsuit violated NJ Consumer Fraud Act because the amount of the fees bore no relation to the actual fees that were or could be incurred in such a proceeding).

82. *See* WASH. REV. CODE ANN. § 59.18.257 (West 1991).

83. In some jurisdictions, landlords who are entrusted with tenant funds to cover certain third-party payments, the amounts of which being within the landlord's exclusive knowledge, have been held to owe a limited fiduciary duty not to retain excess funds beyond the contemplated payment. *See* *P.V. Properties v. Rock Creek*, 549 A.2d 403, 409 (Md. Ct. Spec. App. 1988) (“Remedies at law are inadequate and an accounting is due where one party has exclusive control over financial records showing how much is owed to another.”); *Harlem Cap. Ctr., LLC v. Rosen & Gordon, LLC*, 44 N.Y.S.3d 36 (N.Y. App. Div. 2016) (holding security deposit from tenant imposes fiduciary duty on landlord); *State v. Lasecki*, 946 N.W.2d 137 (Wis. Ct. App. 2020) (landlord's failure to provide statement of charges withheld from security deposit was unfair practice). *But see* *Carroll v. Yankwitz*, 250 A.3d 696 (Conn. App. Ct. 2021) (failure to provide itemized statement of security deposit withholdings not an unfair trade practice where landlord asserted sum total of charges exceeded deposit). While no case appears to have applied this rule to application fees, the same rationale would seem to apply if an applicant entrusts funds to a landlord for purchase of a third-party screening report, or even to cover the landlord's costs of performing its own background investigation.

84. *See, e.g.*, N.Y. REAL PROP. LAW § 238-a (McKinney 2021) (“In relation to a residential dwelling unit: . . . (b) A landlord, lessor, sub-lessor or grantor may charge a fee or fees to reimburse costs associated with conducting a background check and credit check, provided the cumulative fee or fees for such checks is no more than the actual cost of the background check and credit check or twenty dollars, whichever is less. . .”).

85. *See* VA. CODE ANN. § 55.1-1203(C) (West 2022).

reviewing application materials, calling references, and making their own decisions on tenants. But for a landlord that uses fully automated screening, the statute seemingly authorizes a landlord who performs no screening functions itself to nevertheless retain a gratuitous surcharge on top of actual costs paid to a third-party screener.

## 2. Collecting Fees for Futile Rental Applications

Another practice potentially actionable as deceptive is collecting an application fee from someone the landlord already knows will not be accepted, whether due to disqualifying background information or other cause. Many landlords inquire into income and resources, past evictions, rental debts, criminal history, and other such matters orally or on written application forms—and might learn of disqualifying information without the need for purchasing a formal screening report.

A promise made without the intent to fulfill that promise being a form of fraud,<sup>86</sup> a landlord would undoubtedly commit a deceptive and unfair practice by accepting a rental application fee (and thereby promising the consider admitting the applicant as a tenant) despite having already subjectively decided to reject the applicant. Likewise, a landlord who accepts a fee despite knowing with certainty the application would be rejected under a relevant admission policy or an automated screening procedure that the landlord abides by could be deceptive, particular if no exceptions in that policy are made. Only if a landlord truly intends to actually consider information obtained through the screening process in deciding whether to admit the prospective tenant could there be any justification for collecting an application fee.

Housing seekers with problematic background information commonly adopt a strategy of spontaneously disclosing those matters before paying application fees, in hopes that the landlord or leasing agent will let them know whether they will face automatic disqualification.<sup>87</sup> Landlords often decline to cooperate with these inquiries of this kind. Yet if a landlord's admission policy contains categorical exclusions (i.e., conditions that result in automatic denial of admission without exception), then a landlord who is informed that an applicant falls into one of the excluded categories can be reasonably certain the applicant will be rejected. In at least some such scenarios, allowing a prospective tenant to pay an application fee only to then be rejected—rather than notifying the prospective tenant of the categorical exclusion—would seem to constitute an unfair or deceptive

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86. 5 Am. Jur. Proof of Facts 2d 727, § 2 Promissory Fraud (Aug. 2022 update) (A promise to do something necessarily implies the intention to perform, and, where such intention is absent, there is an implied misrepresentation of fact, which is actionable fraud.”).

