No. 20-3493

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

301, 712, 2103 AND 3151 LLC, et al.,

Appellants,

v.

CITY OF MINNEAPOLIS,

Appellee.

On Appeal from the United States District Court for the District of Minnesota, The Honorable Paul A. Magnuson, presiding

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BRIEF AMICUS CURIAE OF HOME LINE, HOUSING JUSTICE CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MID-MINNESOTA LEGAL AID, MINNESOTA COLLABORATIVE JUSTICE INITIATIVE, AND VIOLENCE FREE MINNESOTA IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, all of the Amici Curiae are nonprofit corporations, none of which have parent companies, subsidiaries, or affiliates that have issued shares to the public.

/s/Joanna K. Dobson
Joanna K. Dobson

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IDENTITY AND INTERESTS OF AMICI CURIAE

The amici curiae are public interest organizations that advocate for and assist Minnesotans facing housing instability, evictions, and homelessness.

HOME Line. HOME Line is a statewide, nonprofit organization that provides free legal advice to residential tenants on all landlord-tenant issues regardless of income and works to improve public and private policies relating to rental housing. Website: https://homelinemn.org/.

Housing Justice Center (HJC). HJC is a nonprofit public interest and legal organization whose primary mission is to preserve and expand the supply of affordable housing for low-income individuals and families. Website: https://www.hjcmn.org/.

Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee). The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. Website: https://lawyerscommittee.org/.

Mid-Minnesota Legal Aid (MMLA). MMLA provides free lawyers to those who cannot afford them in a broad range of civil cases in thirty counties throughout Minnesota, including more than 2,000 families facing eviction from their homes each year. Website: https://mylegalaid.org/.

Minnesota Collaborative Justice Initiative (MNCJI). MNCJI brings together diverse stakeholders to collectively serve the needs of some of the most vulnerable in our society by implementing an agreed upon and measurable plan to reduce a persistent societal problem – the successful reentry of men and women released from federal and state facilities. Website: https://www.mncji.com/.

Violence Free Minnesota (VFMN). VFMN is a statewide coalition of over 90 member programs that works to end relationship abuse through several avenues, including advocating for housing access and tenant protections, providing direct financial support to survivors facing housing instability, and supporting service providers. Website: https://www.vfmn.org/.

ARGUMENT

The City of Minneapolis ordinance regulating tenant screening is grounded in a sturdy and growing body of law regulating residential rental housing. More importantly, its passage was informed by the staggering and compelling realities of those who struggle to find a place to call home.

First, this brief illustrates how residential rental housing is highly regulated, and for good reason. Second, it shows that the screening ordinance reasonably addresses a well-documented public purpose: to remove unnecessary and irrelevant barriers keeping renters from accessing stable housing. Finally, it points out that the mechanics of the ordinance are clear and workable, and many landlords already do what the ordinance requires.

Regulating tenant screening falls squarely within the City of Minneapolis's powers. To find otherwise would suggest that the layers of state statute, federal law, related municipal law, and common law that have long regulated and upheld regulations of residential rental property are at risk of undoing.

I. State, Federal, and Municipal Law Regulates Residential Rental Housing, and Courts Consistently Uphold This Regulation.

Landlords' emphasis on the primacy of unfettered property rights ignores the long history of state, federal, and local regulation of residential rental housing and the courts' consistent acceptance of such regulation. Landlords argue that there is something "extraordinary" about this particular screening ordinance that renders it unconstitutional. This assertion is contrary to over a century of evolving landlord-tenant law at the state, federal, and municipal levels. To unravel this area of law – that has evolved over the years to address systemic inequities due to racism, violence, and poverty – would be to take a significant, historical step back in time.

This section shows how regulated rental housing has become in the state, federal, and local arenas, and provides a recent example of the court upholding a related local housing ordinance.

A. Minnesota Statutes Have Regulated Landlord-Tenant Law Since at Least 1851.

Regulation of landlords in Minnesota dates back to the 1851 Minnesota Territorial Statutes. The earliest statutes governed actions concerning real property, including eviction actions, then called forcible entry and detainer, and defenses. Minn. Terr. Stat. Chs. 74, 87 (1851). Conduct on the property was also regulated, including nuisances, waste, removal of wood, and unlawful eviction. Minn. Terr. Stat. Ch. 74, §§ 15, 16, 18, 21-22 (1851). When Minnesota became a state, it incorporated the laws. Minn. Stat. Chs. 64, 77 (1858); Minn. Stat. Chs. 75, 84 (1863).

