

How to Seal Eviction Records

Guidance for Legislative Drafting



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Executive Summary

Tenant screening is a major driver of housing insecurity. Tenant screening companies collect eviction, credit, and criminal records and repackage them into tenant screening reports that they sell to landlords. This business model has helped entrench eviction records, in particular, as a ubiquitous barrier to housing. Landlords — who often purchase tenant screening reports — regularly reject potential tenants who have any eviction history, regardless of the nature or disposition of their case. People with eviction histories often find themselves locked out of housing opportunities.

To mitigate these harms, many advocates have called for local and state legislation to seal at least some subset of eviction records. However, little guidance exists for people trying to draft such legislation. This issue brief aims to help fill that gap. We offer guidance and recommendations for advocates and policymakers who seek to draft or support eviction record sealing laws.

First, we make the following observations in support of sealing eviction records:

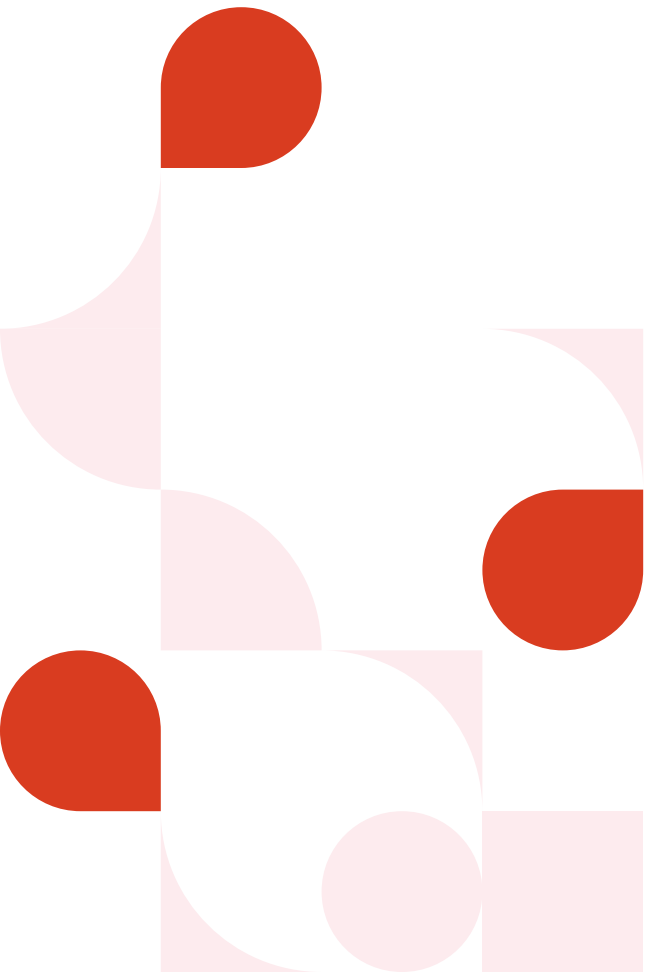
Eviction records should not be used to make housing decisions. Eviction records are products of an unjust, racist, anti-tenant housing system. Using them to screen tenants deepens housing insecurity, discrimination, and conditions of poverty. It also deadens the impact of policies and funding designed to increase access to housing, since many people who qualify for assistance can't secure housing due to eviction histories. Eviction records also are not reliable proxies for tenant behavior or ability to pay. The vast majority of evictions do not end with a judgment in favor of the landlord, and even those that do are products of a court process that is heavily weighted against tenants.

Sealing eviction records is a critical step toward dismantling harmful tenant screening practices. Sealing eviction records is likely the most effective way to keep them off of tenant screening reports and out of landlords' rental decisions. Laws restricting landlords' and tenant screening companies' use of eviction records are also important, but it's practically impossible to fully suppress the dissemination and use of eviction records once they become public.

We offer the following findings and related policy recommendations:

- 1. Eviction records should be automatically sealed at the point of filing.** As researchers Brian McCabe and Eva Rosen have concluded, “in order for record sealing to be effective, it needs to occur at the moment of filing — not later — since third party companies frequently scrape these records and sell the data to [landlords] for screening purposes.” Moreover, eviction filings are merely unproven allegations and have no legitimate value in rental decisions. Sealing at the point of filing allows tenants to search for new housing while their case is pending and limits landlords’ power to chill tenants from asserting their rights.
- 2. Eviction records should remain sealed for as long as possible.** Because eviction records are products of housing injustice and discrimination, we don’t believe there are any eviction records that can be fairly used to make housing decisions. If any eviction records are unsealed, it should be as late as possible in the eviction process. For example, unsealing records only after an eviction is executed and the tenant is removed is preferable to unsealing all judgments in favor of landlords, since many tenants continue paying rent even after an eviction judgment, and are never actually removed.
- 3. Legislation should provide a process for accessing sealed eviction records for housing justice purposes.** Sealing does not need to be a binary system where records are completely open to the public or completely closed. Some access to eviction records may be needed to prevent the immediate harm of eviction and displacement, or to support more transformative change of the housing system. At minimum, the parties to an eviction and their attorneys should have electronic access to their records, and others should be able to request access to records for good cause, including research and reporting. Legal services providers, tenant unions, and similar organizations may need some access to defend against evictions and advance housing justice. The exact scope and methods of access should be determined at the state or local level, based on tenants’ needs and courts’ technical capabilities.
- 4. Eviction sealing laws are compatible with the public’s right to access court records.** Advocates and policymakers should not be deterred when opponents invoke First Amendment concerns. The public’s access to court records can be, and often is, limited by statute to advance other important interests like access to housing and combatting discrimination.
- 5. Advocates and policymakers should engage with courts early in the drafting process to understand courts’ technical capabilities and ensure that they are prepared to implement sealing legislation.** Legislative efforts can be derailed if they don’t align with a court’s technical capabilities and resources, or if court officials are resistant to making the necessary systemic changes. All courts have the capacity to seal records in some way, and many courts use software that would allow them to exclude eviction records from public access portals while maintaining electronic access for authorized users. It’s important to understand and account for courts’ technical capabilities; however, existing processes should not be a barrier to sealing eviction records. Legislators should require courts to make the necessary adjustments to their systems, and allocate the funding needed to make those changes.

Eviction is a consequence of a housing system that is unaffordable for too many people, prioritizes the interests of investors and owners, and is built on a history of segregation and discrimination. While we offer strategies on how to limit the downstream effects of eviction records, we reject any premise that evictions should be permissible under a just housing system. But in a world in which evictions persist, sealing eviction records not only lessens the impact of eviction on tenants, but also delegitimizes the tenant screening industry and its claims that these records can or should be used to predict tenancy outcomes. Restricting access to eviction records also helps shift the power relationship between landlords and tenants by limiting landlords' ability to threaten tenants' future housing access.



Introduction

Landlords and tenant screening companies rely heavily on eviction records to screen out potential tenants.¹ A large and growing body of research demonstrates how this practice can drive housing insecurity and discrimination.² Eviction records are artifacts of housing injustice

- 1 *See, e.g.*, Esme Caramello & Nora Mahlberg, Shriver Center, Combating Tenant Blacklisting Based on Housing Court Records: A Survey of Approaches 1, Sep. 2017, https://web.archive.org/web/20181025193012/http://povertylaw.org/files/docs/article/ClearinghouseCommunity_Caramello.pdf (quoting Teri Karush Rogers, Only the Strongest Survive, N.Y. Times, Nov. 26, 2006, <https://www.nytimes.com/2006/11/26/realestate/26cov.html>) (“It is the policy of 99 percent of [On-Site’s] customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is, because if their dispute has escalated to going to court, an owner will view them as a pain.”); Community Legal Services of Philadelphia, Breaking the Record: Dismantling the Barriers Eviction Records Place on Housing Opportunities 9, Nov. 2020, https://clsphila.org/wp-content/uploads/2020/12/Breaking-the-Record-Report_Nov2020.pdf [hereinafter “Breaking the Record”]; Eric Dunn & Marina Grabchuk, Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State, 9 Seattle Journal for Social Justice 319, 336, 2010; Rudy Kleysteuber, Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records, 116 Yale L. J. 1344, 1347, 2007; Nathan Leys, Testimony in support of H.B. 6528, before the Connecticut General Assembly Housing Committee 1, 2021, <https://www.cga.ct.gov/2021/hsgdata/tmy/2021HB-06528-R000304-Leys,%20Nathan-Sealing%20Eviction%20Records-TMY.PDF>; Complaint 1, 4, Smith v. Wasatch Property Management, Inc., 2:17-cv-00501 (W.D. Wash., Mar. 30, 2017).
- 2 *See generally, e.g.*, Breaking the Record, *supra* note 1; Peter Hepburn, Renee Louis & Matthew Desmond, Eviction Lab, Racial and Gender Disparities among Eviction Americans, Dec. 16, 2020, <https://evictionlab.org/demographics-of-eviction/>; Mathew Desmond, Eviction and the Reproduction of Urban Poverty, 118 Am. J. Sociology 88, 2012; Brian J. McCabe & Eva Rosen, Eviction in Washington, DC: Racial and Geographic Disparities in Housing Instability, Fall 2020, <https://georgetown.app.box.com/s/8cq4p8ap4nq5xm75b5mct0nz5002z3ap>; Sophie Beiers, Sandra Park & Linda Morris, Amer. Civ. Liberties Union, Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color, Jan. 10, 2020, <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color>; Matthew Desmond, MacArthur Foundation, Poor Black Women are Evicted at Alarming Rates, Setting off a Chain of Hardship, Mar. 2014, https://www.macfound.org/media/files/hhm_-_poor_black_women_are_evicted_at_alarming_rates.pdf; Sandra Park, Am. Civ. Liberties Union, Unfair Eviction Screening Policies are Disproportionately Blacklisting Black Women, Mar. 30, 2017, <https://www.aclu.org/blog/womens-rights/violence-against-women/unfair-eviction-screening-policies-are-disproportionately>; Caramello & Mahlberg, *supra* note 1; Nat’l Consumer Law Ctr., Salt in the Wound: How Eviction Records and Back Rent Haunt Tenant Screening Reports and Credit Scores, Aug. 2020, https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Salt_in_the_Wound.pdf; Lydia X. Z. Brown, Ctr. for Democracy & Tech., Tenant Screening Algorithms Enable Racial and Disability Discrimination at Scale, and Contribute to Broader Patterns of Injustice, July 7, 2021, <https://cdt.org/insights/tenant-screening-algorithms-enable-racial-and-disability-discrimination-at-scale-and-contribute-to-broader-patterns-of-injustice/>.

and systemic racism, and they are created by an eviction court system that heavily advantages landlords.³ In DC, less than 1% of judgments in eviction hearings are in favor of the tenant.⁴

Tenant screening services and other data brokers have helped entrench eviction records as barriers to housing.⁵ These companies collect eviction records as soon as they are filed in court, maintain them in proprietary databases, include them in tenant screening reports that they sell to landlords, and encourage landlords to rely on these records in making rental decisions.

Tenants with eviction histories often find themselves locked out of housing opportunities. In the midst of an affordability crisis, efforts to increase funding for housing assistance are undermined because many renters who qualify for funding get screened out of the housing application process because they have eviction histories.⁶

3 See, e.g., Allyson E. Gold, *How Eviction Courts Stack the Deck Against Tenants*, *The Appeal*, Apr. 13, 2021, <https://theappeal.org/the-lab/explainers/how-eviction-courts-stack-the-deck-against-tenants/>; Am. Bar Assoc., *Ten Guidelines for Residential Eviction Laws*, Guidelines 3–6, 8–9, March 14, 2022, https://www.americanbar.org/groups/legal_aid_indigent_defense/sclaid-task-force-on-eviction--housing-stability--and-equity/guidelines-eviction/; Kathryn A. Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, *The Appeal*, Apr. 12, 2021, <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/> (“[E]normous numbers of defendants lose by default and the vast majority have no lawyer.”); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *Fordham Urban L.J.* 37, 46–51 (2010); Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 *OK L. Rev.*, 2022 forthcoming; William E. Morris Inst. for Justice, *Injustice in No Time: the Experience of Tenants in Maricopa County Justice Courts*, June 2005, <https://morrisinstituteforjustice.org/helpful-information/landlord-and-tenant/4-final-eviction-report/file>; Lawyers’ Comm. for Better Housing, *No time for Justice: A Study of Chicago’s Eviction Court*, Dec. 2003, <https://www.lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf>; Monitoring Subcomm. of the City Wide Task Force on Housing Court, *5 Minute Justice*, or, “Aint nothing going on but the rent!”, 1986; Leys, *supra* note 1, at 6 (“[P]lenty of people who have good factual or legal defenses lose their cases by default because of the blisteringly fast nature of eviction cases and the shoddy procedural guardrails baked into the process.”).

4 McCabe & Rosen, *supra* note 2, at 10.

5 See, e.g., Nat’l Consumer Law Ctr., *supra* note 2; Dunn & Grabchuk, *supra* note 1, at 334–37; Kaveh Waddell, *How Tenant Screening Reports Make it Hard for People to Bounce Back from Tough Times*, *Consumer Reports*, Mar. 11, 2021, <https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/>; Letter from Sens. Elizabeth Warren et al. to Consumer Financial Protection Bureau Acting Dir. Dave Uejio, March 1, 2021, <https://www.documentcloud.org/documents/20510708-20210301-letter-to-cfpb-on-over-sight-of-tenant-screening-technology-companies>; Bureau of Consumer Financial Protection, *Bulletin 2021–03, Consumer Reporting of Rental Information*, 86 *Fed. Reg.* 35595, 35597–98, 2021 [hereinafter “CFPB Rental Information Bulletin”].

