

MEMORANDUM

April 5, 2021

TO: Public Safety Committee
Planning, Housing and Economic Development Committee

FROM: Christine Wellons, Legislative Attorney

SUBJECT: Bill 49-20, Human Rights and Civil Liberties – Discrimination in Rental Housing
– Fair Criminal History and Credit Screenings

PURPOSE: Worksession 2 – Committee recommendation expected

Expected Attendees

James Stowe, Director, Office of Human Rights
Aseem Nigam, Director, Department of Housing and Community
Development (or designee)

Bill 49-20, Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings, sponsored by Lead Sponsors Councilmembers Glass and Katz, and Co-Sponsors Councilmembers Jawando, Rice, Navarro and Riemer, was introduced on December 8, 2020.¹ A public hearing was held on January 12, 2020, and a joint Public Safety/Planning, Housing and Economic Development Committee worksession was held on February 4.

Bill 49-20 would:

- prohibit a landlord from raising a stated rent in certain circumstances;
- require a rental application to contain certain information about record checks conducted by a housing provider;
- prohibit certain inquiries regarding criminal histories in rental housing applications;
- prohibit consideration of certain arrests and convictions in rental housing decisions;
- and
- generally amend the law regarding discrimination in housing and landlord-tenant affairs.

BACKGROUND

#HousingJustice

The purpose of the Bill 49-20 is to mitigate discrimination and other impediments to permanent housing, especially for homeless individuals who might have histories of certain low-level misdemeanors such as a first conviction for disorderly conduct.

SPECIFICS OF THE BILL

The bill would bring “ban the box” requirements – which are familiar in the employment law context – into rental housing in the County. The bill would accomplish several objectives.

First, the bill would prohibit a landlord from conducting a criminal record check of a prospective tenant until after a conditional offer of housing has been made to the prospective tenant.

Second, the bill would prohibit inquiring into, or making housing decisions based upon, certain arrests or misdemeanors. Specifically, a landlord would not inquire into or consider whether:

- (1) the applicant has been arrested for, or has an arrest record for, a matter that did not result in a conviction; or
- (2) the applicant has an arrest record or a conviction record for, or otherwise has been accused of:
 - (A) trespass under §§ 6-402 or 6-403 of the Criminal Law Article of the Maryland Code;
 - (B) theft as a misdemeanor under § 7-104 of the Criminal Law Article of the Maryland Code;
 - (C) a refusal or failure to leave public buildings or grounds under § 6-409 of the Criminal Article of the Maryland Code;
 - (D) indecent exposure under § 11-107 of the Criminal Article of the Maryland Code;
 - (E) public urination under § 32-17-A of this Code;
 - (F) an open container violation under § 10-125 of the Criminal Law Article of the Maryland Code;
 - (G) possession of marijuana as a misdemeanor or civil violation under Title 5 of the Criminal Article of the Maryland Code;
 - (H) a first conviction of disturbance of the peace or disorderly conduct under § 10-201 of the Criminal Law Article of the Maryland Code;
 - (I) a vehicle law violation under the Transportation Article of the Maryland Code;
 - (J) except as provided in subsection (g), a conviction of a misdemeanor if at least 2 years have passed since:
 - (i) the date of the conviction; and
 - (ii) the date that any period of incarceration for the misdemeanor ended; or
 - (K) a matter for which records:

- (i) are confidential under § 3-8A-27 of the Courts and Judicial Proceedings Article of the Maryland Code; or
- (ii) have been expunged under §§ 10-101 – 10-110 of the Criminal Procedure Article of the Maryland Code.

The bill would expressly clarify, however, that a landlord may inquire into and consider a prospective tenant's sex offender registry status, as well as any sex offense arrests or convictions.

Third, the bill would require a landlord who denies housing based upon an applicant's criminal background to inform the applicant in writing and give the applicant 7 days in which to provide additional information. A violation of the "ban the box" requirements in rental housing would be subject to enforcement by the Office of Human Rights under Chapter 27 of the Code.

Lastly, the bill would prohibit a landlord from increasing rent that is included on a completed rental application within 7 calendar days of the application. This provision of the bill would be enforced by the Department of Housing and Community Affairs.

SUMMARY OF PUBLIC HEARING

At a public hearing on January 12, 2021, multiple organizations and individuals voiced their support of Bill 49-20. Reasons cited in support of the bill included:

- reducing homelessness is an issue of racial equity, as over 60 percent of homeless individuals in the County are African-American;
- homelessness should not be criminalized;
- homeless individuals are more likely than other individuals to have law enforcement interactions;
- the bill expands access to housing; and
- the bill strengthens protections against housing discrimination.

SUMMARY OF FIRST WORKSESSION

On February 4, 2021, the Committees discussed Issue #1, below: whether to amend the bill – consistent with federal guidelines – to prohibit the consideration by landlords of prospective tenants' *arrests* for sex crimes (as opposed to *convictions* or the individual's presence on an offender registry). The Committees requested further information on this issue.

The Committees also discussed the processes that a landlord using a criminal background check would be required to follow under the bill: (1) making a conditional offer; (2) conducting a criminal background check; (3) if denying the offer, providing a written explanation to the applicant; and (4) providing the applicant with 7 calendar days in which provide the landlord with supplemental or corrected information. An applicant who believed that the landlord denied the housing offer in violation of the bill would be able to file a complaint with the Office of Human Rights.

In addition, the Committee discussed Issue #2, below: whether non-profit housing providers should be exempt from certain requirements of the bill.

The Committee also asked the Office of Human Rights to identify additional resources that are needed to implement this and other new legislation.

ISSUES FOR THE COMMITTEES' CONSIDERATION

1. Consideration of Arrest Records

At the first worksession, the Committees discussed whether to amend the bill in order to prohibit the consideration of arrest records in all circumstances, or whether to allow landlords to consider arrest records related to enumerated sex crimes.²

As currently drafted, the bill would permit housing providers to inquire into, and to base rental decisions upon, arrests for certain sex crimes:

A landlord may:

- (1) inquire into an arrest record or conviction record for:
 - (A) a crime of a sexual nature under Title 3 of the Criminal Law Article of the Maryland Code; or
 - (B) a violation of Sections 11-102, 11-103, 11-104, 11-305, or of Title [12] 11, Subtitle 3, of the Criminal Law Article of the Maryland Code;
- (2) inquire into an applicant's presence on a sex offender registry; and

² The specific crimes of a sexual nature included under the bill are: rape in the first degree; rape in the second degree; sexual offense in the third degree; sexual offense in the fourth degree; attempted rape in the first degree; attempted rape in the second degree; sexual conduct between correction or juvenile justice employee and inmate or confined child; continuing course of conduct against child; unnatural or perverted sexual practice (with an animal); incest; sexual solicitation of minors; use of personal identifying information to invite, encourage, or solicit another to commit sexual crime; adult sexual displays – selling or offering to sell to minor; adult sexual displays – allowing minor to enter or remain on premises; adult sexual displays – exhibition to minors; persuasion, enticement, or aid in persuasion or enticement of individuals under age of 16; obscene matter--distribution, exhibition, importation, and publication; sale or display of obscene item to minor; obscene matter--advertising; obscene matter--requiring acceptance; child pornography; possession of visual representation of child under 16 engaged in certain sexual acts; interactive computer service providers – child pornography; and hiring minor for prohibited purpose.

- (3) base a rental decision upon an arrest record or conviction record under paragraph (1) of this subsection, or upon an applicant's presence on a sex offender registry.

The Homeless Persons Representation Project, Inc. has recommended that the bill be amended so that it does not authorize any inquiries into, or consideration of, any arrest records by housing providers. The Homeless Representation Project has noted that, according to U.S. Housing and Urban Development (HUD) guidance, arrest records should not be considered. Specifically, the HUD guidance provides the following analysis of arrests under the Fair Housing Act:

A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.” Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (e.g., by failing to indicate whether the individual was prosecuted, convicted, or acquitted), the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property.

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 (available at [Office of the General Counsel \(hud.gov\)](https://www.hud.gov/officelaw/condo/criminal/)) (April 4, 2016) (footnotes excluded).

Relevance of HUD guidance. Although the HUD guidance is not mandatory on the County or landlords, it reveals HUD’s best thinking about the likelihood that a court would find that a policy of considering arrests violates fair housing laws. A housing provider risks unlawful discrimination if the provider has a policy or practice that has a disparate impact on a protected group. A policy or practice of considering arrests likely would have a disparate impact on Black residents, who are disproportionately subject to arrest. Given this disparate impact, the provider likely would have to show that that the practice is necessary to meet a substantial, legitimate, and non-discriminatory purpose. In HUD’s analysis, considering arrest data probably would not meet the test of being “necessary” because of the relatively low probative value of arrest data.

