

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
*Richmond Division***

HOUSING OPPORTUNITIES MADE
EQUAL OF VIRGINIA, INC.,

Plaintiff,

v.

WISELY PROPERTIES, LLC,

and

MULTIFAMILY MANAGEMENT
SERVICES, INC.,

Defendants.

Civil Action No. _____

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF
AND DAMAGES**

JURY DEMAND

1. Federal and Virginia fair housing laws seek to eradicate discrimination in housing on the basis of race. Wisely Properties, LLC (“Wisely”) and Multifamily Management Services, Inc. (“MMS”) (collectively “Defendants”) maintain and enforce a policy of automatically excluding any person with a record of a felony conviction and certain other types of criminal history from renting an apartment at the Sterling Glen Apartments (“Sterling Glen”) in Chesterfield, Virginia. Plaintiff Housing Opportunities Made Equal of Virginia (“HOME”) brings this suit against Defendants under the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3601 *et seq.*, and the Virginia Fair Housing Law, VA. CODE ANN. §§ 36–96 *et seq.*, to (1) prevent Defendants from continuing their discriminatory and unlawful conduct at the affected properties and ensure that applicants injured by the policy—who are disproportionately Black—will have a

meaningful opportunity to secure sorely needed rental housing; and (2) redress the harm HOME has suffered as a direct result of Defendants' conduct.

2. The policy's disproportionate, adverse impact on Blacks violates the federal Fair Housing Act and the Virginia Fair Housing Law. There is a readily available and less discriminatory alternative to an automatic blanket ban on felonies and other criminal histories for dealing with any potential concerns about applicants with a criminal record. Instead of automatically excluding every applicant within the scope of its policy, Defendants can and are legally required to individually assess potential residents with a felony or other covered criminal history by considering factors directly relevant to the prospective tenant's qualifications. Individualized assessments would permit Defendants to carefully review the qualifications of applicants to Sterling Glen; it would also permit prospective tenants who have a criminal record, but who pose no threat to the community or the property, to obtain housing.

3. Defendants' decision to maintain a far-reaching blanket ban, despite the housing industry's rejection of such bans due to their discriminatory impact, indicates that this policy not only has an unlawful disparate impact, but was motivated by an intent to block people who are Black from obtaining housing.

4. Defendants' discriminatory policy and practices directly prevent individuals who are reentering society after time in prison from securing the safe and stable housing that is crucial to their successful reintegration. Defendants' policy also impacts individuals with a prior conviction long after an individual has successfully reentered the community.

NATURE OF THE ACTION

5. Plaintiff HOME seeks injunctive, monetary, and declaratory relief against Defendants for engaging in a practice of illegal discrimination on the basis of race at the property

that Defendants own and operate.

6. Since at least August 2017, Defendants have explicitly stated on their application that they automatically exclude any person from renting an apartment at Sterling Glen who has a conviction for any felony or anyone who has had a felony adjudication deferred or withheld. Defendants also state on their application that they automatically exclude any person from renting an apartment who has one of a number of other convictions, including convictions concerning illegal drugs, terrorism, prostitution, sex, or cruelty to animals. This portion of the policy does not distinguish between felonies and misdemeanors. Like the felony ban, it applies to situations where an adjudication was withheld or deferred for the listed offenses.

7. Defendants' policy of automatically excluding people based on their criminal history (the "Criminal Records Policy") – which Plaintiff HOME confirmed through testing is enforced in practice – is absolute and does not permit exceptions. An applicant who has a criminal history within the scope of the Criminal Records Policy is automatically barred regardless of the nature of the conviction, the amount of time that has lapsed since the conviction, evidence of rehabilitation, or any other factor related to whether the person poses a threat to safety or property. As a result, an elderly person with a decades-old drug conviction is treated identically to a person with a very recent violent conviction: both are barred without further review.

8. As a direct result, applicants with a criminal record are either (1) deterred from ever applying to Sterling Glen after learning of the Criminal Records Policy; or (2) automatically denied because of the Criminal Records Policy.

9. Defendants' Criminal Records Policy has the effect of disproportionately barring people who are Black, in violation of the Fair Housing Act and the Virginia Fair Housing Law. Moreover, intentional discrimination unlawfully motivated the adoption of the policy, which was

intended to minimize the number of Black people living at Sterling Glen.

10. Analysis of criminal records and other data shows that the Criminal Records Policy maintained by Defendants, though facially neutral, has a severe disparate impact on the basis of race. A Black resident of Chesterfield County, Virginia, the rental market where Sterling Glen is located, is almost three times as likely as a White resident to be excluded by Defendants' prohibition against people with certain criminal records.¹ That is, the likelihood that a Black resident has a disqualifying record is almost three times the likelihood that a White resident has a disqualifying record.

11. The Fair Housing Act prohibits the application of any policy that has a disparate impact unless it is necessary to achieve a substantial, legitimate, nondiscriminatory business interest that cannot be satisfied by an alternative that has a less discriminatory effect.

12. Defendants' Criminal Records Policy is not necessary to achieve a substantial, legitimate, nondiscriminatory business interest. A less discriminatory alternative for dealing with any potential concerns raised by applicants with criminal records is available to Defendants—one that is well-established in the area of housing and employment discrimination law and regulation.

13. Instead of automatically excluding every applicant covered by their far-reaching Criminal Records Policy, Defendants should individually assess potential residents with a criminal history by considering factors directly relevant to the applicant's qualifications for tenancy such as the nature of their conviction or conduct, when it occurred, their age at the time the conduct occurred, their post-conviction and post-release conduct, evidence of their rehabilitation, evidence of whether their presence would create a direct threat to the health or safety of others or whose tenancy would result in substantial damage to the property of others, their history as a tenant, and

¹ "White" is used throughout to refer to non-Hispanic Caucasians. "Black" is used throughout to refer to African-Americans.

other relevant factors. When considered in their totality, such an individualized assessment enables a landlord to make a reasoned decision about a particular applicant's suitability as a resident.

14. The more tailored approach required by an individual assessment protects public safety and property, yet it is less discriminatory and exclusionary because it reduces the number of Blacks who are categorically barred from housing at Sterling Glen.