6 See, e.g., Annemarie Cuccia, *DC’s New Tenant Rights Bill Protects Voucher Holders, Seals Certain Eviction Records*, *The DC Line*, Mar. 16, 2022, <https://thedcline.org/2022/03/16/dcs-new-tenant-rights-bill-protects-voucher-holders-seals-certain-eviction-records/> (discussing how new tenant protections in DC would help renters with subsidies access housing by removing past rental history from consideration).

To address this problem, advocates and policymakers across the country have advocated for legislation to limit the availability and use of eviction records for tenant screening.⁷ Several states have passed eviction record sealing laws.⁸ Many of these laws only allow people to seal their records after the conclusion of their case, and/or require people to petition the court to seal their records. But support is growing for approaches (such as California’s) that seal eviction records as soon as they are filed, before they become public.⁹ Despite this momentum, little guidance exists for advocates and policymakers seeking to draft eviction record sealing legislation.

This issue brief is informed by Upturn’s legislative advocacy efforts in DC — especially our coalition partnerships with direct legal service providers — and our research into the tenant screening industry. In 2019 we began looking into tenant screening companies’ practices by examining their marketing materials, sample tenant screening reports, and other information, including tenant screening contracts, and reports obtained by the Markup and the New York Times.¹⁰ These materials demonstrate that tenant screening still heavily relies on criminal, credit, and eviction records, even if some companies advertise novel technology or data sources.¹¹

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- 7 See, e.g., Breaking the Record, *supra* note 1, at 16–17; Leys, *supra* note 1; D.C. Council Comm. on Housing & Neighborhood Revitalization, Comm. Rep. on B24–0096 at 13–17, Dec. 1, 2021, https://lms.dccouncil.us/downloads/LIMS/46603/Committee_Report/B24-0096-Committee_Report1.pdf; Indiana University McKinney School of Law Health and Human Rights Clinic et al., How Indiana Courts Can Prevent Evictions: Responding to a Looming Public Health and Economic Crisis 12–13, https://mckinneylaw.iu.edu/practice/clinics/_docs/Indiana_courts_prevent_evictions.pdf; Beiers, Park & Morris, *supra* note 2; Network for Public Health Law, Limiting Public Access to Eviction Records, <https://www.networkforphl.org/wp-content/uploads/2021/05/Fact-Sheet-Limiting-Public-Access-to-Eviction-Records.pdf>; Caramello & Mahlberg, *supra* note 1; Nikki Trautman Baszynski, *Eviction Records Should Be Expunged*, The Appeal, May 20, 2021, <https://theappeal.org/the-point/eviction-records-should-be-expunged/>; McCabe & Rosen, *supra* note 2, at 31–32; Sabbeth, *supra* note 3; Nat’l Consumer Law Ctr., *supra* note 2; Jaboa Lake & Leni Tupper, Ctr. for Am. Progress, Eviction Record Expungement Can Remove Barriers to Stable Housing, Sep. 30, 2021, <https://www.americanprogress.org/article/eviction-record-expungement-can-remove-barriers-stable-housing/>; Am. Bar Ass’n., *supra* note 3, Guideline 10.
- 8 See, e.g., Cal. Civ. Proc. Code § 1161.2; D.C. Code § 42–3505.09; Nev. Rev. Stat. § 40.2545; 2019 Or. Laws Chap. 351; Minn. Stat. § 484.014; Colo. Rev. Stat. § 13-40-110.5(1)-(2); 735 Ill. Comp. Stat. 5/9-121; ME R. Electronic Court Systems 4(C); N.Y. Real Prop. Acts § 757.
- 9 See, e.g., Leys, *supra* note 1; McCabe & Rosen, *supra* note 2, at 31–32; Nat’l Consumer Law Ctr., *supra* note 2; Lake & Tupper, *supra* note 7; Am. Bar Ass’n. *supra* note 3; D.C. Council Office of Racial Equity, Racial Equity (CORE) Impact Assessment of Bill 24–0096, Eviction Record Sealing Authority and Fairness in Renting Amendment Act of 2021 9–11, Nov. 30, 2021, <https://www.dropbox.com/s/nejlhn7ljj8js3y/B24-0096%20Eviction%20Record%20Sealing%20Authority%20Amendment%20Act%20of%202021.pdf?dl=0>.
- 10 Public Housing Agency FOIAs, DocumentCloud, <https://www.documentcloud.org/app?q=%2Bproject%3Atenant-screening-story-fo-49059>. See also Lauren Kirchner & Matthew Goldstein, Access Denied: Faulty Automated Background Checks Freeze Out Renters, The Markup & N.Y. Times, May 28, 2020, <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters>; Lauren Kirchner, How We Investigated the Tenant Screening Industry, The Markup, May 28, 2020, <https://themarkup.org/show-your-work/2020/05/28/how-we-investigated-the-tenant-screening-industry>.
- 11 See, e.g., TransUnion SmartMove, <https://www.mysmartmove.com/> (Advertising screening reports that let landlords “see the full picture of [their] tenant,” and listing credit reports, criminal reports, eviction reports, and “income insights report[s],” as the components included in their tenant screening reports); SafeRent Solutions, Resident Screening, <https://saferentsolutions.com/resident-screening/> (listing credit reports, eviction & address history, criminal records, credit, and ID verification); Saferent Solutions, SafeRent Score, <https://saferentsolutions.com/saferent-score/> (listing rent-to-income ratio, credit reports, and eviction history as the “key factors” influencing the score in a sample image of a tenant screening report).

In 2020, we joined a coalition of DC housing advocates that had formed five years earlier to address barriers to rental housing access in the District.¹² In 2022, largely due to this coalition’s efforts, the DC Council passed major legislation including eviction protections, tenant screening restrictions, and automatic sealing of eviction cases that don’t end in a judgment in favor of the landlord.¹³

While we supported this legislation, we also began pushing (along with a few other advocates)¹⁴ for DC to seal all eviction records immediately at the point of filing.¹⁵ We began talking to coalition partners about how such a law might work, and identified the need for more resources to help advocates and policymakers navigate the questions we were facing.¹⁶

This issue brief provides recommendations, guidance, and analysis to support anyone considering drafting or advocating for eviction record sealing legislation at the state and local levels. While eviction records policy can be a highly localized issue, we’ve mapped out the common issues and challenges that policymakers and advocates will need to navigate.

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- 12 In 2015 — five years before we got involved — the Washington Legal Clinic for the Homeless organized a coalition of “community members, service providers, advocates and District agency representatives” to address the biggest barriers to housing in DC. Washington Legal Clinic for the Homeless, DC Council Reduces Barriers to Rental Housing, Mar. 9, 2022, <https://www.legalclinic.org/dc-council-reduces-barriers-to-rental-housing/>. The group, after conducting focus groups with tenants, identified these barriers as “criminal history, rental or eviction history, credit history, voucher discrimination[,] and high fees.” *Id.* Before we joined in early 2020, the coalition had already convinced the DC Council to pass limits on criminal record screening for housing, D.C. Code § 42–3541, and had begun working on legislation — which has since passed — to put guardrails around the tenant screening process to combat discrimination, and to seal eviction records that do not result in a judgment in favor of the landlord, Eviction Record Sealing Authority and Fairness in Renting Amendment Act of 2022, D.C. Law 24–115, <https://code.dccouncil.us/us/dc/council/laws/24-115>.
- 13 Eviction Record Sealing Authority and Fairness in Renting Amendment Act of 2022, D.C. Law 24–115, <https://code.dccouncil.us/us/dc/council/laws/24-115>.
- 14 *See, e.g.*, Eva Rosen, Testimony before the D.C. Council Committee on Housing & Neighborhood Revitalization and Committee on Government Operations, Joint Public Hearing on B23–0338, Eviction Record Sealing Authority Amendment Act of 2019, Oct. 30, 2020, https://lms.dccouncil.us/downloads/LIMS/42817/Hearing_Record/B23-0338-Hearing_Record1.pdf.
- 15 Natasha Duarte & Tinuola Dada, Upturn, Testimony before the D.C. Council Committee on Housing & Executive Administration, Hearing on B24–96, Eviction Record Sealing Authority Amendment Act of 2021, May 20, 2021, <https://www.upturn.org/work/dc-council-testimony-on-the-eviction-record-sealing-authority-amendment-act/>.
- 16 In recent years, several resources on drafting fair chance housing laws have been published, *see, e.g.*, Nat’l Housing Law Project, Fair Chance Ordinances, an Advocate’s Toolkit, https://www.nhlp.org/wp-content/uploads/021320_NHLP_Fair-Chance_Final.pdf, and many advocates have called for eviction record sealing, *see supra* note 7, but we found little practical guidance on how to draft and implement eviction record sealing legislation.

Key concepts

Eviction process

Knowing how the eviction process works in a jurisdiction is necessary to understand how, when, and what kinds of eviction records are created. The eviction process varies by state, but generally follows these stages:

Notice

In most jurisdictions, to begin the eviction process, landlords are required to give the tenant a written notice, which gives the tenant a certain amount of time to comply with the lease terms (e.g., pay outstanding rent) or leave the property before the landlord can file an eviction lawsuit.¹⁷ This notice period can be as little as 24 hours, or up to 60 days.¹⁸

Filing

After the notice period has elapsed, a landlord may file an eviction lawsuit. In some jurisdictions, the landlord must pay a fee to file. The court then schedules a hearing and formally notifies the tenant of their court date and time.

Court

The court date typically occurs within weeks of the filing. Some landlords and tenants may resolve the issue in the meantime, and those cases are dismissed. Cases may also be dismissed if the judge finds insufficient grounds for the lawsuit or if the landlord does not appear. If the

17 All states allow “unconditional quit notices” in at least some instances, which bar the tenant from resolving the lease violation or unpaid rent. *See* Janet Portman & Ann O’Connell, State Laws on Unconditional Quit Terminations, Nolo, Jan. 26, 2022, <https://www.nolo.com/legal-encyclopedia/state-laws-unconditional-quit-terminations.html>.

18 Some jurisdictions, such as West Virginia, do not require notice to quit, meaning landlords can file an eviction lawsuit immediately after a lease violation without notifying the tenant. Additionally, in some jurisdictions, like Pennsylvania, landlords can waive the notice requirement in the lease agreement. For a more comprehensive list of state notice requirements, *see* Janet Portman & Ann O’Connell, State Laws on Termination for Violation of Lease, Nolo, Jan. 26, 2022, <https://www.nolo.com/legal-encyclopedia/state-laws-termination-violation-lease.html>; Ann O’Connell, State Laws on Termination for Nonpayment of Rent, Nolo, Jan. 26, 2022, <https://www.nolo.com/legal-encyclopedia/state-laws-on-termination-for-nonpayment-of-rent.html>.

tenant does not appear, then a default judgment for the landlord is entered which allows the landlord to proceed with removing the tenant. If both parties are present for the initial hearing, they may be instructed to attempt to come to an agreement, such as a payment plan. The parties may then file a settlement with the court.¹⁹

Removal

If the parties cannot come to an agreement, the case will come before a judge for a trial. If the judge rules in favor of the landlord, the landlord receives a judgment for possession and must then obtain a writ of restitution from the court, authorizing the removal of the tenant.²⁰ The writ is filed with local law enforcement who force the tenant to leave the property. Many states have a right to redemption, which allows a tenant to redeem their tenancy by paying outstanding rent at any time up to, and including, the point at which law enforcement arrives to execute the eviction.

Eviction record

A record is created as soon as a landlord files an eviction lawsuit with the court. The filing typically includes the landlord's allegation of wrongdoing by the tenant, such as failure to pay rent on time. Right after a landlord files for eviction, the court typically makes the case record publicly available, often accessible through an online portal. As the case proceeds, the publicly available court record may be updated with new information, such as hearing dates and final disposition (such as settlement, dismissal, or judgment).

Sealing

We use the term “sealing” to refer to any restriction on public access to court records or to information contained in those records.²¹ Jurisdictions sometimes use other terminology to describe these types of policies, including “masking,” “shielding,” “impounding,” “expungement,”

19 In some jurisdictions, like DC and New Jersey, there are two types of settlement agreements. In one, called a “consent judgment,” the landlord secures a judgment for possession, and the court will move to remove the tenant if they violate the terms of the agreement. In the other, no judgment for possession is entered and the landlord must secure this judgment before the removal process will begin. *See, e.g., McCabe & Rosen, supra* note 2, at 9; NJ Courts, Settlement Agreement (Tenant Remains), https://www.njcourts.gov/forms/10514_appndx_xi_v.pdf.

20 In many jurisdictions, a tenant can be removed as soon as 24 hours after the landlord obtains the writ of restitution. Tenants are also notified in advance of their scheduled removal date. *See, e.g., Texas State Law Library, The Eviction Process*, Jun. 1 2022, <https://guides.sll.texas.gov/landlord-tenant-law/eviction-process>. The writ of restitution can remain valid for several weeks. For example, in DC, a writ of restitution remains valid for 75 days. U.S. Marshals, Writs of Restitution (Evictions), [https://www.usmarshals.gov/foia/Forms/pub22\(7\).pdf](https://www.usmarshals.gov/foia/Forms/pub22(7).pdf).