87. See, e.g., Peggy O’Hare, *Tenants’ criminal histories pose potential legal snag for housing providers*, SAN ANTONIO EXPRESS-NEWS (Aug. 5, 2017), <https://www.expressnews.com/news/local/article/Tenants-criminal-histories-pose-potential-11736804.php> (“After one of his rental applications was denied during his search for a new place, Fonseca said he started telling landlords upfront about his criminal history so he wouldn’t waste money submitting more applications that might be rejected.”).

practice.<sup>88</sup> Indeed, even if an applicant does not spontaneously disclose adverse background information, arguably the landlord should first inquire about information bearing on any automatically disqualifying criteria (thus giving the housing seeker a chance to avoid the fee), or at least make clear the circumstances under which an application will be unconditionally rejected.<sup>89</sup>

One way for landlords to avoid deceiving or exploiting applicants in this manner would be to disclose any categorical exclusions (or the certainty of rejection as to that specific applicant) to prospective tenants before collecting application fees. But this a problematic solution because the types of information on which categorical exclusions are most often based tend to cause discriminatory effects on racial and ethnic minorities.<sup>90</sup> Indeed, often the reason landlords encourage applicants to apply anyway despite knowing about an applicant's disqualifying eviction record, criminal history, bankruptcy, landlord-tenant debt, or other item certain to result in denial is consistent with the notion of "treating everyone the same" to supposedly guard against fair housing liability.<sup>91</sup>

That is, discouraging persons from applying for rental housing because of their membership in a protected class violates the Fair Housing Act.<sup>92</sup> This can occur, for instance, if a leasing agent routinely deters members of a particular group from applying if they report having adverse background information, while encouraging people outside that group to apply regardless. Fair housing testing around criminal history screening has repeatedly uncovered evidence of property management firms discouraging Black applicants who report criminal history from continuing with the application process, for example, while encouraging white applicants to move forward despite similar criminal history.<sup>93</sup>

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88. See generally *Sager v. Hous. Comm'n of Anne Arundel Cnty.*, 957 F.Supp.2d 627 (D. Md. 2013) (inability to avoid a harmful consumer practice as a factor in establishing unfairness).

89. Many tenant-screening and property management firms recommend using "pre-screening" questions to ascertain potential disqualifiers from prospective tenants before running a formal background check. See, e.g., *20 Questions To Ask Potential Tenants*, RENTPREP, <https://rentprep.com/tenant-screening/questions-to-ask-potential-tenants/> (last visited Oct. 27, 2022); see also Mergenhausen, *supra* note 63, at 17.

90. See U.S. DEP'T. OF HOUS. & URB. DEV., *supra* note 57, at 6 ("Screening criteria, such as those related to criminal records, credit, and rental history, may operate unjustifiably to exclude individuals based on their race, color, or national origin.").

91. See HOUS. JUST. CTR., *supra* note 29, at 6–7.

92. 24 C.F.R. § 100.70(c) (2020).

93. See, e.g., EQUAL RIGHTS CENTER, UNLOCKING DISCRIMINATION 22 (Oct. 2016) ("Sixteen out of forty-seven tests, approximately 34% of tests, displayed differential treatment in this category that favored the white tester . . . The most frequent type of differential treatment uncovered through testing occurred when matched pair testers were provided different information about criminal records screening policies and practices. In one DC test, both testers disclosed to the same agent that she had a conviction on her record from approximately 15 years ago related to being in an abusive relationship. After the African American tester disclosed this information to the agent, he 'shook his head no, and stated 'Yeah. They won't approve you. Anyone with a felony on their record will be declined.'" After the white tester disclosed the same information about her criminal record during her test part, the same agent responded that a 'third party conducted the background check and made a decision, and that it really depended on the type of crime and how long ago it had occurred.'").