15. HOME brings this action to address Defendants' discriminatory and unlawful conduct at Sterling Glen and to redress the harm it has suffered and will continue to suffer as a direct result of that conduct, absent relief.

PARTIES

16. Plaintiff HOME is a fair housing advocacy organization and non-profit corporation formed in Virginia and headquartered in Richmond, Virginia. HOME offers a variety of programs and services designed to advance fair housing in Virginia. To advance its mission of ensuring equal access to housing for all, HOME engages in education and outreach; provides counseling to individuals facing discrimination; works with local and federal officials to enhance fair housing laws and their enforcement; undertakes investigations to uncover unlawful discrimination; and, when necessary, initiates enforcement actions.

17. Defendant Wisely Properties, LLC is a Virginia corporation. It owns Sterling Glen Apartments. Its principal office as listed with Virginia's State Corporation Commission is located at 230 N. Lewis Street, Staunton, VA 24401.

18. Defendant Multifamily Management Services, Inc. is a Virginia corporation employed by Defendant Wisely Properties, LLC to operate and manage Sterling Glen on its behalf. Multifamily Management Services, Inc.'s principal office as listed with Virginia's State Corporation Commission is located at 240 N. Central Avenue, Suite A, Staunton, VA 24401.

19. Upon information and belief, Defendant Wisely Properties, LLC and Defendant Multifamily Management Services, Inc. are both owned and/or controlled by Clayton R. Wisely.

20. Defendant Multifamily Management Services, Inc. is, and upon information and belief has been at all relevant times, the employee and/or agent of Defendant Wisely Properties, LLC such that Defendant Wisely Properties, LLC is liable for its acts alleged herein.

21. In acting or omitting to act as alleged herein, each Defendant was acting through its employees and/or agents and is liable on the basis of the acts and omissions of its employees and/or agents.

22. In acting or omitting to act as alleged herein, each employee, officer or agent of each Defendant was acting in the course and scope of his or her actual or apparent authority pursuant to such agencies, or the alleged acts or omissions of each employee or officer as agent were subsequently ratified and adopted by each Defendant as principal.

JURISDICTION AND VENUE

23. This Court has jurisdiction over this matter under 42 U.S.C. § 3613, 28 U.S.C. § 1331, and 28 U.S.C § 1343. This Court has supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

24. This Court has authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

25. Venue is proper in this district under 28 U.S.C. § 1391(b) because Defendants are residents of the district, Defendants' apartment building is located in the district, and a substantial part of the events and omissions giving rise to the claims occurred in the district.

FACTUAL BACKGROUND

I. THE CRIMINAL RECORDS POLICY ENFORCED AT STERLING GLEN

A. Sterling Glen

26. Sterling Glen is an apartment complex in Chesterfield, Virginia, with approximately 300 units. Defendants own and operate Sterling Glen and apply their Criminal Records Policy there.

27. Units offered for rent at Sterling Glen are one-, two-, and three-bedroom apartments. The cost of these units ranges from approximately \$900 to \$1,400 per month.

28. The amenities offered at Sterling Glen include a pool, fitness center, playground, basketball court, volleyball court, clubhouse, concierge services, and parking.

B. Defendants' Policy Prevents Any Applicant with a Criminal Record from Being Considered as a Tenant

29. In 2017, as part of its mission to identify and eliminate unlawful and unfair discrimination in housing and to increase access to fair and affordable housing, HOME conducted a series of tests to assess the types and severity of the barriers individuals with criminal histories face when seeking housing in Virginia.

30. As part of this effort, from June 2017 to January 2019, HOME investigated the Criminal Records Policy maintained at Sterling Glen, including by reviewing application materials and conducting testing.

31. Defendants' tenant application expressly states that individuals with felony convictions and certain other convictions will be rejected as tenants. Specifically, the application states:

A criminal background check will be conducted for each applicant. The applicant will be rejected for any of the following reported criminal related reasons:

- Felony conviction
- Any terrorist related conviction
- Any illegal drug related conviction
- Any prostitution related conviction
- Any sex related conviction
- Any cruelty to animals related conviction
- Any of the above related charges resulting in “Adjudication Withheld and/or “Deferred Adjudication”
- Active status on probation or parole resulting from any of the above

Sterling Glen Rental Application (Attached as Exhibit A) (provided by Defendants on August 20, 2017).

32. In addition to rejecting all people with a past felony conviction, Defendants’ Criminal Records Policy bars many people with misdemeanors; for instance, the policy applies to all convictions for drugs although some drug offenses are misdemeanors.

33. Defendants’ Criminal Records Policy also applies to many people who have not even been convicted of a crime because it applies to charges where adjudication has been withheld or deferred.

34. HOME conducted a series of tests whereby HOME workers posed as a potential tenant with a felony conviction applying for housing at Sterling Glen. In each instance, an agent at Sterling Glen told the HOME tester that because of the felony conviction, the tester’s application would automatically be rejected.

35. In another test, a HOME tester called to ask about the application process. The tester was similarly told by an agent at Sterling Glen that a drug conviction would lead to an automatic denial of the application. The Sterling Glen agent did not distinguish between different types of drug convictions, such as between felony and misdemeanor drug convictions.

36. HOME’s investigation revealed that Defendants’ Criminal Records Policy—an outwardly neutral practice that automatically excludes all applicants with a felony conviction or

certain other convictions, and even some people who have only been charged with but not convicted of criminal conduct—is consistently applied and enforced.

C. Defendants’ Policy Prevents People with Criminal Records from Obtaining Critically Important Safe and Stable Housing

37. The harm inflicted by discriminatory criminal records policies like Defendants’ is significant, not only in terms of the sheer number of people affected, but also in terms of the consequences for the wellbeing of our communities.

38. Securing safe and affordable housing is a particularly crucial need for individuals reentering their communities immediately after time in prison.

39. Research shows that success in finding adequate housing is critically important to allowing reentrants to secure employment, government benefits, and other community ties. Housing has been characterized, properly, as the “lynchpin that holds the reintegration process together.”² Or as another expert put it, “[t]he search for permanent, sustainable housing portends success or failure for the entire reintegration process.”³

40. Other research has shown that reentrants who do not find stable housing in the community are more likely to recidivate than those who are able to secure permanent housing. Recidivism additionally impacts the whole surrounding community.