21 *See Caramello and Mahlberg, supra* note 1, at 1 n.5.

and “confidentiality.”²² In some cases these terms may be interchangeable, but in some jurisdictions different terms may refer to distinct policies. For example, some courts may view “sealed” records as more restricted from access than “confidential” or “masked” records. We recommend paying attention to these local nuances and adopting the vocabulary that most clearly describes the intended outcomes.

Tenant screening

Tenant screening is any process by which a landlord evaluates and accepts or rejects potential tenants. Tenant screening typically starts with a prospective tenant submitting a rental application and paying an application fee. The landlord uses information submitted in the application — and often other information collected from third parties — to make a rental decision. A landlord might approve the tenant to rent the unit at the advertised price, reject them, or attempt to charge the tenant a higher rent, security deposit, or other fees based on their perceived risk.²³

Tenant screening company

Many landlords use third-party tenant screening services. These companies use automated systems to match the applicant’s identifying information (such as name, date of birth, and address) to records from various sources, such as credit reporting agencies, proprietary databases, and courts. They parse, categorize, and compile this information into a tenant screening report that they sell to the landlord. Some tenant screening companies present landlords with a menu of screening criteria and thresholds to choose from.²⁴ Like traditional credit reporting agencies, tenant screening companies are “consumer reporting agencies” subject to fair credit reporting laws.

²² *See Id.*

²³ Charging extra fees or higher fees to tenants with housing subsidies is unlawful in jurisdictions that prohibit source-of-income discrimination, *see* D.C. Code § 2–1402.21(g)(2)(A), and may violate federal fair housing law, *see generally, e.g.*, U.S. Dep’t of Housing & Urban Development, Office of Fair Housing & Equal Opportunity (FHEO) Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties, Apr. 21, 2022 [hereinafter “HUD Marketing and Application Processing Guidance”] (noting that making it harder for renters with subsidies to access housing can result in unlawful disparate impacts). *See also*, Ben Winck, Renters of Color Have to Spend \$294 More on Average than White Renters to Get an Apartment, Insider, Apr. 11, 2022, <https://www.businessinsider.com/rental-market-expensive-people-of-color-housing-prices-real-estate-2022-4> (citing Manny Garcia & Edward Berchick, Zillow Research, Renters: Results from the Zillow Consumer Housing Trends Report 2021, Aug. 10, 2021, <https://www.zillow.com/research/renters-consumer-housing-trends-report-2021-29863/>).

²⁴ For example, RealPage allows landlords to customize how the criminal record scoring model treats different offenses based on the “nature/type and severity” as well as the “degree and/or age of the offense.” Real Page, Resident Screening, <https://www.realpage.com/apartment-marketing/resident-screening/>. National Tenant Network’s DecisionPoint allows landlords to exclude certain criteria, such as medical collections. National Tenant Network, NTN DecisionPoint, <https://ntnonline.com/wp-content/uploads/2018/12/NTN-DecisionPoint-12.14.2018.pdf>.

Tenant screening report

Tenant screening companies compile and repackage records (such as eviction, credit, and criminal histories) into reports that they sell to landlords. Tenant screening companies vary widely in how they package and present the information. Some reports include numerical scores, risk assessments, or recommendations prompting the landlord to accept or reject the tenant. Some reports include only these scores or recommendations with no details about the factors used to generate them.

Eviction records should not be used to make housing decisions

The tenant screening industry profits from repackaging eviction records and encouraging landlords to universally use them as screening criteria. Landlords often reject tenants on the basis of *any* eviction record.²⁵ But tenant screening companies mislead landlords about what eviction records represent. Eviction histories are not reliable indicators of tenants' behavior or ability to pay rent, and they are products of an unjust, racist, anti-tenant housing system. Using them to screen tenants deepens housing insecurity, discrimination, and conditions of poverty.

A. Tenant screening companies profit from repackaging eviction records, which drives housing insecurity.

Tenant screening companies have played a central role in entrenching eviction records as overwhelming barriers to housing. While some tenant screening companies boast about their use of cutting-edge technology or novel data sources,²⁶ they largely repackage criminal, credit, and eviction records.²⁷

Data brokers — including tenant screening companies and third parties that sell records to tenant screening companies — often collect eviction records from online court databases as soon as they become available, usually right after a landlord files for eviction. Even if court records are later sealed, some companies may continue to retain and disseminate them.²⁸ Once an eviction record becomes publicly available, it is practically impossible to effectively suppress it.

²⁵ See sources cited *supra* note 1.

²⁶ See Katy McLaughlin, Robots are Taking Over (the Rental Screening Process), Wall Street Journal, Nov. 21, 2019, <https://www.wsj.com/articles/robots-are-taking-over-the-rental-screening-process-11574332200>.

²⁷ See *supra* note 11. See also Dunn & Grabchuk, *supra* note 1, at 323. An online search for affordable housing in DC in October 2020 returned 806 listings (including those with waitlists), 95% of which required criminal background and credit checks. We conducted this search on DCHousingSearch.org, DC's affordable housing listing and search engine, using the filters for criminal and credit checks.

²⁸ For example, AppFolio settled with the Federal Trade Commission (FTC) for allegedly failing to check whether court records purchased from a third party and used in tenant screening reports had been sealed. Complaint, U.S. Dep't of Justice v. AppFolio, 1:20-cv-03563, Dec. 8, 2020, https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf.

Some tenant screening reports are designed to encourage landlords to accept or reject tenants based solely on the report's contents, score, and/or recommendation. For example, National Tenant Network (NTN)'s DecisionPoint product scores applicants from 0 to 100, indicating whether they meet or fall short of specific criteria.²⁹ Some tenant screening reports provide these types of recommendations without sharing the underlying records or details with the landlord.³⁰

Tenant screening companies sometimes use marketing language or design elements encouraging landlords to rely on their findings or conclusions.³¹ NTN advertises its analysis as “comprehensive” and states that it tells landlords “everything [they] need to make a sound rental decision.”³² However, companies' terms of service often disclaim any legal liability for making housing decisions or for providing reports or scores that don't accurately predict relevant

29 National Tenant Network, NTN DecisionPoint sample report, <https://ntnonline.com/wp-content/uploads/2018/12/NTN-DecisionPoint-12.14.2018.pdf>. The first page of NTN's sample report includes the records and other information attributed to the tenant, and NTN's “DecisionPoint” or “DecisionPoint Plus” score, and the end of the first page says “End of NTN DecisionPoint.” On the second page, NTN includes the following warning in a smaller font size than the rest of the information in the report:

Important Notice to Users of Landlord/Tenant Civil Court Filings and Judgments – A record on file may not always represent a disposition adverse to the consumer. A Landlord/Tenant Civil Court Filing does not necessarily mean that the defendant was evicted from an apartment, found to owe rent or in violation of other lease provisions. Lawsuits may be filed in error or lack merit. These records very rarely contain SSN or date of birth information, which may make it impossible to be certain that the following filings involve your applicant. NTN recommends calling the plaintiff listed for more information. This information is provided pursuant to the NTN subscription agreement.

Id.

30 *See* CT Fair Housing Ctr. v. CoreLogic Rental Property Solutions, LLC, 478 F. Supp. 3d 259, 275 (D. Conn. 2020); Colin Lecher, Automated Background Checks are Deciding Who's Fit for a Home, *The Verge*, Feb. 1, 2019, <https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic>.

31 *See, e.g.* TransUnion, ResidentScreening, <https://www.transunion.com/product/resident-screening> (“Clear decisions”: “The insights from ResidentScreening give you a single recommendation based on your screening policies.”); RentPrep, Understanding Tenant Screening Laws, <https://rentprep.com/tenant-screening/tenant-screening-laws/> (“You can use your tenant screening criteria as the legal standard for selecting your next tenant.”); National Tenant Network, <https://ntnonline.com/> (“NTN's resident screening reports will help you identify whether an applicant is likely to be a good tenant or a problem tenant. . . . Eviction and lease violation data gives you the confidence to make sound rental decisions.”); National Tenant Network, NTN DecisionPoint, <https://ntnonline.com/resident-screening/ntn-decision-point/> (“Everything you need to make a sound rental decision.”); TurboTenant, Tenant Screening Services, <https://www.turbotenant.com/tenant-screening/> (“Rent to a tenant you can trust[.] Whether you've been through an eviction yourself or just heard the horror stories from other property managers, a great rental experience starts with having the right tenant. Join over 400,000 landlords who use TurboTenant to make an informed decision and find a good tenant they trust.”). *See also* Anna Reosti, “We Go Totally Subjective”: Discretion, Discrimination, and Tenant Screening in a Landlord's Market, 45 *Law & Social Inquiry* 618, 633 (“They're [landlords] saying ‘We like using SafeRent because it tells us red, yellow, green lights and our people don't have to think. We don't want them to think.’”).

32 National Tenant Network, NTN DecisionPoint, <https://ntnonline.com/resident-screening/ntn-decisionpoint/>.

Figure 1. National Tenant Network’s sample DecisionPoint tenant screening report

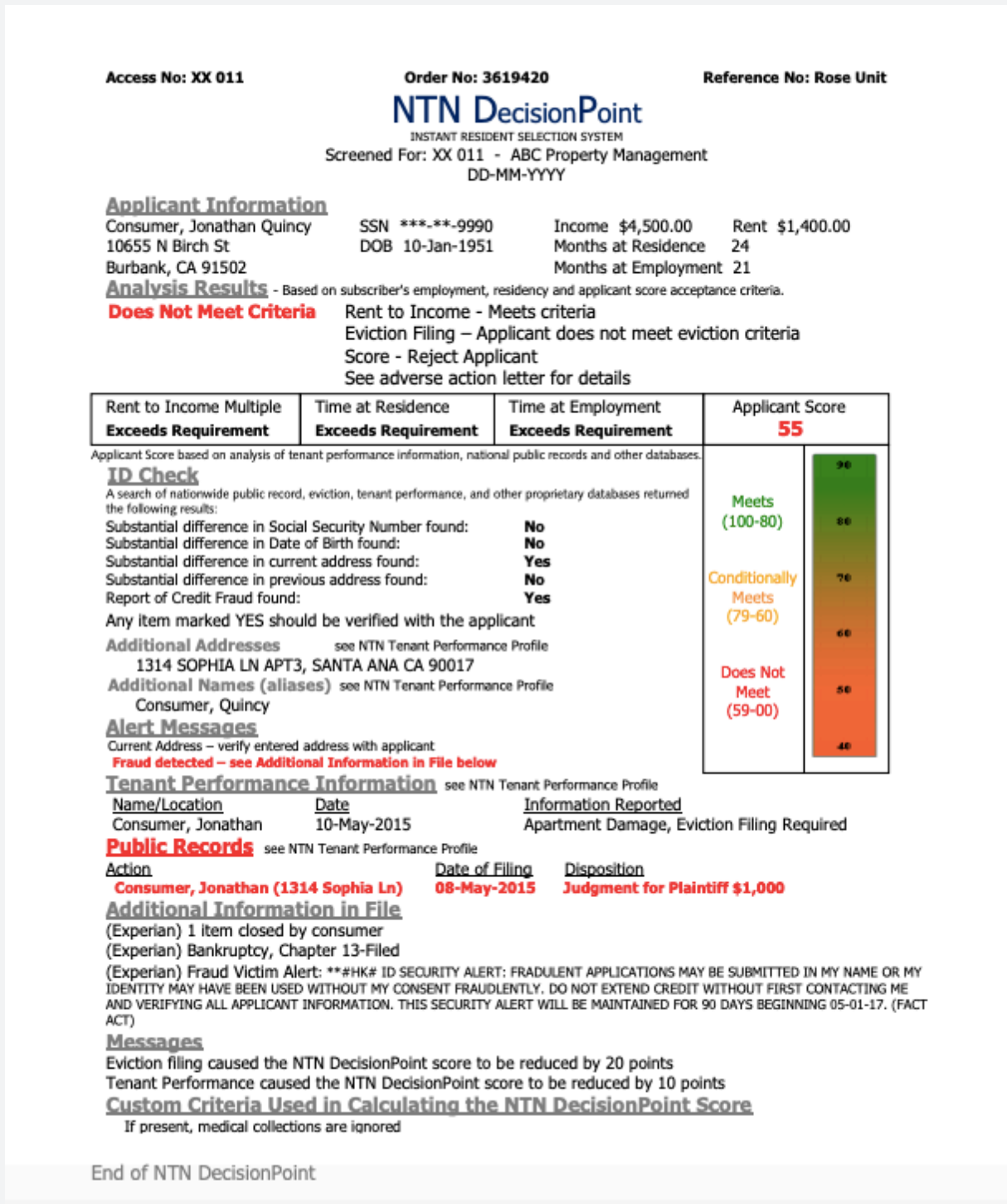


Figure 1. National Tenant Network’s sample DecisionPoint tenant screening report. This figure shows National Tenant Network’s sample DecisionPoint tenant screening report. It shows a score range where a score of 59–00 “does not meet” the rental criteria, 79–60 “conditionally meets” the criteria, and 100–80 “meets” the criteria. The sample report shows an applicant score of 55 and explains that the applicant “does not meet criteria” because of an eviction “[j]udgment for [p]laintiff” for \$1,000.

outcomes.³³ For example, RealPage’s terms require landlords to agree not to hold RealPage liable for “any failures of [its] [s]cores to accurately predict that a [] consumer will repay their existing or future credit obligations”

Tenant screening reports entrench the false idea that any eviction record is a major red flag for a potential tenant.³⁴ For example, NTN’s sample tenant screening report indicates that the hypothetical tenant received a failing score primarily on the basis of an eviction record, even though the fine print on the following page warns that eviction records may be inaccurate or may not represent a lease violation. However, as we explain in the following sections, these records do not represent tenants’ ability to pay rent or uphold their lease; they represent structural discrimination in the systems that created them, and conditions of poverty — all of which are exacerbated by making housing inaccessible to people with records.