The HUD guidance does not single out the particular issue of checking criminal history related to sex crimes.

Prevalence of sex crimes not resulting in conviction. A particular concern about sex crimes relates to the relatively low conviction rates for these crimes. According to the Rape, Abuse & Incest National Network (RAINN), less than 1% of sexual assaults result in felony convictions. The Criminal Justice System: Statistics | RAINN Indeed, only 230 out of every 1,000 sexual assaults are even reported to police, meaning that about 3 out of 4 go unreported. *Id.* Of the 230

cases out of 1,000 reported to police, 46 lead to an arrest, 9 are referred to a prosecutor, and only 5 result in felony convictions. *Id.*

Other jurisdictions. Other jurisdictions with “ban the box” requirements in rental housing have taken varying approaches to inquiries about sex crimes. In the District of Columbia, although landlords may not ask about arrests that did not result in conviction, they may ask about “pending criminal accusations” regarding certain serious crimes, including sex trafficking and crimes of sexual abuse. (Code of the District of Columbia, Chapter 35B, § 42-3541.02). A “criminal accusation” under the D.C. law “means an existing accusation that an individual has committed a crime, lodged by a law enforcement agency through an indictment, information, complaint, or other formal charge.”

In the City of Detroit, a landlord may not inquire about any arrest that did not result in conviction. [To: \(detroitmi.gov\)](http://detroitmi.gov) Similarly, landlords in Berkeley, California may consider certain convictions for sex crimes and sex offender registry status, but they may not consider arrests. (Berkeley Municipal Code, § 13.106.040, [Berkeley Municipal Code \(codepublishing.com\)](http://codepublishing.com)).

Option 1. If the Committees wish to prohibit housing providers from considering any arrest, the Committees could recommend *deleting* the references to “arrest record” in the bill text above (lines 127 and 135 of the bill).

Option 2. Another option, similar to the approach of the District of Columbia, would be to prohibit the consideration of arrests, but to allow for inquiries into “pending criminal accusations” for the enumerated sex crimes.

After line 59, add:

Pending criminal accusation means an existing written accusation that an individual has committed a crime, in the form of an indictment or information under the Criminal Procedure Article of the Maryland Code.

Amend lines 126-127 as follows.

(g) *Consideration of Sex Crimes Permitted. A landlord may:*

(1) *inquire into [[an arrest record]] a pending criminal accusation or a conviction record for:*

* * *

Decision Point: Whether to amend the bill: (1) to prohibit consideration of any arrests, or (2) to prohibit the consideration of arrests, but to allow for the consideration of pending criminal accusations of enumerated sex crimes, as described above.

2. Application of the Bill to Certain Nonprofits' Screening Procedures

The Montgomery Housing Alliance, although it supports the bill, raised the following concerns about the bill's application to certain organizations serving vulnerable individuals:

We do want to call your attention to special circumstances pertaining to housing organizations that serve vulnerable individuals. Specifically, we request that language be inserted to ensure that nothing in this law shall interfere with such organizations' processes of conducting criminal background checks including the timing thereof as part of the assessment process to identify needs for therapeutic and other support services to further housing stabilization.

To ameliorate these concerns, one option would be to adopt the amendment below, which would exempt certain non-profit housing providers from: (1) the bill's prohibition against inquiring into criminal histories on rental applications; and (2) the bill's prohibition against conducting a criminal records check prior to the extension of a conditional offer of housing. The other requirements of the bill – including the prohibition against considering certain misdemeanors when deciding whether to offer housing – would still apply.

After line 172, add:

The requirements of subsections (c) and (d) do not apply to a housing provider that:

- (1) is exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code; and
- (2) consistent with the housing provider's mission and policies, conducts a criminal record check on an individual for the purpose of assessing therapeutic and other support services for the individual.

Decision Point: Whether to exempt certain non-profit housing providers from: (1) the restriction against asking about criminal histories on applications and; (2) the restriction against asking about criminal histories prior to the extension of a conditional offer. The providers still would be subject to the restrictions against considering certain types of criminal history and the other requirements of the bill.

3. Exemption for Rental Housing with Shared Living Spaces

As currently drafted, the bill does not apply to accessory dwelling units and certain other owner-occupied properties. Some owners of other rental properties that, while not owner-occupied, include shared kitchens or other living spaces, have requested that the bill not apply to them. If the Committees wish to extend the exemption to rental properties with shared living areas, they could adopt the following amendment to the definition of housing provider:

Housing provider means any person, individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity offering to sell, rent, or provide housing in the County. Housing provider includes the County government, but does not include the United States, any State, or any other local government. Housing provider does not include a lessor of property under Section 27-14(a), [[or]] a lessor of an accessory dwelling unit, or a lessor of a building or portion of a building that contains individual living units, as defined under Section 29-1.

Under Section 29-1, an *individual living unit* is defined as: “A private living accommodation, located in a personal living quarters building, that a tenant must agree to occupy for longer than 30 days, that may contain complete sanitation facilities and equipment for incidental food preparation, such as small portable kitchen appliances, but must not contain complete cooking facilities, such as a stove, oven, or similar device.” Although the individual living unit itself does not have complete kitchen facilities, the building containing the unit could have a shared full kitchen.

Decision Point: Whether to adopt the amendment described above to exempt certain shared living spaces from the bill.

NEXT STEP: The Committees are expected to recommend whether to enact Bill 49-20.

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Bill No. 49-20
Concerning: Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings
Revised: 11/20/2020 Draft No. 6
Introduced: December 8, 2020
Expires: Jun 28, 2022
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmembers Glass and Katz
Co-Sponsors: Councilmembers Jawando, Rice, Navarro and Riemer

AN ACT to:

- (1) prohibit a landlord from raising a stated rent in certain circumstances;
- (2) require a rental application to contain certain information about record checks conducted by a housing provider;
- (3) prohibit certain inquiries regarding criminal histories in rental housing applications;
- (4) prohibit consideration of certain arrests and convictions in rental housing decisions; and
- (5) generally amend the law regarding discrimination in housing and landlord-tenant affairs.

By amending

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Sections 27-14

By adding

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Section 27-15A

By amending

Montgomery County Code
Chapter 29, Landlord-Tenant Affairs
Section 29-28

The County Council for Montgomery County, Maryland approves the following Act:

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

27 (B) the refusal to consider income derived from any criminal
28 activity.

29 * * *

30 **27-15A. Fair criminal history and credit screenings in rental housing.**

31 (a) *Definitions.* As used in this Section:

32 *Applicant* means a person who applies to lease or rent housing in the
33 County. *Applicant* includes any person who resides or will reside with a
34 person who applies to lease or rent housing in the County.

35 *Arrest record* means information indicating that a person has been
36 apprehended, detained, taken into custody, held for investigation, or
37 otherwise restrained by a law enforcement agency or military authority
38 due to an accusation or suspicion that the person committed a crime.

39 *Conditional offer* means an offer of housing conditioned solely on:

- 40 (1) the results of an inquiry into the applicant’s criminal record; or
- 41 (2) another contingency expressly communicated to the applicant at
42 the time of the offer.

43 *Conviction record* means information regarding a sentence arising from
44 a verdict or plea of guilty or *nolo contendere*, including a sentence of
45 incarceration, a fine, a suspended sentence, and a sentence of probation.

46 *Criminal record report* means a record of a person’s arrest and
47 conviction history obtained from any source.

48 *Housing provider* means any person, individual, proprietorship,
49 partnership, joint venture, corporation, limited liability company, trust,
50 association, or other entity offering to sell, rent, or provide housing in
51 the County. *Housing provider* includes the County government, but
52 does not include the United States, any State, or any other local

53 government. *Housing provider* does not include a lessor of property
 54 under Section 27-14(a) or a lessor of an accessory dwelling unit.

55 *Inquiry* or *inquire* means any direct or indirect conduct intended to
 56 gather information, using any mode of communication. *Inquiry* or
 57 *inquire* does not include a question about an applicant's conviction
 58 record or arrest record when the existence of the record is disclosed by
 59 the applicant voluntarily and not in response to a question.

60 (b) *Transparency of criminal history and credit requirements in rental*
 61 *applications.*

62 (1) A housing provider must disclose in any rental application:

63 (A) the processes the provider uses to inquire into the criminal
 64 history and credit history of an applicant; and

65 (B) requirements of the provider regarding an applicant's
 66 credit history, arrest history, and conviction history.

