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## BREAKING FREE FROM “CRIME-FREE”: STATE-LEVEL RESPONSES TO HARMFUL HOUSING ORDINANCES

by  
Jenna Prochaska\*

*Municipalities throughout the country enforce broad and harmful crime-free housing and nuisance property ordinances (CFNOs)—local laws that encourage landlords to evict or exclude tenants from housing opportunities based on their contact with the criminal legal system or calls for police help. There is little evidence that CFNOs are effective at achieving their stated goal of increasing community safety, and there is significant evidence that they harm Black and Latinx communities, survivors of domestic violence, individuals with disabilities, and low-income tenants and communities more broadly. Despite more than a decade of legal advocacy successfully challenging CFNOs using a range of legal theories under state and federal civil rights laws, these ordinances continue to proliferate.*

*This Article explores the potential for state-level legislative and executive action to combat the civil rights threat posed by CFNOs. It discusses the broad authority states retain to enact preemption laws targeting CFNOs and summarizes the range of existing state preemption legislation on this issue. Informed by interviews with a network of advocates, it discusses the benefits and chal-*

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\* Clinical Teaching Fellow, Loyola University Chicago School of Law. Assistant Professor, University of Illinois Chicago School of Law beginning June 2023. I am grateful to the civil rights, domestic violence, and housing experts who gave informative interviews regarding their experience with state-level CFNO advocacy, including Rita Bettis-Austen (American Civil Liberties Union of Iowa), Allie Bohm (New York Civil Liberties Union), Cynthia Witman Daley (Regional Housing Legal Services), Laura Hessburg (Iowa Coalition Against Domestic Violence), Andy Hoover (American Civil Liberties Union of Pennsylvania), Jane Ni (New York Coalition Against Domestic Violence), Sandra Park (American Civil Liberties Union, Women’s Rights Project), Amy Schwartz-Wallace (Empire Justice Center), and Kate Walz and other advocates at the National Housing Law Project. For their feedback on earlier drafts of this Article, I am grateful to participants at the Works-in-Progress Panel at the 2021 Association of American Law Schools Annual Clinical Conference and the 2021 Clinical Law Review Clinical Writer’s Workshop. I am also grateful to the Loyola University Chicago School of Law and Health Justice Project students who have assisted with a range of research and policy advocacy related to CFNOs, including Olivia Alden, Leah Cable, Laura Christiansen Garcia, Anu Dairkee, Farisa Khan, Abby Mitchell, and Anna Nornes.

allenges of advancing state-level legislation targeting CFNOs. Finally, this Article explores the expansive regulatory and enforcement powers that state governments can deploy to combat or curtail the harmful effects of CFNOs, including through state attorneys general, specialized state agencies, and fair housing planning processes.

As CFNOs continue to harm tenants and communities, this Article argues states should use all available legislative, regulatory, and enforcement tools to respond.

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## INTRODUCTION

Communities throughout the country have adopted dangerous local policies called crime-free housing and nuisance property ordinances (CFNOs). While purporting to address illegal activity and increase community safety,<sup>1</sup> CFNOs have a broad range of detrimental effects. They perpetuate residential segregation, inflict significant and disproportionate harm on survivors of domestic violence and individuals with disabilities, and increase evictions and housing instability in communities more broadly.<sup>2</sup> These impacts are felt in towns and cities nationwide. To offer one example, in Tampa, Florida, police routinely used the city’s “Crime-Free Multi Housing Program” to send notices to landlords encouraging them to evict tenants who were arrested or stopped by the police, regardless of whether the arrest led to a conviction.<sup>3</sup> While the program’s purported goal was to keep communities safe from crime, its extreme breadth and discriminatory enforcement caused significant, destructive effects—particularly for communities of color.<sup>4</sup>

Tampa police trained property owners to conduct criminal-history screenings to exclude prospective tenants with even minimal histories of police contact, and to evict tenants based on minor interactions with the criminal legal system.<sup>5</sup> Police also required participating property owners to attach “crime-free” lease addenda to all of their leases—lease language which gave landlords the authority to pursue evictions on the basis of a broad range of alleged criminal activity.<sup>6</sup> Tampa police then encouraged landlords to use these provisions to pursue evictions by sending notices to landlords when their tenants were arrested or stopped by the police.<sup>7</sup> Tampa’s program, which is under investigation by the U.S. Department of Justice (DOJ),<sup>8</sup> had

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<sup>1</sup> See *infra* Section I.C.

<sup>2</sup> See *infra* Section I.D.

<sup>3</sup> Christopher O’Donnell, Ian Hodgson & Nathaniel Lash, *Tampa Police Called for Hundreds to Be Evicted. Entire Families Lost Their Homes*, TAMPA BAY TIMES, <https://www.tampabay.com/investigations/2021/09/15/tampa-police-called-for-hundreds-to-be-evicted-entire-families-lost-their-homes/> (Sept. 17, 2021).

<sup>4</sup> See Letter from NAACP, N.Y.U. C.R. Clinic, Greater Tampa Chapter of the ACLU of Fla., Hillsborough Cnty. Branch NAACP, Laws.’ Comm. for C.R. Under L., ACLU Women’s Rts. Project & ACLU Racial Just. Program, on Tampa’s Crime-Free Housing Program, to Jane Castor, Mayor & Tampa City Council (Sept. 16, 2021), available at <https://www.lawyerscommittee.org/wp-content/uploads/2021/09/Tampa-Bay-Coalition-Letter-Crime-Free-Housing.pdf> [hereinafter Coalition Letter].

<sup>5</sup> *Id.*; O’Donnell et al., *supra* note 3.

<sup>6</sup> Coalition Letter, *supra* note 4.

<sup>7</sup> O’Donnell et al., *supra* note 3 (“Since 2013, the Tampa Police Department has taken a hands-on role at more than 100 apartment communities.”).

<sup>8</sup> Letter from Sameena Shina Majeed, U.S. Dep’t of Just. & Tamica Daniel, Hous. & Civ. Enf’t Div., to Jane Castor, Mayor, City of Tampa (Dec. 21, 2021) (on file with author) [hereinafter DOJ Tampa Letter]. While the investigation is pending, Tampa has repealed several

a starkly discriminatory impact on Black residents.<sup>9</sup> Under the enforcement of this program, 90% of people flagged by police and reported to their landlord were Black, despite the fact that Black residents make up only 54% of all arrests in Tampa, and only 23% of the city's population.<sup>10</sup>

Tampa's program is far from unique. Thousands of municipalities have adopted CFNOs, which often include "crime-free" programs similar in structure to Tampa's.<sup>11</sup> These programs frequently operate as collaborations between police departments and landlords.<sup>12</sup> While enforcement mechanisms vary, municipalities with CFNOs often track calls for police service at rental properties or incidents considered to be undesirable, and then label properties as a "nuisance" once a threshold number is reached.<sup>13</sup> Many municipalities then fine property owners based on calls for police service or incidents of alleged criminal activity on their rental property.<sup>14</sup> In practice, CFNOs often lead to the eviction of the tenants that caused the calls for police service—regardless of whether the tenant was a victim or an alleged perpetrator.<sup>15</sup>

A critical discussion of the harms caused by CFNOs has recently emerged in legal academic literature.<sup>16</sup> Much of the early research on these policies and programs focused on the risks they pose to survivors of domestic violence, who are often

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aspects of its program and replaced it with an alternative. *Id.*; see also Christopher O'Donnell, *Department of Justice Investigates Tampa Police's Crime-Free Housing Program*, TAMPA BAY TIMES (May 2, 2022), <https://www.tampabay.com/news/tampa/2022/05/02/department-of-justice-investigates-tampa-polices-crime-free-housing-program/>.

<sup>9</sup> O'Donnell et al., *supra* note 3.

<sup>10</sup> *Id.*; *Quick Facts: Tampa City, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/tampacityflorida> (last visited Apr. 26, 2023).

<sup>11</sup> See *infra* Section I.B.

<sup>12</sup> See generally *Crime Free Multi-Housing: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N, <http://www.crime-free-association.org/multi-housing.htm> (last visited Apr. 26, 2023); Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 187–95 (2019) (describing the ways in which CFNOs operate as law enforcement programs).

<sup>13</sup> See, e.g., EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY L., THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 4 (2013); Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146, 1164 (2018); Archer, *supra* note 12, at 187 n.64.

<sup>14</sup> See *infra* Section I.B.

<sup>15</sup> See, e.g., Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 2–4 tbl.S1 (ONLINE SUPPLEMENT) (2013) (setting out the components of CFNO enforcement in 59 cities); *infra* Section I.0.2 (explaining the harms of CFNO enforcement on survivors of domestic violence).

<sup>16</sup> See generally Archer, *supra* note 12; Ramsey, *supra* note 13, at 1177; Sarah Swan, *Home Rules*, 64 DUKE L.J. 823 (2015).

the targets of enforcement.<sup>17</sup> Domestic abuse survivors’ calls to the police for help may trigger the survivors’ eviction or threatened eviction.<sup>18</sup> One direct impact of policies that impose penalties based on police calls from residential properties is to dissuade residents from contacting the police—undermining years of campaigning by advocates to help domestic violence survivors overcome the stigma of, and structural barriers to, reporting experiences of abuse.<sup>19</sup> More recent research has further revealed the harmful impacts that CFNOs have on individuals with disabilities<sup>20</sup> and their discriminatory enforcement in Black and Latinx communities.<sup>21</sup>

For more than a decade, advocacy organizations have targeted harmful CFNOs through litigation, local policy advocacy, community outreach, and education.<sup>22</sup> These efforts have generated important successes, particularly in challenging municipalities with some of the most egregious CFNOs. However, responding to CFNOs with a city-by-city approach poses significant challenges.<sup>23</sup> By the time the issues raised by a CFNO are addressed in one community—often after years of labor-intensive investigation, litigation, and policy advocacy—similar issues have arisen in numerous neighboring communities, which have passed their own version of the ordinance.<sup>24</sup>

In response to the national scope of the civil rights threats posed by CFNOs the U.S. Department of Housing and Urban Development (HUD) and the DOJ have taken on regulatory and enforcement efforts to target them.<sup>25</sup> While critical to establish a floor of protections at the federal level, these interventions alone will not

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<sup>17</sup> See, e.g., Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1195–96 (2008); Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1058–60 (2015).

<sup>18</sup> Fais, *supra* note 17, at 1200; Kastner, *supra* note 17, at 1061.

<sup>19</sup> Gretchen Arnold & Megan Slusser, *Silencing Women’s Voices: Nuisance Property Laws and Battered Women*, 40 LAW & SOC. INQUIRY 908, 911–12 (2015); ACLU WOMEN’S RTS. PROJECT & SOC. SCI. RSCH. COUNS., *SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK* 4 (June 2015).

<sup>20</sup> See generally Alisha Jarwala & Sejal Singh, *When a Disability Is a “Nuisance”: How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes*, 54 HARV. C.R.–C.L. L. REV. 875 (2019).

<sup>21</sup> See generally Archer, *supra* note 12; Rachel Smith, *Policing Black Residents as Nuisances: Why Selective Nuisance Law Enforcement Violates the Fair Housing Act*, 34 HARV. J. ON RACIAL & ETHNIC JUST. 87, 88 (2018).

<sup>22</sup> See *infra* Section III.A.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *infra* Section III.B.

be sufficient.<sup>26</sup> CFNOs exist in hundreds of municipalities throughout the country—posing subtly or substantially different issues in each one.<sup>27</sup> Agencies issuing guidance targeting CFNOs at a federal level may not be equipped to respond to statewide trends in the enactment or enforcement of CFNOs.<sup>28</sup> It is also infeasible to rely on the federal government to pursue a sufficient number of enforcement actions throughout the country to address the endemic nature of the problem. Rather, targeted responses at all levels of government will be necessary to adequately respond to the harms CFNOs cause.

State governments are particularly well equipped to engage in legislative and executive responses to CFNOs. They retain broad legislative powers to rein in local governments' harmful and discriminatory policies and practices.<sup>29</sup> State agencies and officials are equipped to build expertise in the trends among the CFNOs in their states, and to use regulation, enforcement action, and fair housing planning processes to respond.<sup>30</sup> This Article focuses on the promise and challenges of state legislative and executive responses to CFNOs. It proceeds in four parts.

Part I sets out the historical context and impact of CFNOs. It situates CFNOs as part of a broader trend of over-policing and surveillance of the residents of low-income housing, predominantly Black and Latinx tenants. It then reviews the common features of CFNOs, summarizes the harms they pose to Black and Latinx communities, survivors of domestic violence, and individuals with disabilities, and outlines their impact on low-income tenants and communities by increasing housing instability.

Part II sets out constitutional and statutory legal issues raised by CFNOs. CFNOs raise several constitutional concerns. They may violate the First Amendment's Free Speech and Petition Clauses by penalizing tenants for contacting the police for assistance, as well as the Fourteenth Amendment's Due Process and Equal Protection Clauses. They also raise significant concerns under the federal Fair Housing Act (FHA), as well as new protections in the reauthorized Violence Against Women Act (VAWA).

Part III then highlights ongoing local and federal-level interventions targeting CFNOs, including litigation, policy advocacy, and federal agency efforts. While critical to challenge the worst offenders and establish important protections for tenants, these strategies will not solve the insidious problem of CFNOs on their own.

The Article then turns in Part IV to a discussion of state-level responses to CFNOs. It begins by setting out the significant authority that states retain to

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *infra* Section IV.A.

<sup>30</sup> See *infra* Section IV.B.

preempt discriminatory and harmful local ordinances like CFNOs, then summarizes the existing range of state laws enacted in response to CFNOs. Informed by interviews with advocates responding to CFNOs in their communities, Part IV discusses the benefits of enacting state-level legislation targeting CFNOs. It also highlights the challenges of employing state preemption legislation in this context.

Part IV also explores the promise of state regulatory and enforcement responses to CFNOs. It begins with a discussion of the authority of state attorneys general (AGs) to issue written opinions, investigate local policies and practices, and litigate on behalf of the state. It argues that these powers can be leveraged in response to CFNOs. States can also employ specialized state agencies and fair housing planning processes to rein in discriminatory enforcement of CFNOs.

States retain broad legislative authority to preempt local government enactments with harmful impacts, and possess significant enforcement and regulatory powers through state AGs and specialized state agencies to target discriminatory municipal policies and practices. In light of the proliferation of CFNOs throughout the country and the serious civil rights concerns they continue to pose, states should leverage all available tools to respond.

## I. CFNOS: HISTORY AND HARMS

### A. *Historical Context and Rise of CFNOs*

The stereotype of low-income housing (and its predominantly Black and Latinx residents) as a nexus of criminality has long held an over-sized place in the public imagination.<sup>31</sup> As a result, low-income housing has been the target of a range of heavy surveillance and policing measures for decades.<sup>32</sup> In the late 1980s and early 1990s, in line with the War on Drugs approach to crime, policies and practices associated with policing low-income housing became more forceful.<sup>33</sup> Public officials eager to respond to perceptions of criminal activity in public housing turned to increasing police patrols of housing developments, and ramped up processes to

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<sup>31</sup> Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RES. L. REV. 669, 680 (2019); Stephen Lurie, *There's No Such Thing as a Dangerous Neighborhood*, CITYLAB (Feb. 25, 2019, 7:18 AM), <https://www.citylab.com/perspective/2019/02/broken-windows-theory-policing-urban-violence-crime-data/583030> (describing flawed and discriminatory perceptions that poor, predominately Black and Latinx neighborhoods, are centers of crime and urban violence).

<sup>32</sup> See Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788, 811 (2020); Sarah Miller, Note, *Reconceptualizing Public Housing: Not as a Policed Site of Control, but as a System of Support*, 28 GEO. J. ON POVERTY L. & POL'Y 95, 101–03 (2020).

<sup>33</sup> Karteron, *supra* note 31, at 681, 715; see also DEBORAH LAMM WEISEL, POLICE EXEC. RSCH. FORUM, TACKLING DRUG PROBLEMS IN PUBLIC HOUSING: A GUIDE FOR POLICE 4–5 (1990).



evict and exclude people from housing opportunities based on any interaction with the criminal legal system.<sup>34</sup>

As a stark example of this heavy-handed approach to policing low-income housing, a report released in 1990 by a leading research institute on policing practices recommended sharply increasing the number of police officers assigned to housing developments, “i.e., by ‘occupying’ the community,” as a top priority response to drug-related criminal activity.<sup>35</sup> The report emphasized that “screening new residents and evicting aberrant ones are two important tools which [public housing authorities] can use to control occupancy and the behavior of residents,”<sup>36</sup> and that “[l]ease enforcement” was one of the “primary ways in which police and housing officials” could respond to drug use on housing authority property.<sup>37</sup>

Aspects of this new approach to policing public housing were codified in federal law. In 1988, Congress passed the Anti-Drug Abuse Act, which significantly expanded the use of evictions as a response to alleged criminal activity in federally-subsidized housing.<sup>38</sup> This law required public housing authorities to include in all leases terms permitting the eviction of tenants based on any “criminal activity”—whether committed by the tenant themselves, household members, or guests.<sup>39</sup> These zero-tolerance policing policies in federally-subsidized housing were harshly criticized by tenant advocates and some policymakers as overly-broad, ineffective at

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<sup>34</sup> See *infra* notes 38–41; see also Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U.L. REV. 1123, 1124, 1136–41 (2016) (discussing the harmful impact of war-on-drugs era policies on Black low-income housing residents, including “eviction[], denial of admission, and permanent exclusion of family members from public housing—based on almost any type of criminal system exposure . . .”) (emphasis omitted).

<sup>35</sup> WEISEL, *supra* note 33, at 101. The use of federal crime-prevention funding also revealed a trend towards increasing law enforcement presence and patrol at low-income housing developments. Karteron, *supra* note 31, at 681–82 (citing OFF. OF POL’Y DEV. & RSCH., U.S. DEP’T OF HOUS. & URB. DEV., PUBLIC HOUSING DRUG ELIMINATION PROGRAM RESOURCE DOCUMENT: FINAL REPORT 33 (1994)).

<sup>36</sup> WEISEL, *supra* note 33, at 35.

<sup>37</sup> *Id.* at 103.

<sup>38</sup> Lisa Weil, *Drug-Related Evictions in Public Housing: Congress’ Addiction to a Quick Fix*, 9 YALE L. & POL’Y REV. 161, 161–62 (1991) (discussing Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4182).

<sup>39</sup> See Ramsey, *supra* note 13, at 1149 (citing 42 U.S.C. § 1437d(l)(6)) (setting out the history of one-strike policies to exclude individuals from federally subsidized housing).

achieving their purported community safety goals, and dangerous to innocent tenants.<sup>40</sup> Despite this criticism, these methods of policing public housing residents continued, posing harms to tenants and communities.<sup>41</sup>

In the early 1990s, the landscape of federally-subsidized housing shifted significantly with the implementation of the Urban Revitalization Demonstration project (now known as “HOPE VI”).<sup>42</sup> Through designated funding to housing authorities, HOPE VI encouraged the eradication of large public housing developments in favor of smaller, mixed-income communities.<sup>43</sup> Ultimately, the implementation of this vision displaced tens of thousands of public housing residents and drastically decreased the public housing stock.<sup>44</sup> Many low-income renters were left to find housing on the private market. Today, the vast majority of income-eligible tenants, including very low-income tenants, cannot obtain subsidized housing, and thus rent on the private market.<sup>45</sup>

As low-income, predominantly Black and Latinx,<sup>46</sup> renters found themselves forced to move into private housing, the approach of zero-tolerance policing through eviction and exclusion also migrated from public to private housing.<sup>47</sup>

<sup>40</sup> *Id.* at 1150; see also Robert Van Someren Greve, *Protecting Tenants Without Preemption: How State and Local Governments Can Lessen the Impact of HUD’s One-Strike Rule*, 25 GEO. J. ON POVERTY L. & POL’Y 135, 143 (2017) (summarizing critiques of the one-strike rule, and stating “[c]riticism of the [Rule] is as old as the Rule itself . . .”).