B. Tenant screening companies report inaccurate and misleading eviction records.

Tenant screening reports and the records they include are frequently error-ridden.³⁵ This rampant inaccuracy is due to the methods companies use to compile reports, inaccuracies or lack of information in court records databases, market forces that tolerate and reward inaccurate and overinclusive reports, and inadequate enforcement of laws requiring tenant screening companies

33 See, e.g., Real Page, Propertyware and On-Site Screening Services Agreement, <https://www.realpage.com/pw-screening-services/> (“Site Owner and Manager hereby release and hold harmless RealPage . . . from liability for any damages . . . resulting from any failure of the Scores to accurately predict that a United States consumer will repay their existing or future credit obligations satisfactorily. . . . Other than as expressly and specifically set forth in these screening terms, Realpage and its vendors hereby disclaim any warranty or liability concerning (I) the accuracy, correctness, currency, availability, reliability, . . . performance, suitability, . . . or fitness for a particular purpose of . . . or (III) the results that may be obtained from the use of the information or any service.”). See also, e.g., Contract between RentGrow, Inc. DBA Yardi Resident Screening and the Chicago Housing Authority (“CHA”) for Resident Screening Services, Mar. 31, 2017, <https://www.documentcloud.org/documents/6819638-Chicago-IL-Yardi-Contract> (“YRS plays no role whatsoever in determining the Eligibility Criteria for any Property, plays no role in any tenancy decisions and does not guarantee the effectiveness of Client’s Applicant selection policies or the accuracy of any Credit Bureau, CRA or other information delivered by way of the Services or in a Tenant Screening Report.”); Subscription agreement between On-Site and King County Housing Authority, Washington, Jan. 5, 2018, <https://www.documentcloud.org/documents/6819661-King-County-WA-on-Site-Contract> (“ On-Site will have no liability to Client or other person or entity for any acceptance or the failure to accept . . . regardless of whether or not Client’s decision was based on the Client Generated Report or other information generated by Client through the Screening Software. Client must state that the Vendors and/or On-Site did not make the decision to take adverse action against the applicant. . . . ON-SITE AND THE VENDORS DO NOT GUARANTEE THE INFORMATION FURNISHED AND WILL BE HELD HARMLESS, RECOGNIZING THAT INFORMATION IS SECURED THROUGH FALLIBLE HUMAN SOURCES AND THAT FOR THE FEE CHARGED, THE VENDORS AND ON-SITE CANNOT BE AN INSURER OF THE ACCURACY OF THE INFORMATION.”).

34 See, e.g., TransUnion, Eviction Report, <https://www.mysmartmove.com/SmartMove/eviction-check.page>.

35 See Kirchner & Goldstein, *supra* note 10; Ariel Nelson, Nat’l Consumer Law Ctr., Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing 15-23, Dec. 2019, <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf>.

Figure 2. SafeRent's sample tenant screening report

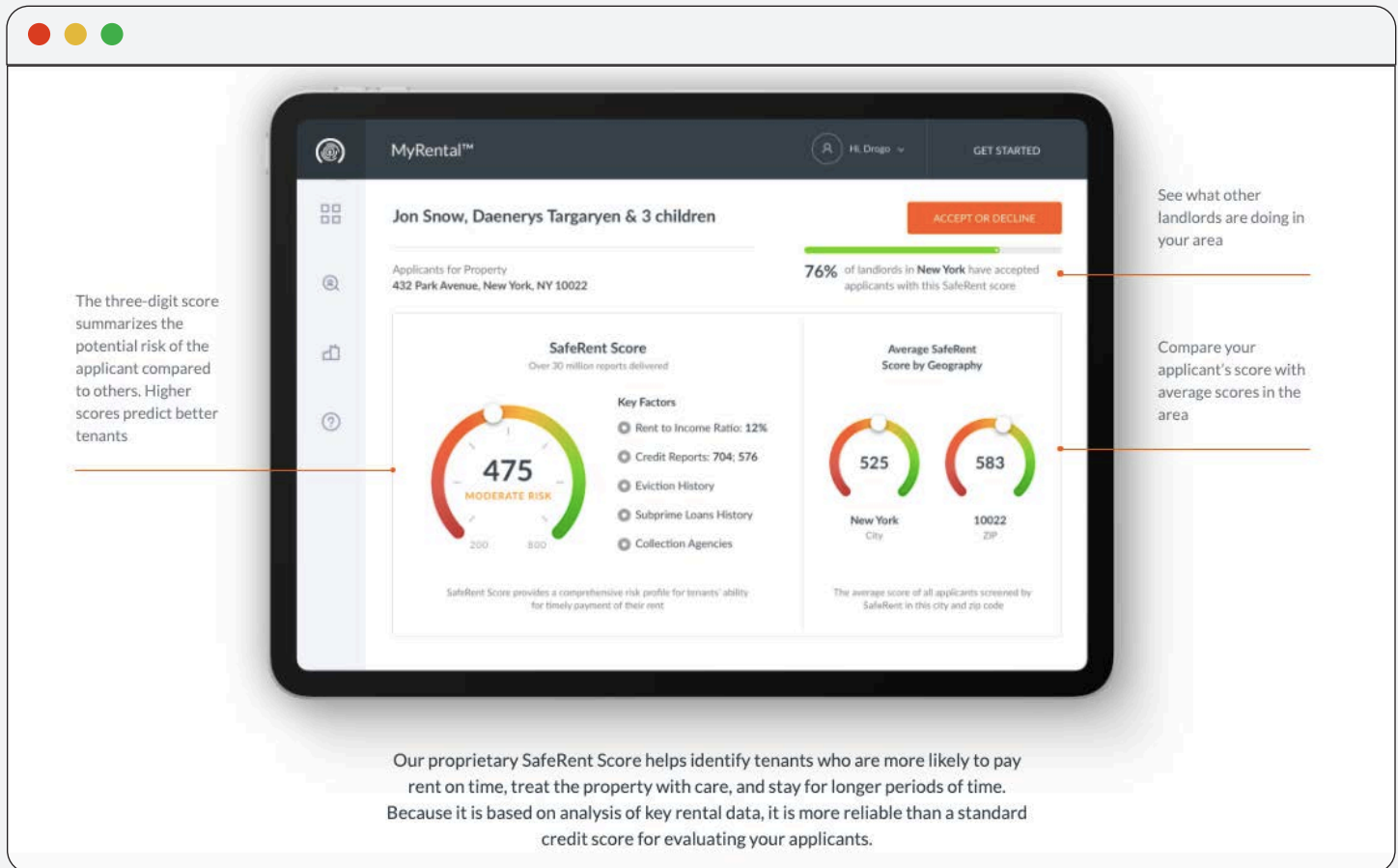


Figure 2. SafeRent's sample tenant screening report. Figure 2 shows an image of a sample tenant screening report from SafeRent's website. This image shows a score range of 200 to 800, where the hypothetical tenants received a score of 475, or "moderate risk." Next to the score is a list of "key factors," which includes rent to income ratio, credit reports, eviction history, subprime loans history, and collection agencies. Text underneath the image of the sample report says "Our proprietary SafeRent score helps identify tenants who are more likely to pay rent on time, treat the property with care, and stay for longer periods of time. Because it is based on analysis of key rental data, it is more reliable than a standard credit score for evaluating your applicants."

to ensure accuracy.³⁶ A 2020 study found that, on average, 22% of eviction records contained ambiguous information on how the case was resolved or falsely represented a tenant's eviction history.³⁷ A lawsuit against tenant screening company RealPage alleged that the company

³⁶ See Kirchner & Goldstein, *supra* note 10; Kleysteuber, *supra* note 1, at 1348, 1358-61; Reosti *supra* note 31, at 627.

³⁷ Adam Porton, Ashley Gromis & Matthew Desmond, Inaccuracies in Eviction Records: Implications for Renters and Researchers, 6 Housing Policy Debate 377, 2020, available at <https://www.tandfonline.com/doi/epub/10.1080/10511482.2020.1748084?needAccess=true> ("The state with the lowest overall inaccuracy rate is Connecticut, where 7.4% of eviction records contain inaccuracies. The state with the highest overall inaccuracy rate is South Carolina, where 46.57% of eviction records contain inaccuracies.").

produced 11,000 inaccurate reports between 2014 and 2019 using “abbreviated” criminal records, which are cheaper than full reports and do not include details of the resolution or complete dates of birth, making it harder to accurately match a person with a record.³⁸ In 2020, the Federal Trade Commission (FTC) settled with AppFolio over allegations that AppFolio did not check the accuracy of criminal records it included on tenant screening reports, and that it sold reports with mismatched records and inaccurate case dispositions, causing people to be denied housing.³⁹ Legal Aid attorneys have found DC residents’ sealed records in Bloomberg Law’s research database, accessible to all subscribers.⁴⁰ These practices continue despite decades of federal enforcement efforts⁴¹ and litigation.⁴²

Tenant screening reports mislead landlords about what eviction records represent and their predictive value. The vast majority of evictions are filed for alleged nonpayment of rent,⁴³ yet tenant screening companies sometimes claim that eviction records indicate other types of risk, such as the risk that a tenant will damage the property. For example, AAA Credit Screening Services encourages landlords to check eviction records to reduce landlords’ risk of legal responsibility for tenants’ criminal activities.⁴⁴ TransUnion, one of the largest consumer credit reporting agencies, advises landlords that checking eviction histories protects against “lost rent, property repairs, and eviction-related expenses.”⁴⁵

38 Kirchner & Goldstein *supra* note 10.

39 Lesley Fair, FTC’s AppFolio Case: The Fair Credit Reporting Act Does More Than Just Abide, Dec. 8, 2020, <https://www.ftc.gov/news-events/blogs/business-blog/2020/12/ftcs-appfolio-case-fair-credit-reporting-act-does-more-just> (“[A]ccording to the FTC, before including criminal records, evictions, etc., in its background reports, AppFolio didn’t have procedures in place to adequately review the accuracy of the information it received from vendors.”); Complaint, U.S. Dep’t of Justice v. AppFolio, 1:20-cv-03563 (alleging that AppFolio received court records from CoreLogic and failed to check those records for basic inaccuracies before including them in tenant screening reports); Kirchner & Goldstein *supra* note 10.

40 After the attorneys brought the sealed records to Bloomberg Law’s attention, Bloomberg Law removed the sealed records from its database.

41 See, e.g., Complaint, *AppFolio*, 1:20-cv-03563; Complaint, Fed. Trade Comm’n v. RealPage, 3:18-cv-02737-N, Oct. 16, 2018, https://www.ftc.gov/system/files/documents/cases/152_3059_realpage_inc_complaint_10-16-18.pdf.

42 See Kirchner & Goldstein, *supra* note 10.

43 See, e.g., Robert Collinson & Davin Reed, The Effects of Evictions on Low-Income Households 7, Dec. 2018 (“The vast majority of cases heard in [New York City] housing court are non-payment filings (82 percent) . . .”); King County Bar Ass’n, 2019 - A Year of Evictions, <https://www.kcba.org/For-the-Public/Free-Legal-Assistance/Housing-Justice-Project/Explore-Data/2019-A-Year-of-Evictions> (“The vast majority of evictions are based on nonpayment of rent (87.5%).”); Greta Kaul, Greater Minnesota’s Eviction Problem, MinnPost, Jun. 12, 2018, <https://www.minnpost.com/economic-vitality-in-greater-minnesota/2018/06/greater-minnesota-s-eviction-problem/> (“89 percent of Greater Minnesota evictions were due to nonpayment of rent.”).

44 AAA Credit, Eviction Reports, <https://www.aaacredit.net/eviction-reports>.

45 Andrea Collatz, TransUnion, How Eviction Works: 11 Things Every Independent Landlord Should Know, Apr. 26, 2018, <https://www.mysmartmove.com/SmartMove/blog/top-things-every-independent-landlord-should-know-about-evictions.page>.