67 (2) The housing provider must not alter the processes and
 68 requirements under paragraph (1) for an applicant whose
 69 application is pending.

70 (c) *Criminal records inquiry on application.* A housing provider must not
 71 require an applicant to disclose on a rental application the existence or
 72 details of the applicant's arrest record or conviction record.

73 (d) *Preliminary inquiry into criminal record.* A housing provider must not,
 74 at any time before the extension of a conditional offer to the applicant:

75 (1) require the applicant to disclose whether the applicant has an
 76 arrest record or conviction record, or otherwise has been accused
 77 of a crime;

78 (2) conduct a criminal record check regarding the applicant; or

79 (3) inquire of the applicant or others about whether the applicant has
80 an arrest record or conviction record or otherwise has been
81 accused of a crime.

82 (e) *Prohibition against inquiry into certain criminal records.* A housing
83 provider must not at any time require an applicant to disclose, conduct a
84 criminal record check solely to determine, or otherwise inquire of the
85 applicant or others, whether:

86 (1) the applicant has been arrested for, or has an arrest record for, a
87 matter that did not result in a conviction; or

88 (2) the applicant has an arrest record or a conviction record for, or
89 otherwise has been accused of:

90 (A) trespass under §§ 6-402 or 6-403 of the Criminal Law
91 Article of the Maryland Code;

92 (B) theft as a misdemeanor under § 7-104 of the Criminal Law
93 Article of the Maryland Code;

94 (C) a refusal or failure to leave public buildings or grounds
95 under § 6-409 of the Criminal Article of the Maryland
96 Code;

97 (D) indecent exposure under § 11-107 of the Criminal Article
98 of the Maryland Code;

99 (E) public urination under § 32-17-A of this Code;

100 (F) an open container violation under § 10-125 of the Criminal
101 Law Article of the Maryland Code;

102 (G) possession of marijuana as a misdemeanor or civil
103 violation under Title 5 of the Criminal Article of the
104 Maryland Code;

- 105 (H) a first conviction of disturbance of the peace or disorderly
 106 conduct under § 10-201 of the Criminal Law Article of the
 107 Maryland Code;
- 108 (I) a vehicle law violation under the Transportation Article of
 109 the Maryland Code;
- 110 (J) except as provided in subsection (g), a conviction of a
 111 misdemeanor if at least 2 years have passed since:
- 112 (i) the date of the conviction; and
 113 (ii) the date that any period of incarceration for the
 114 misdemeanor ended; or
- 115 (K) a matter for which records:
- 116 (i) are confidential under § 3-8A-27 of the Courts and
 117 Judicial Proceedings Article of the Maryland Code;
 118 or
- 119 (ii) have been expunged under §§ 10-101 – 10-110 of
 120 the Criminal Procedure Article of the Maryland
 121 Code.
- 122 (f) Consideration of Certain Records Prohibited. Except as provided in
 123 subsection (g), a housing provider must not base a rental decision upon
 124 any item in an arrest record or a conviction record described under
 125 subsection (e).
- 126 (g) Consideration of Sex Crimes Permitted. A landlord may:
- 127 (1) inquire into an arrest record or conviction record for:
- 128 (A) a crime of a sexual nature under Title 3 of the Criminal
 129 Law Article of the Maryland Code; or

130 (B) a violation of Sections 11-102, 11-103, 11-104, 11-305, or
 131 of Title 2, Subtitle 3, of the Criminal Law Article of the
 132 Maryland Code;

133 (2) inquire into an applicant's presence on a sex offender registry;
 134 and

135 (3) base a rental decision upon an arrest record or conviction record
 136 under paragraph (1) of this subsection, or upon an applicant's
 137 presence on a sex offender registry.

138 (h) *Rescission of a conditional offer based on criminal record.*

139 (1) If a housing provider intends to rescind a conditional offer based
 140 on an item or items in the applicant's arrest record or conviction
 141 record, before rescinding the conditional offer the provider must:

142 (A) provide the applicant with a copy of any criminal record
 143 report;

144 (B) notify the applicant of the intention to rescind the
 145 conditional offer and the items that are the basis for the
 146 intention to rescind the conditional offer; and

147 (C) delay rescinding the conditional offer for 7 days to permit
 148 the applicant to give the housing provider notice of
 149 inaccuracy of an item or items on which the intention to
 150 rescind the conditional offer is based.

151 (2) If a housing provider decides to rescind a conditional offer based
 152 upon the arrest record or conviction record of an applicant, the
 153 provider must notify the applicant of the rescission of the
 154 conditional offer in writing.

155 (i) *Retaliation. A housing provider must not:*

156 (1) retaliate against any person for:

- 157 (A) lawfully opposing any violation of this Section; or
- 158 (B) filing a complaint, testifying, assisting, or participating in
- 159 any manner in an investigation, proceeding, or hearing
- 160 under this Section; or

161 (2) obstruct or prevent enforcement or compliance with this Section.

162 (j) A person aggrieved by an alleged violation of this Section may file a

163 complaint with the Director of the Officer of Human Rights under

164 Section 27-7.

165 (j) The County Executive:

166 (1) may adopt Method (2) regulations to implement the provisions of

167 this Section; and

168 (2) must endeavor to inform prospective applicants and housing

169 providers of their rights and responsibilities under this Section.

170 (k) Exemption. The prohibitions and requirements of this Section do not

171 apply if the inquiries prohibited by this Article are expressly required by

172 an applicable federal or State law or regulation.

173 **Sec. 29-28. Leasing requirements generally.**

174 * * *

175 (h) Rental applications. A rental application must comply with the

176 requirements of Section 27-15A.

177 (i) A landlord must not increase the rent included on a completed rental

178 application:

179 (1) within 7 calendar days of the application; or

180 (2) based upon any discriminatory purpose prohibited under Chapter

181 27, including the source of income of the prospective tenant.

182 **Sec. 2. Short Title.** This Act may be referred to as the Housing Justice Act.

LEGISLATIVE REQUEST REPORT

Bill 49-20

Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings

DESCRIPTION:	Bill 49-20 would: <ul style="list-style-type: none">• prohibit a landlord from raising a stated rent in certain circumstances;• require a rental application to contain certain information about record checks conducted by a housing provider;• prohibit certain inquiries regarding criminal histories in rental housing applications;• prohibit consideration of certain arrests and convictions in rental housing decisions; and• generally amend the law regarding discrimination in housing and landlord-tenant affairs.
PROBLEM:	Discriminatory rental housing practices, especially as applied to homeless individuals.
GOALS AND OBJECTIVES:	Establish “ban the box” requirements related to criminal histories of rental applicants.
COORDINATION:	OHR, DHCA
FISCAL IMPACT:	Office of Management and Budget
ECONOMIC IMPACT:	Office of Legislative Oversight
EVALUATION:	
EXPERIENCE ELSEWHERE:	City of Detroit
SOURCE OF INFORMATION:	Christine Wellons, Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	Chapter 27 applies in most municipalities, including Gaithersburg and Rockville
PENALTIES:	Enforcement under Chapter 27 and Chapter 29

Economic Impact Statement

Office of Legislative Oversight

BILL 49-20

Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 49-20 to provide a modest, targeted benefit to a small number of formerly homeless individuals who, in the process of seeking housing, are the victims of discrimination that is or may be the result of past arrests or convictions. OLO expects that the impact of Bill 49-20 would be a modest increase in costs for a broad set of housing providers who might incur costs related to changes to processes, training materials, or training curricula.

BACKGROUND

Bill 49-20 was introduced on December 8, 2020. The purpose of bill 49-20 is to mitigate housing discrimination and other impediments to permanent housing for certain individuals with past histories of arrests and convictions. Specifically, the bill would:

- prohibit a landlord from raising a stated rent in certain circumstances;
- require a rental application to contain certain information about record checks conducted by a housing provider;
- prohibit certain inquiries regarding criminal histories in rental housing applications;
- prohibit consideration of certain arrests and convictions in rental housing decisions; and
- generally amend the law regarding discrimination in housing and landlord-tenant affairs.¹

A criminal record, or history of encounters with law enforcement and the judicial process, can present challenges to individuals and their households during the search for housing. The universe of affected individuals includes not only those who were convicted and incarcerated, but also those who were convicted and not incarcerated, those who pled guilty or nolo contendere to misdemeanor offenses, and those who were arrested but were not subsequently convicted.