<sup>41</sup> See Weil, *supra* note 38, at 164; Ramsey, *supra* note 13, at 1149–50 (discussing the harms of the federal one-strike policies’ approach to employing eviction of tenants and family members as policing tools); MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER CTR. ON POVERTY L., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 22–28 (2015) (discussing the harms caused by overly-broad criminal records screening policies in federally subsidized housing).

<sup>42</sup> Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102–389, 106 Stat. 1571.

<sup>43</sup> Herbert R. Giorgio Jr., Comment, *HUD’s Obligation to “Affirmatively Further” Fair Housing: A Closer Look at Hope VI*, 25 ST. LOUIS U. PUB. L. REV. 183, 183 (2006).

<sup>44</sup> See, e.g., *id.* at 183–84; NAT’L HOUS. L. PROJECT, FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM 7 (June 2002) (HOPE VI and other HUD programs have been responsible for a net loss of over 107,000 public housing units through demolition).

<sup>45</sup> Ramsey, *supra* note 13, at 1176–77; MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 302–03 (2016); see also JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., AMERICA’S RENTAL HOUSING 36 (2022) (noting that scarcity of subsidized housing adds to a dire situation for very low-income renters seeking affordable housing).

<sup>46</sup> NAT’L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 14 (April 2022) (noting that Black and Latinx renters are much more likely than white households to be extremely low-income renters: 20% of Black households and 15% of Latinx households are extremely low-income renters, compared to only 6% of white households).

<sup>47</sup> See, e.g., Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York’s Narcotics Eviction Program*, 43 HARV. C.R.–C.L. L. REV. 539, 540 (2008)

CFNOs were a key part of this expansion.<sup>48</sup> The rise of CFNOs can be traced back to 1992, when “crime-free” housing programs were developed by crime-prevention specialist Tim Zehring, who was employed by the Mesa, Arizona, Police Department at the time.<sup>49</sup> Zehring later founded a non-profit organization called the International Crime Free Association (ICFA).<sup>50</sup> These programs have since proliferated throughout the country. According to ICFA, over 3,000 CFNOs have been enacted in the United States and internationally.<sup>51</sup> There are over 120 CFNOs in Illinois alone.<sup>52</sup>

Like the zero-tolerance policies in federally-subsidized housing, CFNOs are generally crafted broadly to exclude individuals from housing opportunities based on any interaction with the criminal legal system.<sup>53</sup> CFNOs also operate by conscripting housing providers into quasi-law enforcement roles, employing a form of “third-party policing.”<sup>54</sup> In general terms, third-party policing describes police efforts to persuade or coerce third parties to play a role in crime prevention.<sup>55</sup> In communities that have enacted CFNOs, landlords are put into a position of monitoring tenant behavior and taking action against tenants when directed to do so by law enforcement, including by initiating eviction proceedings.<sup>56</sup> CFNOs impact a wide

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(“In the shadow of the debate over federal public housing policy . . . prosecutors, police departments, and local governments nationwide have quietly implemented programs that apply the same ‘one strike’ logic, utilizing similar exclusionary mechanisms . . .”).

<sup>48</sup> See, e.g., Leora Smith, *When the Police Call Your Landlord*, ATLANTIC (Mar. 13, 2020), <https://www.theatlantic.com/politics/archive/2020/03/crime-free-housing-lets-police-influence-landlords/605728/>; Swan, *supra* note 16, at 826–27 (discussing the rise of CFNOs as an outgrowth of the federal one-strike policies in the early 1990s). See generally Ramsey, *supra* note 13, at 1153.

<sup>49</sup> See *Crime Free Programs: Keep Illegal Activity Off Rental Property*, INT’L CRIME FREE ASS’N, <http://www.crime-free-association.org/index.html> (last visited Apr. 26, 2023).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Jenna Prochaska, Compiled List, *Crime-Free Housing and Nuisance Property Ordinances in Illinois Municipalities* (last updated March 2023) (compiled with assistance from students at Loyola University Chicago’s Center for Urban Research and Learning and Loyola University Chicago School of Law’s Health Justice Project) (on file with author) [hereinafter *Illinois CFNOs*].

<sup>53</sup> See *infra* Section I.B (setting out the common features of CFNOs, which include broad criminal record screenings and lease addenda requiring the eviction of individuals based on even minor incidents of alleged criminal activity).

<sup>54</sup> See, e.g., Swan, *supra* note 16, at 846 (describing CFNOs as a form of third-party policing wherein “the household and the landlord are both conscripted into the project of crime control”); Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 117 (2013).

<sup>55</sup> Desmond & Valdez, *supra* note 54, at 117.

<sup>56</sup> See *infra* Section I.B (describing the typical structure of CFNO enforcement).

range of tenants, often including innocent tenants who are not to blame for the alleged criminal or nuisance activity at issue.<sup>57</sup>

Since CFNOs apply to tenants living in both private market and subsidized rental housing, their enforcement significantly expands the scope of tenants and communities impacted by this discriminatory and ineffective approach to crime-prevention.<sup>58</sup>

### B. Common Features of CFNOs

While CFNOs vary from municipality to municipality, they share many common features. They frequently include two components: nuisance property ordinances and crime-free housing programs.<sup>59</sup> Nuisance property ordinances<sup>60</sup> are local laws that categorize a wide range of conduct associated with rental properties as “nuisance” behavior.<sup>61</sup> The list of conduct defined as nuisance behavior often includes violations as minor as littering, noise disturbances, or abandoning a vehicle.<sup>62</sup> The listed nuisance behavior also frequently contains vague, catch-all provisions, such as “creating a nuisance,”<sup>63</sup> engaging in activities deemed “out of character” with the community, or “impacting the quality of life” in the area.<sup>64</sup> Many nuisance property ordinances broadly categorize criminal conduct of any kind as nuisance behavior—regardless of whether it involved the rental property at issue.<sup>65</sup>

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<sup>57</sup> See *infra* Sections I.D.2–3 (describing the unique risks of harm CFNO enforcement poses for survivors of domestic violence and individuals with disabilities).

<sup>58</sup> Ramsey, *supra* note 13, at 1176–77.

<sup>59</sup> See WERTH, *supra* note 13, at 4–5 (explaining that, based on a review of CFNOs in Illinois, municipalities often “incorporate both the crime free rental housing and nuisance property elements into one ordinance or adopt both types of ordinance simultaneously”).

<sup>60</sup> Note that municipalities use a variety of terms to describe the category of local laws described here as “nuisance property” ordinances, including “nuisance,” “chronic nuisance,” and “disorderly behavior” ordinances. See U.S. DEP’T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES 1 n.2 (Sept. 13, 2016) [hereinafter HUD CFNO GUIDANCE].

<sup>61</sup> HUD CFNO GUIDANCE, *supra* note 60, at 2–3.

<sup>62</sup> HUD CFNO GUIDANCE, *supra* note 60, at 2; WERTH, *supra* note 13, at 17.

<sup>63</sup> WERTH, *supra* note 13, at 17.

<sup>64</sup> See, e.g., VILLAGE OF BELLWOOD, ILL., CODE tit. XI, ch. 124, § 34(D)(2) (2020) (defining a nuisance to include police calls regarding activity that “is out of character for the area and is impacting the quality of life of those in the area”); VILLAGE OF SCHAUMBURG, ILL., CODE OF ORDINANCES tit. 9, ch. 99, § 10.02(D) (2022); FORD HEIGHTS, ILL., CODE OF ORDINANCES ch. 10, art. XII, div. 4, § 10-740(a)(2) (2022).

<sup>65</sup> HUD CFNO GUIDANCE, *supra* note 60, at 2–3.

Once a municipality determines that a certain threshold number of nuisance incidents or calls for police services has occurred at a rental property, they label the property itself as a “nuisance” property—triggering ordinance enforcement.<sup>66</sup> Municipalities enforcing a nuisance property ordinance may then fine property owners for alleged violations, threaten the revocation of rental licenses, or require “abatement” actions, including—in some cases—eviction of the tenants living in the property.<sup>67</sup> In practice, nuisance property ordinance enforcement frequently leads to tenant displacement. Landlords are pressured, or even required, to evict tenants living in the property, regardless of the nature of the alleged “nuisance” activity—or whether or not the tenants were at fault for causing it.<sup>68</sup> Some ordinances track calls to the police or emergency services themselves and use the number of calls to trigger enforcement—imposing penalties after what is deemed to be an “unreasonable” or “excessive” number of calls for police services.<sup>69</sup>

Nuisance property ordinances are often adopted alongside so-called “crime-free” housing programs. These programs are typically managed by local police departments in collaboration with property owners.<sup>70</sup> Some common components of crime-free housing programs include requiring landlords to participate in crime-free housing training conducted by local governments,<sup>71</sup> requiring landlords to conduct broad criminal background checks on prospective tenants,<sup>72</sup> and requiring landlords to include a crime-free lease addendum as part of every rental lease agreement.<sup>73</sup> The crime-free lease addendum defines certain categories of activities engaged in by a tenant, household member, or guest as automatic lease violations that can serve as a

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<sup>66</sup> ACLU WOMEN’S RTS. PROJECT & SOC. SCI. RSCH. COUNS., *supra* note 19, at 3 (explaining that the mechanisms by which nuisance ordinances categorize a property as a nuisance tend to vary—some municipalities categorize properties as nuisance “on the first instance of nuisance activity, others adopt a three-strike method, while still others are points-based . . .”).

<sup>67</sup> See, e.g., *id.* at 20; HUD CFNO GUIDANCE, *supra* note 60, at 3–4; Desmond & Valdez, *supra* note 15, at 2, 9, 13.

<sup>68</sup> See, e.g., Desmond & Valdez, *supra* note 15, at 2–4 tbl.S1; Ramsey, *supra* note 13, at 1151 (“Most significantly, [CFNOs] either explicitly require landlords to evict tenants who are accused of criminal conduct, or they contain provisions that enable the municipality to coerce the landlord into instituting eviction actions.”). See also *infra* Section I.D.2 (explaining the harms of CFNO enforcement on survivors of domestic violence).

<sup>69</sup> See, e.g., Desmond & Valdez, *supra* note 15, at 4, 9, 17; WERTH, *supra* note 13, at 4; see also *infra* note 345 (highlighting CFNOs in Illinois that base ordinance enforcement on calls for police service).

<sup>70</sup> See generally *Crime Free Multi-Housing*, *supra* note 12; Archer, *supra* note 12, at 187–95.

<sup>71</sup> WERTH, *supra* note 13, at 3.

<sup>72</sup> *Id.*; Archer, *supra* note 12, at 191–93.

<sup>73</sup> WERTH, *supra* note 13, at 3; Archer, *supra* note 12, at 193–95; *Crime Free Lease Addendum: Keep Illegal Activity Off Rental Property (Arizona Version)*, INT’L CRIME FREE ASS’N, [http://www.crime-free-association.org/lease\\_addendums\\_az\\_english.htm](http://www.crime-free-association.org/lease_addendums_az_english.htm) (last visited Apr. 26, 2023).

basis of an eviction.<sup>74</sup> ICFA has published a model crime-free lease addendum.<sup>75</sup> This model lease addendum permits a landlord to evict a tenant who has engaged in or facilitated *any* “criminal activity”—a term not defined by the addendum.<sup>76</sup>

This model addendum specifies that a conviction is not required to prove that the alleged activity has occurred,<sup>77</sup> and imposes an obligation on the tenant to prevent the rental unit from being used for criminal activity, “regardless [of] whether the individual engaging in such activity is a member of the household, or a guest.”<sup>78</sup> Even a single violation of any provision of the model lease addendum is deemed a serious, “material and irreparable violation of the lease,” justifying “good cause for immediate termination of tenancy.”<sup>79</sup> The alleged criminal activity does not have to have been committed on the property to constitute a lease violation—the addendum triggers a lease violation if the criminal activity was committed “on or near” the rental property.<sup>80</sup> Communities throughout the country have required the use of similarly broad lease addenda through their crime-free housing programs.<sup>81</sup>

Operating together, nuisance property ordinances and crime-free housing programs employ eviction and exclusion from housing opportunities as policing tools. Crime-free lease addenda permit landlords to evict tenants based on even minor incidents or interactions with the criminal legal system. Municipalities employ their nuisance property ordinances to pressure landlords to evict tenants from “nuisance” properties under threat of penalty if the landlord does not comply. Once a landlord

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<sup>74</sup> *Crime Free Lease Addendum*, *supra* note 73.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (noting that “[u]nless otherwise provided by law, proof of violation shall not require a criminal conviction, but shall be by a preponderance of the evidence”).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (emphasis omitted).

<sup>80</sup> *Id.*; Archer, *supra* note 12, at 194. Some municipalities have removed the geographic requirement and instead stated that any alleged criminal activity constitutes a violation, whether or not it occurred on or near the rental property. *See, e.g.*, VILLAGE OF SCHAUMBURG, ILL., CODE OF ORDINANCES tit. 9, ch. 99, § 10.05(F)(1) (2022) (providing that any criminal activity occurring “within the Village of Schaumburg, which includes the leased premises” constitutes a violation); COUNTRY CLUB HILLS, ILL., CODE OF ORDINANCES, ch. 13, art. 37, § 11(B) (2021) (prohibiting criminal activity occurring “within city limits (not limited to violent criminal activity or drug related criminal activity)”); VILLAGE OF SKOKIE, ILL., CODE OF ORDINANCES ch. 42, art. II, § 43(h) (2022) (targeting alleged nuisance behavior for drugs or violent criminal activity “*anywhere in or outside of the Village of Skokie*,” regardless of whether the alleged criminal activity resulted in a conviction) (emphasis added).

<sup>81</sup> *See* Archer, *supra* note 12, at 194 n.116.

begins eviction proceedings in these circumstances, they rarely face significant resistance, even where the violations were minor and even where the tenant may have viable legal defenses.<sup>82</sup>

### C. Purpose of CFNO Enactment

Many municipalities that have enacted CFNOs claim the purpose of the ordinance is to control criminal activity on rental properties and increase community safety.<sup>83</sup> However, the legislative histories of these ordinances frequently tell a different story. City council minutes, statements of public officials, and other similar records documenting the process of enacting CFNOs reveals that they are often motivated by a desire to codify a vague set of “norms and values” and to protect against a perceived threat to the “character” of a community, rather than by legitimate, evidence-based concerns about crime rates.<sup>84</sup>

A review of records documenting the adoption of CFNOs in Ohio, for example, revealed that residents “rarely . . . express[ed] concern with serious crime.”<sup>85</sup> Rather, the discussion surrounding the enactment of CFNOs often was rooted in a desire to: (1) increase power to the police; (2) respond to complaints of neighbors’ behaviors considered “unwelcome”; (3) regulate behavior according to certain “community norms” or values; and (4) enlist property owners in the policing and regulation of tenant behavior.<sup>86</sup> Similarly, in Illinois, many CFNOs base enforcement and associated penalties with activities that are deemed “out of character for the area” without defining this standard, giving wide discretion to those enforcing the ordinance to define those community norms.<sup>87</sup>

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<sup>82</sup> Even setting aside the broad terms of the lease addenda, many tenants are displaced informally before reaching the phase of raising defenses in eviction court. *See* Desmond & Valdez, *supra* note 54, at 131.

<sup>83</sup> *See, e.g., Crime Free Multi-Housing, supra* note 12 (crime-free housing programs were “designed to reduce crime, drugs, and gangs on apartment properties”); *Crime-Free Housing*, CITY OF CHI. HEIGHTS, ILL., <https://www.cityofchicagoheights.org/189/Crime-Free-Housing> (last visited Apr. 26, 2023) (“The purpose of the [CFNO] is to prevent criminal activity from taking place on [rental properties].”); Complaint and Demand for Jury Trial at 6, *United States v. City of Hesperia*, No. 5:19-cv-02298, 2022 WL 17968834 (C.D. Cal. Dec. 22, 2022) [hereinafter *Hesperia Complaint*].

<sup>84</sup> *See* JOSEPH MEAD, MEGAN E. HATCH, J. ROSIE TIGHE, MARISSA PAPPAS, KRISTI ANDRASIK & ELIZABETH BONHAM, WHO IS A NUISANCE?: CRIMINAL ACTIVITY NUISANCE ORDINANCES IN OHIO 3 (2017).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See, e.g., VILLAGE OF BELLWOOD, ILL., CODE tit. XI, ch. 124, § 34(D)(2)* (2020); *VILLAGE OF SCHAUMBURG, ILL., CODE OF ORDINANCES tit. 9, ch. 99, § 10.02(D)* (2022); *FORD HEIGHTS, ILL., CODE OF ORDINANCES ch. 10, art. XII, div. 4, § 10–740(a)(2)* (2022); *Illinois CFNOs, supra* note 52.

In some communities, the decision to enact a CFNO is sparked by changing demographics.<sup>88</sup> For example, in Faribault, Minnesota, the city council adopted its CFNO after the 2010 census showed an increase of 214% in Faribault’s Black population over the prior 10 years, and a 263% increase in the Black population living downtown during the same period.<sup>89</sup> Similarly, the CFNO in Hesperia, California, was enacted after rapid demographic changes, with new census numbers revealing that the number of Latinx residents increased by 140% and the number of African American residents increased by 103%.<sup>90</sup> According to an investigation of CFNOs in California, this is consistent with a broader trend: of the 147 cities and counties in the state which enacted CFNOs during the investigation’s period of study, a large proportion followed increased racial diversity in the community.<sup>91</sup> Among the 20 cities with the greatest increases in Black populations since 1990, 85% adopted CFNOs.<sup>92</sup> For cities with the largest increases in Latinx populations, 75% adopted CFNOs.<sup>93</sup>

Beyond the statistical connection between demographic diversification and CFNO expansion, statements of local officials during the process of adopting a CFNO often reveal explicit racial animus and discriminatory intent. In Hesperia, for example, the purported goal of the CFNO ordinance was to address increased “illegal activity” and “law enforcement calls for service.”<sup>94</sup> However, in city council hearings, local officials referenced a need to “correct a demographical problem.”<sup>95</sup> According to a lawsuit brought by the DOJ, one local official in Hesperia stated that the ordinance’s purpose was to get each landlord “to rid his rental . . . of that

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<sup>88</sup> See, e.g., MEAD ET AL., *supra* note 84, at 4; Archer, *supra* note 12, at 199.

<sup>89</sup> See Amended Complaint for Declaratory and Injunctive Relief and Damages at 6, Jones v. City of Faribault, No. 18-cv-01643, 2021 WL 1192466 (D. Minn. Feb. 18, 2021) [hereinafter Faribault Complaint] (construing CMTY. PARTNERS RSCH., INC., RICE COUNTY HOUSING STUDY, at DF-6 (July 2012); U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING: MINNESOTA 2139 tbl.DP-1 (May 2001); U.S. CENSUS BUREAU, MINNESOTA 2010: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 216 tbl.3 (Dec. 2012)).

<sup>90</sup> Hesperia Complaint, *supra* note 83, at 4–6 (construing U.S. CENSUS BUREAU, CALIFORNIA 2000: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 122–23 tbl.4 (Nov. 2002); U.S. CENSUS BUREAU, CALIFORNIA 2010: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 188–89 tbl.4 (Dec. 2012)).