41. An Urban Institute study likewise found a strong connection between the inability to find permanent housing and recidivism. According to the study, reentrants often did not succeed

² Jeremy Travis, *But They All Come Back: Facing Challenges of Prisoner Reentry* 219 (2005).

³ Barbara H. Zaitzow, *We’ve Come a Long Way, Baby...Or Have We? Challenges and Opportunities for Incarcerated Women to Overcome Reentry Barriers* 233 (in *Global Perspectives on Re-Entry* (2011)).

in the community if they could not find a safe and stable place to live.⁴

42. Automatic criminal history bans directly prevent reentrants from obtaining such housing, whether immediately after release from prison or decades later, without giving any consideration to the particular circumstances of a person trying to find a place to live. This complete disregard for individual circumstances cannot be justified under the law. Moreover, it needlessly injures formerly incarcerated individuals, their communities, and organizations like Plaintiff that are committed to preserving access to equal housing opportunities.

II. DEFENDANTS' CRIMINAL RECORDS POLICY DISPROPORTIONATELY AFFECTS BLACKS AND CONSTITUTES UNLAWFUL DISCRIMINATION

43. Facially neutral housing practices that have a disparate impact on the basis of race are prohibited by the Fair Housing Act and Virginia law unless they are necessary to achieve a substantial, legitimate, nondiscriminatory business interest that cannot be served through a less discriminatory alternative practice. Policies that automatically deny housing to people with records of felony convictions or other criminal history, including the Criminal Records Policy maintained and enforced by Defendants at Sterling Glen, have a severe disparate impact on Blacks at the national, state, and local levels, and are unlawful under this standard.

44. Because the proportion of people with criminal records in Chesterfield County varies widely by race, Defendants' Criminal Records Policy bars otherwise-qualified Blacks from living at Sterling Glen at a rate of close to three times the rate at which otherwise-qualified Whites are excluded. Defendants' Criminal Records Policy is the direct cause of this disparate impact.

45. Defendants' policy is overbroad and cannot be justified. Protecting safety or property is not a valid reason for an automatic ban, as most renters with criminal backgrounds do not

⁴ Jeremy Travis and Caterina G. Roman, Urban Inst., *Taking Stock: Housing, Homelessness, and Prisoner Reentry* 7-10 (2004), <http://www.urban.org/publications/411096.html>.

pose a more significant risk to landlords than renters without criminal backgrounds. The protection of safety or property cannot be used to justify a policy that categorically bans all people with felonies or other types of criminal history without any attempt to distinguish between past criminal conduct that presents a risk to resident safety or property and past criminal conduct that does not.

46. Any legitimate concerns, including protecting safety or property, can be satisfied by a readily available and less discriminatory policy: giving individualized consideration to each potential resident's circumstances and desirability as a tenant.

A. Automatic Housing Bans Based on Criminal History Disproportionately and Severely Impact Blacks Nationally

47. Nationally, more than 625,000 inmates are released from confinement each year,⁵ and they become targets of automatic criminal history bans at precisely the time when they need housing to reintegrate into their families and communities.⁶

48. The sheer number of people released from prison every year has skyrocketed as the incarcerated population in the United States has grown from 300,000 in 1980 to more than 2.3 million today. Most are imprisoned for non-violent offenses. Approximately 10 million misdemeanor cases are filed every year.⁷ Approximately 19 million people across the country have at least one felony conviction.⁸ At the same time that the sheer number of people with criminal

⁵ E. Ann Carson and Elizabeth Anderson, U.S. Dept. of Justice, *Prisoners in 2016*, BJS Bulletin, 10 (Dec. 2017), <https://www.bjs.gov/content/pub/pdf/p16.pdf> (“*Prisoners in 2016*”).

⁶ The Council of State Governments & The National Reentry Resource Center, *Making People's Transition from Prison and Jail to the Community Safe and Successful: A Snapshot of National Progress in Reentry 2* (2017), https://csgjusticecenter.org/wp-content/uploads/2017/06/6.12.17_A-Snapshot-of-National-Progress-in-Reentry.pdf.

⁷ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314-1315 (2012).

⁸ Pew Research Center, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/02/felony-conviction-rates-have-risen-sharply-but-unevenly>; Prison Legal News,

convictions has dramatically increased, it has become much easier and more common for housing providers to identify and ban people with criminal records because of the digitization of records and the concomitant growth of private companies that provide inexpensive background checks.

49. The massive increase in incarceration and in the number of people with criminal convictions has had an unequal impact on the Black community. Blacks are incarcerated at rates disproportionate to their numbers in the United States general population. Blacks comprise approximately 37.6% of all prisoners.⁹ However, Blacks only make up 13.4% of the U.S. population.¹⁰

50. The fact that Blacks are far more likely than Whites to have a criminal record means that Blacks are much more likely than Whites to be barred from housing by automatic exclusions of people with criminal records.

51. In April 2016, the U.S. Department of Housing and Urban Development (“HUD”) issued interpretive guidance confirming that automatic bans, like the Defendants’ Criminal Records Policy, have a disproportionate, adverse effect on Blacks because of disparities in the criminal justice system; moreover, HUD’s guidance cautioned that automatic bans, which categorically exclude applicants because of their criminal history, are *never* necessary to achieve the potentially legitimate interest of protecting safety or property. *See* Exhibit B (HUD, *Office of Gen. Counsel Guidance on Application of FHA Standards to the Use of Criminal Records by*

<https://www.prisonlegalnews.org/news/2018/jun/8/percentage-americans-felony-convictions-increases-especially-blacks/>.

⁹ *See* Federal Bureau of Prisons, *Inmate Race* (2019), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

¹⁰ *See* U.S. Census Bureau, *Quickfacts: Race and Hispanic Origin* (2018), <https://www.census.gov/quickfacts/fact/table/US/RHI225217#RHI225217>.