Fully screening and considering every applicant under the landlord's formal admission policy avoids the risk of this discrimination—but comes at the cost of some housing seekers paying screening fees for applications that have no chance of being approved. Rental application fees in this context are thus superfluous and dishonest: applicants pay the screening fees in the belief they will be considered for rental housing. But, in fact, such are fees paid merely for a futile application conducted only to bolster a landlord's defense against potential housing discrimination claims.

### 3. Rental Application Fee Schemes May Amount to Illegal Lotteries

Applicants who pay application fees or associated administrative fees and are not approved for the housing receive nothing of any material value in return. At most they receive *a chance* at being approved for the housing. In this way, paying rental application fees carries many characteristics of gambling: the applicant bets the fee on securing the housing. In some circumstances, such rental application fee schemes could potentially amount to unlawful wagers or lotteries.

Gambling occurs when a person risks “any money or thing of value for gain, contingent in whole or in part upon lot, chance, or the happening of an event over which the person taking a risk has no control.”<sup>94</sup> The “gain” to be realized through gambling may be anything of value—certainly including a coveted opportunity to lease a dwelling unit.<sup>95</sup> Bets and wagers are unenforceable and contrary to public policy in many jurisdictions—especially those “bargains in which only one side faces any risk.”<sup>96</sup> Most states also prohibit or tightly regulate participation in so-called “lotteries,” a form of gambling in which participants pay a fee (or give other consideration) to enter and a winner is selected by chance among the entrants.<sup>97</sup> States control such schemes because “[t]he evils attending a system of lotteries, and against which the statutes are directed, consist in the risk which people are willing to take in hazarding their money with a high probability that they will lose it, without any or but little benefit, and with a very remote prospect of gain.”<sup>98</sup>

Charging an application fee involves a payment of consideration for a chance at a prize (i.e., admission to the rental housing), so the question of whether a rental application fee constitutes an illegal gambling transaction turns on whether the outcome is sufficiently determined by chance.<sup>99</sup> This might occur, for

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94. 38 C.J.S. *Gaming* § 5 (2022) (citing *Sniezek v. Colo. Dep't. of Revenue*, 113 P.3d 1280 (Colo. App. 2005)).

95. See also *Williams v. Weber Mesa Ditch Extension Co.*, 572 P.2d 412, 413–15 (Wyo. 1977) (scheme where entrants paid \$5 for chance to win 40-acre land parcel constituted illegal lottery).

96. 7 WILLISTON ON CONTRACTS § 17:1 (4th ed. 2022).

97. Barry M. Benjamin, *Sweepstakes, Contests, and Other Promotions*, 20191018A NYCBAR 156 (Oct. 18, 2019).

98. 7 WILLISTON ON CONTRACTS § 17:4 (4th ed. 2022).

99. See Stephen J. Leacock, *Lotteries and Public Policy in American Law*, 46 J. MARSHALL L. REV. 37, 78–79 (2012).

instance, in a property where large numbers of prospective tenants seek to lease a single vacant unit if the landlord collects application fees from all the interested applicants and then chooses the winner through some random means. Note the winner need not be determined solely by chance; a scheme may nevertheless constitute a lottery if “the element of chance predominates.”<sup>100</sup> Chance could seemingly predominate in such a scheme even where the landlord screened applicants for a set of minimum criteria, then drew randomly from among those remaining.<sup>101</sup> On the other hand, “when the award is made on the basis of quality, skill or superior accomplishment, the transaction is legal. . . .”<sup>102</sup>

#### 4. Unfair Application Fees as Contrary to Public Policy

Though numerous practices with respect to rental application fees could violate consumer protection acts if carried out in misleading ways or accompanied by false statements, rental application fees can be abusive and violate existing laws even if fully disclosed to applicants in a timely and forthright manner, limited to a landlord’s actual costs or other defensible amount, and used to actually process rental applications. This is because a violation of a state consumer protection law can often be established by demonstrating that the challenged practice runs afoul of established public policies.<sup>103</sup>