The Legislature greatly expanded tenant rights in the second half of the twentieth century. Some of these new regulations created the obligation of landlords to maintain the condition of the property and to return security deposits (Minn. Stat. §§ 504.18-504.19 (1971)), added a retaliation defense to forcible entry and unlawful detainer actions (Minn. Stat. § 566.03, subds. 2-4 (1971)), created remedies for tenants facing health and safety hazards in their homes (Minn. Stat. § 566.34 (1989)), governed landlord disclosure of inspection orders and pets in

subsidized handicapped accessible rental housing units (Minn. Stat. §§ 504.246, 504.36 (1993)), provided protections for tenant privacy (Minn. Stat. § 504.183 (1995)), and protected tenants who made police and emergency calls (Minn. Stat. § 504.215 (1997)).

The Legislature continued to adopt new landlord-tenant laws in the 2000s, including creating the right of victims of domestic abuse to terminate the lease (Minn. Stat. § 504B.206 (2007)), amending statutes concerning expungement, receipts, attorney's fees, late fees, deposits, utility metering, abandoned person property, foreclosure notice, and money orders (Minn. Stat. §§ 484.014, 504B.118, 504B.172, 504B.173, 504B.177, 504B.178, 504B.271, 504B.285, 504B.291, 504B.365 (2010)) and recognizing courts' powers to expunge eviction cases (Minn. Stat. § 504B.345 (2014)).

Today's Minnesota landlord-tenant law regulates numerous aspects of residential tenancies from habitability responsibilities and conduct covenants during tenancies, to how tenancies may lawfully end, and even – most relevantly to this case – the initial tenant screening process. Minn. Stat. §§ 504B.235-504B.245 (2020) (regulating tenant screening agencies and landlord use of tenant screening reports); Minn. Stat. §§ 504B.173-175 (2020) (regulating screening fees and pre-lease deposits); Minn. Stat. § 504B.178 (2020) (regulating security deposits).

B. Federal Legislation Regulates Critical Aspects of Residential Rental Housing.

The U.S. Supreme Court has recognized and upheld federal anti-discrimination provisions related to housing for over 100 years. In the first half of the 20th century, the Supreme Court struck down ordinances that enforced race-based local zoning laws and held that racially restrictive covenants in property deeds were unenforceable. *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that a Louisville, Kentucky ordinance segregating city blocks by race was unconstitutional); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (ruling that enforcement of racially restrictive covenants was a violation of the Equal Protection Clause of the Fourteenth Amendment). Since the passage of the Fair Housing Act and subsequent amendments, the courts have continued to uphold federal housing discrimination provisions, which are now well-established governmental regulations of rental housing. *Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (upholding disparate-impact claims of discrimination under the Fair Housing Act). Congress has chosen to further regulate landlord-tenant relationships through provisions of the Violence Against Women Act (VAWA), which protects survivors of domestic and sexual violence against housing discrimination, denial of access to housing, and eviction based on their status as survivors. 34 USCA § 12491 (West).

The federal government even regulates aspects of the very issue before this Court: tenant screening. The Fair Credit Reporting Act (FCRA) regulates how landlords may use consumer reports when screening potential tenants for rental properties. 15 USCA § 1681 *et. Seq*. (West). In addition to requirements of credit reporting agencies, FCRA requires landlords who wish to use consumer reports to have a permissible purpose and to send notices of any adverse action taken based on the report to the applicant. *Id.*

C. The City Regulates Rental Housing to Promote Residents' Access to Safe, Stable Homes.

In addition to Minnesota's statutory framework for residential tenancies and key federal provisions regarding discrimination and consumer protection, municipal ordinances and local codes often regulate additional elements of renting residential property. For example, the City of Minneapolis regulates land use and zoning, landlord licensure, housing maintenance and fire code requirements, lead hazard abatement, energy efficiency, conduct on licensed premises, and vacant buildings. Minneapolis Code of Ordinances (MCO) Titles 5, 9, 12, and 20. The City in fact has the power to determine who gets to even operate as a landlord in Minneapolis, by requiring landlords to hold rental licenses and imposing conditions on maintaining a rental license. MCO Title 12, Article XVI (requiring a license to "allow any dwelling unit to be occupied, or let or offer to let to another

any dwelling unit for occupancy, or charge, accept or retain rent for any dwelling unit" and imposing conditions of rental licenses).