Providers of Hous. and Real Estate-Related Transactions) (“HUD Guidance”) (Apr. 4, 2016) at 2-7. The HUD Guidance further explains that this applies to automatic bans based either on arrests or convictions. *Id.*¹¹

52. The Equal Employment Opportunity Commission’s (“EEOC”) analysis of the impact of automatic criminal history bans in the employment context further confirms the disparate impact described here. The EEOC analyzed national criminal records data, concluded that automatic criminal history bans have a disparate impact on the basis of race, and documented its findings in its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (“Enforcement Guidance”).¹²

53. The EEOC’s conclusion applies to the disparate impact analysis here because categorical criminal record bans operate the same way in housing as they do in employment. In both contexts, applicants are uniformly and permanently excluded, whether from housing opportunities or employment, before due consideration of the merits or qualifications of the applicant for the job or housing in question and without any individualized assessment of whether their criminal history makes them personally unqualified. They are excluded based solely on the fact of a prior conviction or even a pending criminal charge, regardless of whether they pose a current risk.

¹¹ The HUD Guidance explains the appropriate analysis in detail but does not change the law; automatic bans violate the Fair Housing Act independent of the Guidance. *See Jackson v. Tryon Park Apartments, Inc.*, No. 6:18-CV-06238 EAW, 2019 WL 331635, at *3-5 (W.D.N.Y. Jan. 25, 2019).

¹² 2012 WL 1499883 (Apr. 25, 2012). The prior versions from 1987 and 1990 reached the same conclusion and set forth the same presumption.

B. Defendants' Criminal Records Policy Disproportionately and Severely Impacts Blacks in Chesterfield County and in Virginia

54. Defendants' automatic criminal history ban at Sterling Glen has a disproportionate impact on the basis of race. Specifically, Defendants' Criminal Records Policy disproportionately excludes otherwise-qualified Black applicants.

55. Sterling Glen is located in Chesterfield County, Virginia, which is adjacent to Richmond City, Virginia. The rental market for Sterling Glen can be construed as only Chesterfield County or as Chesterfield County and Richmond City.

56. As demonstrated in the table below, in Chesterfield, while Blacks comprise only 22% of the population (68,196 out of 316,236),¹³ they comprise 46% of the individuals who were convicted of a felony between 2007 and 2017 (4,540 out of 9,914).¹⁴ Put another way, while there are 67 people convicted of a felony per 1,000 Black people in Chesterfield County, there are only 24 people with a felony conviction per 1,000 White people in the county. Upon information and belief, the racial disproportionality in felony convictions among all residents of Chesterfield County is equivalent to the racial disproportionality among people convicted in the county between 2007 and 2017.

57. Based on this data, and as shown in the table below, Blacks in Chesterfield County are almost three times more likely than Whites to have a felony record ($66.57/24.3 = 2.74$). That

¹³ 2010 Census Data, <https://www.census.gov/developers/>, (November 14, 2018). These population numbers are from the 2010 census. The disparities are comparable when using data from the Census Bureau's 2017 American Community Survey.

¹⁴ Data on felony conviction rates in Virginia, including in Chesterfield County, is available from the Virginia Circuit Courts. The website virginiacourtdata.org uses web scrapers to extract and compile publicly available data from Virginia Circuit Court websites. Because of how the conviction data is reported by the Virginia Court system, the statistics in this section are based on the non-Hispanic Black population. This distinction has no meaningful effect on the disparities that Plaintiff has calculated because the Black-Hispanic population is so low in the geographies studied.

is, the risk of disqualifying convictions among Blacks is almost three times the risk of disqualifying convictions among White people.

Chesterfield County, Virginia	
Population	316,236
Total Number of People with a Felony Conviction	9,914
White People with a Felony Conviction	5,026
Black People with a Felony Conviction	4,540
White Population	206,792
Black Population	68,196
People with a Felony Conviction Per 1,000 People	31.35
Black People with a Felony Conviction Per 1,000 Black People	66.57
White People with a Felony Conviction Per 1,000 White People	24.3

58. When one includes Richmond City in addition to Chesterfield County in the relevant market for Sterling Glen, the disparity is even greater. In Chesterfield County and Richmond City, while Blacks comprise only 33% of the population (170,460 out of 520,450), they comprise 66% of the of the individuals in Chesterfield County and Richmond who were convicted of a felony between 2007 and 2017 (14,323 out of 21,708). Put another way, while there are 84 people convicted of a felony per 1,000 Black people in Chesterfield County and Richmond City, there are only 24 people convicted of a felony per 1,000 White people. Upon information and belief, the racial disproportionality in felony convictions among all residents of Chesterfield County and Richmond City is equivalent to the racial disproportionality among people convicted in the county and city between 2007 and 2017.

59. Based on this data, Blacks in Chesterfield County and Richmond City are three and

a half times more likely than Whites to have a disqualifying criminal record.

Chesterfield County and Richmond City, Virginia	
Population	520,450
Total Number of People with a Felony Conviction	21,708
White People with a Felony Conviction	6,871
Black People with a Felony Conviction	14,323
White Population	286,605
Black Population	170,460
People with a Felony Conviction Per 1,000 People	41.71
Black People with a Felony Conviction Per 1,000 Black People	84.03
White People with a Felony Conviction Per 1,000 White People	23.97

60. This disparity continues at the statewide level as well. As demonstrated in the table below, in Virginia, while Blacks comprise only 21% of the population (1,396,818 out of 6,756,767), they comprise 45% of the individuals in Virginia who were convicted of a felony between 2007 and 2017 (97,087 out of 214,734).¹⁵ Put another way, while there are 69 people convicted of a felony per 1,000 Black people in Virginia, there are only 25 people convicted of a felony per 1,000 White people. Upon information and belief, the racial disproportionality in felony convictions among all residents of Virginia is equivalent to the racial disproportionality among people convicted in Virginia between 2007 and 2017.

61. Based on this data, Blacks in Virginia are almost three times more likely than Whites to have a disqualifying criminal record.

¹⁵ Court data is not available for Alexandria and Fairfax counties. Accordingly, the population numbers for Virginia also exclude Alexandria and Fairfax counties.