In the context of rental housing that typically costs hundreds or even thousands of dollars per month, a one-time application fee of \$40, \$60, or even \$100 might not appear sufficiently significant to constitute a potentially oppressive or substantially injurious practice. Yet the manner in which rental application fees present genuine consumer harms and policy problems is not often through payment of the single, one-time fee. Rather, it is the repeated payment of those fees for successive applications to different properties—or, at least, the specter of denial and the deterrent effect of such repeated charges—that makes rental application fees truly oppressive and injurious. By deterring people in need of housing from applying to suitable rental properties, or by extracting fees from such persons without providing any housing in return (thereby diminishing resources

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100. 7 WILLISTON ON CONTRACTS § 17:4 (4th ed. 2022).

101. See, e.g., *State ex Inf. McKittrick v. Globe-Democrat Pub. Co.*, 110 S.W.2d 705, 713 (Mo. 1937) (“a contest may be a lottery even though skill, judgment, or [research] enter thereinto in some degree, if chance in a larger degree determine the result. . . . [Whether] the chance factor is dominant or subordinate is often a troublesome question.”).

102. 7 WILLISTON ON CONTRACTS § 17:6 (4th ed. 2022).

103. See, e.g., Donald M. Zupanec, Annotation, *Practices forbidden by state deceptive trade practice and consumer protection acts*, 89 A.L.R.3d 449, § 3[c] (1979) (discussing *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th Supp. 632, 647 (1996) (unfair practice is one that “offends an established public policy, or [that] is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers”)); see also *Philips v. Berner*, 789 So. 2d 41, 48–49 (2001) (unfair practice is one that “offends established public policy and . . . is unethical, oppressive, unscrupulous, or substantially injurious”) (underline added); In re *Bozzano*, 183 B.R. 735, 738 (Bankr. M.D.N.C. 1995) (applying N.C. law).

needed to secure housing elsewhere), application fees counteract important public policies such as reducing housing insecurity and ending homelessness.

Accordingly, one potentially meritorious legal theory concerns landlords who charge rental application fees to applicants who offer free access to a portable tenant screening report.<sup>104</sup> If the portable report is current and contains substantially all the same information the landlord ordinarily considers in deciding whether to offer the applicant a lease, then imposing a fee to order another, duplicative report could amount to an excessive or unreasonable charge.

Probably the main challenge advocates would face in bringing this type of claim is that any two tenant-screening reports will seldom be exactly identical, even if they are close in time and concern the same rental applicant. Screening reports may differ in the types of reports included, the sources of information searched, the “lookback” periods applied to each item, the manner in which the report contents are arranged and displayed, and even the exact personal identifiers used to search for matching records.<sup>105</sup> Importantly, a report from a landlord’s preferred provider will likely contain a score, admission decision, or other analytical component that may even be uniquely generated based on the landlord’s admission criteria—whereas a portable report might contain only a generic credit score<sup>106</sup> or might not include any analytical information at all.<sup>107</sup> Hence, landlords would likely respond to such claims by pointing to differences between the portable report and the landlord’s preferred report and claiming those differences justify the refusal of the portable report. To overcome this defense, advocates would likely need to demonstrate either (i) that the differences between the portable report and the landlord’s preferred report are immaterial (either objectively or immaterial to the specific landlord in question), or (ii) that the adverse public policy implications of refusing portable reports render the practice unfair, even if some important differences may exist between the landlord’s preferred report and the contents of a portable report.

Since only landlords benefit from admission screening, landlords ought rightly to bear the associated costs fully. Yet an applicant who purchases a portable report already shoulders some of that cost; by refusing portable reports, landlords avoid bearing any screening costs whatsoever—shifting those costs entirely to applicants, while still retaining the ability to choose the specific screening product used. This one-sidedness is also anti-competitive behavior because it not

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104. See *supra* notes 70–76 and accompanying text (regarding portable tenant screening reports).