<sup>91</sup> Liam Dillon, Ben Poston & Julia Barajas, *Black and Latino Renters Face Eviction, Exclusion Amid Police Crackdowns in California*, L.A. TIMES (Nov. 19, 2020, 3:00 AM), <https://www.latimes.com/homeless-housing/story/2020-11-19/california-housing-policies-hurt-black-latino-renters>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Hesperia Complaint, *supra* note 83, at 6 (quoting CITY OF HESPERIA, CAL., CODE OF ORDINANCES No. 2015-12 (2016)).

<sup>95</sup> *Id.* at 6.



blight,’ similar to ‘call[ing] an exterminator out to kill roaches, same difference.’”<sup>96</sup> Similarly, when the city council in Bedford, Ohio, adopted its CFNO, the mayor stated that “[w]e believe in neighborhoods[,] not hoods.”<sup>97</sup> He described students walking down the streets as “predominantly African American kids who bring in that mentality from the inner city where that was a gang-related thing by staking their turf.”<sup>98</sup>

The training materials employed in many communities similarly reveal coded racist motivations pervading the program. For example, training slides used to orient property owners to crime-free housing programs in the City of Chicago Heights, Illinois, and Orlando, Florida, include references to “criminals” as “weeds” and a “two-legged, URBAN Predator.”<sup>99</sup> The Chicago Heights slides also describe the overcrowded jail system in Cook County, Illinois, where the vast majority of detainees are Black or Latinx.<sup>100</sup> After noting that judges are releasing people on bond or

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<sup>96</sup> *Id.* at 7. See also Press Release, U.S. Dep’t of Just., Justice Department Secures Landmark Agreement with City and Police Department Ending “Crime-Free” Rental Housing Program in Hesperia, California, (Dec. 14, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-landmark-agreement-city-and-police-department-ending-crime-free>; Consent Order at 5–7, *U.S. v. City of Hesperia*, No. 19-CV-02298 (C.D. Cal. Dec. 14, 2022) [hereinafter *Hesperia Consent Order*]; *infra* Section III.B (discussing resolution of this matter).

<sup>97</sup> MEAD ET AL., *supra* note 84, at 4 (citing BEDFORD CITY COUNCIL, COUNCIL MINUTES, Reg. Sess., at 7 (Ohio May 2, 2005, 8:00 PM)).

<sup>98</sup> *Id.*; see also Second Amended Complaint at 8, *Somai v. City of Bedford*, No. 19-cv-373, 2020 WL 1233951 (N.D. Ohio Mar. 13, 2020) [hereinafter *Bedford Complaint*] (emphasis omitted).

<sup>99</sup> See CITY OF CHICAGO HEIGHTS, ILL. & CHICAGO HEIGHTS POLICE DEP’T, *Owners/Managers, Tenants, Law Enforcement Training*, CRIME FREE MULTI-HOUSING PROGRAM (on file with author) [hereinafter CHICAGO HEIGHTS CFNO TRAINING]; ORLANDO, FLA. & ORLAND POLICE DEP’T, *Keeping Illegal Activity Out of Rental Property*, in CRIME-FREE MULTI-HOUSING MANAGEMENT TRAINING (on file with author) [hereinafter ORLANDO CFNO TRAINING]; GRANITE CITY, ILL., *Section 3. Crime in Rental Property*, in CRIME-FREE HOUSING PROGRAM: NEW LANDLORD TRAINING COURSE, <https://cms3.revize.com/revize/granitecity/docs/CFMH/Training/CFMH%20Crime%20in%20Rental%20SECTION%203.pdf> (last visited Apr. 26, 2023) (stating that “Criminals Prefer Rentals,” describing criminals as “PREDATORS” and “weeds” that “CHOKe OUT the good plants,” and encouraging eviction as landlords have authority to “permanently remove the tenant from the property”); Letter from ACLU Women’s Rts. Project, Laws’ Comm. for C.R. under L., NAACP, Nat’l Disability Rts. Network, Nat’l Fair Hous. All., Nat’l Hous. L. Project, Nat’l Low Income Hous. Coal., Nat’l Network to End Domestic Violence, Nat’l Res. Ctr. on Domestic Violence & Shriver Ctr. on Poverty L., to Demetria McCain, Principal Deputy Assistant Sec’y for Fair Hous. & Equal Opportunity, U.S. Dep’t of Hous. & Urb. Dev. (June 28, 2022) (on file with author) [hereinafter FHEO Letter] (referencing discriminatory training programs in communities with CFNOs in advocating for strengthened federal guidance on the issue).

<sup>100</sup> See CHICAGO HEIGHTS CFNO TRAINING, *supra* note 99, at slide 99; see also SAFETY & JUST. CHALLENGE, COOK COUNTY: 2020 SAFETY AND JUSTICE CHALLENGE FACT SHEET (2022) (setting out average race and ethnicity in the Cook County jail system).

house arrest, the slides state that the best way to prevent crime is to “stop it at the front door,” and that “[i]f we don’t RENT to criminals: We keep them out of our communities.”<sup>101</sup>

Similarly, the Orlando training materials showed photos of jail detainees from former Maricopa County Sheriff Joe Arpaio’s outdoor prison,<sup>102</sup> which was widely criticized by civil rights groups as inhumane and unconstitutional and which disproportionately harmed Latinx people.<sup>103</sup> Above the photo, the training materials include a caption stating: “These people may be seeking residence in YOUR COMMUNITIES!”<sup>104</sup> These training materials are frequently adopted and modified from materials available for download through ICFA,<sup>105</sup> so similar training programs are employed in communities throughout the country.

#### D. Harms Caused by CFNOs

##### 1. Racially Discriminatory Impacts

In light of the racial animus motivating the enactment of many CFNOs,<sup>106</sup> it is not surprising that their enforcement frequently disproportionately targets Black and Latinx communities.<sup>107</sup> A 2013 study of Milwaukee, Wisconsin, demonstrated that properties in predominantly white neighborhoods had a 1 in 41 chance of receiving a CFNO citation, while properties in predominantly Black neighborhoods had a 1 in 16 chance of citation.<sup>108</sup> Similarly, in reviewing enforcement data in California’s largest cities, the *Los Angeles Times* found that from 2015 to 2019, nearly 80% of those who faced eviction under CFNOs were not white.<sup>109</sup>

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<sup>101</sup> CHICAGO HEIGHTS CFNO TRAINING, *supra* note 99, at slides 99–101.

<sup>102</sup> ORLANDO CFNO TRAINING, *supra* note 99, at slide 38.

<sup>103</sup> See, e.g., Maya Salam, *Last Inmate Leaves Tent City, a Remnant of Joe Arpaio*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/us/arpaio-tent-city-jail.html>; Merrit Kennedy, *Joe Arpaio’s Infamous Tent City Jail in Maricopa County Will Shut Down*, NPR (Apr. 5, 2017, 11:36 AM), <https://www.npr.org/sections/thetwo-way/2017/04/05/522707158/joe-arpaio-infamous-tent-city-jail-in-maricopa-county-will-shut-down>; Tom Jackman, *How Ex-Sheriff Joe Arpaio Wound up Facing Jail Time Before Trump Pardoned Him*, WASH. POST (Aug. 25, 2017, 10:59 PM), <https://www.washingtonpost.com/news/true-crime/wp/2017/08/25/how-ex-sheriff-joe-arpaio-wound-up-facing-jail-time-before-trump-pardoned-him/>.

<sup>104</sup> ORLANDO CFNO TRAINING, *supra* note 99, at slide 38.

<sup>105</sup> See *Crime Free Association Site Index: Keep Illegal Activity Off Rental Property*, INT’L CRIME FREE ASS’N, [http://www.crime-free-association.org/site\\_index.htm](http://www.crime-free-association.org/site_index.htm) (last visited Apr. 26, 2023) (setting out “PowerPoint Presentations” as one of the categories of download available to ICFA members).

<sup>106</sup> See *supra* Section I.C.

<sup>107</sup> See Archer, *supra* note 12, at 207.

<sup>108</sup> Desmond & Valdez, *supra* note 54, at 125.

<sup>109</sup> Dillon et al., *supra* note 91.

A fair housing lawsuit challenging a CFNO in Peoria, Illinois, cited evidence of how enforcement of the community's CFNO was concentrated in predominantly Black neighborhoods.<sup>110</sup> Properties in predominantly Black neighborhoods were more than twice as likely to be cited under the city's CFNO as those in white neighborhoods.<sup>111</sup> Like CFNOs throughout the country, Peoria's ordinance required landlords to evict tenants at homes deemed to be "chronic nuisances," which included homes that were subject to multiple police contacts.<sup>112</sup> Peoria also enforced its CFNO by using "military-style armored cars. . . . [n]icknamed the 'Armadillos.'" <sup>113</sup> These armored vehicles, equipped with cameras, were deployed to properties targeted under the CFNO "in order to continuously record the activities of and otherwise harass the residents of those properties."<sup>114</sup> Deploying these Armadillos to surveil and harass residents in Black communities in Peoria presents a stark visual representation of how CFNOs frequently intertwine policing and housing policy, harming communities of color as a result.

As Deborah Archer explains in *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, CFNOs incorporate the deep, systemic failings of the country's criminal legal system—notably, racial bias—into local housing policy.<sup>115</sup> Racial disparities are present throughout each phase of the country's

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<sup>110</sup> Complaint at 2, *HOPE Fair Hous. Ctr. v. City of Peoria*, No. 17-cv-01360, 2018 WL 10246029 (C.D. Ill. May 14, 2018) [hereinafter *Peoria Complaint*].

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1, 9–12 (citing PEORIA, ILL., CODE OF ORDINANCES ch. 20, art. VIII, § 201(a), (b)); *Case Profiles: HOPE Fair Housing Center v. City of Peoria, Illinois*, RELMAN COLFAX PLLC, <https://www.relmanlaw.com/cases-peoria> (last visited Apr. 26, 2023).

<sup>113</sup> *Peoria Complaint*, *supra* note 110, at 16.

<sup>114</sup> *Id.*

<sup>115</sup> See Archer, *supra* note 12, at 207–16 (detailing the racially discriminatory impacts of CFNO enforcement).

flawed criminal legal system—including policing practices,<sup>116</sup> arrests,<sup>117</sup> and incarceration.<sup>118</sup> Variations in crime rates do not explain differential treatment; rather, “individual and systemic biases drive racial and ethnic disparities.”<sup>119</sup>

By displacing and excluding people who have interacted with the criminal legal system, CFNOs inevitably increase longstanding patterns of residential segregation. People that are excluded from one community through the enforcement of a CFNO—predominantly people of color—will need to find housing elsewhere. This pattern of exclusion on a community-by-community basis through the enforcement of CFNOs will lead to increased marginalization of people of color. As Archer explains, “while making White communities Whiter, [CFNOs] will also make nearby communities of color more segregated and marginalized.”<sup>120</sup> The resulting harms are significant. Living in marginalized, segregated communities results in profound negative impacts on people of color, including limited access to life opportunities, quality education, employment, government services, and social capital.<sup>121</sup>

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<sup>116</sup> DEBORAH N. ARCHER, AM. CONST. SOC’Y ISSUE BRIEF: YOU CAN’T GO HOME AGAIN: RACIAL EXCLUSION THROUGH CRIME-FREE HOUSING ORDINANCES 9 (Nov. 2019); Matthew Bloch, Ford Fessenden & Janet Roberts, *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES (July 11, 2010), <https://archive.nytimes.com/www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?action> (showing the disproportionate rates at which Black and Latinx populations were stopped under the New York Police Department’s stop and frisk policy).

<sup>117</sup> SUSAN NEMBARD & LILY ROBIN, URB. INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM: A RESULT OF RACIST POLICIES AND DISCRETIONARY PRACTICES 4 (Aug. 2021) (highlighting arrest disparities by race and noting that “Black people represent roughly 13 percent of the US population but account for roughly 27 percent of arrests. . . . [W]hen looking at arrests for drug law violations: Black people experience over one-quarter of arrests for drug law violations, despite similar rates of drug use among racial and ethnic groups.”).

<sup>118</sup> ASHLEY NELLIS, SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021) (highlighting disparities in incarceration rates and noting that “Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans. . . . In 12 states, more than half the prison population is Black. . . . Latinx individuals are incarcerated in state prisons at a rate that is 1.3 times the incarceration of whites.”).

<sup>119</sup> NEMBARD & ROBIN, *supra* note 117, at 4 (summarizing studies showing the racial disparities in the criminal legal system that find that the disparities cannot be explained by differences in criminality between racial groups).

<sup>120</sup> See Archer, *supra* note 12, at 213.

<sup>121</sup> *Id.* at 176–77.

## 2. *Impact on Survivors of Domestic Violence*

CFNOs also pose unique risks of harm to survivors of domestic violence, who can be threatened with eviction after calling the police for help.<sup>122</sup> CFNOs that tie penalties to numbers of police calls directly dissuade reporting by survivors of domestic violence.<sup>123</sup> Domestic violence advocacy organizations argue that CFNOs have led to a dangerous silencing of survivors of violence—erasing decades of advancements in campaigns for survivors to overcome the significant structural barriers and stigmas associated with reporting abuse.<sup>124</sup> The CFNO adopted by East Rochester provides a compelling case study in how these ordinances harm survivors.<sup>125</sup> This CFNO required a landlord to evict any household for which there were three police calls within a 12 month period.<sup>126</sup> Under the law, the city would revoke rental permits (required to rent residential property in the city) from any landlord who failed to evict tenants who met the threshold number of such calls.<sup>127</sup>

In *Grape v. Town/Village of East Rochester*, domestic violence survivor Laurie Grape sued East Rochester for the harms she experienced as a result of this CFNO. The lawsuit alleged that Ms. Grape called 911 twice after incidents of repeated physical assault by her ex-boyfriend.<sup>128</sup> After the first call, despite visible bruises on her neck, the police did not remove the perpetrator from Ms. Grape's home.<sup>129</sup> Later that night, after a second incident of domestic violence, the police returned.<sup>130</sup> This time, officers told Ms. Grape—in the presence of her ex-boyfriend—that, because

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<sup>122</sup> See, e.g., Fais, *supra* note 17, at 1195; Kastner, *supra* note 17, at 1058–60; Arnold & Slusser, *supra* note 19, at 911–12; ACLU WOMEN'S RTS. PROJECT & SOC. SCI. RSCH. COUNS., *supra* note 19, at 4; Jarwala & Singh, *supra* note 20, at 881.

<sup>123</sup> See sources cited *supra* note 69 (highlighting CFNOs tying penalties to police calls).

<sup>124</sup> Rebecca Burns, *Under Local Laws, 911 Calls Turn Domestic Abuse Victims into 'Nuisances,'* AL JAZEERA AM. (Dec. 8, 2014, 5:00 AM), <http://america.aljazeera.com/articles/2014/12/8/nuisance-ordinancesdomesticviolencevictims.html> (quoting Gwyn Kaitis of the Metropolitan Chicago Battered Women's Network, who explained that advocates have "spent so many years [encouraging] victims to call for help when incidents occur, trying to get them to report it," but these ordinances "set us back 30 years on that front").

<sup>125</sup> See generally Second Amended Complaint, *Grape v. Town/Vill. of East Rochester*, No. 6:07-cv-6075 (W.D.N.Y.) [hereinafter *Grape Complaint*]. This matter was voluntarily dismissed pursuant to a settlement in which Rochester agreed to pay \$100,000 in damages and amend its CFNO. See Order Regarding Settlement Agreement, *Grape v. Town/Vill. of East Rochester*, No. 6:07-cv-6075, (W.D.N.Y.); ACLU WOMEN'S RTS. PROJECT & SOC. SCI. RSCH. COUNS., *supra* note 19, at 10.

<sup>126</sup> *Grape Complaint*, *supra* note 125, at 5 (citing TOWN/VILLAGE OF EAST ROCHESTER, N.Y., CODE pt. II, ch. 144, § 13(A)(4), (E) (1995)).

<sup>127</sup> *Id.* (citing § 13(A)(4), (E)).

<sup>128</sup> *Id.* at 7–8; see ACLU WOMEN'S RTS. PROJECT & SOC. SCI. RSCH. COUNS., *supra* note 19, at 10.

<sup>129</sup> *Grape Complaint*, *supra* note 125, at 7.

<sup>130</sup> *Id.* at 8.

it was her second call for police service, a third call would result in her eviction.<sup>131</sup> Then, knowing that the CFNO meant she could not call the police for assistance without threatening the security of her home, Ms. Grape’s ex-boyfriend was able to use the CFNO as a shield to continue to harass and stalk her without fear of consequences.<sup>132</sup>

Ms. Grape’s situation is not unique. A study of CFNOs in New York revealed that domestic violence was the single largest category of enforcement under the CFNOs in the cities of Binghamton and Fulton.<sup>133</sup> Similarly, in a 2013 study of CFNO enforcement in Milwaukee, Wisconsin, domestic violence was the third most commonly cited offense.<sup>134</sup> In 83% of these cases, landlords used eviction or the threat of eviction to address the alleged nuisance activity.<sup>135</sup> Increasing housing instability for survivors of domestic violence through the enforcement of CFNOs is particularly dangerous, as this population has long struggled to find and maintain safe, affordable housing.<sup>136</sup> In the United States, 1.3 million women each year experience some form of domestic or sexual violence,<sup>137</sup> so the potential negative impacts of CFNOs on this population is substantial.

### 3. *Impact on Individuals with Disabilities*

CFNOs also have harmful impacts on individuals with disabilities, who may need to contact the police more frequently for assistance related to mental health crises or other emergencies.<sup>138</sup> For example, in *Metropolitan St. Louis Equal Housing and Opportunity Council v. City of Maplewood*, the plaintiff presented evidence that more than 25% of incidents of CFNO enforcement were initiated because of “man-

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<sup>131</sup> *Id.*

<sup>132</sup> ACLU WOMEN’S RTS. PROJECT & SOC. SCI. RSCH. COUNS., *supra* note 19, at 10.

<sup>133</sup> *Id.* at 2, 22–23; SCOUT KATOVICH, N.Y. C.L. UNION & ACLU, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCES OF NEW YORK’S NUISANCE ORDINANCES 23 (Aug. 2018).

<sup>134</sup> Desmond & Valdez, *supra* note 54, at 130.

<sup>135</sup> *Id.* at 133 tbl.5.

<sup>136</sup> Kastner, *supra* note 17, at 1063; Arnold & Slusser, *supra* note 19, at 911 (citing Fais, *supra* note 17).

<sup>137</sup> U.S. DEP’T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, SEXUAL ASSAULT SERVICES PROGRAM 1 (Mar. 2011).