These regulations fall squarely within the City's powers. As a home rule charter city, Minneapolis can exercise any powers within its Charter that do not conflict with state laws. MN CONST Art. 12, § 4; Minn. Stat. § 410.07 (2020) ("[A city charter] may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before home rule charters for cities were authorized by constitutional amendment in 1896."); Minneapolis, Minnesota, Charter § 1.4(a) (outlining the City's powers). The courts have long upheld these powers. *Power v. Nordstrom*, 184 N.W. 967, 969 (Minn. 1921) ("Every business and occupation is subject to the reasonable exercise of the police power of the municipality where [the business activity occurs] and in the exercise of the power a city or village may regulate that which the state has failed to regulate."); *State v. Crabtree Co.*, 15 N.W.2d 98, 100 (Minn. 1944) (confirming that municipalities have "wide discretion" to use their police power to regulate matters of public health and general welfare); *Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 251 (Minn. 1946) ("Municipalities have generally been accorded wide latitude in the exercise of police powers .... This is especially true with

respect to conditions affecting public health and safety."), *overruled on other grounds, Johnson v. City of Plymouth*, 263 N.W.2d 603, 608 (Minn. 1978).

The City has explicitly stated its justified interest in regulating aspects of residential rental housing. *E.g.* MCO, § 244.20 ("The purpose of the housing maintenance code is to protect the public health, safety and welfare."). In fact, in addition to the more common statements of purpose found in most ordinances, the City has explicitly stated its intention to support renters and address housing instability in Minneapolis through broader initiatives. In 2019, the City Council adopted a "Renter-First Policy," which outlines the City's commitment to renters in Minneapolis. "The Policy prioritizes the dignity, stability, health, and safety of renters in regulatory and enforcement decision-making." City of Minneapolis, Renter-First Policy, (March 23, 2019) https://lims.minneapolismn.gov/Download/File/2132/Renter%20First%20Policy%2003.01.19.pdf. Through 2019 and 2020, the City developed a Strategic Racial Equity Action Plan (SREAP). One of the policy priorities of this Plan is to "Reduce involuntary displacement in rental housing for Black, Indigenous, People of Color [BIPOC] and Immigrant communities." The Plan is explicit about the reason why this was chosen as a priority: "Affordable, safe housing is a crucial foundation for BIPOC communities, and the City relies on property owners to provide stable rental housing situations. By more effectively leveraging our rental

licensing authority, we can help BIPOC renters access the housing they need." City of Minneapolis, Strategic & Racial Equity Action Plan, *available at* https://www2.minneapolismn.gov/media/content-assets/documents/government/SREAP-One-Pager.pdf.

The ordinance at issue in this case is exhaustively explicit in outlining its purpose. MCO, § 244.2030. It cites not only the City's broad policy powers to regulate public health, safety, and general welfare, but also outlines a compelling case for the rules. *Id.* To find that this extensive "Findings and purpose" statement somehow undercuts the legitimacy of the ordinance would send an absurd signal to municipal legislators.

D. The Minnesota Supreme Court Recently Upheld a Related City Ordinance in *Fletcher*.

In 2017, the Minneapolis City Council amended its civil rights ordinance related to discrimination on the basis of receipt of public assistance. The change explicitly prohibited landlords from refusing to rent to someone based on the landlord's refusal to participate in or adhere to requirements of a public assistance program. MCO, Title 7, § 139.40(e) (2017). The City Council's action was based on findings that renters who hold Section 8 housing vouchers had difficulty finding landlords who would rent to them. *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 1 (Minn. 2020). Prior to passage of the ordinance, the City engaged

with stakeholders and conducted research "to further its understanding of the Section 8 housing choice voucher program, affordable housing, and the Minneapolis housing market, among other topics." *Id.* It found that "families who use the vouchers face an especially challenging task of finding affordable housing in Minneapolis with a tight rental market and about 75 percent of units currently priced above the program's payment standard." City of Minneapolis, "City Council Approves Section 8 Anti-Discrimination Ordinance" (March 24, 2017) http://news.minneapolismn.gov/2017/03/24/city-council-approves-section-8-anti-discrimination-ordinance/.