C. Eviction records primarily reflect landlords' behavior and incentives, not tenants' behavior.

1. Eviction records often do not indicate any wrongdoing by a tenant.

Eviction records are not reliable evidence that a tenant broke their lease, or that their landlord had a legal reason to evict them. Many eviction filings do not even allege that the tenant did anything wrong. Most jurisdictions allow landlords to file for eviction for reasons that involve no fault (or without “good cause”), such as the landlord deciding to remove their property from the rental market.⁴⁶ In King County, WA, no-cause terminations were the second most common basis for evictions in 2019.⁴⁷

Even when fault is alleged, the fact that a landlord filed an eviction does not mean any wrongdoing by the tenant was found. There is a large gap between the number of evictions *filed* against tenants and the number of *judgments* landlords actually win in court. A study of eviction records in DC by Brian McCabe and Eva Rosen found that 69% of evictions filed for nonpayment of rent in 2018 were dismissed — meaning there were insufficient grounds for filing the eviction, the tenant paid the rent owed before their hearing, or the landlord failed to attend the hearing.⁴⁸ An even smaller percentage of those filings result in executed evictions, where a tenant is legally required to move out of their home. In DC, McCabe and Rosen found that landlords executed only 5.5% of evictions filed in 2018.⁴⁹ Some eviction judgments go unexecuted because the tenant pays the rent they owe, and/or the landlord continues to accept their monthly rent payments.⁵⁰ In Baltimore, less than half of all filed evictions result in judgments for the landlord, and only 4.3% of all evictions are ultimately executed.⁵¹ In 2017, only 9% of eviction filings in New York City were executed.⁵²

The gap between filed and executed evictions is so large because landlords have more incentive to file evictions than to execute them. For landlords, the cost of an eviction filing is low. In the largest American cities, the median filing fee for landlords to file an eviction lawsuit is \$106. In

46 See, e.g., Leys, *supra* note 1.

47 King County Bar Ass’n, *supra* note 43 (“Second to nonpayment are evictions based on no-cause terminations or expired leases, which account for 35% of all evictions not about nonpayment.”).

48 McCabe & Rosen, *supra* note 2, at 9.

49 *Id.* at 10.

50 *Id.* at 13.

51 See Philip ME Garboden & Eva Rosen, Serial Filing: How Landlords Use the Threat of Eviction, 18 City & Community 638, 639, 2019.

52 NY City Council, Evictions, <https://council.nyc.gov/data/evictions/>.

DC, the filing fee is just \$15.⁵³ Some landlords routinely file evictions against their tenants, even filing multiple evictions against the same tenant (known as “serial filing”), rather than working with them to resolve rent or maintenance issues.⁵⁴ In Baltimore, landlords file for eviction approximately 150,000 times per year, while the city only contains 130,000 renter households.⁵⁵ In DC, 20 landlords were responsible for almost half of all evictions filed in 2018.⁵⁶ The threat of eviction allows landlords to leverage the state’s police power to collect on missing rent, even if they are unlikely to execute the eviction because of the costs related to vacancy and property turnover.⁵⁷ Often, an eviction filing for nonpayment of rent is a landlord’s first resort to collect money.

2. Eviction records do not reflect applicants’ ability to pay rent.

Tenant screening companies often present eviction records as a proxy for a renter’s ability to pay. But eviction records often do not reflect tenants’ present financial situations, for several reasons. First, tenants who have cause to withhold rent due to poor living conditions sometimes have evictions filed against them for missed rent.⁵⁸ Additionally, many tenants with eviction filings are able to make consistent late payments that the landlord still accepts, sometimes because they get paid or receive financial aid after rent is due.⁵⁹ Finally, missed rent payments can be due to

53 McCabe & Rosen, *supra* note 2, at 18.

54 *Id.* at 12-13; Garboden & Rosen, *supra* note 51; Kyle Swenson, A Small Group of Landlords is Behind Nearly Half of DC’s Evictions, Report Says, Washington Post, Oct. 8, 2020, <https://www.washingtonpost.com/dc-md-va/2020/10/08/small-group-landlords-is-behind-most-dcs-evictions-report-says/>.

55 Garboden & Rosen, *supra* note 51, at 639.

56 Swenson, *supra* note 54.

57 *See* Garboden & Rosen, *supra* note 51.

58 *See* Ann O’Connell, State Laws on Rent Withholding and Repair and Deduct Remedies, Nolo, Jan. 26, 2022 <https://www.nolo.com/legal-encyclopedia/state-laws-on-rent-withholding-and-repair-and-deduct-remedies.html>; Public Justice Center, Justice Diverted: How Renters in Baltimore Are Processed in the Baltimore City Rent Court 33, 2015, http://www.publicjustice.org/wp-content/uploads/2019/09/JUSTICE_DIVERTED_PJC_DEC15.pdf (“The survey data demonstrate clearly that disputants more than likely had valid defenses. An overwhelming 85 percent (53 of 62) of this subset indicated that they had already complained to their landlord about the threats to health and safety existing on the trial date.”); Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process, 20 Hofstra Law Review 533, 554, 1991 (“In short, landlords avoided the imposition of rent abatement or damages for impaired habitability in 98.25% of all cases.”).

59 Landlords are also incentivized to accept late payments because they are able to charge late fees. *See* Garboden & Rosen, *supra* note 51, at 649; Lillian Leung, Peter Hepburn & Matthew Desmond, Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement, 1 Social Forces 316, 317, 2020 (“[W]e estimate that each eviction filing translates into approximately \$180 in fines and fees for the typical renter household, raising their monthly housing cost by 20%.”). Landlords also file evictions against Section 8 tenants when the government withholds payment for the property not meeting certain standards. *See* Mel Zahnd & Emily Near, Legal Aid Society of the District of Columbia, Testimony before the DC Council Comm. on Housing & Executive Admin. at 3, Public Hearing Regarding Bill 24-0096, the “Eviction Record Sealing Authority Amendment Act of 2021,” and Bill 24-0106, the “Fair Tenant Screening Act of 2021,” May 20, 2021, https://www.legalaiddc.org/wp-content/uploads/2021/05/Legal-Aid-Record-Sealing-and-FTSA-testimony_5.20.21-FINAL.pdf; Kate Vlach, Office of the Attorney General for DC, Testimony before the DC Council Comm. on Housing & Executive Admin., Public Hearing on Fair Tenant Screening Act of 2021 and Eviction Record Sealing Authority Amendment Act of 2021, May 20, 2021, <https://oag.dc.gov/release/oag-testimony-fair-tenant-screening-act-2021-and>.

financial circumstances that are likely to change, such as job loss.⁶⁰ Many people who are named in eviction filings for missed rent payments have since received housing vouchers or other rental assistance that directly demonstrates their ability to pay.⁶¹

Landlords almost always ask for prospective tenants' current income information on rental applications, which should obviate the need to use unreliable eviction records as a basis for predicting whether someone can pay rent. Yet, tenants, especially those with housing vouchers, are often screened out of housing they can afford because of their eviction histories. A recently filed lawsuit against tenant screening company SafeRent alleges that the company violated the Fair Housing Act and state source-of-income discrimination laws by giving disproportionately low scores to renters of color who use housing vouchers to pay their rent, leading to them being denied housing. In response to discrimination against voucher holders, DC Council recently passed a law banning landlords from screening out tenants with housing vouchers based on negative rental or credit history they incurred before receiving their vouchers.⁶²

D. Eviction records are products of an unjust, racist system.

Tenant screening has more than just an accuracy problem. Even when records accurately indicate a judgment against the tenant, they reflect systematic power imbalances in the housing system that disproportionately impact low-income people of color.

1. Landlords are significantly advantaged in the eviction court process.

Even when a landlord wins an eviction judgment, those records represent a vast power and resource imbalance between landlords and tenants in eviction proceedings.⁶³ Many tenants lose their eviction cases simply because they are unable to appear at their hearing. In Philadelphia,

60 See Rasheedah Phillips, *Eviction Records Follow People Around for Years. This Isn't Fair*, Next City, Jun. 4, 2021, <https://nextcity.org/urbanist-news/eviction-records-follow-people-around-for-years-this-isnt-fair>

61 See, e.g., Liv Barry, *Baltimore County announces \$17M to prevent evictions for residents impacted by COVID-19*, Baltimore Fishbowl, Jun. 17, 2022, <https://baltimorefishbowl.com/stories/baltimore-county-announces-17m-to-prevent-evictions-for-residents-impacted-by-covid-19/>; Cuccia, *supra* note 6.

62 D.C. Code § 2–1402.21(g)(1)(A), as amended by Eviction Record Sealing Authority and Fairness in Renting Amendment Act of 2022, D.C. Law 24–115.

63 See sources cited *supra* note 3.

default judgments are issued in about 33% of all landlord-tenant cases.⁶⁴ This is often because the tenant did not receive their eviction notice, cannot afford to take time off work, or cannot find transportation to the court.⁶⁵ In 2019, lack of notice accounted for 21% of all default judgments in Philadelphia’s eviction courts.⁶⁶ In a survey of tenants with eviction filings in Baltimore, participants expressed that the value of appearing in court was outweighed by the cost of lost time and wages.⁶⁷

Even those who are able to appear at their hearings typically do not have the resources to defend themselves or navigate the eviction process. Most jurisdictions do not require free legal representation for tenants. On average, in jurisdictions without a right to counsel, only 3% of tenants facing eviction in 2022 had lawyers, compared to 81% of landlords.⁶⁸ Studies of eviction proceedings describe a “one-sided, factory-like process in favor of landlords.”⁶⁹ For example, in 2002, the average time for hearing a case in Chicago’s housing court was 1 minute and 44 seconds.⁷⁰ Unsurprisingly, this inequitable process produces lopsided results: In DC, less than 1% of judgments are in favor of the tenant.⁷¹

2. Eviction disproportionately burdens Black and brown tenants, particularly Black women.

On average, Black renters have evictions filed against them at twice the rate of white renters.⁷² However, Black women are also more likely to have a prior eviction filing that ultimately resulted in a dismissal. In Massachusetts, Black women renters were found to be three times more likely

64 Sheller Center for Social Justice, Temple University Beasley School of Law, *Reducing Default Judgments in Philadelphia’s Landlord-Tenant Court* 1 n.2, Jun. 2020, <https://law.temple.edu/csj/wp-content/uploads/sites/3/2020/07/Reducing-Default-Judgments-in-Philadelphias-Landlord-Tenant-Court.pdf>. See also Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 4 *Housing Policy Debate* 461, 478 n.16, 2003 (collecting literature to show that nearly half of all defendants default in California, 42% in Chicago, 35% in Hartford, and 31% in Massachusetts).

65 Josh Kaplan, *Thousands of D.C. Renters Are Evicted Every Year. Do They All Know to Show Up to Court?*, DCist, Oct. 5, 2020, <https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/>.

66 Sheller Center for Social Justice, *supra* note 64, at 7.

67 Public Justice Center, *supra* note 58, at 32.

68 Nat’l Coalition for a Civil Right to Counsel, *Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention*, Apr. 2022, http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC_.pdf.

69 Hartman & Robinson, *supra* note 64, at 478.

70 Lawyers’ Comm. for Better Housing, *supra* note 3, at 4.

71 McCabe & Rosen, *supra* note 2.

72 Beiers, Park & Morris, *supra* note 2; Hepburn, Louis & Desmond, *supra* note 2.

to see their eviction cases dismissed.⁷³ In other words, Black women are more likely to be subject to illegitimate eviction filings, *and* most likely to be further denied future housing due to those records. Eviction filings are more likely to be a proxy for race — as well as for source-of-income and familial status⁷⁴ — than for any real indicator of tenant behavior or ability to pay.

Recently, the US Department of Housing and Urban Development (HUD) issued new fair housing guidance to subsidized multifamily properties, noting that screening criteria, including eviction histories, “may operate unjustifiably to exclude individuals based on their race, color, or national origin,” and that negative records should not trigger an automatic denial of tenancy.⁷⁵ Given the racist distribution of eviction filings, their use in tenant screening is unjustifiable and can only deepen racial injustice in access to housing.

73 Beiers, Park & Morris, *supra* note 2.

74 See Bryce Covert, Why Landlords Target Mothers for Eviction, *New Republic*, Mar. 16, 2021, <https://newrepublic.com/article/161578/landlords-target-mothers-eviction-crisis-covid>.

75 HUD Marketing and Application Processing Guidance at 6.

Sealing eviction records is a critical step toward dismantling harmful tenant screening practices

In a growing number of cities and states, tenant advocates and policymakers are trying to limit eviction records as a barrier to housing. To date, legislative reform efforts primarily include: (1) “fair chance housing laws,” which limit the criteria and records landlords can use to screen tenants, and usually strengthen tenants’ access to information about and ability to challenge the screening process;⁷⁶ (2) consumer reporting laws, which can limit what companies include in tenant screening reports;⁷⁷ and (3) eviction sealing measures, which limit public access to certain court records.⁷⁸

These approaches can suppress access to or use of eviction records at different points in the tenant screening process: Fair chance housing laws try to stop or limit landlords’ reliance on eviction records,⁷⁹ but can’t guarantee that landlords won’t see the records.⁸⁰ Consumer reporting laws may prevent certain records from appearing in tenant screening reports (where landlords

76 See Nat’l Housing Law Project, *supra* note 16. See also, e.g., Seattle Ord. 125393, <http://clerk.seattle.gov/search/ordinances/125393>; Phila. Code § 9–810 and §9–1108, as amended by the Philadelphia Renter’s Access Act, Bill. No. 210330-A, 2021, <https://phila.legistar.com/LegislationDetail.aspx?ID=4915397&GUID=268EE934-AB33-4480-B124-58F6D9CE6B-6B&Options=ID|Text|&Search=210329>.