The U.S. Department of Housing and Urban Development summarized the problem in the 2016 guidance from the Office of the General Counsel on the application of Fair Housing Act standards to the use of criminal records by providers of housing²:

“When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society. Yet many formerly incarcerated individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally subsidized housing because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.”

¹ Montgomery County Council, Bill 49-20, Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings, Introduced on December 8, 2020, Montgomery County, Maryland.

² U.S. Department of Housing and Urban Development, *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*, April 4, 2016.

Economic Impact Statement

Office of Legislative Oversight

The scale of the problem is difficult to quantify using federal data.³ That said, the number of individuals who could potentially be affected by discrimination based on arrest or conviction records is substantial.

- By some estimates, more than one-half of all Americans has had at least one family member incarcerated.⁴
- In 2016, 91 million Americans (roughly two-fifths of the adult population of the United States) were included in the Interstate Identification Index, the Federal Bureau of Investigation (FBI) database used to determine whether someone has a criminal record. The number of individual offenders in the Maryland database of criminal history was more than 1.6 million in 2016, or more than a quarter of the total population of the State.⁵

A recent New York University Brennan Center study resulted in new estimates of some of the affected sub-populations: 7.7 million formerly imprisoned individuals nationwide; 12.1 million with felony convictions who were not sentenced to imprisonment; and 46.8 million convicted of misdemeanors.⁶

For many of these individuals, the existence of such records limits economic opportunities and negatively affects outcomes throughout their lives. For example, according to the Brennan Center's study:

- The impact of having been imprisoned is a 52% reduction in earnings;
- The impact of a previous felony conviction that did not result in imprisonment is a 22% reduction in earnings; and
- The impact of a previous misdemeanor conviction is a 16% reduction in earnings.

While these outcomes relate to earnings from employment, rather than the economic effects of housing discrimination, they illustrate the magnitude of the economic challenges facing individuals whose histories include past encounters with the criminal justice system.

Past studies of housing discrimination have generally focused on racial discrimination and have more commonly examined the for-sale market rather than the for-rent market. Many such studies illustrate that minorities are steered towards predominantly minority neighborhoods. Authors of one recent study⁷ outlined the potential effects of such steering:

"If housing market discrimination constrains a household's choice set during a search, then discriminatory behavior will impact the likelihood that minority households locate in disadvantaged neighborhoods. A large body of evidence suggests that such constraints could impact labor market outcomes, educational attainment, criminal activity, physical safety and environmental health."

The research is less clear on whether such steering occurs in the rental market, or whether the same dynamic is at play when the discrimination is primarily based on arrest or conviction rather than on race. Given that minorities are disproportionately affected by encounters with the judicial system, and that the negative outcomes associated with housing discrimination stem from a constrained set of location choices, the statement is probably also true for those who

³ See, e.g., Dr. Nicholas Eberstadt, "America's Invisible Felon Population: A Blind Spot in US National Statistics, Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data, 2019.

⁴ FWD.us, *Every Second: The Impact of the Incarceration Crisis on America's Families*, 2019, <https://everysecond.fwd.us/downloads/EverySecond.FWD.us.pdf>.

⁵ Becki Goggins and Dennis DeBacco, *Survey of State Criminal History Information Systems: A Criminal Justice Information Policy Report, 2016*. U.S. Department of Justice, Bureau of Justice Statistics, February 2018, Table 20, <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>

⁶ Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings*. Brennan Center for Justice at New York University School of Law, 2020.

⁷ Peter Christensen and Christopher Timmins, "Sorting or Steering: Experimental Evidence on the Economic Effects of Housing Discrimination," Working Paper 24826, National Bureau of Economic Research, October 2019.

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have difficulty finding rental housing as a result of discrimination based on a history of arrests or convictions. The housing choices for such individuals are more likely to be in locations that are generally farther from jobs, not served by high quality schools, and that are less safe and less healthy than the housing options that would be available to a similar individual without a criminal background or history.

Bill 49-20 would prohibit a landlord from conducting a criminal record or background check of a prospective tenant until after a conditional offer of housing has been made to the prospective tenant. The bill would also prohibit inquiring into - or making decisions about - whether to rent to an individual based on a history that includes certain arrests or misdemeanors. Specifically, a landlord would not inquire into or consider whether the applicant has been arrested for a matter that did not result in conviction, or whether an applicant has an arrest record or a conviction record or has been accused of violations of several specific provisions of Maryland law.

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

OLO did not use any methodologies in this analysis. OLO assumes that the universe of County residents who have records of previous encounters with law enforcement or the judicial system is relatively large and consistent with the best available national statistics. OLO further assumes that a significant number of homeless individuals have previously been arrested or convicted of crimes. OLO cannot make any assumptions regarding the number of County or regional residents who have been arrested for or convicted of the specific Maryland crimes identified in Bill 49-20.

Uncertainties largely stem from the fact that there is so little information available regarding the number of individuals with arrest and conviction records, the geographic and socio-economic characteristics of those individuals, how frequently those individuals encounter housing discrimination generally, and how frequently housing discrimination is primarily based on arrest and conviction records rather than other characteristics (such as race, credit history, etc.).

Dr. Nicholas Eberstadt, author of *Men Without Work: America's Invisible Crisis*, provided insights regarding this “blind spot in U.S. National Statistics” in his 2019 testimony⁸ to the Joint Economic Committee:

“What do we know about this huge contingent of people? Almost nothing. Age, sex, ethnicity, living arrangement, family situation, income, educational profile, health status, and all the rest of the data the US federal statistical system collects for our national population cannot be cross-referenced by arrest status...”

For those with past felony or misdemeanor convictions, the impact on economic outcomes is even larger than it is for those with only arrest records. However, as with arrest records, the quality of the data has been a barrier to developing a better understanding of the problems faced by this population.

Furthermore, even the most current and relevant studies lack the granularity that would be necessary to estimate or quantify the potential impacts of local legislation. For example, while the 2016 *Survey of State Criminal History Information Systems* included the number of records in Maryland’s database, those records relate to Maryland criminal records and not Maryland residency.

This legislation, in contrast, affects the population of potential Montgomery County renters, and many of the provisions in the legislation relate to violations of specific Maryland laws. Of course, even many of the renters with criminal records or histories may have been arrested for or convicted of violating the laws of other states, rather than simply the laws of

⁸ Dr. Nicholas Eberstadt, *America's Invisible Felon Population: A Blind Spot in US National Statistics*. Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data, 2019.

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Maryland. Similarly, many of those who have previously encountered Maryland's judicial system may in fact reside in other States.

There is also overlap between the provisions of Bill 49-20 and existing laws. State and Federal law prohibit housing discrimination against members of a protected class.⁹ This overlap makes it difficult to estimate the effect on economic outcomes for affected individuals, and difficult to estimate the effect of the legislation on the practices and policies of real estate providers.¹⁰

An additional source of uncertainty is the degree to which the "ban the box" approach will affect outcomes. It remains unclear whether the "ban the box" approach will result in improved outcomes for the intended beneficiaries of such laws rather than merely changing the policies and practices of housing providers.¹¹

VARIABLES

The following variables could affect the economic impacts of the proposed legislation:

- The number of housing providers who reside in the County;
- Profit margins for housing providers who reside in the County;

⁹ See 42 U.S.C. §3601 *et seq.* and Maryland Code Annotated §20-702 *et seq.*

¹⁰ The overlap is illustrated by the existing guidance from HUD regarding the application of the Fair Housing Act to the use of arrest and conviction records in housing. The U.S. Fair Housing Act prohibits housing discrimination in the sale, rental, or financing of dwellings and in other housing related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.¹⁰ A decision not to rent to an individual on the basis of a past arrest or conviction may constitute a violation of the Fair Housing Act under certain circumstances. The following steps are involved in analyzing whether a policy or practice violates the Fair Housing Act:

- Step #1: In evaluating whether a housing provider is using criminal history in a manner that violates the Act, the first step is for the plaintiff to prove that the policy has a discriminatory effect. This burden is satisfied by proving that the practice actually or predictably results in a disparate impact on a group of persons because of their race or national origin.
- Step #2: Subsequently, the burden shifts to the housing provider to prove that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider. To prove this, the housing provider must not only provide evidence proving that such an interest exists but must also show that the challenged policy actually achieves that interest.
- Step #3: Finally, if a housing provider is able to prove that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest, then the burden shifts back to the plaintiff who must show that such interest could be served by a different practice that has a less discriminatory effect.