62. Blacks seeking to rent an apartment at Sterling Glen are thus substantially more likely than Whites to be harmed by Defendants’ Criminal Records Policy irrespective of the exact boundaries of the rental market.

Virginia (excluding Fairfax and Alexandria Counties)	
Population	6,756,767
Total Number of People with a Felony Conviction	214,734
White People with a Felony Conviction	113,211
Black People with a Felony Conviction	97,087
White Population	4,507,101
Black Population	1,396,818
People with a Felony Conviction Per 1,000 People	31.78
Black People with a Felony Conviction Per 1,000 Black People	69.51
White People with a Felony Conviction Per 1,000 White People	25.12

63. The disparities are comparable when considering all felony and misdemeanor convictions combined. Blacks are 2.82 times as likely as Whites to have a felony or misdemeanor conviction in Chesterfield County; 3.09 times as likely in Chesterfield County and Richmond City combined; and 2.6 times as likely in Virginia.

64. Chesterfield County, alone and in combination with Richmond City, includes a substantial number of Black renters who are qualified to become tenants at Sterling Glen but are nevertheless *per se* ineligible for tenancy because of the Criminal Records Policy.

65. Considering Sterling Glen’s other rental criteria does not eliminate the significant disparities in the racial impact of Defendants’ policy.

66. Defendants' refusal to provide housing to people on the basis of their Criminal Records Policy directly causes a racially disparate, adverse impact on Blacks.

C. Defendants' Broad Criminal Records Policy Cannot be Justified as Necessary for Protecting Safety or Property

67. Extensive research establishes that protecting safety and property does not justify a blanket criminal records policy. The research shows that additional factors, such as the amount of time since the last offense, the person's age, and the type of conviction, must be considered to assess whether a past criminal conviction suggests a risk of future criminal conduct.

68. The amount of time since the last offense is a critical factor in making this assessment. Studies show that in seven years or even less, the risk of future arrest for somebody with a past conviction becomes no greater than the risk for somebody without a past conviction.¹⁶ One more recent study found that negative outcomes in rental housing specifically are no more likely once a felony conviction is five years old and once a misdemeanor conviction is just two years old.¹⁷

69. The rental housing study also demonstrated that the type of conviction is important in predicting whether a person's criminal record indicates heightened risk.¹⁸ It found that in 11 out of 15 categories of crime studied, there is no statistically meaningful increase in negative outcomes for renters with a past conviction in comparison to renters without a criminal history. These 11 categories

¹⁶ Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol'y* 483 (2006). *See also* Alfred Blumstein and Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *Criminology* 327 (2009).

¹⁷ Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, Wilder Research (2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

¹⁸ *See id.*

include minor drug offenses, prostitution, alcohol-related offenses, and minor public disorder offenses. The increase in the other four categories is small and, as explained above, disappears over time.

70. Studies show that a person's age and the frequency of past criminal activity are also key factors in determining whether the individual poses any risk to safety or property.¹⁹ People with a criminal record who are older, and those with fewer criminal offenses, are much less likely to engage in future criminal conduct or to pose a threat to the community.

71. In addition to convictions, Defendants' Criminal Records Policy bans individuals who simply had their "Adjudication Withheld" and those with "Deferred Adjudication." These two statuses are even poorer indicators of whether someone poses a future threat.

72. Accordingly, safety and the protection of property do not provide a substantial and legitimate rationale for a broad blanket ban on eligibility like Defendants' Criminal Records Policy.

D. Giving Individualized Consideration to Applicants' Circumstances Is a Readily Available and Less Discriminatory Alternative That Would Satisfy Any Substantial, Legitimate, Nondiscriminatory Interest Behind Defendants' Criminal Records Policy

73. Giving individualized consideration to each potential resident's circumstances is a less discriminatory alternative to Defendants' Criminal Records Policy and would address any substantial, legitimate, nondiscriminatory justification for the policy.

74. Specifically, to the extent that public safety or protection of property at Sterling Glen is a valid justification, protection of safety and property can be accomplished through the use of individual assessments that consider the nature of an individual's conviction, the amount of time since the conviction or release, and evidence of rehabilitation, among other factors. An

¹⁹ See Shawn Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 *Criminology* 27, 52 (2011).

individualized assessment allows people with a criminal record, but who pose no realistic current or future threat to the community, to obtain housing. This more tailored approach both protects public safety and property *and* is less discriminatory and exclusionary because it reduces the number of Black applicants who are categorically banned from Sterling Glen.

75. The HUD Guidance expressly calls for the use of individualized consideration as a less discriminatory alternative to automatic exclusion on the basis of criminal history, through consideration of factors such as “the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts.”²⁰

76. In the analogous employment context, the EEOC recognizes that individualized assessments are almost always required by law because they provide a less discriminatory alternative to automatic criminal history bans and are sufficient to protect legitimate interests, including safety. Specifically, the EEOC’s Enforcement Guidance advocates the use of “a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job.”²¹ This screening should include “notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.”²²

²⁰ See HUD Guidance at 7.

²¹ Enforcement Guidance at 14.

²² *Id.*

77. Defendants' overly broad Criminal Records Policy prevents any individualized consideration. But Defendants would not have to compromise any legitimate concerns that they may have to give individualized consideration to applicants' particular circumstances and allow those individuals whose tenancy would not threaten public safety or property interests to live at Sterling Glen. Defendants' policy of automatically excluding people with felony convictions, certain misdemeanor convictions, and even some arrests, is not necessary to achieve a substantial and legitimate business interest.

III. DEFENDANTS MAINTAIN THE CRIMINAL RECORDS POLICY TO INTENTIONALLY DISCRIMINATE AGAINST BLACKS BY REDUCING THE NUMBER OF BLACKS LIVING AT STERLING GLEN

78. Several factors strongly indicate that the real reason Defendants adopted the Criminal Records Policy was not to protect safety or property, or for any other substantial and legitimate reason, but to reduce the number of Black people who are eligible to become tenants. Specifically, Defendants' decision to maintain a far-reaching Criminal Records Policy despite the housing industry's rejection of such policies precisely because of their discriminatory impact suggests that this policy was intended to block Blacks from living at Sterling Glen. Any such purported justification is actually a pretext for intentional racial discrimination.