<sup>138</sup> See, e.g., MEAD ET AL., *supra* note 84, at 18; see Jarwala & Singh, *supra* note 20.

ifestation of mental illness or other disability,” rather than suspected criminal activity.<sup>139</sup> One example of nuisance enforcement involved a sexual assault survivor suffering from a post-traumatic stress disorder who was cited under the CFNO for generating too many calls for police services after contacting a crisis hotline.<sup>140</sup>

Public records related to CFNO enforcement in Fulton, New York, similarly reveal that calls related to tenants experiencing medical events, some of whom suffer from mental and physical disabilities, made up nearly 13% of calls prompting CFNO enforcement.<sup>141</sup> The medical events that triggered CFNO enforcement in Fulton included suicide attempts, mental health crises, health and welfare checks, and calls for emergency medical service.<sup>142</sup> For example, in 2017, the Fulton police responded to a call from a man who reported having a seizure.<sup>143</sup> The police facilitated his transport to the emergency room, but the call was counted along with other calls for police service that ultimately triggered enforcement of the CFNO.<sup>144</sup>

Research into CFNO enforcement in Ohio similarly revealed a trend of enforcement activities triggered after residents with disabilities called police seeking assistance, or others called to seek assistance on their behalf.<sup>145</sup> For example, when one resident called a mobile crisis center and threatened to harm himself, the local government sent the details of the call to the landlord with a warning that the activity qualified as a nuisance; the landlord initiated eviction proceedings a few weeks later.<sup>146</sup> Another property was designated as a nuisance due to calls for emergency services related to a “psychiatric situation” involving a child with a disability.<sup>147</sup>

#### 4. *Impact on Low-Income Tenants*

Beyond their impacts on specific vulnerable populations, the enforcement of CFNOs broadly harms low-income tenants and communities by increasing housing insecurity and displacement. Whether or not eviction is explicitly required, the enforcement mechanisms contained within these ordinances—including threatening

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<sup>139</sup> Metro. St. Louis Equal Hous. & Opportunity Council v. City of Maplewood, No. 4:17-cv-886, 2017 WL 6278882, at \*2 n.2 (E.D. Mo. Dec. 8, 2017); Complaint at 10, *Metro. St. Louis Equal Hous. & Opportunity Council*, 2017 WL 6278882 (No. 4:17-cv-886) [hereinafter *Maplewood Complaint*].

<sup>140</sup> *Maplewood Complaint*, *supra* note 139, at 10.

<sup>141</sup> See KATOVICH, *supra* note 133, at 23–24 fig.13.

<sup>142</sup> *Id.* at 23–25.

<sup>143</sup> *Id.* at 24.

<sup>144</sup> *Id.* at 25.

<sup>145</sup> MEAD ET AL., *supra* note 84, at 14.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

landlords with fines and the revocation of rental licenses—inevitably leads to displacement. The displacement may be through formal or informal eviction.<sup>148</sup> A growing body of research demonstrates that eviction has a range of negative impacts on health and well-being.<sup>149</sup> Evictions are associated with increased incidents of adverse birth outcomes, low birth weight, prematurity, infant mortality, increased child hospitalizations, increased emergency room visits, and worse mental health.<sup>150</sup>

Evicted tenants are more likely to move to lower-quality homes in neighborhoods with higher rates of poverty and crime.<sup>151</sup> Eviction also has significant financial consequences, which are compounded for families that are already living in financially precarious situations.<sup>152</sup> The harmful consequences of evictions may also linger for years through an eviction record. In many states, tenants with an eviction on their record are barred from securing subsidized housing in the future,<sup>153</sup> further exacerbating the resulting housing instability and increasing the likelihood that eviction will cause homelessness.

The harms of evictions caused by CFNO enforcement fall disproportionately on low-income residents for several reasons. Renters in general are significantly lower income than homeowners.<sup>154</sup> Of all renter households, 61% meet HUD’s definition of low income.<sup>155</sup> Due to the lack of federally subsidized housing in communities throughout the country, many renters on the private market are extremely low income.<sup>156</sup> Moreover, the legislative histories of some CFNOs reveal intentional targeting of low-income residents or a desire to keep low-income families out of a

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<sup>148</sup> See Desmond & Valdez, *supra* note 54, at 123 (separating landlord abatement strategies in response to CFNO enforcement into categories which included: (1) a court-ordered formal eviction; (2) an informal eviction (e.g., changing locks or telling a tenant to leave); and (3) a threat of eviction if the alleged nuisance happened again).

<sup>149</sup> See HEALTH AFFS., EVICTION AND HEALTH: A VICIOUS CYCLE EXACERBATED BY A PANDEMIC, at supp. Exhibit 1 (Apr. 2021).

<sup>150</sup> *Id.* at 2–3.

<sup>151</sup> Matthew Desmond, Carl Gershenson & Barbara Kiviat, *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 230 (2015); Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1763 (2015).

<sup>152</sup> HEALTH AFFS., *supra* note 149, at 3 (“Eviction can also have devastating financial consequences, with evicted people more likely than nonevicted renters to rely on social assistance programs and to experience job loss and reduced credit access.”).

<sup>153</sup> Desmond & Valdez, *supra* note 54, at 137; see also HOUS. ACTION ILL. & LAW.’S COMM. FOR BETTER HOUS., PREJUDGED: THE STIGMA OF EVICTION RECORDS 9, 15 (Mar. 2018).

<sup>154</sup> JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 45, at 13 (“[T]he median income for all renter households was just \$42,000 in 2019—little more than half the \$81,000 median for homeowners.”).

<sup>155</sup> *Id.*

<sup>156</sup> NAT’L LOW INCOME HOUS. COAL., *supra* note 46, at 2 (“Eleven million renter households with extremely low incomes account for 25% of all renter households . . .”).



municipality.<sup>157</sup> Enforcement data also shows that some CFNOs are disproportionately enforced in communities with high rates of poverty, further concentrating their harmful effects among low-income residents.<sup>158</sup>

## II. POTENTIAL LEGAL CLAIMS RAISED BY CFNOS

CFNOs raise significant constitutional and fair housing issues. Lawsuits have been brought by civil rights advocates, tenants, survivors of domestic violence, and individuals with disabilities challenging CFNOs using a variety of legal theories. CFNOs may violate the First Amendment by punishing tenants who contact the police for assistance. They may also raise Fourteenth Amendment issues, both under the Due Process and Equal Protection Clauses. CFNOs also raise significant statutory issues under VAWA, the FHA, and parallel state laws.

### A. *Constitutional Claims*

The First Amendment protects the right to communicate with law enforcement by reporting a crime or seeking medical or other emergency assistance.<sup>159</sup> Thus, CFNOs—particularly those which rely on calls for police service to trigger enforcement—raise significant First Amendment concerns. CFNOs that impose penalties for engaging in the protected speech of communicating with law enforcement can violate the First Amendment right to petition the government and create a chilling effect by dissuading people from calling the police for help.<sup>160</sup> A state appellate court struck down the nuisance law in Village of Groton, New York, as unconstitutional on its face under the First Amendment because it deterred tenants

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<sup>157</sup> See, e.g., MEAD ET AL., *supra* note 84, at 4 (citing BEDFORD CITY COUNCIL, COUNCIL MINUTES, Reg. Sess., at 7 (Ohio May 2, 2005, 8:00 PM)) (discussing statements of the mayor of Bedford, Ohio, who pointed to a desire to uphold “middle class values” in Bedford as a factor weighing in favor of the CFNO).

<sup>158</sup> See, e.g., KATOVICH, *supra* note 133, at 17–19.

<sup>159</sup> See *Bd. of Trs. of Groton v. Pirro*, 58 N.Y.S.3d 614, 620–23 (App. Div. 2017) (concluding that a New York CFNO is unconstitutional under the First Amendment); see also Danielle Panizzi, *A Victim of Domestic Violence a ‘Nuisance’ to Society?: How Chronic Nuisance Ordinances in Municipalities Impact Victims of Domestic Violence*, 39 WOMEN’S RTS. L. REP. 146, 155 (2018) (explaining the constitutional implications that arise from nuisance ordinances deterring victims from reporting crimes); WERTH, *supra* note 13, at 11–12 (discussing First Amendment concerns presented by CFNO enforcement).

<sup>160</sup> *Bd. of Trs. of Groton*, 58 N.Y.S.3d at 622–23.

from seeking police assistance.<sup>161</sup> The First Amendment has been utilized by plaintiffs in numerous cases challenging CFNOs that penalized tenants for calling the police.<sup>162</sup>

Most First Amendment challenges to CFNOs include allegations that CFNOs violate the Petition Clause by infringing on a plaintiff's right to petition the government for grievances, as well as by violating their freedom of speech more broadly under the Free Speech Clause.<sup>163</sup> In *Brumit v. Granite City*, however, the plaintiffs raised an alternative First Amendment argument challenging a CFNO.<sup>164</sup> The plaintiffs argued that Granite City's enforcement of its CFNO violated the plaintiffs' First Amendment right to freedom of association, as the CFNO required an entire family's eviction based on the alleged criminal activity of their adult daughter, who spent time at their home but did not reside there.<sup>165</sup> The alleged criminal activity at issue did not occur on the property, but violated a wide-reaching crime-free housing lease addendum required by the CFNO.<sup>166</sup> The plaintiffs argued that holding individuals “strictly liable for crimes committed by people they associate with burdens the right to association.”<sup>167</sup>

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<sup>161</sup> *Id.* at 620–23. The Village of Groton CFNO provided that a property could be deemed a public nuisance if there was evidence of “repeated criminal activity” that had an adverse impact, which the law defined to include “complaints made to law enforcement officials of illegal activity associated with the property.” *Id.* at 621 (citing VILLAGE OF GROTON, N.Y., CODE pt. II, ch. 152, §§ 3, 4(C)(3) (2014)).

<sup>162</sup> See, e.g., Complaint at 7–8, 16–17, *Watson v. City of Maplewood*, No. 17-cv-1268, 2017 WL 4758960 (E.D. Mo. Oct. 20, 2017) [hereinafter *Maplewood Complaint* 2]; *Bedford Complaint*, *supra* note 98, at 32–36 (tenant with a disability was evicted after calling the police to report concerns regarding a neighbor's threatening behavior).

<sup>163</sup> See, e.g., Verified Second Amended Complaint at 24, *Briggs v. Borough of Norristown*, No. 13-cv-02191 (E.D. Pa.) [hereinafter *Norristown Complaint*] (alleging that the borough violated the First Amendment's Right to Petition Clause through its enforcement of the CFNO); Complaint at 34–36, *Markham v. City of Surprise*, No. 15-cv-01696 (D. Ariz.) (alleging that a CFNO violated the First Amendment's Right to Petition and Free Speech Clauses by deterring and burdening tenants' ability to report crimes or seek police assistance). These matters were voluntarily dismissed pursuant to settlement agreements prior to the court ruling on the merits of these legal theories. See Release and Settlement Agreement, *Briggs v. Borough of Norristown*, No. 13-cv-02191 (E.D. Pa. Sept. 18, 2014) [hereinafter *Norristown Settlement*]; Release and Settlement Agreement, *Markham v. City of Surprise*, No. 2:15-cv-01696-SRB (D. Ariz. Mar. 21, 2016).

<sup>164</sup> *Brumit v. Granite City*, No. 19-cv-1090, 2021 WL 462624, at \*6 (S.D. Ill. Feb. 9, 2021).

<sup>165</sup> *Id.* at \*1–2; GRANITE CITY, ILL., MUNICIPAL CODE tit. 5, ch. 142, § 5.142.010 (2022).

<sup>166</sup> *Id.* (citing MUNICIPAL CODE § 5.142.050).

<sup>167</sup> *Id.* at \*6. Ruling on defendant's motion to dismiss, the U.S. District Court for the Southern District of Illinois concluded that Plaintiffs had pled facts sufficient to state a First Amendment claim. *Id.* However, the court ultimately granted summary judgment in the defendant's favor, concluding that the CFNO's impact on familial association was too indirect to

CFNOs may also violate the Fourteenth Amendment. First, they may violate the procedural due process rights of tenants and landlords.<sup>168</sup> Many CFNOs provide insufficient process to landlords, who may be penalized based on alleged nuisance conduct without a sufficient opportunity to contest an alleged violation.<sup>169</sup> Tenants often have no available notice or process whatsoever, since CFNOs are enforced through communication from law enforcement directly to the landlord rather than the tenant. This means that tenants have no opportunity to contest allegations against them. In *Victor Valley Family Resource Center v. City of Hesperia*, the court entered an injunction against enforcement of a CFNO on due process grounds, as the CFNO at issue lacked a hearing and notice for tenants prior to the initiation of eviction proceedings.<sup>170</sup>

CFNOs may also violate the Equal Protection Clause if enacted with the purpose and intent to discriminate against protected classes.<sup>171</sup> Disparate impact liability is unavailable, and liability for an equal protection violation requires proof of discriminatory intent. While this is a high bar, in addition to direct evidence, circumstantial evidence in the form of evidence of a disparate racial impact can be used to support an inference of discriminatory intent.<sup>172</sup> For example, the plaintiffs in *Jones v. City of Faribault* provided direct evidence of racial animus underlying the enactment of the CFNO in Faribault, Minnesota, by citing to the legislative record.<sup>173</sup> Specifically, plaintiffs highlighted derogatory comments about the city's

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constitute and infringement on the First Amendment. *See* *Brumit v. City of Granite City, Illinois*, No. 19-CV-1090-SMY, 2022 WL 4250264, at \*3 (S.D. Ill. Sept. 15, 2022). Plaintiff has appealed this matter to the Seventh Circuit Court of Appeals, where it remains pending. *See* Plaintiff's Notice of Appeal, *Brumit v. City of Granite City, Illinois*, No. 19-CV-1090-SMY (S.D. Ill. Oct. 10, 2022).

<sup>168</sup> *See, e.g.,* *Javinsky-Wenzek v. City of St. Louis Park*, 829 F. Supp. 2d 787, 798–99 (D. Minn. 2011) (ruling that the CFNO violated procedural due process as landlords were neither properly notified nor provided a hearing to challenge the determination requiring them to evict tenants); *Cook v. City of Buena Park*, 126 Cal. App. 4th 1, 7–8 (Cal. Ct. App. 2005) (outlining multiple reasons that a CFNO violated a landlord's procedural due process rights, including lack of sufficient and specific notice); *Bedford Complaint*, *supra* note 98, at 37 (alleging that a CFNO put the plaintiff tenant at risk of losing her home without adequate notice or an opportunity to be heard).

<sup>169</sup> WERTH, *supra* note 13, at 20.

<sup>170</sup> *Victor Valley Fam. Res. Ctr. v. City of Hesperia*, No. ED-CV-16-00903, 2016 WL 3647340, at \*5, \*7 (C.D. Cal. July 1, 2016); CITY OF HESPERIA, CAL., CODE OF ORDINANCES No. 2015-12 (2016).

<sup>171</sup> *See, e.g.,* *Bedford Complaint*, *supra* note 98, at 38.

<sup>172</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976).

<sup>173</sup> *See* *Faribault Complaint*, *supra* note 89, at 33–34 (citing Council Committee Memorandum from Andy Bohlen, Police Chief, to Brian J. Anderson, Faribault City Adm'r (Oct. 10, 2013), available at <https://www.aclu.org/cases/jones-et-al-v-city-faribault?document=jones-et-al-v-city-faribault-complaint-exhibit-b>).

growing Somali population made by local officials during the debate on the ordinance. In addition to this direct evidence of intent, the plaintiffs noted the starkly discriminatory way in which the CFNO was being enforced.<sup>174</sup> In February 2021, the court denied the city’s motion for summary judgment on the equal protection claim, finding that “the record supports a reasonable inference that racial animus was either a motivating factor or the but-for cause in the City’s decision to implement the Ordinance.”<sup>175</sup>

### B. *Statutory Claims*

CFNOs can also violate state and federal statutory protections, including fair housing laws. The federal FHA was enacted with the purpose of promoting “open, integrated residential housing patterns.”<sup>176</sup> To that end, it prohibits discrimination on the basis of race, sex, disability, or membership in another protected class when renting or engaging in other housing-related activities.<sup>177</sup> Consistent with its purpose of promoting integration, the FHA, unlike the Equal Protection Clause, permits legal claims challenging policies or practices that, while not intentionally discriminatory, have a disparate impact on a protected class.<sup>178</sup>

Following decades of consistent lower court case law, in 2015 the U.S. Supreme Court confirmed that disparate impact claims—claims alleging that a facially neutral policy or practice disproportionately impacts a specific protected class—are cognizable under the FHA.<sup>179</sup> In reaching this conclusion, the Court noted that challenging local “housing restrictions that function unfairly to exclude minorities

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<sup>174</sup> *Id.* at 34 (noting how an ordinance that targets rental housing will have a disparate impact on Black people because “[a]pproximately 90% of Faribault’s Black households are renter households, as compared to just 28% for non-Hispanic white households”).

<sup>175</sup> *Jones v. City of Faribault*, No. 18-1643, 2021 WL 1192466, at \*1 (D. Minn. Feb. 18, 2021). This matter was settled in 2022. The settlement required amendments to the CFNO. *ACLU Wins Settlement to End Housing Discrimination Case*, ACLU MINN. (June 15, 2022), <https://www.aclu-mn.org/en/press-releases/aclu-wins-settlement-end-housing-discrimination-case>.

<sup>176</sup> *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1133–34 (2d Cir. 1973); *see also* *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) (quoting *Otero*, 484 F.2d at 1134); 114 Cong. Rec. 3422 (1968).

<sup>177</sup> *See generally* *Housing Discrimination Under the Fair Housing Act*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/fair\\_housing\\_act\\_overview#\\_The\\_Fair\\_Housing](https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_The_Fair_Housing) (last visited Apr. 26, 2023).

<sup>178</sup> *See* *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521–25 (2015).

<sup>179</sup> *Id.* at 2525.

from certain neighborhoods” is “at the heartland of disparate-impact liability.”<sup>180</sup> Courts have recognized that conduct which has the consequence of perpetuating segregation can be just as harmful as purposeful discrimination, in terms of its effect of frustrating the FHA’s central purpose of achieving integration.<sup>181</sup>

Evaluating an FHA disparate impact claim involves a burden-shifting analysis. The plaintiff must first make a *prima facie* showing that the challenged policy has a disparate impact on a protected class. The defendant must then demonstrate that the policy is necessary to achieve a “substantial, legitimate, nondiscriminatory interest,” and the plaintiff may counter with proof that this interest could be served by another policy with a less discriminatory effect.<sup>182</sup> The application of this analysis to crime-free housing ordinances was set out and discussed by HUD in a 2016 guidance.<sup>183</sup>

Under the first step of the analysis, the plaintiff must show that a CFNO has a discriminatory effect.<sup>184</sup> This could be satisfied by presenting evidence—likely based on statistics—that the challenged ordinance results in a disparate impact on a protected class.<sup>185</sup> There are several protected classes CFNOs may disproportionately impact: people of color,<sup>186</sup> individuals with disabilities,<sup>187</sup> and women (since survivors of domestic violence are disproportionately women).<sup>188</sup>

Once the plaintiff establishes a *prima facie* case, the burden shifts to the local government to prove that the ordinance is necessary to further a “substantial, legitimate, nondiscriminatory interest.”<sup>189</sup> Municipalities are likely to assert that the CFNO is necessary to reduce crime and to promote safe rental properties.<sup>190</sup> While this might serve as a legitimate basis to enact a CFNO, courts must assess whether the purported problem presented is based in fact and not “hypothetical or speculative.”<sup>191</sup> If the demographic data and legislative history reveal that a local government’s true impetus for enacting the ordinance was changing racial demographics

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<sup>180</sup> *Id.* at 2521–22.

<sup>181</sup> *See, e.g., Metro. Hous. Dev. Corp.*, 558 F.2d at 1289.

<sup>182</sup> HUD CFNO GUIDANCE, *supra* note 60, at 7 (citing 24 C.F.R. § 100.500 (2022)).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 7.

<sup>185</sup> *Id.* at 8.

<sup>186</sup> *See supra* Section I.D.1.

<sup>187</sup> *See supra* Section I.D.3.

<sup>188</sup> *See supra* Section I.D.2.; HUD CFNO GUIDANCE, *supra* note 60, at 8.