Furthermore, housing discrimination against protected classes is also prohibited under Maryland law. Article ** of the Maryland Annotated Code makes it illegal to discriminate on the bases of race, color, religion, marital status, physical or mental disability, national origin, sex, or familial status. The Maryland Commission on Human Relations investigates and conciliates some housing discrimination complaints, while the Real Estate Commission enforces other relevant provisions of Maryland law.

¹¹ It is not yet clear to what extent "ban the box" laws positively affect economic outcomes. See, e.g., Christina Plerhoples Stacy and Mychal Cohen, *Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations*, Urban Institute, 2017. Plerhoples and Cohen conclude that while "ban the box" laws do increase callback rates for job applicants with arrest or conviction records, they do not increase the rate at which those individuals are hired. The authors summarize the research thusly: "[R]ecent research has concluded that ban the box also reduces the likelihood that employers call back or hire young black and Latino men...These findings suggest that when information about a person's criminal history is not present, employers may make hiring decisions based on their perception of the likelihood that the applicant has a criminal history. Racism, harmful stereotypes, and disparities in contact with the justice system may heavily skew perceptions against young men of color."

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- The costs to business organizations associated with changing business processes and training materials for real estate professionals in order to ensure future compliance with the law;
- The cost of economic disruptions caused by being denied rental housing due to discrimination;
- The universe of re-housing options available to homeless individuals in the County; and
- The extent to which arrest and conviction records are used as a pretext, rather than as a basis, for making decisions regarding whether to rent to a particular applicant.

IMPACTS

WORKFORCE ▪ TAXATION POLICY ▪ PROPERTY VALUES ▪ INCOMES ▪ OPERATING COSTS ▪ PRIVATE SECTOR CAPITAL INVESTMENT ▪ ECONOMIC DEVELOPMENT ▪ COMPETITIVENESS

Businesses, Non-Profits, Other Private Organization

OLO believes that Bill 49-20 will have a small, negative economic impact on some private organizations in the County in the form of additional costs and changes to processes.¹² Rental housing managers, leasing agents, and landlords will need to modify some lease forms and business practices. It is also possible that the legislation will generate a need for some changes to continuing education curricula or training program literature for housing providers. The costs associated with those potential outcomes is modest and would be near-term in nature.

Housing providers currently face tort liability in certain circumstances when the criminal behavior of residents imperils other residents and may be subject to legal risks associated with potential tort liability if their property is deemed a public nuisance or danger to the neighborhood. To the extent that such liability exists, the costs associated with that liability would be of an ongoing nature. This legislation, and any resulting change to the practices of housing providers regarding criminal background checks, *may* result in additional legal risk for housing providers. State legislation could clarify the circumstances under which an aggrieved or injured party could bring a cause of action against a landlord who is making a good faith effort to balance their duty to their residents and their obligation to comply with local law.

Residents

OLO is not able to quantify the economic impact on individuals for several reasons. It is not possible to quantify the incidence or prevalence of discriminatory pre-leasing practices, nor is it possible to quantify the extent to which a change in local law would reduce the frequency at which discriminatory practices occur. Furthermore, in the absence of research that separates the effects of housing discrimination from other forms of discrimination, it is not possible to estimate the potential long-term cost to individuals that is associated with being the victim of housing discrimination. As such, OLO cannot quantify the extent to which the prohibitions in Bill 49-20 will mitigate the negative economic outcomes associated with these specific discriminatory practices.

That said, OLO believes that the legislation will have a positive, targeted impact on the economic well-being of a small number of individuals or households. The magnitude of that impact could be substantial for the limited universe of individuals who otherwise might have been subjected to housing discrimination based on a history that includes past arrests or convictions.

¹² For the Council's priority indicators, see Montgomery County Council, Bill 10-19 Legislative Branch – Economic Impact Statements – Amendments, Enacted on July 30, 2019, Montgomery County, Maryland, 3.

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While it is not possible to accurately estimate how many County residents are potentially affected, the Brennan Center study provides a basis for some order-of-magnitude illustrations. That study found that 7.7 million living Americans had been imprisoned, 12.1 million had been convicted of felonies but not imprisoned, and 46.8 million had been convicted of misdemeanors. If those individuals were distributed proportionately on the basis of population, the Montgomery County figures would be roughly:

- 25,000 formerly imprisoned individuals
- 39,000 individuals with felony convictions who have not been imprisoned
- 150,000 individuals with misdemeanor convictions

Together, those groups would constitute 20% of the County's population. The bill's sponsors intend for the legislation to specifically address the challenges faced by homeless individuals. According to the most recent "point-in-time" count, the homeless population of the County in 2019 was 647 individuals (including 441 individuals and an additional 206 people who belong to 61 family units).¹³ While it is not clear what percentage of those individuals have previously been arrested or convicted, it is safe to assume that the number is high.¹⁴

It is difficult to provide an accurate estimate of the portion of those individuals who might be the subject of housing discrimination of any kind during a year, though recent experience indicates that a relatively small number of such cases are reported to the Office of Human Rights.¹⁵

QUESTIONS FOR CONSIDERATION

OLO recommends clarifying whether the Office of Human Rights needs additional legislative authority to investigate claims of housing discrimination on the basis of arrest or conviction records, or whether the Office simply needs new screening criteria for determining whether such claims fall within their existing jurisdiction, or new policies related to pursuing cases of housing discrimination on the basis of arrest or conviction records when the victim is a member of a protected class.

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Christensen, Peter and Christopher Timmins. "Sorting or Steering: Experimental Evidence on the Economic Effects of Housing Discrimination." Working Paper 24826. National Bureau of Economic Research. October 2019.

Craigie, Terry-Ann, Ames Grawert, and Cameron Kimble. *Conviction, Imprisonment, and Lost Earnings*. Brennan Center for Justice at New York University School of Law. 2020.

Eberstadt, Dr. Nicholas. *America's Invisible Felon Population: A Blind Spot in US National Statistics*. Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data. 2019.

¹³ Montgomery County's point-in-time survey is conducted annually. The most recent point-in-time survey for which data is available was conducted on January 23, 2019. For more information see <https://www.montgomerycountymd.gov/homelessness/numbers.html>

¹⁴ For example, in 2011, the Men's Shelter of Charlotte (North Carolina) surveyed its clients in an effort to ascertain to what extent those clients had previously experienced arrests and convictions. In that survey, 75 of 96 men surveyed responded that they had been arrested at least once (78.1%). Forty respondents had spent time in either State or Federal prison.

http://www.mensshelterofcharlotte.org/wp-content/uploads/2014/01/Criminal_History_2011.pdf

¹⁵ In response to our inquiry, the County's Office of Human Rights indicated that they have 44 current claims of housing discrimination of any kind against members of protected classes.

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FWD.us. Every Second: The Impact of the Incarceration Crisis on America's Families. 2019.

<https://everysecond.fwd.us/downloads/EverySecond.FWD.us.pdf>.

Goggins, Becki and Dennis DeBacco. *Survey of State Criminal History Information Systems: A Criminal Justice Information Policy Report, 2016*. U.S. Department of Justice. Bureau of Justice Statistics. February 2018. Table 20, <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>.

Montgomery County Council. Bill 10-19, Legislative Branch – Economic Impact Statements – Amendments. Enacted on July 30, 2019. Montgomery County, Maryland.

U.S. Department of Housing and Urban Development. *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*. April 4, 2016.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

Jacob Sesker, contractor for OLO, prepared this report with contributions from Stephen Roblin (OLO).

Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

BILL 49-20: HUMAN RIGHTS AND CIVIL LIBERTIES – DISCRIMINATION IN RENTAL HOUSING – FAIR CRIMINAL HISTORY AND CREDIT SCREENINGS

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 49-20 to narrow racial and social disparities in access to affordable housing by race and ethnicity.

BACKGROUND

The primary goal of Bill 49-20 is to reduce bias against homeless persons in the rental housing market; the secondary goal is to reduce bias against justice-involved persons in the same market. The potential for bias against homeless and justice-involved persons is especially pronounced in the affordable housing market where demand exceeds supply, particularly for individuals with extremely low incomes.¹

As noted by the Job Opportunities Task Force, “a criminal record is acquired upon arrest, whether or not a person is ever convicted of a crime. Anything that occurs after arrest is documented on an individual’s criminal record, and in Maryland, will remain publicly visible until the charges and dispositions are expunged. Mere acquisition of a criminal record, even if an individual is released immediately after arrest, charges are dropped and the individual is never found guilty of a crime, triggers numerous collateral consequences.”²

An estimated 4 out of 5 private landlords utilize background checks to screen out applicants with criminal records.³ This practice disadvantages the formerly homeless due to the criminalization of homelessness where people without housing are punished for doing things in public that every person has to do, such as sleep or rest.⁴ The use of automated criminal background checks among rental applicants also over identifies the number of justice-involved persons due to records that reflect arrests and dropped charges rather than convictions and flawed screening reports that misidentify individual criminal records.⁵

The criminalization of homelessness places formerly homeless individuals at risk for experiencing the collateral consequences of criminal convictions in accessing housing and other benefits.⁶ Collateral consequences refer to social and economic barriers for justice-involved individuals that deny or restrict benefits otherwise available to others. For example, federal law bans access to public housing for certain types of convictions and grants discretion to local housing authorities to deny housing based on any criminal activity.