79. Intentional discrimination may be inferred from a number of factors, including whether the challenged action weighs more heavily on one group than another, whether there have been changes in normal procedures, and whether there have been substantive departures from usual practices.²³

80. The statistical disparities here are extraordinary. That is, the difference in the rates at which prospective Black tenants are adversely affected by the policy is dramatically larger than

²³ *Vill. of Arlington Heights v. Metro. Dev. Corp.*, 429 U.S. 252 (1977).

the rate at which prospective White tenants are affected. This is not a situation where a facially neutral policy harms minorities 10% or 20% more frequently than it harms non-minorities. Rather, as shown above, otherwise-qualified Blacks are almost three times more likely than Whites to be barred from Sterling Glen because of Defendants' Criminal Records Policy. Moreover, these dramatic disparities are entirely foreseeable because of well-known disparities in the criminal justice system. As the Supreme Court has explained, large statistical disparities are "often a telltale sign of purposeful discrimination[.]"²⁴

81. The HUD Guidance was released three years ago, in April of 2016, and has been well-publicized to housing providers. Major industry organizations including the National Multifamily Housing Council, the National Apartment Association, and the National Association of Realtors, as well as local organizations, including the Virginia Association of Realtors, all disseminated information about the HUD Guidance and emphasized the importance of dispensing with automatic criminal history bans.²⁵ It is very unusual for apartment companies to thoroughly disregard sound and well-known industry practices designed to prevent discrimination. Upon information and belief, Defendants have been aware of the HUD Guidance since its release.

82. The Guidance is not ambiguous; it clearly explains how broad-based criminal

²⁴ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977).

²⁵ Nat'l Multifamily Hous. Council, *Criminal Conviction Screening Policies* (June 23, 2016), http://www.nmhc.org/uploadedFiles/News/NMHC_News/Criminal%20Conviction%20Screening%20Policies%20_NMHC_NAA_062316%20webinar.pdf; Nat'l Apartment Ass'n, *Fed Officials Warn Against Blanket Criminal History Exclusions* (April 25, 2016), <https://www.naahq.org/news-publications/fed-officials-warn-against-blanket-criminal-history-exclusions>; Nat'l Ass'n of Realtors, *What the Latest Fair Housing Guidance on Criminal Background Checks Means for Real Estate* (May 13, 2016), <https://www.nar.realtor/newsroom/what-the-latest-fair-housing-guidance-on-criminal-background-checks-means-for-real-estate>; Va. Ass'n of Realtors, *Criminal Background Checks Under the Fair Housing Act* (Nov. 15, 2017).

background policies that rely on criminal histories cause a disparate impact on people of color, how automatic blanket bans that categorically exclude applicants as a result of their criminal history are not necessary to satisfy a legitimate business interest, and that giving individualized consideration to applicants based on factors such as the nature of a conviction and evidence of rehabilitation is a less discriminatory alternative that satisfies legitimate interests in protecting safety and property.

83. Accordingly, on information and belief, Defendants are aware of the disparate and discriminatory impact that their Criminal Records Policy has on Blacks, and they are aware of a less-discriminatory approach to screening potential tenants—individual assessment of the potential tenant’s criminal history, based on the factors identified above—that would not only protect their safety and property interests but would also comply with the federal Fair Housing Act and HUD’s Guidance, and with the Virginia Fair Housing Law. However, despite this knowledge and awareness, Defendants maintain exactly the type of policy that the HUD Guidance rejects. Defendants deliberately chose to implement and maintain the more discriminatory method for criminal record screening that automatically excludes a greater number of prospective tenants who are Black. One can infer from this that the disparate outcome identified by HUD is exactly the outcome intended by Defendants.

84. Defendants’ choice to maintain the overly broad and discriminatory Criminal Records Policy also reflects a substantial departure from usual industry practices, which further raises an inference of discriminatory intent.

85. Defendants’ outright rejection of applicants with felony and other convictions and arrests is entirely counter to normal business practices in the apartment industry. In the normal course of business, landlords and property managers are highly motivated to get people in the door

to see their buildings. Even if someone who visits does not become a tenant, word of mouth is an important component of apartment marketing, as visitors may tell others about the building. Defendants' policy instead assures that a group of people—disproportionately Black—has no reason to visit Sterling Glen.

86. Defendants' elevation of a criminal history as an absolute bar to residency without consideration of other eligibility criteria for tenancy is also counter to normal business practices in the apartment industry. In the normal course of business, consideration of income, prior rental history, credit, and other factors occurs simultaneously during the application process, and after an application has been submitted and reviewed.

87. Departures like this from industry norms suggest an illicit motive.

88. In light of these facts, there is no non-discriminatory explanation for why Defendants deliberately chose and continue to implement the Criminal Records Policy over an individualized screening practice. Rather, these facts collectively support the inference—indeed, they strongly suggest—that Defendants fully understand the unnecessary and unlawful disparate impact of their Criminal Records Policy on Blacks, and that they created their policy precisely because of its discriminatory impact. The Criminal Records Policy is a tool that Defendants intentionally use to minimize the number of Blacks residing in their apartment complex in violation of the federal Fair Housing Act and the Virginia Fair Housing Law.

INJURY TO PLAINTIFF

89. As a result of Defendants' actions described above, HOME has been directly and substantially injured. Plaintiff has been frustrated in its mission to eradicate discrimination in housing and in carrying out the programs and services it provides, including encouraging integrated living patterns, eliminating unlawful barriers in housing, educating the public about fair

housing rights and requirements, educating and working with industry groups on fair housing compliance, and providing assistance to individuals and families looking for housing or affected by discriminatory housing practices.

90. Since becoming increasingly aware of the effects of overbroad and punitive criminal record screening policies, including the exclusion of applicants with criminal records without individualized consideration, as well as the disparate impact such policies have on minority applicants, HOME has invested considerable time and effort in educating the community about the importance of accessible housing for people with criminal records. As a result of discovering Defendants' policy, HOME has directed much of its education and counseling efforts to rebutting the impression that automatic criminal history bans like Defendants' are permissible.