<sup>189</sup> HUD CFNO GUIDANCE, *supra* note 60, at 8–9 (citing 24 C.F.R. § 100.500(c)(2)).

<sup>190</sup> *See, e.g., supra* Section I.B; *Crime Free Multi-Housing*, *supra* note 12 (explaining that CFNOs were “designed to reduce crime, drugs, and gangs on apartment properties”).

<sup>191</sup> HUD CFNO GUIDANCE, *supra* note 60, at 9 (citing Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11471 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100)).

rather than, for example, preventing actual criminal activity,<sup>192</sup> the cities’ pretextual justification cannot serve as a legitimate basis for enactment.<sup>193</sup>

Only if the local government is successful under the second step would a court turn to the final step, where the plaintiff must “prove that such interest could be served by another policy or practice that has a less discriminatory effect.”<sup>194</sup> Thus, even if the court concludes that the purported goal of the CFNO was legitimate, it may find that a policy with a less discriminatory effect could achieve that same goal.<sup>195</sup> For example, it may find that the city could have narrowed the scope of the nuisance or criminal activity that could trigger enforcement, or employed measures other than a CFNO to achieve the stated community safety goals.

Some alternatives to improve safety on rental properties include landlord registration, proactive rental inspection programs, complaint processes and hotlines for tenants to report dangerous conditions, and incorporating crime prevention through environmental design (CPTED) into municipal codes.<sup>196</sup> CPTED principles seek to reduce criminal activity through design and management of the physical environment.<sup>197</sup> If a court concludes that an alternative could achieve the stated crime-prevention goals without the discriminatory consequences of a CFNO, the FHA challenge should succeed.<sup>198</sup>

CFNOs may also violate the FHA through intentional discrimination (often referred to as disparate treatment).<sup>199</sup> In a 2022 guidance setting out scenarios where policies and practices related to criminal records and criminal histories may violate the FHA, HUD specifically noted a scenario where the enforcement of a CFNO

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<sup>192</sup> See *supra* Section I.B.

<sup>193</sup> HUD CFNO GUIDANCE, *supra* note 60, at 9.

<sup>194</sup> *Id.* at 9–10 (citing 24 C.F.R. § 100.500(c)(3)).

<sup>195</sup> See Archer, *supra* note 12, at 216–31 (setting out a detailed summary of the FHA analysis as applied to CFNOs, focusing in particular on bringing FHA claims based on the segregative effects of CFNO enforcement).

<sup>196</sup> See, e.g., OPEN CMTYS. & SARGENT SHRIVER NAT’L CTR. ON POVERTY L., REDUCING THE COST OF CRIME FREE: ALTERNATIVE STRATEGIES TO CRIME FREE/NUISANCE PROPERTY ORDINANCES IN ILLINOIS 5, 6, 8, 13 (Oct. 2015).

<sup>197</sup> See, e.g., NAT’L CRIME PREVENTION COUNCIL, BEST PRACTICES FOR USING CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN IN WEED AND SEED SITES 1 (2009) (noting some examples of CPTED principles, including promoting proper upkeep and management of rental properties and increasing visibility by strategically placing lighting, parking, sidewalks, windows, doors, and walkways, in order to discourage criminal activity and set up natural surveillance without needing to turn to more aggressive methods of policing).

<sup>198</sup> HUD CFNO GUIDANCE, *supra* note 60, at 9–10; see also Archer, *supra* note 12, at 228–31 (discussing several options to limit the discriminatory impact of CFNOs, including by ending their reliance on arrest records and requiring some connection between the criminal histories that may be considered and the safety of other tenants or the property at issue).

<sup>199</sup> HUD CFNO GUIDANCE, *supra* note 60, at 10.

may result in a disparate treatment claim.<sup>200</sup> Specifically, the guidance notes that a disparate treatment claim may arise where “[a] locality applies a crime-free ordinance requiring the eviction of criminally involved residents in a neighborhood with a significant Black or Hispanic population but does not apply the ordinance in neighborhoods that are predominantly populated by White households.”<sup>201</sup>

CFNOs may also violate the Affirmatively Furthering Fair Housing (AFFH) mandate of the FHA.<sup>202</sup> This mandate is imposed by two provisions of the FHA. Pursuant to 42 U.S.C. § 3608(e)(5), the HUD secretary is required to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA].”<sup>203</sup> The FHA then extends the AFFH mandate in § 3608(d) to “[a]ll executive departments and agencies” that administer housing programs.<sup>204</sup> Thus, each state, local government, and public housing authority that receives grants through any federal program is obligated to take steps to affirmatively further fair housing.

To comply with the AFFH requirement, all states and local governments receiving federal housing and community development funds must consider whether any local CFNOs conflict with their duty to affirmatively further fair housing by discriminating against protected classes or contributing to segregated housing patterns.<sup>205</sup> If a CFNO is found to be discriminatory or to increase patterns of segregation, local governments or states must repeal or modify it.<sup>206</sup> According to HUD, “[o]ne step a local government may take toward meeting its duty to affirmatively further fair housing is to eliminate disparities by repealing a nuisance or crime-free ordinance that requires or encourages evictions for use of emergency services, including 911 calls, by domestic violence or other crime victims.”<sup>207</sup>

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<sup>200</sup> U.S. DEP’T OF HOUS. & URB. DEV., IMPLEMENTATION OF THE OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 3–4 (June 10, 2022) [hereinafter 2022 HUD GUIDANCE ON USE OF CRIMINAL RECORDS].

<sup>201</sup> *Id.* at 4.

<sup>202</sup> See Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,782 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) [hereinafter Interim Final AFFH Rule].

<sup>203</sup> 42 U.S.C. § 3608(e)(5).

<sup>204</sup> 42 U.S.C. § 3608(d).

<sup>205</sup> HUD CFNO GUIDANCE, *supra* note 60, at 12–13.

<sup>206</sup> *Id.* at 13.

<sup>207</sup> *Id.* at 12–13.

Discriminatory CFNOs may also violate state fair housing laws,<sup>208</sup> as well as Title VI of the Civil Rights Act of 1964 (Title VI),<sup>209</sup> and HUD’s implementing regulations, which prohibit discrimination in programs or activities that receive federal financial assistance.<sup>210</sup> HUD has employed these regulations to hold municipalities accountable for discriminatory CFNOs.<sup>211</sup>

Many states also have comprehensive tenant protection statutory schemes, which could be employed to challenge CFNOs based on conflict preemption—a doctrine which provides, in general terms, that a law of a higher authority will replace the law of a lower authority when the two conflict.<sup>212</sup> For example, a group of landlords in Iowa successfully challenged a Cedar Rapids CFNO based on an argument that it conflicted with Iowa state landlord–tenant laws.<sup>213</sup> The CFNO at issue required a broad crime-free lease addendum to be attached to all residential leases.<sup>214</sup> The lease required the eviction of residents or anyone affiliated with them when they engaged in a wide range of “criminal activity.”<sup>215</sup> Iowa landlord–tenant law, on the other hand, required evictions for cause to be based on a “clear and present danger to the health or safety of other tenants.”<sup>216</sup> The court held that the CFNO was preempted by state law to the extent it required the attachment of the lease addendum.<sup>217</sup>

Finally, CFNOs may violate new protections set out in the 2022 Violence Against Women Act Reauthorization Act (2022 VAWA Reauthorization).<sup>218</sup> It protects the “right to report crime and emergencies” in jurisdictions receiving funding

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<sup>208</sup> See *State Fair Housing Protections*, POLICY SURVEILLANCE PROGRAM, <https://lawatlas.org/datasets/state-fair-housing-protections-1498143743> (Aug. 1, 2019) (reporting that 49 states and Washington, D.C., have adopted their own fair housing laws, many of which expand on the protections in the federal FHA).

<sup>209</sup> 42 U.S.C. § 2000(d).

<sup>210</sup> See 24 C.F.R. § 1.1 (2022); City of Hemet, HUD No. 09-20-0002-6, at 3 (U.S. Dep’t. of Hous. and Urban Dev. Dec. 10, 2020) (voluntary compliance agreement) [hereinafter *Hemet Compliance Agreement*].

<sup>211</sup> See, e.g., *Hemet Compliance Agreement*, *supra* note 210, at 4; *infra* Section III.B.

<sup>212</sup> See Meredith Joseph, Note, *Conflict Preemption: A Remedy for the Disparate Impact of Crime-Free Nuisance Ordinances*, 54 U. MICH. J.L. REFORM 801 (2021) (discussing how the doctrine of conflict preemption could be employed by advocates to invalidate broad CFNOs that are not tailored to state landlord-tenant laws).

<sup>213</sup> Ruling on Motions for Summary Judgment, *Landlords of Linn Cnty. v. City of Cedar Rapids*, No. EQCV069920, at 16 (Dist. Ct. Linn Cnty. July 1, 2011).

<sup>214</sup> *Id.* at 1.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 13–14 (discussing IOWA CODE § 562A.27A(2) (2022)).

<sup>217</sup> *Id.* at 16.

<sup>218</sup> Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, sec. 603, § 41415, 136 Stat. 840, 885 (to be codified at 34 U.S.C. § 12495).



from the Community and Development Block Grant Program (CDBG).<sup>219</sup> It prohibits those jurisdictions from penalizing landlords, tenants, and others based on requests for emergency assistance or based on criminal activity when they are a victim or are otherwise not at fault.<sup>220</sup> The 2022 VAWA Reauthorization also requires any jurisdictions receiving CDBG funding to report and certify that they are not interfering with the right to report, or to report the actions they will take in order to come into compliance with the law.<sup>221</sup>

### III. LOCAL ADVOCACY AND FEDERAL INTERVENTIONS

#### A. *Local Advocacy*

Advocacy organizations, including the American Civil Liberties Union (ACLU)<sup>222</sup> and National Housing Law Project (NHLP),<sup>223</sup> have engaged in a range of efforts targeted at curbing the spread of CFNOs. These efforts have included outreach, education, and local policy advocacy aimed at informally resolving problematic CFNOs,<sup>224</sup> as well as litigation raising constitutional claims and claims under the federal FHA.<sup>225</sup> Local advocacy efforts have generated important successes, including the repeal of particularly harmful ordinances.<sup>226</sup> However, responding to CFNOs on a city-by-city basis poses significant challenges.

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<sup>219</sup> *Id.* § 41415(a).

<sup>220</sup> *Id.* § 41415(b)(1). Penalties prohibited include actual or threatened: fines or fees, eviction, refusal to rent or renew a lease, refusal to issue an occupancy or landlord permit, and designation of a property as a nuisance. *Id.* § 41415(b)(2).

<sup>221</sup> *Id.* § 41415(c). “Covered governmental entity” means any governmental entity receiving funding under the Housing and Community Development Act of 1974, 42 U.S.C. § 5306. *Id.* § 41415(a).

<sup>222</sup> See *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, ACLU, <https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime> (last visited Apr. 26, 2023).

<sup>223</sup> See *Nuisance and Crime-Free Ordinances Initiative*, NAT’L. HOUS. L. PROJECT, <https://www.nhlp.org/initiatives/nuisance/> (May 2021).

<sup>224</sup> See, e.g., ACLU of Ill., Press Release, *Ordinances in More than 40 Illinois Municipalities Conflict with New Illinois Law* (Sept. 21, 2015), <https://www.aclu-il.org/en/press-releases/ordinances-more-40-illinois-municipalities-conflict-new-illinois-law>. (detailing targeted outreach and education efforts to over 40 municipalities with problematic CFNOs on the books); *I Am Not a Nuisance*, *supra* note 222 (summarizing community outreach and education efforts, including the dissemination of factsheets regarding the harms of CFNOs).

<sup>225</sup> See, e.g., Faribault Complaint, *supra* note 89, at 62–63 (alleging that a CFNO in Minnesota targeted communities of color in violation of the FHA and Equal Protection Clause); Norristown Complaint, *supra* note 163, at 24 (challenging a CFNO in Pennsylvania, raising claims under the First and Fourteenth Amendments and FHA); *I Am Not A Nuisance*, *supra* note 222 (summarizing ACLU litigation challenging CFNOs).

<sup>226</sup> See, e.g., *Court Cases: Nancy Markham v. City of Surprise*, ACLU, <https://www.aclu.org/cases/nancy-markham-v-city-surprise> (Jan. 30, 2015) (summarizing settlement reached with the

A disparate impact claim under the FHA is one of the strongest claims that can be raised against a discriminatorily-enforced CFNO, since it does not require proof of an intent to discriminate, only a discriminatory effect. However, litigating the claim can be costly and time-consuming, requiring a significant amount of data collection and statistical analysis by expert witnesses to successfully pursue.<sup>227</sup> The informal enforcement mechanisms underlying many CFNOs also make it difficult to identify impacted tenants who would be able to serve as plaintiffs with standing to challenge the CFNO. Tenants are often unaware that the reason they are being evicted or asked to leave is related to their municipality’s CFNO. Landlords frequently displace tenants outside of the officially-sanctioned court processes—by pressuring tenants to leave, hiring a moving company to remove their belongings and conducting an illegal lock-out, or simply refusing to extend a lease that is expiring.<sup>228</sup> Informal evictions of this kind may be particularly likely to result from landlords facing pressure from municipalities to avoid the threat of penalties.<sup>229</sup>

An advocacy organization which is unable to identify individual tenants who have been harmed by CFNO enforcement and are willing to serve as plaintiffs in a lawsuit may still be able to bring litigation challenging a problematic ordinance. The FHA provides a route for establishing organizational standing, where the advocacy organization itself serves as the plaintiff.<sup>230</sup> However, challenging CFNOs on this basis has its own difficulties. It requires a significant investment of organizational time and resources, since organizations seeking to challenge a discriminatory CFNO under the FHA must provide evidence of concrete and demonstrable injury to their activities, such as a diversion of resources or a frustration of their mission.<sup>231</sup> For example, in *Hope Fair Housing*

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City of Surprise, Arizona, under which the city agreed to repeal the challenged CFNO); *Pennsylvania City Agrees to Repeal Law that Jeopardizes Safety of Domestic Violence Survivors*, ACLU (Sept. 8, 2014), <https://www.aclu.org/press-releases/pennsylvania-city-agrees-repeal-law-jeopardizes-safety-domestic-violence-survivors> (describing settlement reached with the City of Norristown, Pennsylvania, under which the city agreed to repeal the challenged CFNO).

<sup>227</sup> See Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 COLUM. L. REV. SIDEBAR 106, 111 (2015) (citing Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2523 (2015) (explaining that establishing a prima facie case of disparate impact liability under the FHA requires showing statistical disparities, as well as a robust causal connection between those disparities and the challenged practice)).

<sup>228</sup> See DESMOND, *supra* note 45, at 330 (citing the Milwaukee Area Renters Study, 2009-2011) (explaining that nearly half (48%) of forced moves in Milwaukee were due to “informal evictions,” described as “off-the-books displacements not processed through the court”).

<sup>229</sup> See *supra* Section I.B (describing typical CFNO enforcement mechanisms).

<sup>230</sup> See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 379 (1982) (affirming that standing to sue under the FHA extends to the limits of Article III organizational standing).

<sup>231</sup> *Id.* at 372–79.

*Center v. City of Peoria*, the fair housing organization challenging the CFNO at issue alleged that it had standing because it had diverted resources from other activities and efforts to challenge the discriminatory enforcement of the CFNO—including through investigation, advocacy, and community education.<sup>232</sup>

City-by-city policy advocacy targeting particularly problematic CFNOs raises similar practical challenges to litigation. As enforcement often looks very different in practice than the text of the ordinance indicates, uncovering the depth of harm caused by a CFNO requires completing thorough public records research and interviewing impacted tenants and property owners.<sup>233</sup> Even after the investigation has been completed, local policy advocacy efforts may not succeed.<sup>234</sup> The experience of advocates in New York is instructive regarding the challenges of city-by-city advocacy. After spending years challenging a problematic ordinance in East Rochester through advocacy and litigation,<sup>235</sup> advocates saw communities throughout the state enacting similar, harmful laws.<sup>236</sup> According to one advocate involved with this work, combatting nuisance ordinances one municipality at a time became like “playing whack-a-mole.”<sup>237</sup> She explained that, as soon as one law was successfully challenged, new laws were enacted.<sup>238</sup> To get around these challenges, advocates in New York ultimately turned to state legislation.<sup>239</sup>

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<sup>232</sup> *HOPE Fair Hous. Ctr. v. City of Peoria*, No.17-cv-01360, 2018 WL 10246029, at \*4 (C.D. Ill. May 14, 2018) (finding that the fair housing organization’s allegations that they had diverted resources to challenge the CFNO’s discriminatory enforcement were sufficient to survive a motion to dismiss challenging their organizational standing).

<sup>233</sup> See, e.g., KATOVICH, *supra* note 133, at 10.

<sup>234</sup> See, e.g., Fran Spielman, *ACLU Strikes Out Again in Attempt to Repeal of Nuisance Property Ordinance*, CHI. SUN TIMES (Mar. 21, 2018, 1:11 PM), <https://chicago.suntimes.com/2018/3/21/18316506/aclu-strikes-out-again-in-attempt-to-repeal-of-nuisance-property-ordinance> (describing unsuccessful attempts by local advocacy organizations to persuade Chicago aldermen to repeal a problematic CFNO).

<sup>235</sup> Grape Complaint, *supra* note 125 (challenging a CFNO on behalf of a survivor of domestic violence); Sandra Park & Scout Katovich, *Tenants Can Get Evicted for Calling the Police Across New York and Much of the Country*, N.Y. C.L. UNION (Jan. 23, 2018, 12:30 PM), <https://www.aclunv.org/en/news/tenants-can-get-evicted-calling-police-across-new-york-and-much-country>.

<sup>236</sup> Video Interview with Amy Schwartz-Wallace, Senior Att’y & Unit Dir., Empire Just. Ctr. (June 25, 2021) (on file with the author).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* This advocate further noted the challenges of identifying impacted tenants, and the difficulty in targeting the most problematic ordinances due to the frequent disjunction between the legislative text of the CFNOs and how they were being enforced. *Id.*

<sup>239</sup> See *infra* Section IV.A.2 (describing the successful legislative initiative in New York to enact a state statute preempting certain categories of CFNOs).

### B. Federal Interventions

As CFNO enforcement often conflicts with federal civil rights laws,<sup>240</sup> the federal government has an important role to play in combating them. Recently, the DOJ and HUD have taken several important steps forward in reining in harmful CFNOs.

First, in 2016, HUD’s Office of General Counsel promulgated guidance specifically targeting CFNOs.<sup>241</sup> This guidance sets out how CFNOs may violate the FHA, focusing primarily on the impact CFNOs have on domestic violence victims and other victims of criminal activity.<sup>242</sup> The guidance also describes the obligation of HUD grantees to consider the impacts that CFNOs have on the FHA’s requirement that they act affirmatively to further fair housing.<sup>243</sup> It recommends that local governments assess their CFNOs, including how they are being enforced, to understand how protected classes will be impacted.<sup>244</sup> It further notes that HUD intends to issue guidance in the future “specifically [addressing] how the [FHA] applies to ensure that [CFNOs] do not lead to discrimination because of disability.”<sup>245</sup>

HUD issued a second guidance in 2016 aimed more directly at local policies that create housing barriers for individuals with criminal records.<sup>246</sup> This guidance highlighted racial disparities in the prisoner population and explained that criminal record-based barriers to housing often have a disproportionate impact on minorities.<sup>247</sup> Thus, even though having a criminal record is not a protected class, criminal history-based restrictions still violate the FHA if they intentionally discriminate, or disproportionately affect a protected class without sufficient justification.<sup>248</sup>

This guidance was recently revisited and strengthened.<sup>249</sup> The 2022 guidance explains that housing providers that employ “policies or practices that exclude individuals with criminal involvement from housing . . . should raise red flags for civil rights investigators.”<sup>250</sup> Examples of such policies include relying on broad criminal

<sup>240</sup> See *supra* Section II (setting out the range of civil rights issues presented by CFNOs).