77 See, e.g., MD H.B. 251, 2022, <https://legiscan.com/MD/text/HB251/id/2477485>.

78 See *supra* note 8.

79 Fair chance housing laws can complement sealing laws by limiting or banning landlords’ use of eviction records that do get disseminated, such as records that were not sealed at the point of filing or that are later unsealed. They can also strengthen enforcement of tenant screening laws, for example, by creating new private rights of action allowing tenants to sue when their rights are violated, or amending definitions of housing discrimination to include prohibited uses of eviction records. However, while they can significantly limit the harms of tenant screening, most fair chance housing laws today still allow landlords to screen tenants based on a range of credit, eviction, and criminal histories despite the discriminatory impact of these records.

80 These laws usually don’t directly stop companies from disseminating records on tenant screening reports (though they may attempt to do so by prohibiting landlords from “inquiring into” certain histories), and landlords are likely to rely on those records if they see them, and use pretextual reasons to reject tenants.

are likely to see them), but don't suppress the records in other sources, like court databases.⁸¹ And sealing — especially at the point of filing — keeps records from being accessible to the public in the first place.

These approaches can be complementary, but sealing eviction records at the point of filing is the only one designed to suppress eviction records at their source, ensuring that they can't be accessed for use in housing decisions. Sealing eviction records acknowledges that they are products of injustice and shouldn't be used to make decisions about people. Eviction record sealing can also bolster the protections of existing laws: for example, multiple federal agencies have warned that reporting sealed records can be evidence of Fair Credit Reporting Act violations.⁸²

Depending on the dynamics in a particular jurisdiction, it may be strategic to simultaneously advocate for multiple legislative approaches, or to combine them in the same legislation. For example, housing advocates in DC successfully combined tenant screening, eviction record sealing, and other eviction protections in the same legislation. In some places, such as Philadelphia, advocates have prioritized tenant screening protections because the local or state governments or legal regimes are more hostile to sealing.

Of course, sealing laws come with their own challenges and complexities, which we address in the following guidance.

81 Consumer reporting laws, regulations, and guidance related to tenant screening companies tend to focus on strengthening or clarifying CRAs' responsibilities to ensure the accuracy of consumer reports. *See, e.g.*, MD H.B. 251, *supra* note 77; CFPB Rental Information Bulletin, *supra* note 5. "Accuracy" alone won't mitigate the harms of tenant screening, though some regulators and advocates have used accuracy standards to win broader restrictions on the contents of consumer reports. *See, e.g.*, *In the matter of Equifax Information Services LLC et al., Assurance of Voluntary Compliance/ Assurance of Voluntary Discontinuance* (May 11, 2015), <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2015-05-20-CRAs-AV> C.aspx; Jasper Clarkberg & Michelle Kambara, Consumer Financial Protection Bureau, Removal of Public Records has Little Effect on Consumers' Credit Scores, Feb. 22, 2018, <https://www.consumerfinance.gov/about-us/blog/removal-public-records-has-little-effect-consumers-credit-scores/>. The Consumer Financial Protection Bureau (CFPB) recently published an interpretive rule affirming that states *can* pass laws prohibiting consumer reporting agencies (such as tenant screening companies) from reporting certain information. Bureau of Consumer Financial Protection, The Fair Credit Reporting Act's Limited Preemption of State Laws, https://files.consumerfinance.gov/f/documents/cfpb_fcra-preemption_interpretive-rule_2022-06.pdf. This guidance should embolden state and local governments to pass laws broadly restricting tenant screening companies from reporting eviction records.

82 The FTC and CFPB have warned that including certain eviction records in tenant screening reports — such as sealed records, or filings without final dispositions — could violate companies' obligations to ensure the accuracy of information they include in reports. CFPB Rental Information Bulletin at 13, 16; Federal Trade Comm'n, What Tenant Background Screening Companies Need to Know About the Fair Credit Reporting Act, Oct. 2016, <https://www.ftc.gov/business-guidance/resources/what-tenant-background-screening-companies-need-know-about-fair-credit-reporting-act>.

Guidance for drafting eviction record sealing legislation

This section provides recommendations and guidance for people drafting eviction record sealing laws. Eviction is a consequence of a housing system that is unaffordable for the majority of people, prioritizes the interests of investors and owners, and is built on a history of segregation and discrimination.⁸³ While we offer strategies on how to limit the downstream effects of eviction records, we reject any premise that evictions should be permissible under a just housing system. But in a world in which evictions persist, sealing eviction records not only lessens the impact of eviction on tenants, but also delegitimizes the tenant screening industry and its claims that these records can or should be used to predict tenancy outcomes. Restricting access to eviction records also helps shift the power relationship between landlords and tenants by limiting landlords' ability to threaten tenants' future housing access.⁸⁴

A. Automatically seal eviction records.

Eviction sealing can be petition-based or automatic. When records are sealed automatically, all records that meet certain criteria are sealed. For example, in DC, eviction records that do not result in a judgment in favor of the landlord are automatically sealed within 30 days of the conclusion of the case. All other eviction records are sealed after three years.⁸⁵ Petition-based sealing typically requires a tenant to submit a request to the court, requiring a judge to decide whether the record can be sealed. Petition-based sealing laws often involve court discretion, requiring the court to weigh factors such as the legitimacy of the original eviction filing and the public's interest in keeping the record accessible.⁸⁶ The sealing petition often must overcome an explicit policy favoring public access to court records.⁸⁷ Recent petition-based sealing laws in Virginia and DC attempt to remove judges' discretion, requiring the court to seal records where certain showings are made.⁸⁸

83 See generally, e.g., David J. Madden & Peter Marcuse, *In Defense of Housing: the Politics of Crisis*, 2016.

84 See Garboden & Rosen, *supra* note 51.

85 D.C. Code § 2–1402.21(g)(1)(A), as amended by the Eviction Record Sealing Authority and Fairness in Renting Amendment Act of 2022, D.C. Law 24–115.

86 See, e.g., 735 Ill. Comp. Stat 5/9-121(b); Minn. Stat. § 484.014 Subd. 2.

87 See, e.g., Ind. Code § 5-14-3-5.5; Okla. Stat. tit. 51 § 24A.30 (movant must show “compelling privacy interest exists which outweighs the public’s interest in the record”).

88 D.C. Code §42–3505.09(c)(1).

Petition-based sealing burdens tenants with paperwork and protects few tenants from the impact of eviction records. Under petition-based sealing laws, sealing is not guaranteed and there are significant barriers to even making a request. First, in jurisdictions without a right to counsel, most tenants are self-represented and typically lack the legal knowledge to pursue sealing.⁸⁹ Second, petition-based sealing is only intended to be available to a small minority of defendants. The majority of landlord-tenant disputes, which concern failure to pay rent, would not be eligible for sealing under most petition-based sealing criteria.⁹⁰ Third, leaving eligibility for sealing up to the court allows for the same kind of biases that exist in other parts of the judicial system. By design, petition-based sealing protects few tenants from the adverse effects of having an eviction record.⁹¹

Petition-based sealing can and should be permitted even when most records are automatically sealed. For example, in DC, tenants can ask the court to seal an eviction judgment before the three-year automatic sealing period in a number of circumstances, including if the judgment for the landlord was for \$600 or less, if the tenant was evicted from a subsidized housing unit, and if the tenant shows that they faced a retaliatory eviction.⁹²

B. Seal eviction records at the point of filing.

Records can be automatically sealed either post-filing or at the point of filing. In post-filing sealing legislation, eviction records are sealed if certain conditions are met — usually at the conclusion of the case — such as a judgment against the landlord, a foreclosure, or a dismissal. Records are typically still made public when the landlord files for eviction, and are later sealed within some number of days of the final disposition or another qualifying event.⁹³

Point-of-filing sealing laws, on the other hand, require courts to seal records when a landlord files for eviction, so the records never become public unless they are later “unsealed.”⁹⁴ These laws also usually allow for petition-based sealing, where tenants that do not meet the specified criteria can still request sealing on another basis. Point-of-filing sealing laws may also list the

89 Caramello & Mahlberg, *supra* note 1, at 3.

90 See e.g., 735 Ill. Comp. Stat 5/9-121(b); Minn. Stat. § 484.014; VA Code § 8.01-130.01; Ind. R. Acce. Ct. Rec. 6 (allowing sealing only in “extraordinary circumstances”).

91 See Colleen Chien, America’s Paper Prisons: The Second Chance Gap, 119 Mich. L. Rev. 519, 541-44, 2020, http://michiganlawreview.org/wp-content/uploads/2021/01/119MichLRev519_Chien.pdf.

92 D.C. Code §42–3505.09(c)(1), as amended by D.C. Law 24–115.

93 See, e.g., D.C. Code §42–3505.09; 735 Ill. Comp. Stat 5/9-121(c); Minn. Stat. § 484.014 Subd. 3.

94 See Cal. Civ. Proc. Code § 1161.2; Nev. Rev. Stat. § 40.2545.

parties that are permitted access to the sealed records, which usually includes parties to the case, their attorneys, and third parties with “good cause” to request access to records, such as for journalism and research.⁹⁵

Sealing eviction records at the point of filing is the most effective sealing policy for suppressing eviction records, especially because data brokers regularly scrape records directly from court websites, incorporating them into proprietary databases as soon as the court makes the information public. Even if the record is later sealed, it might remain in a company’s database and be reflected in tenant screening reports.⁹⁶ Attempting to suppress records once they’ve been made public is incredibly difficult if not impossible. By limiting data broker access, sealing at the point of filing makes it far less likely that eviction records will be included in tenant screening reports.

Recently, several organizations have called for sealing at the point of filing, citing its advantages for keeping eviction filings out of the tenant screening process. The DC Council Office of Racial Equity concluded that sealing eviction records post-filing would merely maintain the status quo of racial inequity, and that records would need to be sealed immediately upon filing to improve racial equity in rental housing decisions.⁹⁷ And the American Bar Association adopted ten guidelines for eviction laws, including that courts “should automatically seal the names of defendants before a final judgment and in dismissed cases[,]” noting that the efficacy of sealing is limited when records are not sealed until after they are made public.⁹⁸

C. Keep eviction records sealed for as long as possible.

In general, anyone can petition a court to reopen a sealed record.⁹⁹ But in states where point-of-filing sealing laws have been passed or considered, they have typically provided for a subset of sealed eviction records to be automatically “unsealed” when certain criteria are met (for example, after a judgment has been entered).

95 Other third parties may be allowed access to sealed records. In California, third parties provide the clerk with “the names of at least one plaintiff and one defendant and the address of the premises, including the apartment or unit number, if any.” Cal. Civ. Proc. Code § 1161.2(a)(1).

96 See sources cited *supra* note 28.

97 D.C. CORE, *supra* note 9 (“[D]elaying sealing is the same as not sealing at all.”).

98 Am. Bar Assoc., *supra* note 3, Guideline 10.

99 See, e.g., Reporters Comm. for Freedom of the Press, Procedure for Requesting Access in Civil Matters, <https://www.rcfp.org/open-court-sections/c-procedure-for-requesting-access-in-civil-matters/>; Reporters Comm. for Freedom of the Press, First Step in Unsealing Court Records: Try Asking, <https://www.rcfp.org/journals/news-media-and-law-fall-2014/first-step-unsealing-court-re/>.

Records should be unsealed as late in the eviction process as possible, if at all, in order to protect the most tenants. How late records can be unsealed may depend on a jurisdiction’s eviction process and the court’s ability to unseal records. Drafters may need to identify a point in the eviction court process, between judgment and removal, that the court can use to “trigger” unsealing. In some jurisdictions, this may mean records are made public once there is a judgment for the landlord. In California, records are unsealed if the landlord wins a judgment within 60 days.¹⁰⁰ A proposed sealing bill in Connecticut would have unsealed evictions only if a judgment was entered for the landlord at trial.¹⁰¹

The justification for unsealing evictions after a judgment for the landlord is that the landlord has shown cause for the eviction to an independent court, presumably making these records a better indicator of a tenant’s suitability.¹⁰² However, as previously discussed, the eviction court process is heavily weighted in favor of landlords due to lack of representation for tenants, notice problems, insufficient time spent adjudicating cases, and barriers to tenants being able to make their court dates. Many eviction cases result in a judgment in favor of the landlord despite no wrongdoing by the tenant.

Additionally, many tenants, especially poor tenants, would likely not qualify for permanent sealing. The vast majority of evictions are for failure to pay rent. Landlords are typically legally permitted to evict on this basis, and judgments in these cases are more likely to go to landlords than to tenants.¹⁰³ As a result, many of these records would become unsealed, pushing low-income tenants into greater economic and social precarity. Even when an eviction judgment accurately represents a tenant’s failure to pay rent, it’s only a “brief snapshot of a person going through a difficult period,” and does not account for the tenant’s current financial situation, which landlords can (and often do) evaluate based on income, including vouchers.¹⁰⁴

Ideally, records should remain sealed even after a judgment is entered against the tenant. Unsealing at the latest point in the eviction process, such as after the writ is executed and the tenant is forced to leave the property, protects tenants who are able to redeem their tenancy by

100 Cal. Civ. Proc Code § 1161.2.

101 Conn. H.B. 6528, 2021, <https://www.cga.ct.gov/2021/TOB/H/PDF/2021HB-06528-R00-HB.PDF>. See also Leys, *supra* note 1.