In upholding the City's rational basis for passing the ordinance, the Minnesota Supreme Court explained their deference to the City Council on policymaking:

> We generally defer to legislative judgments on the wisdom and utility of a law out of concern for democratic legitimacy and institutional capacity. Legislators—as the elected representatives of the people—and legislative bodies are generally institutionally better positioned than courts to sort out conflicting interests and evidence surrounding complex public policy issues.

Id. at 11 (citing *Red Owl Stores, Inc. v. Commr. of Agric.*, 310 N.W.2d 99, 104 (Minn. 1981). The Court reasoned that "under the due process clause then, 'it is not this court's function, at least in the absence of overwhelming evidence to the contrary, to second-guess the ... accuracy of a legislative determination of fact. Nor is it within our province to determine the wisdom of or necessity for a legislative

enactment.'" *Id*. (citing *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 629 (Minn. 1976)). The United States Supreme Court has also expressed the importance of deferring to legislative decisions when the rationality of a policy is "at least debatable." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 456 (1981).

The legislative purpose for the ordinance at issue in this case is similar to the purpose for the housing voucher ordinance considered by the court in *Fletcher*. In both instances, the City Council sought to remove barriers to accessing stable housing by regulating landlord practices for screening and admitting tenants. This Court should defer to the policymaking decisions of the legislative body that enacted the ordinance at issue, even if the Court finds the basis for it to be debatable.

II. The Ordinance Addresses an Important Public Interest in a Reasonable Way.

The provisions of the ordinance were not made up out of thin air; they were based upon research and data. Landlords' attacks of the City's legislative findings, asserting that the City has no clear purpose for adopting this ordinance, are baseless. There is substantial research, locally and around the country, which has identified the screening standards used by many property owners and managers as arbitrary and not closely related to their purpose: identifying applicants likely to be

lease-compliant tenants. This results in tenants being denied based upon information that bears little relevance to their fitness as a tenant. Recently published groundbreaking local research on this topic helped shape the City's screening ordinance.

A. Recent Local Research Supports the Ordinance.

In 2017, the Family Housing Fund and the Housing Justice Center, together with a group of community-based organizations, concluded that the practices employed by Twin Cities landlords to determine who would be accepted into their rental units deserved closer examination. As these organizations began gathering information, they were surprised to learn that there was no recognized set of best practices in tenant screening; that is, screening standards which both treated applicants fairly and protected landlord interests in admitting qualified tenants.

These organizations began an extensive effort to survey the range of screening practices local landlords use, with the goal of shining a light on a part of the rental industry which is usually hidden from view. The idea was to better understand the screening experience from the point of view of both landlord and applicant-tenant. The goal was to produce an objective report, pointing the way to a set of evidence-based best practices fair to both landlords and tenants.

The result is *Opening the Door. Tenant Screening and Selection: How Tenant Screening Works in the Twin Cities Metro Area and Opportunities for*

Improvement, (Housing Justice Center Feb. 2021) (hereinafter "*Opening the Door"*), https://www.fhfund.org/report/opening-the-door/. The information gathered for this report was substantial, including obtaining and analyzing over 50 property owner selection plans, interviewing over 400 tenants on their experiences through various means, and interviews with 13 landlords and another five online surveys (covering owners of up to 34,000 rental units). *Id.* at 5.

The report finds that almost all landlords rely upon the same four broad criteria in screening tenant-applicants: criminal history, rental history, credit history, and income. *Id.* at 6. The specific standards landlords use within those four broad categories, however, vary widely. How landlords draw those lines is a focus of the report. The report examines screening standards within each of these four criteria, with substantial disagreement among landlords over what information in the applicant's background should determine acceptance or denial. *Id.* at 8-17.

For instance, landlords classify particular criminal offenses differently and make very different judgments about when a criminal record old enough to longer be relevant in predicting tenant behavior (commonly referred to as "lookback periods"). *Id.* 13. This raises the question: if a number of landlords have concluded that traffic offenses or ten-year old criminal offenses have no bearing on the likelihood of being a successful tenant, should other landlords still be disqualifying

applicants on those grounds? Is it fair or reasonable for an applicant's past indiscretion to bar their access to housing indefinitely, or even forever?