<sup>241</sup> HUD CFNO GUIDANCE, *supra* note 60.

<sup>242</sup> *Id.* at 1, 12–13; see also *supra* Section II.B (summarizing the FHA analysis in the 2016 HUD Guidance).

<sup>243</sup> HUD CFNO GUIDANCE, *supra* note 60, at 1.

<sup>244</sup> *Id.* at 13.

<sup>245</sup> *Id.* at 1.

<sup>246</sup> U.S. DEP’T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (Apr. 4, 2016).

<sup>247</sup> *Id.* at 3–4, 5–7.

<sup>248</sup> *Id.* at 2, 10.

<sup>249</sup> See 2022 HUD GUIDANCE ON USE OF CRIMINAL RECORDS, *supra* note 200.

<sup>250</sup> *Id.* at 2.

record screenings, permitting evictions based on criminal activity with no connection to the tenancy, evicting entire families based on the criminal activity of one member, or evicting tenants who were the victim of the alleged criminal activity.<sup>251</sup> The guidance specifically references CFNOs in a list of scenarios that may support FHA liability.<sup>252</sup> Additional HUD guidance addressing CFNOs and other barriers to housing faced by individuals with criminal records may be forthcoming.<sup>253</sup>

In addition to issuing guidance, HUD has also targeted CFNOs with enforcement action under the FHA and Title VI by investigating and challenging particularly harmful ordinances and programs. For example, in December 2020, HUD entered into a voluntary compliance agreement with Hemet, California, over the enforcement of its CFNO.<sup>254</sup> The compliance agreement included a requirement that Hemet would repeal the problematic CFNO, and create a remediation fund of \$200,000 to improve housing conditions for low-income families, including by proactively addressing potential code violations.<sup>255</sup>

HUD also has an important role to play in implementing the AFFH mandate of the FHA.<sup>256</sup> Unlike FHA disparate impact or effects claims, the AFFH rule is challenging to enforce through private litigation, as the regulation does not explicitly provide a private right of action.<sup>257</sup> Rather, the majority of enforcement of the AFFH rule happens through an administrative process facilitated by HUD.<sup>258</sup> HUD requires recipients of federal financial assistance, including states and local governments, to engage in fair housing planning processes and to provide certifications that they are undertaking assessments of impediments to fair housing choice and

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<sup>251</sup> *Id.* at 2–3.

<sup>252</sup> *Id.* at 4.

<sup>253</sup> In April 2023, HUD announced a plan to amend its regulations and issue new guidance targeted at addressing the barriers to housing facing people with criminal records. *See* Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Outlines its Action Plan to Remove Unnecessary Barriers for People with Criminal Records (April 24, 2023), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_23\\_083](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_23_083). At the time this Article went to press, the proposed regulation and guidance were not yet available for review.

<sup>254</sup> Hemet Compliance Agreement, *supra* note 210.

<sup>255</sup> *Id.* at 3, 8.

<sup>256</sup> *See* Interim Final AFFH Rule, *supra* note 202, at 30,782.

<sup>257</sup> *See* Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL'Y REV. 1, 56–57 (2020). Advocates have also successfully employed the False Claims Act to pursue challenges to enforcing local governments' obligations to affirmatively further fair housing. *See, e.g.,* United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., No. 06 Civ. 2860, 2012 WL 1574819 (S.D.N.Y. May 3, 2012).

<sup>258</sup> *See* Abraham, *supra* note 257, at 57.

taking steps to affirmatively further fair housing in accordance with the FHA.<sup>259</sup> This process can be used to rein in the discriminatory enforcement of CFNOs.<sup>260</sup>

The DOJ Civil Rights Division, in coordination with HUD, has also begun to take steps towards mitigating the harms caused by CFNOs.<sup>261</sup> For example, the DOJ filed a lawsuit alleging that the city of Hesperia, California, discriminated against Black and Latinx renters through the enactment of its CFNO, in violation of the FHA.<sup>262</sup> This matter resolved with a consent decree pursuant to which the City of Hesperia agreed to pay \$950,000, comprising a settlement fund for individuals harmed by their enforcement of the CFNO, civil penalties, and funding for activities designed to promote fair housing.<sup>263</sup> Hesperia further agreed to stop enforcing its CFNO, and to submit any future policies related to rental housing to the DOJ’s Civil Rights Division for review and approval.<sup>264</sup> The DOJ has also opened an investigation into the discriminatory CFNO in Tampa, Florida.<sup>265</sup>

Congress can also enact legislation in response to the harms caused by CFNOs. For example, as discussed above, the 2022 VAWA Reauthorization established critical new protections aimed at CFNOs.<sup>266</sup> While it remains to be seen how these new protections will be carried out in practice,<sup>267</sup> they represent a significant step forward in the efforts to combat CFNO at the national level.

As these recent legislative and executive actions reveal, there is a clear role for the federal government in responding to the harms of CFNOs. The federal government can set a floor of basic protections and target worst-offender municipalities

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<sup>259</sup> *Affirmatively Furthering Fair Housing (AFFH)*, U.S. DEPT’ OF HOUS. & URB. DEV., <https://www.hud.gov/AFFH> (last visited Apr. 26, 2023).

<sup>260</sup> See HUD CFNO GUIDANCE, *supra* note 60, at 12–13; *supra* Section IV.B (discussing how states can employ their fair housing planning processes to rein in discriminatory enforcement of CFNOs).

<sup>261</sup> See, e.g., Press Release, U.S. Dep’t of Just., Justice Department Sues City of Hesperia, California and San Bernadino County Sheriff’s Department for Discriminating Against African American and Latino Renters Through the Enactment and Enforcement of a Rental Ordinance (Dec. 2, 2019), available at <https://www.justice.gov/opa/pr/justice-department-sues-city-hesperia-california-and-san-bernardino-county-sheriff-s>.

<sup>262</sup> *Id.*; Hesperia Complaint, *supra* note 83.

<sup>263</sup> See Hesperia Consent Order, *supra* note 96, at 5–7.

<sup>264</sup> *Id.*

<sup>265</sup> DOJ Tampa Letter, *supra* note 8; see also O’Donnell et al., *supra* note 3.

<sup>266</sup> Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, sec. 603, § 41415, 136 Stat. 840, 885 (to be codified at 34 U.S.C. § 12495); FHEO Letter, *supra* note 99, at 5–6 (highlighting advocacy behind the new protections in the 2022 VAWA Reauthorization and advocating for comprehensive enforcement of the provisions).

<sup>267</sup> See FHEO Letter, *supra* note 99, at 5–6 (discussing implementation of the 2022 VAWA Reauthorization, which went into effect in October 2022); see also *infra* Section IV.B (discussing opportunities for states to employ the VAWA Reauthorization as a tool for holding governments accountable for the enactment and enforcement of harmful CFNOs).

through investigations and enforcement. However, federal action alone will not be sufficient to solve the insidious problem of CFNOs. Federal action is inevitably bound by the varying priorities of each federal administration and the risk of federal gridlock.<sup>268</sup> Additionally, CFNOs exist in hundreds of municipalities, posing subtly or substantially different issues in each one. Agencies issuing guidance or engaging in enforcement actions targeting CFNOs at a federal level may not be equipped to respond to statewide or regional trends in the enactment or enforcement of CFNOs. Thus, state governments need to be a part of the solution.

#### IV. STATE-LEVEL RESPONSES TO CFNOS

The position that states hold in the U.S. constitutional structure makes them well equipped to respond to the threats posed by CFNOs. While the powers of the federal government are limited to those enumerated in the Constitution, the remaining sovereign powers of government are reserved to the states by the Tenth Amendment.<sup>269</sup> As a result, states have broad legislative authority to regulate matters affecting health, safety, and the general welfare, and to limit the scope of powers delegated to municipalities.<sup>270</sup> This legislative authority can be employed to restrict the ability of local governments to enact and enforce CFNOs. State agencies and officials are also well positioned to build expertise in trends among municipalities in their state and the impact of CFNOs on residents, and have a wide range of tools to respond.

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<sup>268</sup> The history of regulation for the AFFH rule provides one example of the limitations of federal regulation. In 2015, the Obama administration passed regulations interpreting the AFFH requirement—the first significant federal attempt to give the mandate teeth. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). Five years later, the Trump administration promulgated a rule that repealed the 2015 AFFH rule, again leaving HUD without the tools needed to enforce the AFFH mandate. Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020) (eliminating 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). Soon after taking office, the Biden administration issued a memorandum regarding the widespread lack of enforcement of the AFFH requirement, which ultimately led to the current Interim Final Rule. Interim Final AFFH Rule, *supra* note 202, at 30,783. For a discussion of the full history of the AFFH requirement, see Abraham, *supra* note 257, at 13–48.

<sup>269</sup> U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>270</sup> *See infra* Section IV.A (discussing the broad legislative authority states retain to preempt local laws, and the balance of powers between state and local governments).

A. *Legislative Responses: State Preemption Statutes*

1. *The Interplay Between State and Local Legislative Authority*

One role that states can play in combatting CFNOs is through the use of their significant legislative powers. Specifically, states can use legislative enactments to impose limits on the use of local legislative powers to enact CFNOs, preventing municipalities from enacting certain categories of local ordinances and programs through state preemption legislation.

The scope of local government authority within the American democratic structure has shifted significantly over time. In the 19th century, local governments were almost entirely subordinate to states.<sup>271</sup> Early assessments by courts of the scope of local authority generally reflected the view that local governments are agents of the state, and that all local powers must be “traced back to a specific delegation.”<sup>272</sup> The modern approach reflects a broader scope of authority delegated to local governments, defined by the concept of “home rule.”<sup>273</sup> In general terms, home rule is the delegation of power from states to local governments through constitutional amendments. It allows municipalities to engage in policy-making and self-regulation without specific legislative delegation from states.<sup>274</sup>

While there is wide variance between states in the structure and scope of home rule authority today, the approaches can be roughly divided into two general categories.<sup>275</sup> In the first, typically referred to as “*imperio*” home rule,<sup>276</sup> provisions of the state constitution grant local governments direct authority over the realm of local or municipal affairs.<sup>277</sup> In these states, local governments have some shield

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<sup>271</sup> David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2278 (2003).

<sup>272</sup> Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990).

<sup>273</sup> See Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & C.R. L. REV. 371, 383–84 (2008) (setting out the history of the home rule movement, beginning with the adoption of a home rule constitutional provision in Missouri in 1875).

<sup>274</sup> Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007).

<sup>275</sup> Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. L. REV. 1337, 1338–39 (2009).

<sup>276</sup> NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 11 (2020) (this name is inspired by the Latin phrase *imperium in imperio*, meaning a “government within a government”).

<sup>277</sup> *Id.* at 12.



from state preemption,<sup>278</sup> and courts are left with the task of defining what constitutes the purely local realm.<sup>279</sup> In the second category, typically referred to as “legislative” home rule,<sup>280</sup> local governments are delegated the full range of state legislative authority, with the caveat that states retain broad authority to preempt local laws.<sup>281</sup> The preemption authority retained by states under this model is generally only constrained by certain general requirements, including that any preemption laws must be general in their terms and effects.<sup>282</sup>

Within both home rule structures, the ultimate task of defining the scope of local sovereignty frequently falls to the courts.<sup>283</sup> Courts resolving conflicts between state and local governments regarding issues of local authority are often tasked with assessing whether the issue being regulated is a matter of purely local interest—in which case local governments are typically given latitude to legislate without state interference—or one of “statewide concern”—in which case states retain broad authority to override local legislative enactments.<sup>284</sup> In conducting this analysis, courts frequently apply a balancing test to assess the importance of the asserted state versus local interests.<sup>285</sup>

## 2. *Statewide Interests Implicated by CFNOs*

CFNOs implicate a range of important statewide interests, justifying state legislative response under the home rule balancing between state and local authority. CFNOs tend to present as a statewide problem, proliferating in municipalities across the state rather than cropping up in a few isolated municipalities.<sup>286</sup> There are typically statewide trends in the structure of CFNOs adopted by municipalities within

<sup>278</sup> Baker & Rodriguez, *supra* note 275, at 1342–43.

<sup>279</sup> This frequently leads to court interpretations of home rule that give broad deference to state legislative enactments. *See, e.g., id.* at 1342 (explaining that courts have “largely declined to subject state legislation to scrutiny under the rubric of home rule”); NAT’L LEAGUE OF CITIES, *supra* note 276, at 11–12 (explaining that the impact of *imperio* home rule was complicated by judicial resistance to honoring the immunity functions afforded to municipalities).

<sup>280</sup> NAT’L LEAGUE OF CITIES, *supra* note 276, at 12.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 13 (“[C]ourts have always played a central role in interpreting what are often open-ended constitutional and statutory provisions framing home rule”).

<sup>284</sup> *Id.* at 57.

<sup>285</sup> *See* Baker & Rodriguez, *supra* note 275, at 1351 (citations omitted) (explaining that the factors frequently assessed include: “the need for statewide uniformity of regulation” on an issue; whether the matter impacts individuals living in multiple municipalities in the state; whether a subject is one “traditionally governed by state or local governments”; and “whether the state Constitution specifically commits the particular matter to state or local regulation”).

<sup>286</sup> *See, e.g.,* KATOVICH, *supra* note 133, at 4, 10 (describing the spread of CFNOs throughout New York); MEAD ET AL., *supra* note 84, at 1 (Ohio); WERTH, *supra* note 13, at 2 n.5 (Illinois).

a particular state, and in the particular harms they cause.<sup>287</sup> CFNOs impose significant harms on a range of protected classes and vulnerable populations, including individuals with disabilities, survivors of domestic violence, and low-income populations, implicating statewide antidiscrimination protections and interests.<sup>288</sup> CFNOs are also disproportionately enforced in Black and Latinx communities and are used to exacerbate patterns of residential segregation, which has harmful regional and statewide impacts.<sup>289</sup>

States have a critical role in reining in local government actions that have a clear negative impact beyond municipal borders. There is a long, checkered history in the United States of local governments using their delegated legislative authority to discriminate and exclude certain classes of people.<sup>290</sup> State preemption is a particularly important tool for preventing local governments from enacting and enforcing discriminatory local policies or practices.<sup>291</sup> While the specific formulation of the legal test varies from state to state, courts assessing a state preemption statute restricting municipal use of CFNOs would likely weigh any identified statewide interests against the traditionally local concerns of regulating health and welfare and land use.<sup>292</sup>

Advocates and policymakers interested in advancing state legislation to combat CFNOs must therefore first lay the groundwork for the need for statewide intervention with community outreach and data collection. Several state advocates and policymakers have used this approach to build the case for state-level legislative action

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<sup>287</sup> See, e.g., KATOVICH, *supra* note 133, at 10; MEAD ET AL., *supra* note 84, at 17–18; WERTH, *supra* note 13, at 2–4.

<sup>288</sup> See *supra* Section I.D.

<sup>289</sup> *Id.* (discussing the regional impacts of exclusionary housing policies like CFNOs, which make some communities whiter and therefore inevitably results in nearby communities of color becoming more segregated and marginalized).

<sup>290</sup> See, e.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1998 (2000); see also Archer, *supra* note 12, at 180–86 (discussing the long history of racially exclusionary local government policies); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 41–42, 44–45 (2017).

<sup>291</sup> See, e.g., NAT’L LEAGUE OF CITIES, *supra* note 276, at 58 (arguing that “[statewide] concern for protecting vulnerable populations or vindicating norms of equal treatment” should be given particularly great weight by courts balancing local versus state interests).

<sup>292</sup> Baker & Rodriguez, *supra* note 275, at 1356–60 (describing land use and the regulation of health and welfare as areas that are traditionally considered within the scope of local control in balancing state versus local interests); *Developments in the Law—State Preemption of Local Zoning Laws as Intersectional Climate Policy*, 135 HARV. L. REV. 1592, 1592 (2022) (describing land use and zoning as realms in which local governments have traditionally been granted broad deference to act independently).

in response to CFNOs.<sup>293</sup> In New York, for example, a legislative effort followed years of advocacy at the local level in communities with CFNOs throughout the state.<sup>294</sup> The city-by-city advocacy revealed trends in CFNO enactment and enforcement, which prompted a statewide investigation.<sup>295</sup> Advocates then engaged in detailed public records research to document the scope and harms of CFNOs in the state.<sup>296</sup> A survey of the 40 most populous towns in New York outside of New York City found that 25 had CFNOs in place.<sup>297</sup>

This research also revealed problematic statewide trends in CFNO enforcement. A report published in 2018 set out a range of harms caused by CFNOs, including the imposition of penalties on individuals seeking police assistance and the disproportionate enforcement against people of color and in low-income communities.<sup>298</sup> The report noted that “many of the harms identified . . . stem from the ways in which municipalities enforce their [CFNOs],” even where an ordinance may not appear problematic or discriminatory on its face.<sup>299</sup> Ultimately, the report recommended that New York legislators “enact legislation that affirmatively protects residents’ rights to police and emergency assistance.”<sup>300</sup>

Similarly, before taking on a legislative initiative targeting CFNOs in Illinois, advocates carefully tracked the scope and harms of CFNOs in the state.<sup>301</sup> At the time, there were at least 125 municipalities in the state which had enacted a CFNO of some kind.<sup>302</sup> As in New York, Illinois advocates engaged in public records research and identified problematic trends in enforcement, including enforcement

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<sup>293</sup> See, e.g., Kate Walz & Jenna Prochaska, *No One Should Be Punished for Calling 911: Responding to the Spread of Harmful Housing Ordinances in Illinois*, CLEARINGHOUSE CMty. (Nov. 10, 2015), <https://nhlp.org/files/supplement/023.%20No%20One%20Should%20Be%20Punished%20for%20Calling%20911%20-%20-%20K%20Walz%20and%20J%20Prochaska.pdf> (discussing joint legislative effort to respond to CFNOs in Illinois); KATOVICH, *supra* note 133, at 10; Joint Memorandum of Support of A.1322/S.4955 from ACLU Women’s Rts. Project, Empire Just. Ctr & N.Y. Coal. Against Domestic Violence (May 15, 2015), available at <https://empirejustice.org/wp-content/uploads/2018/01/nuisance-ordinance-joint-memo.pdf> (discussing need for a state legislative response to CFNOs in New York); NAT’L HOUS. L. PROJECT, CAL. P’SHIP TO END DOMESTIC VIOLENCE, WOMEN’S FOUND. OF CAL. & W. CTR. ON L. & POVERTY, *THE RIGHT TO A SAFE HOME ACT: AN OVERVIEW FOR CALIFORNIA ADVOCATES* (Dec. 2018) (discussing passage of a state law responding to CFNOs in California).

<sup>294</sup> See *supra* text accompanying notes 235–239 (summarizing local advocacy that preceded statewide legislative intervention targeted at CFNOs in New York).

<sup>295</sup> *Id.*; KATOVICH, *supra* note 133, at 10.

<sup>296</sup> See, e.g., KATOVICH, *supra* note 133, at 10.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 10, 12, 16, 17.

<sup>299</sup> *Id.* at 27.

<sup>300</sup> *Id.* at 28.

<sup>301</sup> Walz & Prochaska, *supra* note 293.