It is estimated that more than 1.5 million Marylanders, roughly 25%, have a criminal record.⁷ Thus the collateral consequences of having a criminal record in accessing rental housing may affect a significant proportion of County residents beyond individuals impacted by homelessness.



RESJ Impact Statement

Bill 49-20

Bill 49-20 would prohibit landlords from seeking information about applicants' arrest and conviction records prior to making a conditional offer. It would also prohibit the consideration of an applicant's criminal record for the following offenses when making an official offer for housing:

- Arrests for matters that did not result in a conviction
- Convictions of theft as a misdemeanor
- Convictions for trespass orders
- Convictions for refusal to leave public buildings or grounds
- Convictions for indecent exposure
- Convictions for public urination
- Convictions for open container violations
- Convictions for possession of marijuana as a misdemeanor or civil violation
- First conviction for disturbing the peace or disorderly conduct
- Vehicle law violations
- Conviction of a misdemeanor if at least two years have passed

Toward these ends, Bill 49-20 also:

- Prohibits a landlord from raising a quoted rent in certain circumstances;
- Requires a rental application to contain certain information about record checks conducted by housing providers;
- Generally amends the law regarding discrimination in housing and landlord-tenant affairs;
- Requires the Executive to inform prospective applicants and housing providers of their rights and responsibilities; and
- Requires alleged violations to be filed with the Office of Human Rights for enforcement.

The bill would clarify, however, that a landlord may inquire information and consider a prospective tenant's sex offender registry status, as well as sex offense arrests or convictions. The bill would also require a landlord who denies housing based on an applicant's criminal background to inform the applicant in writing and to give the applicant seven days to provide additional information.

DEMOGRAPHIC DATA

Understanding the potential impact of Bill 49-20 on racial equity and social justice requires understanding the demographics of persons who have experienced homelessness in Montgomery County. According to recent data Black residents are three- to four-times more likely than their population share to experience homelessness. Whereas, African Americans accounted for 19% of County residents in 2017:

- Black families with children accounted for 83% of homeless families in the County in 2018;⁸ and
- Black residents accounted for 64% of homeless persons in the County in 2019.⁹

RESJ Impact Statement

Bill 49-20

Understanding the RESJ impact of Bill 49-20 also requires understanding the demographics of justice-involved persons. Disaggregated data for arrests and/or convictions among the offenses prohibited from consideration in rental applications under this bill are not currently tracked. Yet data on arrests and traffic stops suggests that Black and Latinx residents are over-represented among justice-involved persons. For example:

- Black and Latinx persons each accounted for 19 – 20% of County residents in 2017 but accounted for 44% and 26% of arrests by the Montgomery County Police Department.¹⁰
- Approximately 38% of Black men and 25% of Latinx men in the County experienced a traffic stop by MCPD in 2019 compared to 17% of White men.

Finally, understanding the RESJ impact of Bill 49-20 requires understanding the demographics of persons most in need of affordable housing. Latinx and Black households are especially in need of affordable housing in Montgomery County compared to White and Asian households. For example:

- A majority of Black and Latinx households in the County (55% and 62%) expended more than 30% of their income on rents in 2017 compared to a minority of Asian and White households (43% and 45%).¹¹
- At the end of May 2020 in the Washington Metropolitan Area, 40% of Latinx residents and 24% of Black residents had not paid their last month's rent vs. less than 5% of Asian and White residents.¹²

ANTICIPATED RESJ IMPACTS

OLO anticipates that the implementation of Bill 49-20 will narrow racial and ethnic disparities in housing within the County because Black and Latinx residents are over-represented, both, among homeless and justice-involved persons who are impacted by collateral consequences and among those in need of affordable housing. More specifically:

- Black residents are over-represented among homeless individuals and families.
- Black and Latinx residents, and men in particular, are over-represented among justice-involved persons based on arrest rates and traffic stops. Some research has shown that homeless people of color are more likely to have an incarceration history than White homeless individuals.¹³
- Latinx and Black residents are over-represented among housing-insecure residents based on access to affordable housing and recent rental payment histories.

The discriminatory enforcement of having a criminal record also suggests that Black and Latinx residents will benefit disproportionately from this bill. For example, a study examining private District of Columbia-area housing providers when considering applicants with similar criminal backgrounds found that potential White tenants experienced preferential treatment 47% of the time.¹⁴ White applicants received more sympathetic reactions when disclosing their criminal record and were more often encouraged to apply, despite their criminal records, than Black applicants.¹⁵ The same study also found that property agents imposed tougher criminal records screening criteria and sometimes higher fees on Black applicants than White applicants.¹⁶

RESJ Impact Statement

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Black and Latinx residents are also more likely to benefit from the exclusion of inaccurate tenant screenings that unfairly flag them as having criminal histories that would be reduced under this bill. Tenants and consumer attorneys note that errors can have an outsize effect on people with common names that often include communities of color who have fewer unique last names. For example, the New York Times notes that more than 12 million Latinx persons in the U.S. share just 26 surnames according to the Census.¹⁷

METHODOLOGIES, ASSUMPTIONS AND UNCERTAINTIES

This RESJ impact statement and OLO's analysis relies on several sources of information. They include:

- How Automated Background Checks Freeze Out Renters, New York Times, May 28, 2020¹⁸
- Racial Equity Profile, Montgomery County, Office of Legislative Oversight, 2019¹⁹
- Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities: Brief Before the U.S. Commission on Civil Rights, Briefing Report, June 2019²⁰
- Housing for Criminal Justice Involved Individuals in the District of Columbia, Criminal Justice Coordinating Council, 2019²¹
- The Criminalization of Poverty: How to Break the Cycle through Policy Reform in Maryland, Job Opportunities Task Force, January 2018²²
- Housing Not Handcuffs Fact Sheet: The Top Five Ways Criminalization of Homelessness Harms Communities (National Law Center on Homelessness and Poverty)²³
- Collateral Consequences of Criminal Convictions Judicial Bench Book, American Bar Association²⁴

RECOMMENDED AMENDMENTS

The County's Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequities are warranted in developing RESJ impact statements.²⁵ This RESJ statement, however, does not offer recommended amendments because the Bill 49-20 as currently drafted aligns well with its intended goals of reducing racial and social disparities in housing.

COMMUNITY ENGAGEMENT

The bill's sponsors engaged in a number of conversations with County government and community-based stakeholders to develop this bill, including meetings with representatives from:

- Montgomery County Department of Health and Human Services
- Montgomery County Office of Human Rights
- Montgomery County Department of Housing and Community Affairs
- Interfaith Works
- Montgomery County Coalition for the Homeless
- AOBA
- Montgomery Housing Alliance

RESJ Impact Statement

Bill 49-20

CAVEATS

Two caveats to this statement should be noted. First, estimating the impact of legislation on racial and social inequities in Montgomery County is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ statement is intended to inform the legislative process rather than to determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

OLO staffer Dr. Elaine Bonner-Tompkins drafted this RESJ impact statement with assistance from Dr. Theo Holt.

¹ According to the U.S. Commission on Civil Rights June 2019 briefing report, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* - the National Low Income Housing Coalition estimates that only 35 affordable rental units exist for every 100 "extremely low-income" households. (<https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>)

² The *Criminalization of Poverty: How to Break the Cycle through Policy Reform in Maryland*, Job Opportunities Task Force, January 2018 (https://jotf.org/wp-content/uploads/2018/08/cop-report-013018_final.pdf)

³ Ibid.