102 See Leys, *supra* note 1, at 6.

103 See McCabe & Rosen, *supra* note 2, at 10; Lawyers’ Comm. for Better Housing, *supra* note 3, at 4. (“While judges typically asked tenants whether they had paid the rent, judges only asked tenants if they had a defense in 27% of the cases.”).

104 See Phillips, *supra* note 60 (“[E]viction records are often just a brief snapshot of a person going through a difficult period. Tenants can recover from an illness, job loss, family death, or domestic violence issues, but the eviction record will follow them . . .”).

paying outstanding rent or resolving the lease violation.¹⁰⁵ Unfortunately, unsealing evictions even this late in the process protects all but the most vulnerable tenants, and potentially scapegoats them as “deserving” of eviction and its downstream consequences.¹⁰⁶

Ultimately, unsealing of any kind leaves too many tenants behind. The eviction court process today is fatally unjust to tenants. Under these conditions, we don’t believe there are any eviction records that can fairly be used to make housing decisions without perpetuating this unjust and discriminatory system. However, we recognize that drafters may need to make a decision about when to unseal records, and in that case we encourage unsealing as late in the eviction process as possible and addressing the underlying problems with the judicial process.

D. Maintain limited electronic access to sealed eviction records for housing justice purposes.

A sealing regime does not need to be a binary system in which records are completely open to the public or completely closed. While sealing is intended to reduce harm from evictions to people searching for housing, some access to eviction records may be needed to prevent the immediate harm of eviction and displacement, or to support more transformative change of the housing system. The benefits of allowing some access to sealed records to advance housing justice should be carefully weighed against the risk that access could be misused to sell eviction records. To help mitigate this risk, legislation should limit the permissible purposes for accessing records, not just the parties that can obtain access. The exact scope and methods of access will need to be determined at the state or local level, based on tenants’ needs and courts’ technical capabilities. Some parties that may need access to sealed eviction records include:¹⁰⁷

- **Parties to an eviction case, their attorneys, and other occupants of the unit:** Tenants named in an eviction filing and their attorneys need access to the court records so that they can defend themselves against the eviction and have a record of the disposition of their case.¹⁰⁸ Courts routinely allow parties and their attorneys to access sealed or confidential

105 In Washington State, eviction records can be sealed by petition if someone is able to reinstate their tenancy, even after a judgment is entered against them. Rev. Code Was. § 59.18.367.

106 *See generally* Matthew Desmond, Carl Gershenson, Who gets evicted? Assessing Individual, Neighborhood, and Network Factors, 62 Social Science Research, 2016.

107 This list was heavily informed by advocacy in support of point-of-filing eviction record sealing legislation in Connecticut, *see Leys, supra* note 1, at 5, as well as conversations with direct service providers and tenant advocates in DC.

108 *See Leys, supra* note 1, at 5.

records.¹⁰⁹ Additionally, as Nathan Leys, formerly of the New Haven Legal Assistance Association, pointed out, landlords might mistakenly fail to name some occupants of the unit when they file an eviction action, and those occupants also need access to the case records.¹¹⁰

- **Legal and other direct service providers:** Legal services organizations use eviction records to reach out to people who have evictions filed against them, advise them on the eviction process, and offer pro bono representation.¹¹¹ Because of failures by landlords and process servers to notify tenants of evictions, some tenants only find out that an eviction case has been filed against them because of this outreach.¹¹² Some advocates also use information from eviction records to do outreach and offer help applying for rental assistance or eviction diversion programs.

DC’s eviction sealing law allows any attorney authorized to practice in DC who is “considering commencing representation of the tenant” to request access to sealed eviction records.¹¹³ California does not provide general access to legal organizations but requires courts to mail a notice to each person named in an eviction action.¹¹⁴ The notice informs people of the steps they need to take to avoid eviction and directs them to legal service providers and rental assistance.¹¹⁵ To prevent misuse, legislation should prohibit or limit further disclosure of records accessed by attorneys and other service providers.

- **Tenant unions and organizers:** Tenants and organizers also use eviction records to learn about and prevent the immediate harms of eviction filings. Access to records can help tenants build power and fight for more transformative change, for example, by organizing with neighbors to collectively fight evictions, or by tracking where evictions occur and which

109 See, e.g., U.S. District Court for W.D.N.C., Electronic Case Filing User’s Manual 73, Oct. 2011, https://www.ncwd.uscourts.gov/sites/default/files/ecf_guides/Seal-Atty.pdf (“Attorneys will be able to electronically file sealed or restricted documents where some type of access is provided to the participants. . . .”); VA Courts, Circuit Court Clerks’ Manual — Civil & Criminal, App. F – Sealing Court Records/Confidentiality Considerations, https://www.vacourts.gov/courts/circuit/resources/manuals/cc_manual_criminal/appendix_f.pdf (describing different types of sealed and confidential records, many of which can be opened or accessed by the participants in a case and their attorneys); N.J. Courts R. 1:38, Public Access to Court Records and Administrative Records, <https://www.njcourts.gov/attorneys/assets/rules/r1-38.pdf> (same); The People’s Law Library of Maryland, Shielding Your Convictions from the Public: the Maryland Second Chance Act, <https://www.peoples-law.org/shielding-your-convictions-public-maryland-second-chance-act> (listing who does and does not have access to shielded records) (“A shielded record will remain fully accessible by: . . . The person who is the subject of the shielded record and that person’s attorney”); Cal. Civ. Proc. Code § 1161.2(a)(1)(A) (providing access to sealed eviction records to a party and their attorney).

110 Leys, *supra* note 1, at 5.

111 See, e.g., *Id.*

112 Kaplan, *supra* note 65.

113 D.C. Code § 42–3505.08(e)(2)(A)(iii).

114 Cal. Civ. Proc. Code § 1161.2(c).

115 *Id.*

landlords are the biggest evictors.¹¹⁶ The needs of tenants in a given jurisdiction should inform the scope and methods of access to sealed records. Ultimately, transformative change in the housing system is necessary so people don't need to rely on access to court records to remain in their homes.

- **Researchers, journalists, and others with “good cause” requests:** Research and reporting on eviction records have created critical knowledge about the nature and distribution of evictions.¹¹⁷ For example, Josh Kaplan's reporting for DCist used eviction court records to show that eviction process servers were routinely failing to effectively serve tenants in DC with notice that they had been named in eviction filings.¹¹⁸ This, along with other research including a report on evictions in DC by Brian McCabe and Eva Rosen,¹¹⁹ helped convince legislators to address these issues.

Researchers commonly submit bulk records requests to courts, and not all research projects require the parties to a case to be identified. Both California's¹²⁰ and DC's¹²¹ eviction sealing laws allow the court to grant access to sealed records for research and reporting, with limitations on access to identifiable records. These requests typically fall under “good cause” access provisions. In some cases, researchers may need identifiable eviction records to extract or infer demographic data to study the discriminatory impacts of eviction. DC's eviction record sealing law establishes a procedure to request identifiable eviction records. For example, requesters must provide “documented procedures to protect the confidentiality and security of the information.”¹²²

Where access to sealed records is needed, electronic access should be available. Courts often require tenants and their attorneys to access sealed records in person, which can be an onerous barrier to getting representation and defending against an eviction. In DC, advocates negotiated with the Superior Court and City Council to require the court to make sealed records available “by an electronic means designated by [the court].”¹²³

116 See, e.g., Right to Counsel NYC Coalition et al., Worst Evictors, <https://www.worstevictorsnyc.org>.

117 See generally, e.g., Anti-eviction Mapping Project, <https://antievictionmap.com/>; Eviction Lab, <https://evictionlab.org/>; New America Future of Land and Housing, Eviction and Foreclosure Data, Foreclosure and Eviction Analysis Tool (FEAT), <https://www.newamerica.org/future-land-housing/eviction-and-foreclosure-data/about/the-foreclosure-and-eviction-analysis-tool-feat/>; Kaplan, *supra* note 65; McCabe & Rosen, *supra* note 2.

118 Kaplan, *supra* note 65.

119 McCabe & Rosen, *supra* note 2. See D.C. Council Committee on Housing & Neighborhood Revitalization, Committee Report on B24–0096, Eviction Record Sealing Authority Amendment Act of 2021, https://lms.dccouncil.us/downloads/LIMS/46603/Committee_Report/B24-0096-Committee_Report1.pdf (citing McCabe & Rosen, *supra* note 2).

120 Cal. Civ. Proc Code § 1161.2(a)(1)(D), (b)(1)(A).

121 D.C. Code § 42–3505.09(e)(1).

122 D.C. Code § 42–3505.09(e)(1)(A)–(E).

123 D.C. Code § 42–3505.09(e)(2)(B).

Courts and legislatures should make more aggregate data on evictions available to the public. The Right to Counsel NYC Coalition’s demands include making eviction case filing data public “in a way that protects tenants’ identity and information, so that tenants can have better data about landlords’ actions.”¹²⁴ New America’s Future of Land and Housing program has proposed that California make aggregate (or de-identified) eviction data available to the public.¹²⁵

E. Eviction sealing laws are compatible with the public’s right to access court records.

Some opponents — particularly industry groups — have tried to defeat eviction record sealing proposals by invoking First Amendment concerns.¹²⁶ However, this should not deter advocates or policymakers from advancing legislation. Sealing laws are common and justifiable limitations on public access to court records.¹²⁷ This section is intended to help advocates and policymakers anticipate and respond to these concerns.

124 Right to Counsel NYC Coalition, Demands to Make NYC Eviction Free, https://d3n8a8pro7vhm.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1572474813/Demands_to_Make_NYC_Eviction_Free_-_Final_Language_%2885%29_%281%29.pdf?1572474813.

125 Fanilla Cheng, New America Future of Land and Housing, Why It’s So Hard to Gauge the Extent of California’s Eviction Crisis, June 3, 2021, <https://www.newamerica.org/future-land-housing/blog/why-its-so-hard-to-gauge-the-extent-of-californias-eviction-crisis/>.

126 See, e.g., MassLandlords, Eviction Sealing Talking Points: An In-Depth Essay, <https://masslandlords.net/policy/eviction-sealing/> (“If enacted, eviction sealing would . . . erode a bedrock constitutional principle by making secret what is and ought to be publicly available court information.”); Testimony of Investigation Technologies LLC DBA rapsheets.com before the MD Court of Appeals, Jan. 12, 2004, https://www.courts.state.md.us/sites/default/files/import/access/proposedrules_comments.pdf.

127 See, e.g., Kleysteuber, *supra* note 1, at 1352 n.36 (noting the “well-established practices of placing cases under seal and expunging court records when other values (e.g., privacy, public safety, or fairness) justify it.”); *Id.* at 1386 (noting examples where courts and legislatures have restricted access to court records); Margaret Love & David Schluskel, Collateral Consequences Resource Center, From Reentry to Reintegration: Criminal Record Reforms in 2021, Jan. 2022, https://ccresourcecenter.org/wp-content/uploads/2022/01/2022_CCRC_Annual-Report.pdf. See also *supra* note 109 (citing various examples of court records access and e-filing policies that require many types of information to be sealed or kept confidential); Daniel J. Solove, Access and Aggregation: privacy, Public Records, and the Constitution, 86 Minn. L. Rev. 1137, 1156 n. 126 and accompanying text, 2002; L.A. Police Dep’t. v. United Reporting Publishing Corp., 528 U.S. 32, 40 (1999) (“California could decide not to give out arrestee information at all without violating the First Amendment.”); *McBurney v. Young*, 569 U.S. 221, 232 (2013) (“This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”). Some courts have also declined to extend a right of access to certain types of civil court documents. See *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1331–40 (D.C. Cir. 1985) (finding no First Amendment right to access court records prior to judgment); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 908 (E.D. Pa. 1981) (“With respect to the question whether the common law right to inspect and copy [discovery materials] has a constitutional dimension, we conclude that it does not.”).

1. The right to access court records is not absolute.

The public has a limited right to access court proceedings, including some court records, to protect “the proper functioning of the judicial process and the government as a whole,”¹²⁸ and “the free discussion of governmental affairs.”¹²⁹ The Supreme Court has never acknowledged a right to access civil court records,¹³⁰ but several lower and state courts have,¹³¹ and in some jurisdictions this right could extend to eviction records.¹³²

However, the right to access court records is not absolute.¹³³ State and local governments can — and regularly do — pass laws that limit access to court records to protect important interests like access to housing.¹³⁴

Unlimited and unregulated public access to eviction records (along with other anti-tenant court processes) has undermined tenants’ access to fair hearings. The prospect of having an eviction record chills tenants from fighting their evictions in court. As the American Bar Association acknowledged, this “dynamic [] undermines the fundamental legitimacy of the judicial forum.”¹³⁵ Sealing eviction records is not only allowable but necessary to preserve tenants’ access to the courts.

Courts vary in their approaches to analyzing right-to-access cases,¹³⁶ but they generally consider whether sealing advances a significant or compelling state interest, and whether the sealing measure is appropriately tailored to advance that interest, including whether alternative measures that don’t burden access to court records could accomplish the same goal.¹³⁷

128 Repts. Comm. for Freedom of the Press, 773 F.2d, at 1331–32 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 506–08; *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 605 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–70 (1980)).