91. Because Defendants' Criminal Records Policy has had and continues to have the effect of banning people with criminal records, who are disproportionately Blacks, from living at Sterling Glen, Defendants' conduct frustrates Plaintiff's mission of ensuring equal housing opportunity for all individuals, free of arbitrary barriers.

92. Plaintiff has been damaged by having to divert scarce resources that could have been used to provide the aforementioned services, *supra* at ¶ 89, to instead identify, investigate, and counteract Defendants' discriminatory conduct.

93. Specifically, Plaintiff's staff has expended a significant number of hours investigating Defendants' unlawful policy and practices. The investigation has included conducting testing at Sterling Glen, through phone calls and on-site visits, documenting each test, reviewing Sterling Glen's application material, analyzing cases adjudicated in Chesterfield Circuit Court over an 11-year period, between January 1, 2007, and December 31, 2016, and calculating the racial disparity in felony convictions compared with the county population.

94. In addition, Plaintiff has diverted time and money to education and outreach efforts directly and specifically aimed at countering Defendants' discrimination. After encountering Defendants' blatantly discriminatory practices in the summer of 2017, Plaintiff developed community education programs to counteract them. For example, Plaintiff (a) added content to its educational presentations about discriminatory criminal records screening policies; (b) designed a social media effort, including significant advertisement on Facebook, about the discriminatory impact of criminal records screening policies to educate Virginians; (c) engaged in community events to help educate individuals with criminal records who have encountered automatic criminal history bans in the housing market; and (d) participated in housing industry events to train service providers about the unlawful, discriminatory impact of automatic criminal history bans.

95. Plaintiff engaged in each of the aforementioned activities in specific response to Defendants' practices because they were significantly more egregious and exclusionary than the practices of other housing providers. These activities have caused Plaintiff's staff to expend a significant amount of time and money.

96. But for the need to address Defendants' practices, Plaintiff would have directed these resources to other efforts to further its mission. Specifically, the time and resources would have been allocated toward its programs aimed at encouraging integrated living patterns, eliminating unlawful barriers in housing, educating the public and industry groups about fair housing rights and requirements, and providing assistance to individuals and families looking for housing or affected by other discriminatory housing practices. Plaintiff's ability to direct resources to these efforts has been and continues to be reduced because of the need to divert resources to addressing and counteracting Defendants' discriminatory Criminal Records Policy.

97. Until redressed and permanently ceased, Defendants' unlawful, discriminatory

actions will continue to injure Plaintiff, for example by:

- a. interfering with efforts and programs intended to bring about equality of opportunity in housing;
- b. requiring the commitment of scarce resources, including substantial staff time and funding, to investigate and counteract Defendants' discriminatory conduct, thus diverting those resources from Plaintiff's other activities and services, such as education, outreach, and counseling; and
- c. frustrating Plaintiff's mission and purpose of promoting the equal availability of housing to all persons without regard to their membership in any protected category, including race.

98. Defendants' discriminatory conduct, if continued, will also deprive individuals to whom Plaintiff provides services and others living in and near Sterling Glen of the benefit of living in a diverse community.

99. Defendants' unlawful actions described herein were, and are, intentional, willful, and malicious, and/or have been, and are, implemented with callous and reckless disregard for rights protected under federal and state law.

CAUSES OF ACTION

Count I: Disparate Impact in Violation of the Fair Housing Act, 42 U.S.C. § 3604

100. Plaintiff repeats and incorporates by reference all allegations set forth in Paragraphs 1 through 99 above.

101. Defendants' acts, policies, and practices have an adverse and disproportionate impact on Blacks as compared to similarly-situated Whites. This adverse and disproportionate impact is the direct result of Defendants' Criminal Records Policy, which automatically denies

housing to people with a criminal record without considering the applicant's individual characteristics and circumstances.

102. Defendants' Criminal Records Policy was not and is not necessary to serve any substantial, legitimate, nondiscriminatory interest, and any such interest could be satisfied by another practice—providing individualized consideration—that would have a less discriminatory effect.

103. Defendants' acts, policies, and practices constitute discrimination and violate the Fair Housing Act, as amended, 42 U.S.C. § 3604, and its implementing regulations, in that:

- a. Defendants' acts, policies, and practices constitute a refusal to rent housing or negotiate for the rental of housing because of race, and have made housing unavailable because of race, in violation of 42 U.S.C. § 3604(a);
- b. Defendants' acts, policies, and practices provide different terms, conditions, and privileges of rental housing, as well as different services and facilities in connection therewith, on the basis of race in violation of 42 U.S.C. § 3604(b);
and
- c. Defendants' notices and statements indicate a preference, limitation, and discrimination based on race in violation of 42 U.S.C. § 3604(c). Defendants' statements in their Criminal Records Policy that exclude any person from renting an apartment at Sterling Glen because of criminal history have a discriminatory effect on Blacks because they actually or predictably result in a disparate impact on the basis of race.

**Count II: Intentional Discrimination in Violation of the Fair Housing Act,
42 U.S.C. § 3604**

104. Plaintiff repeats and incorporates by reference all allegations set forth in Paragraphs 1 through 103 above.

105. Defendants' acts, policies, and practices have been carried out with the intention of discriminating on the basis of race.

106. On information and belief, Defendants are aware of the disparate impact that their Criminal Records Policy has on Blacks. They are also aware of HUD's April 2016 Guidance regarding criminal records-based screening policies, including its repudiation of automatic blanket bans and its instructions to adopt less discriminatory approaches to screening, such as individual assessment of criminal history, that would adequately protect public safety and property concerns.

107. However, despite this knowledge and awareness, Defendants departed from industry practices and deliberately chose and continue to implement their more discriminatory method for screening on the basis of criminal history. Under these facts, no legitimate, non-discriminatory explanation exists for Defendants' choice in adopting and maintaining the more discriminatory and exclusionary policy. Defendants selected the Criminal Records Policy with the intent and expectation that the policy would disproportionately prevent Blacks from obtaining housing at Sterling Glen.