⁴ See *Housing Not Handcuffs Fact Sheet: The Top Five Ways Criminalization of Homelessness Harms Communities* by the National Law Center on Homelessness and Poverty (<https://nlchp.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf>)

⁵ See the *Criminalization of Poverty* and <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>

⁶ See *Collateral Consequences of Criminal Convictions Judicial Bench Book*, American Bar Association (<https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf>)

⁷ *The Criminalization of Poverty: How to Break the Cycle through Policy Reform in Maryland*, Job Opportunities Task Force, January 2018

⁸ <https://www.nccf-cares.org/wp-content/uploads/2019/03/InvisibleAndHomeless.pdf>

⁹ https://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2020/20200210/20200210_PHEHHS1.pdf

¹⁰ Jupiter Independent Research Group "Racial Equity Profile Montgomery County," Montgomery County Office of Legislative Oversight, July 2019. <https://www.montgomerycountymd.gov/OLO/Resources/Files/2019%20Reports/RevisedOLO2019-7.pdf>

¹¹ Ibid.

¹² <https://www.montgomerycountymd.gov/OLO/Resources/Files/2020%20Reports/COVID-19Recovery-Evictions.pdf>

¹³ *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*

¹⁴ Equal Rights Center study cited in *Collateral Consequences*

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>

¹⁸ Ibid.

¹⁹ <https://www.montgomerycountymd.gov/OLO/Resources/Files/2019%20Reports/RevisedOLO2019-7.pdf>

²⁰ <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>

²¹ <https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/Housing%20for%20criminal%20justice%202020.pdf>

²² https://jotf.org/wp-content/uploads/2018/08/cop-report-013018_final.pdf

²³ <https://nlchp.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf>

²⁴ <https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf>

²⁵ Montgomery County Council, Bill No. 27-29 Racial Equity and Social Justice, Effective on March 2, 2020, Montgomery County, Maryland. <https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/RacialEquity/Bill27-19.pdf>.

**In Support of Bill 49-20: Human Rights and Civil Liberties –
Discrimination in Rental Housing – Fair Criminal History and Credit Screening
January 12, 2021**

This testimony is submitted in support of **Bill 49-20, Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screening**, by Anna Levy and Deedee Jacobsohn, both residents of District 1, on behalf of Jews United for Justice. JUFJ draws on the Jewish tradition of a commitment to justice to advance campaigns to improve the lives of people in Montgomery County.

The Book of Lamentations compares homelessness to the loss of a parent or spouse. By contrast, the establishment of a permanent home promises lasting security. Thus, God's ultimate promise to the Jewish people, articulated first in God's covenant with Abraham, is the guarantee of a home. Without a secure home, normal social relations fall apart, and happiness becomes impossible. Homelessness brings with it fear, depression and a loss of grounding.

The best way to permanently reduce the population of homeless individuals is to help those who are experiencing homelessness obtain permanent housing. However, formerly homeless individuals often face discrimination in obtaining new housing based on previous homelessness, systemic racism, and previous criminal records. Currently, landlords are not required to reveal criminal background considerations, credit requirements, or rental fees on applications and can refuse a rental application without explanation. These practices compound existing racial inequities in housing.

We thank Councilmember Glass and Councilmember Katz for co-sponsoring this important bill, which seeks to reduce racial and social inequities in access to housing by requiring transparency in tenant screening practices and prohibiting consideration of specific types of criminal charges or convictions. **We hope that the final bill will include oversight and penalties** for violation of the requirements outlined.

We urge the members of the Montgomery County Council to approve Bill 49-20 to help to interrupt the cycle of homelessness that disproportionately affects Black and brown families and individuals.

Thank you for the opportunity to provide comments on this meaningful legislation.

County Bill 49-20: The Housing Justice Act -- SUPPORT WITH AMENDMENT

Testimony of Alexandra M. Curd, Staff Attorney, acurd@hprplaw.org

Homeless Persons Representation Project, Inc.

Public Hearing, January 12, 2020

Homeless Persons Representation Project, Inc. (HPRP) is a non-profit legal services provider that provides free legal representation to people who are homeless or at risk of homelessness.

I. The Housing Justice Act could play a key role in helping to break the barriers to housing caused by criminal records and police interaction.

Homelessness is a growing problem in Maryland. Overall homelessness in Montgomery County has slightly increased, with a 4 percent increase since 2019.¹ Black residents constitute 18 percent of the county’s general population,² but represent 58 percent of the population experiencing homelessness.³ These figures are based on data before the onset of the COVID-19 pandemic and the resulting economic fallout, however, and since March 2020 73 percent of persons who have entered our homeless services system have been Black.⁴

One of the most significant barriers to housing is a criminal record.⁵ Our nation’s legacy of using the criminal justice system to address social and public health problems has played a direct role in the overrepresentation of Black residents in both the criminal justice and homeless services systems. Montgomery County issues 25.3 percent of all criminal citations in the state, more than any other county.⁶ Statewide, Black residents receive more than 47 percent of the criminal citations.⁷ These citations can have a lifelong impact on residents of Montgomery County; a record can lock someone out of jobs, housing, and access to other basic needs.

Under Maryland law, all criminal charges, even those charges that do not result in a conviction, remain on someone’s record until expunged. These records are accessible to the public through Maryland Judiciary Case Search as well as through private background check companies. Some landlords use the existence of a criminal record to weed through and reject applicants without

¹ Interagency Comm’n on Homelessness Annual Report 2020, (Dec. 2020),

<https://www.montgomerycountymd.gov/Homelessness/Resources/Files/Documents/Annual%20Reports/2020-ICHAnnual%20Report.pdf>.

² Nat’l Law Center on Homelessness & Poverty, “Housing not Handcuffs, Ending the Criminalization of Homelessness in U.S. Cities,” (Dec. 2019), <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

³ Montgomery Cnty. Gov’t, “Homelessness – The Numbers”

<https://www.montgomerycountymd.gov/Homelessness/Numbers.html> (last visited Jan. 9, 2021).

⁴ Montgomery Cnty Homeless Continuum of Care, Annual Homeless Point-in-Time Count: Highlights from the 2020 Count (July 24, 2020), https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2020/20200728/20200728_9.pdf.

⁵ Opportunity Starts at Home, “Criminal Justice Fact Sheet,” (Apr. 22, 2019), <https://www.opportunityhome.org/wp-content/uploads/2018/02/Criminal-Justice-Fact-Sheet.pdf>.

⁶ Governor’s Office of Crime Control and Prevention, “2017 Criminal Citations Data Analysis Final Report to the State of Maryland,” (Oct. 1, 2018), <https://goccp.maryland.gov/wp-content/uploads/criminal-citations-report-2018.pdf> [hereinafter “2017 Criminal Citations Data Analysis”].

⁷ 2017 Criminal Citations Data Analysis, *supra*, note 6.



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understanding the nature of the charges or the outcome of the case.⁸ **Limiting criminal record screening in housing will undoubtedly improve access to housing for persons experiencing homelessness and aid the County in its efforts to end homelessness.**

II. Federal Guidance supports efforts to limit criminal record screening in housing

In 2016, the US Department of Housing and Urban Development's (HUD) Office of the General Counsel issued guidance advising that the federal Fair Housing Act can apply "to the use of criminal history by providers or operators of housing and real-estate related transactions."⁹ The guidance recognizes that while having a criminal record is not a protected class under the federal Fair Housing Act, criminal record screening policies are likely to have a disproportionate impact on persons of color and may give rise to lawful claims of housing discrimination on the basis of race.¹⁰ **Efforts, such as this bill, to limit criminal record screening will reduce this discriminatory effect.**

III. Federal Guidance advises against consideration of any arrests without conviction

Federal guidance and US Supreme Court precedent both discount the utility of any law or policy considering criminal arrests without conviction. The 2016 HUD guidance states "[A] policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest."¹¹ The guidance then cites to several US Supreme Court cases noting the unreliability of arrest records without conviction, including Schwartz v. Bd of Bar Examiners, in which the Court stated "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."¹²

In contravention of this precedent and guidance, Section 27-15A(g) of the bill as drafted nevertheless permits consideration of an "arrest record or conviction" in certain circumstances. For the reasons stated above, HPRP advises that the bill be amended to prevent any consideration of arrest records. **For all these reasons, HPRP supports County Bill 49-20 with Amendment.**

⁸ Criminal Justice Fact Sheet, *supra*, note 6.

⁹ US Dept Hsg & Urban 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, April 4, 2016, available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

¹⁰ *Supra* note 9, at 2.

¹¹ *Supra* note 9, at 5.

¹² 353 U.S. 232, 241 (1957); *see also* *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) ("[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity."); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) ("[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.").





January 12, 2021

Council President Tom Hucker
Montgomery County Council
Stella Warner Council Office Building
100 Maryland Avenue
Rockville, MD 20850

Testimony regarding Supplemental Appropriation for The Affordable Housing Opportunity Fund, Bill 49-20 - The Housing Justice Act, and Bill 51-20 - Window Guards

Good Afternoon,

My name is John Paukstis. I am the President and CEO of Habitat of Humanity Metro Maryland, a non-profit affordable homeownership provider working in Montgomery County since 1982.