129 *Globe Newspaper*, 457 U.S. at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

130 See David S. Ardia, *Court Transparency and the First Amendment*, 38 *Cardozo L. Rev.* 835, 840 (2017).

131 See *Id.* at 912 n. 433 and accompanying text; Solove, *supra* note 127, at 1196 n. 395–98 and accompanying text.

132 See Kleysteuber, *supra* note 1, at 1382–83 (“[T]he right of access to civil court records is even murkier.”).

133 See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) (“[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”).

134 See sources cited *supra* note 127.

135 Am. Bar Ass’n, *supra* note 3, at Guideline 10.

136 See, e.g., Ardia, *supra* note 130, at 856 (“[T]he Supreme Court’s decisions addressing a putative First Amendment right of access to information paints a conflicting doctrinal picture. . . . Lower courts have struggled to make sense of the Supreme Court’s conflicting guidance. . . .”); *Id.* at 857–58 (“Indeed, scholars have described the lower courts’ application of the Supreme Court’s access precedents as ‘convoluted,’ ‘confused,’ and ‘wildly inconsistent.’”).

137 There are two sources of law from which a right to access court records might arise: the First Amendment and the common law. Under the common law, courts are only required to determine whether the interests in sealing court records outweigh the interests in access. There are no bright-line rules for evaluating countervailing interests and decisions are typically based on the specific facts of a case. See, e.g., *Nixon*, 435 U.S. at 602; *United States v. Graham*, 257 F.3d 143, 153–55 (2d Cir. 2001); *United States v. Beckham*, 789 F.2d 401, 409–10 (6th Cir. 1986). If a court finds that the public has

2. Protecting access to housing and combatting discrimination are valid reasons to limit the public’s access to court records.

Governments can limit access to court records to protect housing access and combat discrimination. In *U.D. Registry v. State of California*,¹³⁸ the California Court of Appeals found that “concern about the availability of rental housing for those needing housing, and particularly those facing eviction, is a valid and significant state interest.”¹³⁹ In *Yim v. City of Seattle*,¹⁴⁰ the US District Court for the Western District of Washington found that Seattle had a substantial interest in reducing racially discriminatory barriers to housing.¹⁴¹

Public access to court records can also be limited “. . . where court files might have become a vehicle for improper purposes.”¹⁴² Clearly, eviction records have become a vehicle for improper purposes. Eviction records have become a profitable commodity for data brokers at the expense of fair housing. Even when these practices violate fair housing and fair credit reporting laws, tenants struggle to hold anyone accountable. They are seldom able to correct inaccurate records at all, let alone in time to secure an apartment.¹⁴³ This market for eviction records also chills tenants from asserting their rights and makes it easier for landlords to evict tenants with no real process.

3. Sealing laws can be tailored to preserve access to the courts.

Sealing laws are not a binary on/off switch for all access to eviction records. They can and should allow tenants and other parties to access records as needed to effectively defend against and prevent evictions, and advance housing justice. Sealing laws typically allow people to request

a First Amendment right to access a court proceeding (or record), restrictions on access must be necessary to achieve a compelling government interest and narrowly tailored to serve that interest. *Press-Enterprise*, 464 U.S. at 509–10; *Globe Newspaper*, 457 U.S. at 604.

138 34 Cal. App. 4th 107 (Ct. App. 1995).

139 *U.D. Registry*, 34 Cal. App. at 114. In *U.D. Registry*, the California Court of Appeals invalidated a California law restricting CRAs from reporting eviction records, holding that the information reported from eviction records was not commercial speech because it was “truthful information taken from public records” and did not propose a commercial transaction. *Id.* at 111–16. In a 2006 case of the same name, the California Court of Appeals acknowledged that its narrow reliance on the “commercial transaction” test had become outdated. *U.D. Registry v. State of California*, 144 Cal. App. 4th 405. The 2006 *U.D. Registry* opinion acknowledged that consumer reports could reasonably be considered commercial speech even if they were derived from public records. *Id.* at 420–22.

140 2021 WL 2805377 (W.D. Wash. 2021). In *Yim*, the Western District of Washington upheld Seattle’s fair chance housing ordinance as constitutional under the First Amendment because it concerned commercial speech and was tailored to advance the city’s interest in making rental housing more accessible and combatting discrimination.

141 *Yim*, 2021 WL 2805377 at 8–9.

142 *Reps. Comm. for Freedom of the Press*, 773 F.2d at 1333.

143 See Kirchner & Goldstein, *supra* note 10; Lauren Kirchner, *When Zombie Data Costs you a Home*, The Markup, Oct. 6, 2020, <https://themarkup.org/locked-out/2020/10/06/zombie-criminal-records-housing-background-checks>.

access to sealed records for good cause, such as journalism and research.¹⁴⁴ Eviction sealing laws can also be an opportunity to enhance access to courts and eviction data by requiring courts to provide notice to tenants, including resources for legal help, and requiring public disclosure of aggregate eviction statistics. Where feasible, some jurisdictions might consider maintaining a public database but removing tenants’ names and other personal information.¹⁴⁵

4. Alternatives to sealing eviction records at the point of filing offer incomplete protection.

Of the eviction records policies that have been proposed, sealing at the point of filing is most likely to keep eviction filings out of private databases and off of tenant screening reports. By limiting access to records in the first instance, jurisdictions can make more affirmative choices about the appropriate circumstances under which records can be made publicly available. Delaying sealing to a later point (e.g., until after the conclusion of a case) is limited in its effectiveness because it still allows data brokers and others to collect and disseminate eviction filings before they’re sealed. Similarly, while laws regulating landlords’ and tenant screening companies’ use of eviction records are important complements to sealing, they are not alternatives to sealing eviction records at the point of filing.¹⁴⁶

F. Work with courts to ensure sealing will be implemented.

When legislatures pass eviction sealing laws, courts must adapt their records systems to comply. Legislative efforts can be quickly derailed if they don’t align with the court’s technical capacity and resources, or if court officials are resistant to making the necessary systemic changes. Advocates and policymakers should engage court personnel early on in the drafting process to make sure that courts will be able to implement the legislation.¹⁴⁷

Luckily, courts almost always have some capacity to maintain confidential case information that can be accessed by certain people — such as court personnel and parties to the case — but not by the general public. While some jurisdictions build their own case records management

¹⁴⁴ See *supra* text accompanying notes 117–22.

¹⁴⁵ Courts have allowed litigants to proceed anonymously when the litigants would face significant harm from their identities being public. The 5th Circuit has recognized that “the public right to scrutinize government functioning is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself.” *Doe v. Stegall*, 653 F.2d 180, 185 (1981). The D.C. Circuit has noted that “. . . where both the public interest in access and the private interest in non-disclosure are strong, partial or redacted disclosure [may] satisfy both interests.” *U.S. v. Hubbard*, 650 F.2d 293, 324–24 (D.C. Cir. 1980).

¹⁴⁶ See *supra* notes 79–81 and accompanying text.

¹⁴⁷ See Caramello & Mahlberg, *supra* note 1 (“Work with the Courts. The coalition advocating the successful California bill wrote it in such a way that necessary administrative changes to implement it would be limited. Minimizing administrative changes secured support from the courts as well as avoided fiscal costs for the bill.”).

systems, many contract with vendors to provide these services.¹⁴⁸ One of the largest of these vendors is Tyler Technologies, which claims its Odyssey court records management products are implemented in at least 28 states.¹⁴⁹

Advocates and policymakers should be cognizant of three key court technology systems that can impact the ability to seal records: (1) E-filing systems, which allow people to file documents with the court; (2) case records management systems, which allow courts to track, update, schedule, and process case information; and (3) online access portals, which allow the general public or certain credentialed parties to access court records.

1. E-filing systems can limit the information included in documents filed with the court.

E-filing systems, and the rules e-filers must follow, dictate what information must be included in the court filing, what information must be *excluded*, and what information must be *filed under seal*. Many courts use e-filing rules to protect certain personal information from disclosure.¹⁵⁰ For example, many courts prevent the names of minors, social security numbers, and other sensitive information from being included in court filings or appearing in public court records.¹⁵¹ E-filing systems review filings for compliance with these rules, usually along with some manual review by clerks, before making them available for others (such as other court personnel or members of the public) to see.¹⁵²

E-filing systems and rules could be used to prevent tenants' identifying information from ever entering court filings, or from being included in publicly available court documents. For example, as is common in juvenile cases, courts could require landlords filing evictions to only include the defendant's initials or a pseudonym, rather than their full name.¹⁵³

148 See Council for Court Excellence, Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts 21, Apr. 2017, http://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf.

149 Tyler Technologies, Enterprise Justice Software, <https://www.tylertech.com/products/enterprise-justice/saas-for-courts-justice>. See also Council for Court Excellence, *supra* note 148 (finding that of the five jurisdictions surveyed that retained a third-party vendor, all five used “Tyler Technologies, the dominant software provider in this market space.”).

150 See, e.g., Fla. R. Gen. Prac. & Jud. Admin., R. 2.425.

151 See, e.g., Council for Court Excellence, *supra* note 148, at 3.

152 See Joint Tech. Comm., JTC Resource Bulletin: Strategic Issues to Consider Before Starting an E-filing Initiative 1–2, July 14, 2013, https://www.ncsc.org/_data/assets/pdf_file/0022/18490/efiling-issues-paper-v-101-final.pdf.

153 This approach is simple and may work best for courts that don't have more sophisticated court records systems, but it could impede efforts to study the disparate impacts of evictions or to reach out to people who may need legal assistance. However, those research and outreach needs could be met more directly by requiring states to study and release aggregate data on evictions (including their racial distribution) and to proactively connect eviction defendants with attorneys and public assistance. Eviction records that include initials or pseudonyms instead of full names may still be able to be linked to the tenant using other information such as the address, if it appears in the court records. However, including these records on consumer reports would likely violate the Fair Credit Reporting Act since they don't contain enough personal information to be accurately matched with people. See *supra* note 82.

2. Case records management systems can allow courts to assign different levels of confidentiality to different types of records.

Case records management systems often include the ability to designate certain documents as sealed or confidential and control who has access to those records. California’s contract with Tyler Technologies includes the ability to assign different levels of confidentiality and access restrictions to different types of cases, and the ability to seal cases immediately upon filing and unseal them when certain conditions are met.¹⁵⁴

Even in states with the strongest public access laws, there are always many types of confidential records in the court’s system. These records can include discovery material, adoption records, and the many case records that get sealed pursuant to statutes or petitions.

3. Courts use portals to provide limited access to the general public and privileged access to certain parties.

Courts usually maintain public access portals that people can use to see docket information and case records that have not been categorized as sealed or confidential.¹⁵⁵ Some of these systems allow certain people or organizations to register for enhanced access to records through the same or a different portal.¹⁵⁶ For example, Vermont’s Odyssey portal allows parties to a case, attorneys of record, as well as other agencies and organizations that have agreements with the judiciary, to log in to the portal to access records not available to the general public.¹⁵⁷

Courts with these types of systems can use different levels of portal access to keep identifiable eviction records out of public portals while maintaining access for the parties to the case and their attorneys. They could also provide access through the portal — using memoranda of understanding (MOUs) or other agreements — to legal services organizations, tenant unions, or other designated parties for the limited purpose of helping prevent and defend against evictions.

154 Master Agreement between Tyler Technologies, Inc., and the Judicial Council of California for Odyssey Case Management System Software License, Professional Services, and Support, Maintenance and Hosted Services 50, effective Mar. 1, 2019 – Feb. 28, 2024, <https://www.courts.ca.gov/documents/lpa-MA-2017-13-Tyler-Technologies.pdf>.

155 *See generally*, e.g., San Mateo Superior Court, Odyssey Portal, https://www.sanmateocourt.org/online_services/odyssey_portal.php.

156 *See, e.g.*, Vermont Judiciary, Public Portal, <https://www.vermontjudiciary.org/about-vermont-judiciary/public-portal> (“Attorneys, self-represented litigants and others who are entitled to elevated access to particular cases in which they are involved must register as Portal users and submit a request for that access. This is a one time process for each Portal user which provides ongoing elevated access for all subsequent cases in which the person is involved.”).

157 *Id.* *See also* Vermont Judiciary, Public Portal User Guide 5, <https://www.vermontjudiciary.org/sites/default/files/documents/Vermont%20Public%20Portal%20User%20Guide%20.pdf>; Vermont Courts, Access to Case Data, Documents and other Records on the Vermont Judiciary Public Portal, https://www.youtube.com/watch?v=rD_Hkcatv60.

Conclusion

The need for eviction records sealing is urgent. The economic impact of the pandemic has left millions of renters thousands of dollars behind in rent. The rising number of eviction filings will likely exacerbate the homelessness crisis, in part because of the collateral effects of eviction records. Landlords and tenant screening companies have shown that they won't voluntarily stop screening people based on eviction records despite the evidence of discriminatory impact. Luckily, momentum is building across the country for eviction record sealing, with legislatures passing new sealing laws and institutions calling for sealing records at the point of filing. This issue brief has set forth some recommendations for how eviction sealing laws can be most effective and how to navigate common challenges drafters may face. Eviction records policy can be highly localized and we encourage advocates and policymakers to conduct research and experiment with sealing policies at the state and local level.

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