105. See PASLEY ET AL., *supra* note 23, at 4–8 (comparing contents, sources, and formats of tenant screening reports from nine different providers).

106. See, e.g., *Dispelling the myths of the portable tenant screening report*, *supra* note 71 (“MyScreeningReport.com® reports include an Experian credit report and credit score – fully visible to the applicant and the landlord.”).

107. See, e.g., *What is included with the online rental application and third-party reports?*, ZILLOW (Feb. 2022), <https://zillow.zendesk.com/hc/en-us/articles/360000963727-What-is-included-with-the-online-rental-application-and-third-party-reports-> (describing contents of Zillow tenant-screening reports, which do not include scores or analytical materials).



only imposes unnecessary costs on rental applicants, but also stifles innovation by suppressing the market for more efficient portable reports.

Steering renters away from higher-quality rental opportunities because they have damaged credit, eviction records, or criminal history has its own implications for individuals and families directly affected no matter who they are. But in many communities, the renters most heavily deterred by application fees from applying to certain properties will more likely be people of color, and possibly women or families with children.<sup>108</sup> Such deterrence can therefore be expected to undermine established public policy by driving residential segregation or, at the very least, inhibiting residential integration.<sup>109</sup> Rental application fees that produce such discriminatory outcomes might violate consumer protection laws, and might be susceptible to challenge under housing discrimination laws as well.

### *B. Possible Fair Housing Challenges to Rental Application Fees*

The natural collective consequence of application fee-driven residential steering is racial segregation by race and color because the most common grounds for housing denial are not evenly distributed across racial and ethnic lines. Housing providers who charge significant application fees likely deter people saddled with such admission barriers from applying in the first place.<sup>110</sup> And this strongly implies that BIPOC renters, who more frequently have such impediments, are disproportionately more likely to be deterred.<sup>111</sup>

As the tenant-screening company TransUnion SmartMove reported in 2017, based on a survey of 669 landlords throughout the United States, the five most important factors landlords considered in screening rental applicants were (in order) income and employment history, eviction history, criminal background, credit history, and references.<sup>112</sup> Since the key factors that lead landlords to reject rental applications are disproportionately common among BIPOC renters, one would naturally expect the application fees to disproportionately steer BIPOC applicants away from rental opportunities with stiffer admission standards. Basic supply and demand principles suggest those rentals would tend to be higher-quality properties clustered in areas of greater opportunity—i.e., with better schools and job opportunities, a cleaner environment, safer streets, and superior public spaces and amenities—while admission requirements would tend to decline as the quality of the housing itself and the surrounding community diminishes. With genuine data and analysis to confirm and better explain this phenomenon,

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108. See Hepburn et al., *supra* note 56; see THOMAS ET AL., *supra* note 56.

109. See 24 C.F.R. § 100.70 (2020) (describing various housing practices that are unfair because they “perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.”).

110. See, e.g., Collatz, *supra* note 35; White, *supra* note 34; Manolas, *supra* note 37; Leonard, *supra* note 59.

111. See U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 57, at 6.

112. See TRANSUNION *supra* note 14.

advocates could likely curtail the oppressive and discriminatory impacts of rental application fees through fair housing litigation.

Though the effects of deterrence and steering have not been empirically verified, some data does show that BIPOC renters pay successive application fees considerably more often than members of other racial groups. Significantly, the typical white or Asian renter submits an average of two rental applications in a housing search, while Black and Latinx renters typically submit three.<sup>113</sup> And 38% of Black and Latinx renters must present five or more applications, compared with 21% of white renters.<sup>114</sup> While these rates may differ across marketplaces, already these data show that BIPOC renters are disproportionately harmed by the cost of rental screening fees—whether or not any steering effects can be proven.