Regarding the Supplemental Appropriation for The Affordable Housing Opportunity Fund

Habitat for Humanity strongly supports the supplemental appropriation of at least \$8 million for the creation of the Affordable Housing Opportunity Fund. Habitat also urges the council to consider increasing the appropriation to the originally requested amount of \$10 million in year one and \$10 million in year two. It's estimated that funding at that level could leverage between \$60 and \$80 million in private dollars.

The need for housing affordability is acute and has only been magnified by our current health crisis. Between 2010 and 2017 the County lost more than 27,000 housing units that rented under \$1,500. We applaud the Council for its commitment to meet the housing shortfall projections laid out in the Council of Governments (COG) Report. In order to produce more than 23,000 affordable units we need to make more funding available while thinking creatively about how we can bring in new partners to leverage public dollars.

The Affordable Housing Opportunity Fund is one way to use public dollars to leverage private investment in housing. That said we must also provide robust funding for the Housing Initiative Fund to ensure a quick take-out strategy so that short-term acquisition dollars can be revolved. Habitat would like to see the acquisition fund paired with a \$50 million bond supporting the preservation and development of affordable housing, with a focus on areas around the Purple Line.

Regarding Bill 49-20 - The Housing Justice Act

Habitat strongly supports The Housing Justice Act and believes the bill is an important step in providing equitable access to housing. This Act will prohibit discrimination in rental housing against individuals convicted of non-violent, low level crimes that are often associated with poverty and homelessness. Justice-involved individuals currently experience high levels of discrimination making it more difficult to find safe, adequate and affordable housing because of their criminal record. This increases the likelihood of homelessness and recidivism.

Moreover, people of color experience poverty and interaction with the criminal justice system at a disproportionately higher rate and are unduly affected by this type of housing discrimination. Decriminalizing poverty and homelessness is an important step in ensuring that all members of our community have equitable access to quality housing.

As the bill is considered, Habitat encourages the council to include language ensuring the law does not interfere with housing organizations that serve vulnerable individuals. These organizations have processes of conducting criminal background checks with timing critical to the assessment process of identifying needs for therapeutic and other support services to further housing stabilization.

Regarding Bill 51-20 - Window Guards

Lastly, Habitat voices its support for Bill 51-20, the requiring of window guards in rental units in certain circumstances. Especially after a number of tragic events, we must take steps to protect the safety of children living in rental housing by ensuring that families requesting window guards have unimpeded access to them.

Habitat recommends that during the implementation of this bill, fire safety and escape be carefully considered. While window guards are an important safety measure in protecting small children, they should not hinder fire escape exits.

Moreover, Habitat recommends that the Council consider providing funding to help with the implementation of this bill. The COVID-19 pandemic has caused economic devastation on many families in rental units, in many cases causing them to be unable to pay their rent. This has, in turn, had a devastating effect on landlords and this may be a difficult time for them to add expenses. Habitat believes in the importance of the bill and believes that an appropriation to support its speedy implementation would be helpful.

We appreciate the Council's dedication to affordable housing, housing safety, and social justice. Thank you for your time and consideration.

Sincerely,



John Paukstis
President & CEO
Habitat for Humanity Metro Maryland, Inc.

CC: Council Vice President Gabe Albornoz
Councilmember Andrew Friedson
Councilmember Evan Glass
Councilmember Will Jawando
Councilmember Sidney Katz
Councilmember Nancy Navarro
Councilmember Craig Rice
Councilmember Hans Riemer



MONTGOMERY HOUSING ALLIANCE

www.montgomeryhousingalliance.org

A coalition of organizations focused on increasing the rate of preservation and development of affordable housing in Montgomery County

Testimony on Bill 49-20, the Housing Justice Act

Montgomery Housing Alliance

January 12, 2021

Good afternoon Council President Hucker and members of the Council. My name is Mary Kolar, and I am testifying on behalf of Montgomery Housing Alliance (MHA). MHA is a coalition of organizations focused on increasing the rate of affordable housing preservation and development in Montgomery County. MHA members include non-profit developers, organizations that serve people in need of affordable housing, and other groups who count affordable housing as one of their policy goals.

MHA supports Bill 49-20, the Housing Justice Act, which would allow many households greater access to housing and address some of the long-standing racial and economic inequities in the County's housing market. Throughout the country, including in Montgomery County, people of color are disproportionately affected by poverty, and disproportionately represented in the criminal justice system. It is crucial to ensure that involvement with the justice system does not, in and of itself, create a barrier to housing. Nearly one in three Americans has a criminal record. In Montgomery County, we already face a critical scarcity of affordable housing; it is imperative to eliminate additional barriers to housing access. Failure to do so puts justice-involved individuals at much greater risk of homelessness and subsequent recidivism.

We do want to call your attention to special circumstances pertaining to housing organizations that serve vulnerable individuals. Specifically, we request that language be inserted to ensure that nothing in this law shall interfere with such organizations' processes of conducting criminal background checks including the timing thereof as part of the assessment process to identify needs for therapeutic and other support services to further housing stabilization.

MHA commends Councilmembers Katz and Glass and the co-sponsors of the Housing Justice Act for their leadership on this critical issue. As the Council examines and strives to address the impacts of racial and economic injustice, one clear step is to decriminalize poverty. We must ensure that those with low-level non-violent offenses, especially survival crimes and offenses linked to poverty and homelessness, do not face additional barriers to housing. MHA members know that quality affordable housing stabilizes communities; fostering access to housing, both through measures like the Housing Justice Act and by increasing the supply of affordable



The Montgomery Housing Alliance is a coalition of the Community Development Network of Maryland



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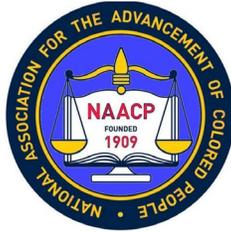
A coalition of organizations focused on increasing the rate of preservation and development of affordable housing in Montgomery County

housing, is necessary so all people in Montgomery County, especially low-income people and people of color, can not only survive, but thrive. We urge you to pass the Housing Justice Act with the above-specified amendment.

Thank you for the opportunity to provide input as you consider this matter.



The Montgomery Housing Alliance is a coalition of the Community Development Network of Maryland



**The National Association for the Advancement of Colored People (NAACP)
Montgomery County Branch
Testimony - Bill 49-20, Human Rights and Civil Liberties - Discrimination in Rental
Housing - Fair Criminal History and Credit Screenings (“Housing Justice Act”)
Tuesday, January 12, 2021**

Good afternoon Council President Hucker and Council members. Thank you for holding this hearing to receive comments on Council Bill 49-20 Human Right and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings – the Housing Justice Act. The NAACP Montgomery County branch supports the proposed CB49-20 Housing Justice Act sponsored by CM Glass and Katz.

This legislation will strengthen current fair housing legislation which does not compel landlords to explain disclosure requirements for criminal records or credit history. Further, landlords are not currently required to explain the disposition of application fees charged to prospective tenants or provide an explanation for rejection of a prospective tenant's application. While individual landlords may allow a prospective tenant to explain or rebut inaccurate or misleading information contained in credit reports or criminal histories, there is no uniform requirement that such an opportunity be afforded. that has been reported.

A landlord's failure to provide explanations for personal information, refusing to provide explanations for an applicant's rejection while refusing to allow a tenant to explain unfavorable information at best leads to the perception of discriminatory treatment and at worse may mask discriminatory practices.

The NAACP has a long and storied history in fighting housing discrimination in the rental and sale of housing. Given these precarious and perilous times, landlords and mortgage companies must take the necessary steps to eliminate practices that result in implicit and explicit discrimination. This county must enact laws that deconstruct the barriers to fair housing and work to replace systemic discrimination with systemic equity.

While the nation has made significant strides in enacting laws that prevent housing discrimination, the coronavirus pandemic has caste a spotlight on the growing need for affordable housing as well as the need to update our laws to increase fairness and equity in housing opportunities.

The COVID-19 pandemic has compounded the plight of homeless persons of color. Prior to the pandemic 60% of the homeless were Black, now over 70% are Black. This coupled with systemic racism requires some action to be taken. Strengthening the Fair Housing Legislation via the Housing Justice Act is a step in the right direction by mandating transparency in rental applications and strengthening housing discrimination laws.

We support the proposed Housing Justice Act.

Thank you.