Fortunately, another groundbreaking local study sheds light on this question. Wilder Research collaborated with four Twin Cities nonprofit landlords to compare background criminal histories of their tenants with their subsequent housing outcomes (success as a tenant). *Success in Housing: How Much Does Criminal Background Matter?* (Wilder Research Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf, (hereinafter "*Success in Housing*"). One key finding was that 11 of 15 criminal offense categories had no significant effect on housing outcomes. Another key finding was that the effect of a prior criminal offense declines over time and becomes insignificant; for misdemeanors, this point comes after two years, for felonies, after five years. *Id.* at 15. Contrast this with the *Opening the Door* study, which found some owners still barring applicants for any felony, no matter how old or irrelevant to renting an apartment. *Opening the Door* at 13.

Landlords also vary widely in how they treat prior court eviction filings. The standards identified in *Opening the Door* range from barring any applicant who has ever been had an eviction case filed against them for any reason to some landlords who disregard evictions under particular circumstances or those that are more than

a year old. *Id.* at 9. Most landlords understandably want to avoid having to evict a tenant in the future, but a few examples can illustrate the unfairness of a blanket ban on past evictions: a 20-year-old eviction with no negative rental history since then, an eviction five years ago stemming from a marriage breakup due to domestic abuse with the abuser no longer part of the household now seeking housing, an eviction on an applicant's record because the applicant was a minor child listed on the complaint when their parents were being evicted, an eviction three years ago for nonpayment of rent due to unemployment but a steady record of employment and successful rent payment since then. Importantly, many of the court filings that landlords use to disqualify applicants never resulted in proven allegations. For good reason, parties in evictions like any civil matter often settle their case to avoid trial. Yet these never-proven allegations haunt renters for decades, shutting them out from stable housing opportunities. *See* Dr. Brittany Lewis, *The Illusion of Choice: Evictions and Profit in North Minneapolis*, University of Minnesota Center for Urban and Regional Affairs, 2019, http://evictions.cura.umn.edu/sites/evictions.dl.umn.edu/files/general/illusion-of-choice-full-report-web.pdf.

The injustice of blanket standards for denial extends to credit history as well. While many landlords will not even consider an applicant whose credit score is below a certain level, others do not consider minimum credit scores at all (only

considering debts relevant to housing, like back rent or utilities). *Opening the Door* at 11. The national system of assigning credit scores has long been criticized as unfairly discriminatory toward certain groups, particularly communities of color. But what is most problematic about closing the door on applicants who do not meet the landlord's minimum credit score is that credit scores almost never reflect rent payment history. The maxim "the rent eats first" reflects the common practices of tenants paying rent first over other consumer bills, resulting in reliable rent payment but a damaged credit score. *Id.* at 12.

Finally, *Opening the Door* considers landlords' use of minimum income tests. Here again, practices vary widely. *Id.* at 8. Landlords who use these tests typically demand that the tenant demonstrate an income which is a certain multiple of the rent. Some landlords require an income equal to three times the rent, others require 2.5 or two times the rent, others have no set minimum ratio at all. Logic suggests, of course, that the more income a tenant has, the more likely they will pay the rent. But this logic can break down. For example, approximately 40% of Twin Cities renters could not meet a triple-the-rent income test, despite the fact that most of them are managing to pay their rent (based on data from before the onset of the COVID-19 pandemic and economic recession). The research does not indicate that an applicant who has consistently paid rent despite failing a triple-the-rent income test should necessarily be barred from consideration. *Id.* at 8-9.

Opening the Door suggests that broadly exclusionary standards are excluding worthy applicants, and that more carefully tailored standards can operate more fairly while still protecting landlords. The report cites many examples of such carefully tailored standards. *See*, *e.g.*, *id.* at 26. Through a combination of continued research and the movement of more overly exclusionary landlords toward the more tailored standards of their colleagues, a fairer and more effective screening system is possible.

B. The Ordinance Removes Housing Barriers for People of Color and Survivors of Domestic Abuse.

When screening standards are unnecessarily strict, Black, Indigenous, and People of Color (BIPOC) seeking housing are disproportionately harmed. Blanket policies banning applicants with any eviction history or with low or limited credit history have a larger adverse impact on households of color in the Twin Cities Metro Area and nationally. *Opening the Door* at 18.