<sup>302</sup> *Id.*; WERTH, *supra* note 13, at 1.

against survivors of domestic violence.<sup>303</sup> The investigation in Illinois revealed, for example, that at least 35 municipalities based enforcement of their CFNOs on calls for police service.<sup>304</sup> This included some CFNOs that deemed it a violation of the ordinance for tenants to make an “unreasonably high number” of police calls, as well as others that set a certain threshold number of calls for police service that constituted a violation.<sup>305</sup>

Illinois advocates also met with stakeholders, such as tenants, social service providers, and property owners throughout the state, to gather data about the impact CFNOs were having on the ground.<sup>306</sup> In combination with public records, these meetings revealed the statewide consequences of CFNO enforcement.<sup>307</sup> Advocates then built a coalition of supporters to advocate for statewide legislation to address the problem.<sup>308</sup> The coalition included advocates focused on an array of different issues implicated by CFNOs, including civil rights, domestic violence, tenants’ rights, and the rights of individuals with disabilities.<sup>309</sup>

### 3. *Existing State Preemption Laws*

In response to these types of advocacy efforts, and armed with substantial evidence gathered by advocates of the statewide harms caused by CFNOs, the state legislatures in Illinois, New York, and a number of other states enacted preemption legislation restricting how local governments may enact or enforcement CFNOs.<sup>310</sup> In total, at least ten states have enacted some form of statewide preemption legislation aimed at mitigating the harms caused by CFNOs.<sup>311</sup>

These existing state laws targeting CFNOs generally operate by prohibiting municipalities from punishing landlords or tenants based on certain categories of calls to the police or emergency services.<sup>312</sup> Some laws carve out specific protections

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<sup>303</sup> Walz & Prochaska, *supra* note 293.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> See 65 ILL. COMP. STAT. 5 / 1–2–1.5 (2022); N.Y. CIV. RIGHTS LAW § 97 (McKinney 2022).

<sup>311</sup> See, e.g., CAL. GOV’T CODE § 53165(b) (West 2022); 65 ILL. COMP. STAT. 5 / 1–2–1.5 (2022); IND. CODE § 32-31-1-22(d) (2022); IOWA CODE § 562A.27B(2)(b) (2022); LA. STAT. ANN. § 33:9701(D)–(F) (2022); MINN. STAT. § 504B.205(3) (2022); NEV. REV. STAT. § 118A.515(2) (2022); N.Y. CIV. RIGHTS LAW § 93 (McKinney 2022); 53 PA. CONS. STAT. § 304(a) (2022); WIS. STAT. § 66.0627(7) (2022).

<sup>312</sup> See, e.g., CAL. GOV’T CODE § 53165(b) (West 2022); IND. CODE § 32-31-1-22(d) (2022); IOWA CODE § 562A.27B(2)(b) (2022); LA. STAT. ANN. § 33:9701(D)–(F) (2022); MINN. STAT. § 504B.205(3) (2022); NEV. REV. STAT. § 118A.515(2) (2022); N.Y. CIV. RIGHTS LAW § 93 (McKinney 2022); 53 PA. CONS. STAT. § 304(a) (2022).

for individuals with disabilities or survivors of domestic violence or sexual assault,<sup>313</sup> while others more broadly prohibit local governments from enacting laws that penalize landlords or tenants based on calls for emergency services.<sup>314</sup>

The law that was enacted in California in response to the proliferation of CFNOs in the state, for example, prohibits local governments from enacting or enforcing any ordinance that penalizes tenants or landlords due to “law enforcement assistance or emergency assistance being summoned by, or on behalf of, a victim of abuse, a victim of crime, or *an individual in an emergency*.”<sup>315</sup> By including all individuals in emergency situations, the California legislature included a broad scope of people protected by the preemption statute, compared with the narrower categories of protection enacted in several other states.<sup>316</sup> The California legislature is now in the process of considering a new state preemption law, which was introduced to target additional harmful effects of CFNOs.<sup>317</sup>

The law passed in New York similarly provides that “[a]ny person who is a victim of domestic violence . . . or who otherwise believes they are in need of police or emergency assistance has the right to request [it].”<sup>318</sup> It also prohibits the imposition of penalties based on someone’s efforts to seek emergency assistance or “because they reside at a property where domestic violence or other law enforcement or emergency response activity occurred.”<sup>319</sup> In doing so, the New York law extends some protection to all tenants who reside at a property targeted for CFNO enforcement—regardless of whether they were the victims of or involved in an emergency themselves.

Existing state preemption laws targeting CFNOs often include a private right of action as part of their enforcement mechanism.<sup>320</sup> For example, California’s law

<sup>313</sup> See, e.g., WIS. STAT. § 66.0627(7) (2022); 65 ILL. COMP. STAT. 5 / 1–2–1.5(b)(1) (2022).

<sup>314</sup> See, e.g., CAL. GOV’T CODE § 53165(b) (West 2022); IOWA CODE § 562A.27B(2)(b) (2022); IND. CODE § 32-31-1-22(d) (2022); LA. STAT. ANN. § 33:9701(D)–(F) (2022); MINN. STAT. § 504B.205(3) (2022); NEV. REV. STAT. § 118A.515(2) (2022); N.Y. CIV. RIGHTS LAW § 93 (McKinney 2022); 53 PA. CONS. STAT. § 304(b) (2022).

<sup>315</sup> See CAL. GOV’T CODE § 53165(b) (West 2022) (emphasis added).

<sup>316</sup> Compare CAL. GOV’T CODE § 53165(b) (West 2022) with 65 ILL. COMP. STAT. 5 / 1–2–1.5(b)(1) (2022) (carving out protections for calls for service related to incidents of domestic violence or made on behalf of individuals with disabilities); WIS. STAT. § 66.0627(7) (2022) (carving out protections for survivors of domestic and sexual violence).

<sup>317</sup> See Assemb. B. 1418, 2034 Cal. Leg., Reg. Sess. (CA 2023); Section IV.A.5, *infra* (discussing the scope of this bill).

<sup>318</sup> N.Y. CIV. RIGHTS LAW § 91 (McKinney 2022).

<sup>319</sup> *Id.*

<sup>320</sup> See, e.g., CAL. GOV’T CODE § 53165(c) (West 2022); 65 ILL. COMP. STAT. 5 / 1–2–1.5(c) (2022); IOWA CODE § 562A.27B(4) (2022); LA. STAT. ANN. § 33:9701(G)(2022); NEV. REV. STAT. § 118A.515(5) (2022); N.Y. CIV. RIGHTS LAW § 97 (McKinney 2022); 53 PA. CONS. STAT. § 304(c) (2022).

provides that if any local government violates the statute, a tenant, resident, landlord, or other person may obtain an injunctive order preventing the enforcement of a conflicting local law or other equitable relief deemed appropriate by a court.<sup>321</sup> Several laws also provide monetary damages for successful plaintiffs challenging CFNOs.<sup>322</sup> The law in Illinois provides that, if a local government enacts or enforces a law that violates the protections it sets out, a tenant or landlord may obtain compensatory damages, as well as injunctive and equitable relief.<sup>323</sup> Some of these state statutes also include fee shifting provisions, allowing plaintiffs who bring lawsuits under the statute’s private right of action to collect attorneys’ fees.<sup>324</sup>

#### 4. *Weaknesses of Existing State Preemption Laws*

While existing preemption laws targeting CFNOs provide critical protections to vulnerable populations, tenant and civil rights advocates have identified two primary limitations with the current statutory regimes. Existing laws usually have a limited scope of protections. Additionally, barriers to enforcement limit the practical effect of even the modest protections contained in the existing state laws.<sup>325</sup>

The existing state laws targeting CFNOs generally set out protections for limited categories of people—frequently including protections targeted specifically to victims of criminal activity, survivors of domestic violence, or individuals with disabilities.<sup>326</sup> Often, advocates and policymakers identified these limited protections as the most politically feasible when the laws were proposed.<sup>327</sup>

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<sup>321</sup> CAL. GOV’T CODE § 53165(c) (West 2022).

<sup>322</sup> See, e.g., 65 ILL. COMP. STAT. 5 / 1–2–1.5(c)(2) (2022); IOWA CODE § 562A.27B(4)(c) (2022); LA. STAT. ANN. § 33:9701(G)(2) (2022); NEV. REV. STAT. § 118A.515(5)(b) (2022); N.Y. CIV. RIGHTS LAW § 97 (McKinney 2022); 53 PA. CONS. STAT. § 304(c)(2) (2022).

<sup>323</sup> 65 ILL. COMP. STAT. 5 / 1–2–1.5(c) (2022).

<sup>324</sup> See, e.g., *id.* § 1–2–1.5(c)(3); IOWA CODE § 562A.27B(4)(d) (2022); NEV. REV. STAT. § 118A.515(5)(c) (2022); N.Y. CIV. RIGHTS LAW § 97 (McKinney 2022); 53 PA. CONS. STAT. § 304(c)(3) (2022).

<sup>325</sup> The challenges and recommendations in this Section are based on interviews with advocates involved with legislative responses to CFNOs in five states: Pennsylvania, Illinois, New York, California, and Iowa. Given the significant parallels in the experiences of these advocates, it is likely that the challenges and recommendations are relevant to advocates and policymakers exploring state-level solutions to CFNOs nationally.

<sup>326</sup> See *supra* Section IV.A.3 (describing the current scope of state preemption laws targeting CFNOs).

<sup>327</sup> See, e.g., Walz & Prochaska, *supra* note 293 (discussing legislative effort in Illinois); Video Interview with Allie Bohm, Pol’y Couns., N.Y. C.L. Union (June 21, 2021) (on file with author); Video Interview with Andy Hoover, Dir. of Commc’ns, ACLU of Pa. (July 8, 2021) (on file with author); Interview with Sandra Park, Senior Staff Att’y, ACLU Women’s Rts. Project (May 21, 2021) (on file with author).

The first state legislative efforts to combat CFNOs followed a federal lawsuit filed in 2013 challenging an ordinance in Norristown, Pennsylvania.<sup>328</sup> The lawsuit was filed by Lakisha Briggs, a domestic violence survivor who faced eviction from her home after requesting police protection from an abusive ex-boyfriend.<sup>329</sup> Due to the threatened consequences to her housing, Briggs became reluctant to call the police for future incidents, including one in which her ex-boyfriend attacked her with a brick.<sup>330</sup> When neighbors called the police on her behalf after an attack that resulted in Briggs being airlifted to the hospital, the city threatened her with eviction.<sup>331</sup> This lawsuit was widely publicized in the national media,<sup>332</sup> and ultimately led to a HUD investigation, conciliation agreement, and settlement in which Norristown agreed to repeal its CFNO and pay Ms. Briggs \$495,000 in compensation.<sup>333</sup>

In part motivated by Briggs' experience, both Republican and Democratic legislators in Pennsylvania worked together with advocates to pass statewide legislation targeting CFNOs in 2014.<sup>334</sup> The law prohibits municipalities from enforcing any provision in an ordinance which penalizes tenants or landlords for contacting police or emergency assistance on behalf of a victim of abuse or an individual in an emergency.<sup>335</sup> Similarly, the experience of a domestic violence survivor harmed by a CFNO in Des Moines, Iowa, prompted Iowa legislators to enact a preemption law

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<sup>328</sup> See Video Interview with Andy Hoover, *supra* note 327; Norristown Complaint, *supra* note 163; Borough of Norristown, Pa., Ordinance 12-15 (Dec. 4, 2012) (reserved).

<sup>329</sup> Norristown Complaint, *supra* note 163, at 1–2.

<sup>330</sup> *Id.* at 2, 12.

<sup>331</sup> *Id.* at 14–16; see also U.S. DEP'T OF HOUS. & URB. DEV, HUD NO. 14-121, HUD AND PHILADELPHIA-AREA BOROUGH SETTLE ALLEGATIONS OF HOUSING DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE (Oct. 2, 2014), <https://archives.hud.gov/news/2014/pr14-121.cfm>; U.S. DEP'T OF HOUS. & URB. DEV, HUD NO. 16-134, HUD ANNOUNCES NEW PROTECTIONS FOR VICTIMS OF HARASSMENT AND SURVIVORS OF DOMESTIC VIOLENCE (Sept. 13, 2016), <https://archives.hud.gov/news/2016/pr16-134.cfm>.

<sup>332</sup> See, e.g., Burns, *supra* note 124; Erik Eckholm, *Victim's Dilemma: 911 Calls Can Bring Eviction*, New York Times (Aug. 16, 2013), <https://www.nytimes.com/2013/08/17/us/victims-dilemma-911-calls-can-bring-eviction.html>; Am. Civ. Lib. Union, *Briggs v. Village of Norristown*, <https://www.aclu.org/cases/briggs-v-borough-norristown-et-al> [hereinafter *Briggs Case Summary*] (summarizing media coverage).

<sup>333</sup> See Norristown Settlement, *supra* note 163; *Briggs Case Summary*, *supra* note 332 (discussing case resolution).

<sup>334</sup> Video Interview with Andy Hoover, *supra* note 327; Video Interview with Cynthia Witman Daley, Dir. of Cmty. Dev. Initiative, Reg'l. Hous. Legal Serv. (July 8, 2021) (on file with author); Act of Oct. 31, 2014, 2014 Pa. Laws 3039 (codified as amended at 53 PA. CONS. STAT. § 304 (2022)) (prohibiting local governments from enacting ordinances penalizing tenants or landlords for contacting police or emergency assistance on behalf of a victim of abuse or an individual in an emergency).

<sup>335</sup> 53 PA. CONS. STAT. § 304(b) (2022).

targeting CFNOs throughout the state.<sup>336</sup> The Iowa law also provides tailored protections from CFNO enforcement for victims of abuse, crime victims, and individuals in emergency situations.<sup>337</sup>

State preemption laws targeting CFNOs are also frequently limited in scope in response to opposition from local governments.<sup>338</sup> In Illinois, for example, the bill that was introduced to combat the harms of CFNOs initially proposed preempting local governments from penalizing tenants or landlords based on any calls for police or emergency service.<sup>339</sup> In response to opposition, the sponsors and advocates advancing the legislation decided to narrow the bill to provide more tailored protection for survivors of domestic violence and individuals with disabilities.<sup>340</sup>

In states with CFNO legislation that carves out protections for narrow categories of tenants, advocates remain concerned that the narrow scope of these laws is limiting their impact and leading to ongoing harms.<sup>341</sup> Rather than repealing or significantly amending their CFNOs, several cities in Iowa simply amended them to incorporate the narrow limitations imposed by state law.<sup>342</sup> Similarly, in Illinois, the total number of CFNOs in the state has actually increased since the passage of the state law in 2015.<sup>343</sup> Several municipalities throughout the state have simply added in “carve-outs”—or limited protections for survivors of domestic violence and individuals with disabilities mirroring the state law—leaving the basic enforcement

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<sup>336</sup> Video Interview with Laura Hessburg, Iowa Coal. Against Domestic Violence (July 9, 2021) (on file with author); Act of May 27, 2016, 2016 Iowa Acts ch. 1120 (codified as amended at IOWA CODE § 562A.27B(2)(b) (2022)) (preempting any governmental authorization of penalties on tenants or landlords when a call for police service was made by or on behalf of a victim of abuse, crime, or in an emergency situation).

<sup>337</sup> IOWA CODE § 562A.27B(1) (2022).

<sup>338</sup> See Video Interview with Andy Hoover, *supra* note 327 (discussing the Pennsylvania legislative initiative); Interview with Sandra Park, *supra* note 327 (New York); Video Interview with Laura Hessburg, *supra* note 336 (Iowa); Video Interview with Renee Williams, Mariel Block, Marco Secura & Sarah Brandon, Nat’l Hous. L. Project (July 20, 2021) (on file with author) (California) [hereinafter NHLP Interview].

<sup>339</sup> Walz & Prochaska, *supra* note 293 (discussing S.B. 1547, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) (introduced)).

<sup>340</sup> *Id.*; see 65 ILL. COMP. STAT. 5 / 1–2–1.5(b)(1) (2022).

<sup>341</sup> See sources cited *supra* note 338.

<sup>342</sup> See, e.g., CEDAR RAPIDS, IOWA, GEN. ORDINANCES ch. 22A.03 (2022) (noting that “notwithstanding the foregoing, no penalty shall be imposed . . . because the resident, owner, tenant or landlord was a Victim of Abuse or Crime.”); see Video Interview with Rita Bettis Austen, Legal Dir., ACLU of Iowa (June 23, 2021) (on file with author).

<sup>343</sup> See WERTH, *supra* note 13, at Appendix A (indicating that there were at least 106 CFNOs in Illinois in 2013); *Illinois CFNOs*, *supra* note 52 (indicating that there are at least 123 CFNOs in Illinois in 2023).



structure and scope of the ordinance in place.<sup>344</sup> At least 30 Illinois municipalities continue to base CFNO enforcement on calls for police service, with most only including narrow carve-outs for survivors of domestic violence and individuals with disabilities as required by the state law.<sup>345</sup>

Unfortunately, in practice these types of carve-outs are often ineffective in providing the intended protections to vulnerable groups. Enforcement is typically left to the discretion of law enforcement and property owners, who may not recognize when a police call or visit is related to domestic violence or a person's disabilities. Many domestic violence-related calls are not directly coded by police or emergency dispatchers as "domestic violence," but may instead be categorized as incidents of excessive noise, disorderly conduct, or property damage.<sup>346</sup> As a result, the enforcement of CFNOs with carve-outs leads to continued harms, even to the populations they are intended to protect.

For example, in Cedar Rapids, one of the Iowa municipalities that incorporated a limited carve-out into its CFNO in response to the state law, domestic violence

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<sup>344</sup> See, e.g., VILLAGE OF NILES, ILL., CODE OF ORDINANCES ch. 22, art. XVII, § 22-591(d) (2022) (providing for no enforcement based on "[c]ontact made to police or other emergency services if (i) the contact was made with the intent to prevent or respond to a domestic violence or sexual violence . . . or (iii) the contact was made by on behalf of, or otherwise concerns an individual with a disability and the purpose of the contact was related to that individual's disability"); VILLAGE OF GLENWOOD, ILL., CODE OF ORDINANCES ch. 26, art. XI, § 812(4)(a) (2022) (providing exceptions in lease addendum for incidents where "contact made to the police or other emergency services was made where (i) the intent was to prevent or respond to domestic violence or sexual violence . . . or (iii) the contact was made by, on behalf of, or otherwise concerns an individual with a disability and the purpose of the contact was related to that individual's disability"); see also *Illinois CFNOs*, *supra* note 52 (surveying Illinois municipalities with CFNOs and finding at least 50 municipalities with similar protections carved out for individuals with disabilities and survivors of domestic violence).

<sup>345</sup> See, e.g., VILLAGE OF HAZEL CREST, ILL., GEN. ORDINANCES ch. 6, art. VI, § 6-70(a)(2) (2022) (defining a nuisance to include an "unreasonably high number of calls for police service"); VILLAGE OF BELLWOOD, ILL., CODE tit. XI, ch. 124, § 34(D)(2) (2020) (same); ELK GROVE VILLAGE, ILL., CODE tit. 3, ch. 22, § 6(e)(2) (2022) (same); CITY OF MOLINE, ILL., CODE div. 5, § 87500 (same); *Illinois CFNOs*, *supra* note 52. This number is likely higher in practice. It only accounts for those CFNOs which directly link penalties with calls for police service in the plain text of the ordinance. It does not take into account those municipalities which, in practice, employ calls for police or emergency services as a proxy for tracking incidents of alleged nuisance or criminal activity.