Charging rental application fees is an outwardly neutral practice—i.e., one that does not expressly discriminate on the basis of race, ethnicity, or other protected characteristics. But if rental application fees can indeed be proven to have a disproportionate adverse effect on BIPOC renters, then a housing provider may lawfully impose such fees only if necessary to achieve a substantial, legitimate interest.<sup>115</sup>

Some of the reasons landlords might give for imposing rental application fees cannot be justified as substantial or legitimate. Deterring applicants with criminal history or eviction records, for example, is unlikely to be justifiable both for the lack of evidence showing that such screening actually makes rental properties any safer or more profitable, as well as the availability of “individualized review” as a less-discriminatory alternative to rigid admission rules.<sup>116</sup> Profiting from housing seekers who are charged fees to apply for housing and never actually considered may further the landlord’s interest in financial gain, but is an illegitimate and exploitative method of doing so.

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113. Garcia & Berchick, *supra* note 8 (also finding “[t]he typical white renter reported paying \$35 in application fees on their rental, while the typical Black, Latinx, and Asian renters all reported spending \$50 on application fees”).

114. *Id.*

115. 24 C.F.R. § 100.500(c)(2) (2013); *see also* U.S. DEP’T OF HOUS. & URB. DEV., REINSTATEMENT OF HUD’S DISCRIMINATORY EFFECTS STANDARD, 86 Fed. Reg. 33590 (proposed June 25, 2021) (“In 2020, HUD published a rule titled “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard” (“2020 Rule”). Prior to the effective date of the 2020 rule, the U.S. District Court for the District of Massachusetts issued a preliminary injunction in *Massachusetts Fair Housing Center v. HUD*, staying HUD’s implementation and enforcement of the rule. Consequently, the 2020 Rule never took effect. After reconsidering the 2020 Rule, HUD is proposing to recodify its previously promulgated rule titled, “Implementation of the Fair Housing Act’s Discriminatory Effects Standard” (“2013 Rule”), which, as of the date of publication of this Proposed Rule, remains in effect due to the preliminary injunction.”).

116. *See* U.S. DEP’T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (Apr. 16, 2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF); *see also* 24 C.F.R. § 100.500 (2013).

Some of the other core reasons for imposing rental application fees, such as deterring “tire-kickers” or recouping genuine expenditures cannot be immediately dismissed as illegitimate. Again, however, less-discriminatory alternatives abound. Non-financial burdens, such as written application requirements or the prospect of a “hard” credit pull may be sufficient to deter non-serious applicants, and even if some charge is necessary the amount could be nominal (in place of the current \$50 per adult average).<sup>117</sup> Note that the burden of justifying a discriminatory practice with evidence is on the housing provider.<sup>118</sup>

## VI. CONCLUSION

As the United States emerges from a lingering pandemic that saw more than 11 million renter households fall behind on rent, and during which as many as 40 million people faced a risk of eviction,<sup>119</sup> the need for tenant-screening restrictions to ensure families who acquired eviction records, landlord-tenant debts, or other adverse rental history can still secure safe and suitable housing could not be more pressing. But even where such protections are enacted, the persistent fear of forfeiting rental application fees will deter and ultimately prevent many tenants from even applying to high-quality housing in the first place. And those rental application fees will have their deepest effects in discriminatorily steering BIPOC renters away from better rental properties in the more highly-desirable areas. If we are to have any hope of preserving what residential integration we have achieved, we must disrupt the harmful dynamics that rental application fees impose on the housing search process.

This means scholars and social science researchers in the housing sphere should investigate rental application fees and verify whether the likely steering effects actually occur. Policymakers should adopt new laws to limit and, better yet, prohibit rental application fees. And housing advocates should pursue legal challenges to rental application fees available now under existing consumer protection and fair housing theories.

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117. Garcia & Berchick, *supra* note 8.

118. 24 C.F.R. § 100.500(b)(2) (2013) (“A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.”).

119. See Emily Benfer et al., *The COVID-19 Eviction Crisis: an Estimated 30-40 Million People in America are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/>.