Overly restrictive screening on criminal backgrounds falls especially hard on BIPOC, an impact that has now been widely studied. The Minneapolis ordinance acknowledges the disparate burdens communities of color and ex-offenders face in accessing housing in Ordinance Findings 6, 11, 12 and 13. Mpls. Code of Ord. § 244.2030. Due to the technological advances of the past quarter century, criminal background checks in rental applications have become the norm. David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. and Soc.

Inquiry, 5 (2008). A whole industry has developed that provides national and state databases of criminal and credit history to housing providers and others who are willing to pay. Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 Ind. L. J. 422, 428-29.

In 2016, the Department of Housing and Urban Development (HUD) issued *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*, (HUD Office of General Counsel Apr. 4, 2016) (hereinafter "*HUD Guidance"*). Noting that nearly a third of U.S. adult population has a criminal record of some sort, HUD observes that across the country, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. *Id.* at 1-2. As a result, to avoid potential Fair Housing Act liability based upon policies which have a disparate impact on protected classes, *HUD Guidance* emphasizes criminal record screening policies must be carefully tailored to only consider criminal activities which directly bear upon current fitness as a tenant, which consider the nature, severity and recency of criminal conduct, and which employ an individualized assessment of relevant mitigating information. *Id.* at 7. The Minneapolis ordinance provisions regarding criminal screening are well-aligned with this guidance.

A housing provider's policy or practice that bases decisions on criminal history alone without looking into the nature, severity, or recency of the criminal conduct provides little to no indication of an individual's future potential for positive housing outcomes. Recent literature on recidivism demonstrates that a convicted individual's risk of committing new crimes dramatically reduces over time. Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 Criminology and Pub. Pol'y 483 (2006). For example, Kurlychek et al. found that that the "risk of recidivism is highest in the time period immediately after arrest or release from custody and, thereafter, decreases rapidly and dramatically." *Id*. at 498. And if an individual does not reoffend within six or seven years, their risk of new offence approximates the risk of a new offense by individuals with no criminal record. *Id*. at 483; *see also* Patrick A. Langan and David J. Levine, *Recidivism of Prisoners Released in 1994*, 14 Fed. Sent'g Rep. 1, 58 (Oct. 2002) (finding the longer the time since the last offence, the less likely an individual will re-offend).

The nature of individuals' criminal histories can vary greatly, and most types of criminal history provide little to no indication of an individual's propensity to commit future crime or affect housing outcome. For example, HUD has held that housing providers cannot use arrest records for denial of housing because such 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)." *HUD Guidance* at 5; *see Schware v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957) ("[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.").

In a 2019 study conducted in the Twin Cities area, researchers at four nonprofit housing developers found that of "15 categories of criminal offenses, 11 showed no evidence of a significant impact on the likelihood of a negative housing outcome." *Success in Housing* at 23. In addition, the study found that offenses that occurred over 5 years before an individual's housing had no significant effect on an individual's outcome. *Id*. at 20, 23. Other literature has found there is little evidence that criminal convictions are predictive of a tenant's ability to meet their financial obligations to a housing provider. Schneider, 93 Ind. L.J. at 423.

While non-contextualized criminal history fails to predict an individual's ability to have a positive housing outcome and to meet their financial obligations, access to stable housing significantly decreases an individual's risk of recidivism. Valerie A. Clark, *The Effect of Community Context and Post-Release Housing Placements on Recidivism: Evidence from Minnesota*, State of Minnesota Department of Corrections (April 2015), https://mn.gov/doc/assets/Ecology_Study_-_April_2015_tcm1089-272810.pdf; Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing,*

and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy, 42 W. St. U. L. Rev. 1, 11 (2014) ("Next to employment, the second most important factor affecting recidivism is stable housing.").

Survivors of domestic violence are also disproportionately screened out by standards that lack necessary nuance. Although domestic and sexual violence is widespread, African American and Native American women experience higher rates of domestic violence than white women. Black women experience intimate partner violence at a rate 35% higher than that of white females, and about 2.5 times the rate of women of other races. Native American women are victims of violent crime, including rape and sexual assault, at more than double the rate of other racial groups. HUD Memorandum, *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA)* at 2 (Feb. 9, 2011) (hereinafter "*HUD Memorandum*") https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF.