108. Defendants' acts, policies, and practices constitute intentional discrimination and violate the Fair Housing Act, as amended, 42 U.S.C. § 3604, and its implementing regulations, in that:

- a. Defendants' acts, policies, and practices constitute a refusal to rent housing or negotiate for the rental of housing because of race, and have made housing unavailable because of race, in violation of 42 U.S.C. § 3604(a);

- b. Defendants' acts, policies, and practices provide different terms, conditions, and privileges of rental housing, as well as different services and facilities in connection therewith, on the basis of race in violation of 42 U.S.C. § 3604(b); and
- c. Defendants' notices and statements indicate a preference, limitation, and discrimination based on race in violation of 42 U.S.C. § 3604(c).

**Count III: Disparate Impact in Violation of the Virginia Fair Housing Law,
VA. CODE ANN. § 36-96.3(A)**

109. Plaintiff repeats and incorporates by reference all allegations set forth in Paragraphs 1 through 108 above.

110. Defendants' acts, policies, and practices have an adverse and disproportionate impact on Blacks as compared to similarly-situated Whites. This adverse and disproportionate impact is the direct result of Defendants' Criminal Records Policy, pursuant to which it automatically refuses housing to people with a criminal record with no consideration of their individual characteristics and circumstances.

111. Defendants' Criminal Records Policy was not and is not necessary to serve any substantial, legitimate, nondiscriminatory interest, and any such interest could be satisfied by another practice—providing individualized consideration—that would have a less discriminatory effect.

112. Defendants' acts, policies, and practices constitute discrimination and violate the Virginia Fair Housing Law, VA. CODE ANN. § 36-96.3(A), and its implementing regulations, in that:

- a. Defendants' acts, policies, and practices constitute a refusal to rent housing or negotiate for the rental of housing because of race, and have made housing

unavailable because of race, in violation of VA. CODE ANN. § 36-96.3(A)(1);

- b. Defendants' acts, policies, and practices provide different terms, conditions, and privileges of rental housing, as well as different services and facilities in connection therewith, on the basis of race in violation of VA. CODE ANN. § 36-96.3(A)(2); and
- c. Defendants' notices and statements indicate a preference, limitation, and discrimination based on race in violation of VA. CODE ANN. § 36-96.3(A)(3). Defendants' statements in their Criminal Records Policy that exclude any person from renting an apartment at Sterling Glen because of criminal history have a discriminatory effect on Blacks because they actually or predictably result in a disparate impact on the basis of race.

**Count IV: Intentional Discrimination in Violation of the Virginia Fair Housing Law,
VA. CODE ANN. § 36-96.3(A)**

113. Plaintiff repeats and incorporates by reference all allegations set forth in Paragraphs 1 through 112 above.

114. Defendants' acts, policies, and practices are carried out with the intention of discriminating on the basis of race.

115. On information and belief, Defendants are aware of the disparate impact that their Criminal Records Policy has on Blacks. They are also aware of HUD's April 2016 Guidance regarding criminal records-based screening policies, including its repudiation of automatic blanket bans and its instructions to adopt less discriminatory approaches to screening, such as individual assessment of criminal history, that would adequately protect public safety and property concerns.

116. However, despite this knowledge and awareness, Defendants departed from industry practices and deliberately chose and continue to implement their more discriminatory

method for screening on the basis of criminal history. Under these facts, no legitimate, non-discriminatory explanation exists for Defendants' choice in adopting and maintaining the more discriminatory and exclusionary policy. Defendants selected the Criminal Records Policy with the intent and expectation that the policy would disproportionately prevent Blacks from obtaining housing at Sterling Glen.

117. Defendants' acts, policies, and practices constitute intentional discrimination and violate the Virginia Fair Housing Law, VA. CODE ANN. § 36-96.3(A), and its implementing regulations, in that:

- a. Defendants' acts, policies, and practices constitute a refusal to rent housing or negotiate for the rental of housing because of race, and have made housing unavailable because of race, in violation of VA. CODE ANN. § 36-96.3(A)(1);
- b. Defendants' acts, policies, and practices provide different terms, conditions, and privileges of rental housing, as well as different services and facilities in connection therewith, on the basis of race in violation of VA. CODE ANN. § 36-96.3(A)(2); and
- c. Defendants' notices and statements indicate a preference, limitation, and discrimination based on race in violation of VA. CODE ANN. § 36-96.3(A)(3).

DEMAND FOR JURY TRIAL

118. Under Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury on all issues triable as of right.

REQUESTED RELIEF

119. Plaintiff respectfully asks that the Court grant it the following relief:

- (1) Enter a declaratory judgment finding that the foregoing actions of

Defendants violate 42 U.S.C. § 3604 and VA. CODE ANN. § 36-96.3(A);

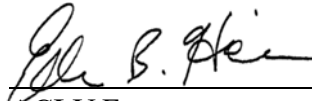
- (2) Enter a permanent injunction:
 - a) enjoining Defendants and their directors, officers, agents, and employees from publishing, implementing, and enforcing the illegal, discriminatory conduct described herein;
 - b) directing Defendants and their directors, officers, agents, and employees to revise their Criminal Records Policy, to reduce the adverse and disproportionate effect it causes on the basis of race and make it consistent with the federal Fair Housing Act, the HUD Guidance, and the Virginia Fair Housing Law; and
 - c) directing Defendants and their directors, officers, agents, and employees to take all affirmative steps necessary to remedy the effects of the illegal, discriminatory conduct described herein and to prevent additional instances of such conduct or similar conduct from occurring in the future;
- (3) Award compensatory damages to Plaintiff in an amount to be determined by the jury that would fully compensate Plaintiff for injuries caused by the conduct of Defendants alleged herein;
- (4) Award punitive damages to Plaintiff in an amount to be determined by the jury that would punish Defendants for the willful, malicious, and reckless conduct alleged herein and that would effectively deter similar conduct in the future;
- (5) Award Plaintiff its reasonable attorneys' fees and costs under 42 U.S.C. §

3613(c)(2) and VA. CODE ANN. § 36-96.18(C);

- (6) Award prejudgment interest to Plaintiff; and
- (7) Order such other relief as this Court deems just and equitable.

June 4, 2019

Respectfully submitted,



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**application for admission pro hac vice to be filed*