Domestic violence also has a direct intersection with homelessness, making fair access to housing even more critical. The Wilder Foundation's 2015 study found more than one-third of homeless women were homeless as a direct result of domestic abuse. *2015 Minnesota Homeless Study: Homeless Older Adults in*

Minnesota at 5 (Wilder Foundation June 2017) https://www.wilder.org/sites/default/files/imports/2015_HomelessOlderAdultsInMinnesota_6-17.pdf.

The screening process can become a barrier to housing for survivors of domestic abuse because the process of being abused can lead to flaws in their background that both are unfairly attributed to the survivor and no longer relevant to their fitness as a tenant once their relationship with the abuser is in the past. Too often, however, screening standards that do not consider individual circumstances gloss over these distinctions and disqualify survivors who would be good tenants.

The abuser's actions lead to black marks on the survivor's background record in a number of ways. Credit problems and lower credit scores get tagged to the survivor because financial abuse by the abuser in the form of running up debts in the survivor's name is not uncommon. Moreover, since financial histories generally get placed in the name of both individuals in a domestic relationship, the abuser's financial decisions get attributed to the survivor long after the relationship ends. In other cases, the problem is the opposite; the survivor may lack a record of earning significant income or rental history because the abuser did not allow the survivor to work or appear on the lease as part of a pattern of control and isolation. *See Survivors Know Best Report: How to Disrupt Intimate Partner Violence During COVID-19 and Beyond* at 6 (FreeFrom Aug. 2020),

https://www.freefrom.org/news/survivors-know-best-report, citing Adrienne E. Adams, Cris M. Sullivan, Deborah Bybee, & Megan R. Greeson, *Development of the Scale of Economic Abuse*, Violence Against Women 14, no.5 (2008), https://www.researchgate.net/publication/5444856_Development_of_the_Scale_of_Economic_Abuse.

Eviction records can be similarly misleading. The eviction may have been based upon disruptive actions by the abuser, but the eviction will also list the survivor and will follow the survivor in housing applications for years to come. In other cases, the landlord may decide to evict due to too many police calls to the apartment, even where those calls are made by the survivor seeking protection. *See* Renee Williams and Marie Flannery, *Nuisance and Crime-Free Ordinances: The Next Fair Housing Frontier*, Rural Voices (Housing Assistance Council, May 2018), http://www.ruralhome.org/storage/documents/rural-voices/rv-may-2018.pdf#page=28. Even criminal activity caused by the abuser can unfairly stain the survivor's record. Survivors may be forced into participating in situations by the abuser that lead to criminal convictions, or find themselves having committed a crime while acting in self-defense. Charlene K. Baker et al., *Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors*, 15 Aggression & Violent Behavior 430, 430–39 (2010); Monica McLaughlin & Debbie Fox, *National Network to*

End Domestic Violence, Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking (2019).

Screening standards that operate on a blanket basis without considering individual circumstances will miss these circumstances, denying survivors who have moved past these situations the opportunity for housing. By requiring landlords to either use more inclusive screening standards or doing individualized assessments, the Minneapolis ordinance is designed to reduce these kinds of injustices.

C. Many Landlords Already Use the Screening Criteria Called for by the Ordinance.

Landlords argue that the ordinance's requirements endanger them by forcing them to accept applicants who will default on rent, damage their property, and drive out other tenants through their misbehavior. Of course, any screening criteria are an imperfect tool and just a means of predicting likely behavior. But the landlords' assertion that the standards required by the ordinance will wreak havoc on their business is hard to accept in the face of the reality that the standards the ordinance requires are already successfully employed by many Twin Cities landlords.

The collection and analysis of current landlord screening practices by *Opening the Door* illustrates this point. The ordinance requires that where landlords seek to continue to use a minimum income test of three times the rent,

they must allow an exception for tenants who can prove successful rent payment despite a lower income ratio. Compare this to the current prevailing practices, where the report cites to a recent HousingLink landlord survey demonstrating that only 25% of respondents were still using the triple-the-rent income test. *Opening the Door* at 8.

On evictions, the ordinance allows landlords to look back three years on eviction judgments; the report finds that lookback periods on evictions can vary from as little as one year to forever, but that most landlord lookbacks fall within the two, three or five year range. *Id.* at 10. The ordinance prohibits denials solely based on credit score whereas the report finds that although one third of landlords consider credit scores to be quite important, about half currently do not use them at all. Finally, there is the question of how the ordinance's limits on criminal activity lookback periods compare with current market practices. Comparisons here are more difficult because each landlord creates their own categories of criminal matters for lookback purposes. However, the ordinance requirements can be compared with the findings in the Wilder study discussed earlier. The ordinance deems irrelevant misdemeanors more than three years old, and felonies more than 7 years old or in some cases more than 10 years old. The Wilder study found misdemeanors no longer relevant after two years and felonies no longer relevant

after five years. Thus, the ordinance took a more conservative view (more exclusionary) than the current social science suggests.

Contrary to Landlords' assertion that these radical requirements will endanger their business, these comparisons suggest that the ordinance requirements merely follow the practice of much of the local rental industry right now. The effect of the ordinance then, is to bring those overly exclusionary outliers into what is increasingly becoming prevailing community practice.

III. Landlords and the PLF Amicus Mischaracterize the Ordinance.

Landlords challenge the ordinance's goals of ensuring that negative information is evaluated in light of factors like recency and extenuating circumstances. They also contend they already take such factors into account. This is the very point of the ordinance: to ensure that all property owners are considering these factors. The ordinance sets a baseline for screening that much of the industry already meets or exceeds.

As the City noted in its principal brief, Landlords mischaracterize the ordinance as requiring them to accept applicants they consider unacceptable. But the ordinance merely lays out two options. The first, the inclusive screening criteria, merely identifies specific information that *cannot* form the basis of a denial. It does not dictate that if an applicant does not have these items on their record, they must automatically be selected. Plenty of other criteria can be used by

landlords to screen applicants, including references from previous landlords or applicant interviews. Regardless of any prior evictions, if a landlord identifies prior negative rental history, such as unpaid rent or damage done to the property, the ordinance would not prohibit denial of the application. The second option, the individualized assessment, in fact allows the landlord to consider *any* legal criteria including credit score, criminal history, and eviction records. They just need to also consider mitigating evidence a tenant might supply and explain their reason if an applicant is denied.

Even the fact that the ordinance provides landlords a choice, adopting the ordinance's screening standards or doing an individualized assessment of the applicant, is attacked as illusory and burdensome. But the Declarations of property owners filed by Landlords illustrate that the choice option is working; among these Declarants, some are choosing the ordinance's standards and some are choosing the individualized assessment. Declarations in Support of Plaintiff's Motion for a Preliminary Injunction. Contrary to the Landlords' assertions, owners opting for the individualized assessment are not required to hold mini-hearings nor can an applicant appeal a denial to the City. All that is required is providing tenants with the chance to present information explaining past negative information, to consider that information, and to notify rejected applicants why that additional information still led to rejection.

Landlords argue that considering individual circumstances leaves them vulnerable to a claim under the Fair Housing Act for failing to "consider everyone the same." *Opening the Door* considered this issue at length. *Id.* at 6-7. The HUD Guidance emphasizes that due to the disproportionate impact of criminal records on populations of color, the prohibition against disparate impact in screening policies suggests that to avoid vulnerability to FHA liability, screening policies should both be carefully tailored and consider individual extenuating circumstances. *Id.* at 10. In other words, consideration of individual circumstances does not create Fair Housing liability, it may be compelled by the FHA.

As discussed above, the ordinance is designed not to require landlords to accept applicants that will increase the landlord's risk, but to ensure decisions are made based on standards that are fact-based, fair, not arbitrary, and which still protect landlords' interests. The owner's right to control her property is hardly destroyed by abiding by fair and balanced screening standards, particularly when the ordinance-imposed standards are already widely employed by many landlords.

CONCLUSION

For the reasons stated above, these amici curiae respectfully request that this Court affirm the denial of a preliminary injunction.

DATED: April 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that this brief is typed in Microsoft Word using 14-point type and "Times New Roman" proportionally spaced font. The length of this brief is, with allowed exclusions, 6,318 words.

I further certify that the electronic version of this brief provided to the Court and parties has been scanned for viruses and has been found to be virus-free, as required by Eight Circuit Local Rule of Appellate Procedure 28A(h).

Dated: April 8, 2021

/s/Joanna K. Dobson
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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 8, 2021

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