<sup>346</sup> See *HUD Issues Fair Housing Act Guidance to Help Domestic Violence Victims*, OFF. OF PUB. AFFS., U.S. DEP'T OF JUST. ARCHIVES (Nov. 21, 2016), <https://www.justice.gov/archives/opa/blog/hud-issues-fair-housing-act-guidance-help-domestic-violence-victims>.

survivors continue to be penalized under the enforcement of the CFNO.<sup>347</sup> Advocates fear that the incidents they become aware of are only the “tip of the iceberg.”<sup>348</sup> Similarly, the CFNO in Madison, Wisconsin, also provides a carve-out for survivors of domestic violence.<sup>349</sup> Despite this, a 2019 investigation found at least eight instances in which citations were issued to properties based in part on calls related to domestic violence.<sup>350</sup> Carve-outs of this kind also fail to address the broader range of harms caused by CFNOs. For example, several Illinois CFNOs continue to rely on police calls to trigger ordinance enforcement.<sup>351</sup> Many also still require the use of expansive crime-free lease addenda, and encourage property owners to pursue eviction of tenants who have done nothing more than residing at a property with someone else who has engaged in one of a broad range of criminal or quasi-criminal activities.<sup>352</sup>

There are also practical barriers to the enforcement of existing state preemption laws.<sup>353</sup> Broad scale community outreach and education are needed to inform impacted communities about their rights under the new CFNO preemption statutes, without which the new protections risk languishing as dead letter legislation.<sup>354</sup> Moreover, resource-strapped legal services providers are likely unable to take full advantage of the private right of action provided by state laws.<sup>355</sup> Even tenants who

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<sup>347</sup> Video Interview with Rita Bettis Austen, *supra* note 342; Video Interview with Laura Hessburg, *supra* note 336.

<sup>348</sup> Video Interview with Rita Bettis Austen, *supra* note 342.

<sup>349</sup> See MADISON, WIS., CODE OF ORDINANCES ch. 25, § 25.09(3)(b)(2) (2022) (indicating that incidents of domestic abuse should not be considered nuisance activity in light of the “strong public policy in favor of domestic victims reporting alleged abuses”).

<sup>350</sup> See Jarwala & Singh, *supra* note 20, at 913.

<sup>351</sup> See *Illinois CFNOs*, *supra* note 52 (documenting at least 30 municipalities with CFNO enforcement triggered by police calls); see also sources cited *supra* note 345.

<sup>352</sup> See, e.g., BERWYN, ILL., CODE OF ORDINANCES pt. 8, tit. 2, §§ 822.15–.16 (2022) (requiring the attachment of a lease addendum that indicates that the property owner will initiate eviction proceedings if a tenant “or any guest or co-occupant . . . engages in any criminal activity, that would violate state statutes or city ordinances, on or around the premises of the multi-tenant/mixed-use property”); BURBANK, ILL., CODE OF ORDINANCES ch. 8, art. XXV, div. 6, § 8-878 (2022) (requiring the attachment of a lease addendum prohibiting both criminal and “quasi-criminal activities”); COUNTRY CLUB HILLS, ILL., CODE OF ORDINANCES, ch. 13, art. 37, § 11(A)–(B) (2021) (requiring the attachment of a broad crime-free lease addendum prohibiting tenants, occupants, or their guests from engaging in “criminal activity within city limits”).

<sup>353</sup> See generally Video Interview with Allie Bohm, *supra* note 327; Video Interview with Jane Ni, Pol’y & Cmty. Engagement Coordinator, N.Y. Coal. Against Domestic Violence (July 2, 2021); NHLP Interview, *supra* note 338; Video Interview with Rita Bettis Austen, *supra* note 342.

<sup>354</sup> See Video Interview with Allie Bohm, *supra* note 327 (discussing barriers to the enforcement of the new state law in New York).

<sup>355</sup> See NHLP Interview, *supra* note 338; see also *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP., <https://justicegap.lsc.gov> (last visited Apr. 26, 2023) (setting out data revealing the current gap in access to legal services in the United States,

are able to find legal counsel to pursue an affirmative lawsuit may find they have opened the door for their landlord to counter-sue for back rent, which likely further dissuades tenants from pursuing valid claims related to CFNOs.<sup>356</sup> Absent formal enforcement, existing state laws have been used as a tool to negotiate with municipalities and educate them about their obligations and the risks of enacting and enforcing CFNOs.<sup>357</sup> Unfortunately, outside of a litigation context, informal negotiations of this kind yield one-off solutions at best, and infrequently lead to the repeal of problematic CFNOs or meaningful progress towards more equitable enforcement.<sup>358</sup>

### 5. *Considerations for Future State Preemption Laws*

State advocates and policymakers interested in responding to the harms of CFNOs should keep these weaknesses in mind in enacting new legislation on this issue, or in amending existing laws. The specific legislative enactments that are feasible will vary from state to state based on trends in local CFNO enforcement, political will, and the scope and structure of home rule constitutional delegations.<sup>359</sup> However, advocates and policymakers should aim to broadly preempt local government laws, policies, or programs that penalize landlords or tenants based on tenant contact with police or emergency services. Carve-outs for specific groups of tenants, such as survivors of domestic violence and individuals with disabilities, leave too much discretion in the hands of the local law enforcement officials tasked with carrying them out to be effective at achieving their intended goals.<sup>360</sup>

States could also craft preemption legislation that more broadly targets laws that encourage the eviction and exclusion from housing opportunities of individuals who have had contact with the criminal legal system. For example, states could preempt local laws, policies, or programs that impose penalties on landlords or tenants based solely on arrests or minor criminal charges.<sup>361</sup> States could also prohibit the imposition of penalties based on tenant conduct that has no connection with the health or safety of other tenants or tenants' ability to uphold their obligations

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including the fact that Americans do not get any or enough legal help for 92% of the legal problems that have had a substantial impact on them).

<sup>356</sup> Video Interview with Rita Bettis Austen, *supra* note 342.

<sup>357</sup> ACLU of Ill., *supra* note 224 (explaining that, after the state law targeting CFNOs passed in Illinois, advocates at the ACLU and Sargent Shriver National Center on Poverty Law sent over 40 letters to municipalities explaining their obligations and encouraging them to repeal or amend conflicting CFNOs).

<sup>358</sup> See, e.g., *Illinois CFNOs*, *supra* note 52 (surveying the current scope of CFNOs in Illinois).

<sup>359</sup> See *supra* Section IV.A.1.

<sup>360</sup> See *supra* Section IV.A.3.

<sup>361</sup> States could set out specific convictions in their criminal code that could justify penalties. States could also broadly categorize criminal convictions that cannot justify such penalties, such as misdemeanors or offenses that do not result in a felony conviction.

under their lease,<sup>362</sup> or prohibit local ordinances or programs that require or encourage landlords to adopt wide-reaching crime-free lease addenda which purport to expand the permissible bases for eviction beyond those provided for in state landlord–tenant law. Finally, states could preempt laws or policies that require or encourage the use of broad criminal background checks of prospective or current tenants.<sup>363</sup>

Beyond expanding the scope of preemption legislation targeting CFNOs, states interested in addressing the harms caused by CFNOs should incorporate strong and clear enforcement mechanisms into future legislative enactments. At a minimum, these laws should include private rights of action and fee-shifting provisions allowing tenants and property owners to hold municipalities accountable for violating state law. States could also require local governments to amend or repeal their ordinances to become compliant with the state law,<sup>364</sup> or incorporate specific grants of authority to state AGs or specialized state agencies to enforce the new prohibitions. State agencies already retain significant authority to enforce state laws targeting CFNOs.<sup>365</sup> However, specific grants of authority could allow states to bypass the hurdles associated with exercising that authority. For example, state laws could directly establish the right of state AGs to challenge CFNOs in court.<sup>366</sup> They could also direct state agencies to hire dedicated staff, issue targeted regulations, and collect

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<sup>362</sup> States with an existing framework of landlord–tenant protections could incorporate those into the legislation directly by preempting local laws that encourage or require the eviction of tenants based on a broader range of nuisance activities or alleged criminal activity.

<sup>363</sup> For example, a bill recently introduced in the California legislature, AB 1418, would prohibit any local laws that require or encourage a landlord to perform a criminal background check on a tenant or prospective tenant. *See* Assemb. B. 1418, 2034 Cal. Leg., Reg. Sess. (CA 2023). The bill would also broadly prohibit local governments from imposing penalties on landlords based solely on a tenant’s “contact with a law enforcement agency” or conduct that “does not result in a felony conviction based on an adult tenant’s use of the property in compliance with the lease or rental agreement.” *Id.* *See also* Liam Dillon, *Mandatory Evictions for Arrested Tenants Would Be Banned Under New State Bill*, L.A. TIMES (Feb. 18, 2023, 5:00 AM) <https://www.latimes.com/homeless-housing/story/2023-02-18/mandatory-evictions-for-arrested-tenants-would-be-banned-under-new-state-bill>.

<sup>364</sup> In addition to incorporating a private right of action, for example, AB 1418—the bill recently introduced in the California legislature—would affirmatively require local governments to repeal or bring their existing CFNOs into compliance with the prohibitions in the proposed law within one year of its enactment. *See* Assemb. B. 1418, 2034 Cal. Leg., Reg. Sess. (CA 2023). The bill would also deem any conflicting local laws unenforceable within that one-year period. *Id.*

<sup>365</sup> *See infra* Section IV.B (exploring the existing regulatory and enforcement authority states have to respond to CFNOs).

<sup>366</sup> *Id.* (discussing the promise and challenges associated with state AG litigation challenging CFNOs based on the common law standing doctrine of *parens patriae*); *see also* Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999, 1050 (2020) (discussing the value of specific legislative grants of authority to state AGs in the context of police misconduct regulation).

data from local governments regarding the scope and harms caused by CFNOs—strengthening formal and informal enforcement efforts at the state level.

Enacting broad legislation targeting CFNOs will require substantial support in state legislatures.<sup>367</sup> For this reason, advocates interested in advancing legislative initiatives of this kind should establish diverse coalitions across different interest groups to educate policymakers about the harms of CFNOs and the need for state-level action. Strategic relationships between landlord organizations, tenant advocates, advocates for victims of domestic violence, and civil rights organizations have been a critical component of previous successful advocacy campaigns against harmful CFNOs.<sup>368</sup> As landlord organizations and tenants' rights advocates are often on opposite sides of statewide legislative efforts, their unified interest in combatting CFNOs can be a powerful tool in advancing statewide legislation.<sup>369</sup>

State advocates working to combat the harms caused by CFNOs have further identified the promise of strengthening state-level protections targeting CFNOs in the future by connecting these efforts with broader movements to advocate for police reform and racial justice.<sup>370</sup> The murder of George Floyd and other headline-grabbing incidents of outrageous police violence and abuse galvanized America, and brought significant public discussion of police reform efforts previously considered radical, such as the movement to “defund the police” or reallocate funding away from police departments towards social services or community investment programs.<sup>371</sup> Building partnerships with grassroots police reform efforts could help to shift the framing of CFNO reform away from narrow efforts to protect survivors of domestic violence and victims of criminal activity towards more expansive, bolder reforms seeking to abolish these harmful local policies and practices entirely.<sup>372</sup>

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<sup>367</sup> Some states have heightened requirements for passing preemption legislation in home rule constitutional amendments. *See, e.g.*, ILL. CONST. art. VII § 6(g) (requiring a three-fifths majority vote to preempt local legislation in home rule municipalities).

<sup>368</sup> Video Interview with Laura Hessburg, *supra* note 336 (discussing the diverse coalition of advocates behind the legislative initiative in Iowa, including property owners); Video Interview with Rita Bettis Austen, *supra* note 342; Walz & Prochaska, *supra* note 293 (discussing the diverse coalition of advocates behind the legislative initiative in Illinois).

<sup>369</sup> Walz & Prochaska, *supra* note 293. Landlords face financial penalties through CFNO enforcement, so are often eager to see them limited or repealed. Video Interview with Laura Hessburg, *supra* note 336; Video Interview with Rita Bettis Austen, *supra* note 342.

<sup>370</sup> Video Interview with Andy Hoover, *supra* note 327; NHLP Interview, *supra* note 338.

<sup>371</sup> *See, e.g.*, Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>.

<sup>372</sup> *See* Audra Wilson, Eric Sirota & Tex Pasley, *Crime-Free and Nuisance Property Ordinances Should Be Abolished*, SHRIVER CTR. ON POVERTY L. (Oct. 9, 2020), <https://www.povertylaw.org/article/crime-free-and-nuisance-property-ordinances-should-be-abolished/> (discussing the importance of including CFNO advocacy in broader conversations about police reform: “We cannot talk about dismantling systems of racial oppression and in turn, police reform, without

Relying on state preemption as a tool to limit the harmful impact of CFNOs poses some risks for advocates and policymakers committed to advancing goals of racial justice and civil rights more broadly, beyond the specific issues related to CFNOs. In recent years, state preemption has shifted from a tool to place reasonable limitations on local government power to one wielded by Republican legislative majorities to block policy initiatives enacted by more progressive local governments, often in larger cities governed by Democratic leaders.<sup>373</sup> This has resulted, in part, from a concerted effort by the American Legislative Exchange Council (ALEC)—a conservative nonprofit known for writing model legislation and advancing it through partners in the legislature<sup>374</sup>—to preempt progressive local policies.<sup>375</sup>

The scope of this new genre of state preemption legislation is significant. At least 28 states have preempted local minimum wage legislation,<sup>376</sup> and 23 states have preempted local paid leave legislation.<sup>377</sup> Preemption legislation has also been enacted to roll back local regulations related to environmental protection, public health, firearms restrictions, and so-called “sanctuary cities.”<sup>378</sup> States have also preempted local antidiscrimination laws.<sup>379</sup> Some states have even enacted laws that penalize local governments or officials for enacting legislation that conflicts with

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considering one of the most blunt civil instruments law enforcement and local governments have at their disposal: [CFNOs]”).

<sup>373</sup> See Richard Briffault, Nestor Davidson, Paul A. Diller, Olatunde Johnson & Richard C. Shragger, Issue Brief, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, AM. CONST. SOC’Y L. & POL’Y, Sept. 2017, at 1, 5.

<sup>374</sup> See Molly Jackman, *ALEC’s Influence Over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/>.

<sup>375</sup> Thomas Silverstein, *Combating State Preemption Without Falling into the Local Control Trap*, POVERTY & RACE, Oct.–Dec. 2017, at 1, 1–2 (“It is clear that . . . many state legislatures are exercising their power to preempt local laws in a manner that frustrates racial justice goals and reduces the political self-determination of people of color. . . . [f]or those familiar with civil rights history, however, the need for constraints on local control is equally clear”).

<sup>376</sup> NICOLE DUPUIS, TREVOR LANGAN, CHRISTIANA MCFARLAND, ANGELINA PANETTIERI & BROOKS RAINWATER, NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 6 (2018).

<sup>377</sup> *Id.* at 8.

<sup>378</sup> Briffault et al., *supra* note 373, at 5; see also DUPUIS ET AL., *supra* note 376, at 23 (discussing trends in other areas of state preemption legislation, including plastic bags, firearms, nutrition, and inclusionary zoning and rent control).

<sup>379</sup> The state of North Carolina’s preemption of the city of Charlotte’s ordinance protecting LGBTQ residents from discrimination in places of public accommodation serves as one high-profile example. See Briffault et al., *supra* note 373, at 7 (citing Act of Mar. 23, 2016, sec. 1.3, § 143-760, 2016 N.C. Sess. Laws 12, 12–14 (repealed 2017)) (discussing North Carolina’s success in blocking Charlotte’s ordinance extending nondiscrimination protections to LGBTQ residents).

state law, beyond the ordinary remedy for state preemption legislation of simply invalidating the conflicting local law.<sup>380</sup>

While this recent trend of state-level preemption being used to restrict progress and innovation at the local level is troubling, it does not indicate that state preemption is never warranted, or should be categorically rejected by civil rights and tenants advocates and allied lawmakers. States retain a critical role in reining in local policies that have harmful effects beyond municipal borders and in advancing compelling state interests, such as preventing discrimination.<sup>381</sup> However, this trend does warrant thoughtful consideration by advocates and policymakers interested in advancing preemption legislation targeting CFNOs, as it poses practical and political concerns.

In some states, advancing preemption legislation of any kind risks opening the door to add-on provisions, derailing the legislative initiative or leading to harmful, unintended consequences. Due to home rule structures, state legislatures seeking to invalidate local laws may be required to enact preemption legislation with an express statement that local authority will be preempted by the state legislative action—or even with a vote of the legislature beyond the standard majority vote.<sup>382</sup> In part due to these factors, it is increasingly common for states to pass umbrella preemption laws, targeting several local policy issues simultaneously.<sup>383</sup>

The use of multi-issue preemption legislation as a political tool to restrict civil rights and social progress at a local level has already presented some challenges for advocates interested in advancing legislation targeting CFNOs. For example, in Pennsylvania, when advocates were advancing a state preemption statute in response

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<sup>380</sup> See, e.g., Briffault et al., *supra* note 373, at 9 (first citing ARIZ. REV. STAT. ANN. § 41-194.01(B) (2020), *invalidated by* State *ex rel.* Brnovich v. City of Phoenix, 468 P.3d 1200 (Ariz. 2020); then citing OKLA. STAT. tit. 21, § 1289.24(D) (2022); and then citing FLA. STAT. § 790.33(3)(c) (2017), *invalidated by* Marcus v. Scott, No. 2012-ca-001260, 2014 WL 3797314 (Fla. Cir. Ct. June 2, 2014)) (discussing legislation in Arizona that placed local governments at risk of losing funding if they did not remove local policies in conflict with state law, and legislation in Florida and Oklahoma that imposed civil or criminal sanctions on local officials in preemption conflicts).

<sup>381</sup> See *supra* Section IV.A.1.

<sup>382</sup> See, e.g., ILL. CONST. art. VII § 6(g) (if a local law being preempted is in an area that the state has not yet regulated, a three-fifths majority is required to preempt the local law).

<sup>383</sup> Erin Adele Scharf, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J., 1469, 1484–86 (2018); *id.* at 1486 (citing MICH. COMP. LAWS §§ 123.1381–.1396 (2022) (broad preemption statute passed in Michigan in 2015 preventing “local governments from regulating many aspects of employment, including wages, benefits, application questions, and legal remedies for violations of state wage and hour claims.”); *id.* (citing H. File 295, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) (Iowa statute passed in 2017 preempting a similar range of local employment laws, as well as local regulation of the use of plastic bags)).

to CFNOs, Philadelphia was considering a paid leave ordinance.<sup>384</sup> In response, Republican legislators proposed an amendment to the CFNO preemption statute that would have also preempted municipalities from requiring employers to provide paid leave.<sup>385</sup> The addition of the paid leave amendment to the CFNO bill nearly resulted in the derailment of the legislation.<sup>386</sup> However, a vote to revert to a prior version of the bill—removing the amendment related to paid leave—was ultimately successful, allowing the legislation to proceed unencumbered.<sup>387</sup>

In Iowa, state legislation targeting CFNOs passed at a time when there was split-party control in the statehouse.<sup>388</sup> Since that time, the political landscape in the state has shifted, with both the Iowa House and Senate controlled by Republicans. Under unified Republican control, the Iowa State Legislature has taken action to block a variety of local laws and initiatives through preemption legislation.<sup>389</sup> State legislators in Iowa have “overturned already-enacted minimum wage increases in three counties, and . . . passed a sweeping immigration enforcement law threatening local governments with the loss of funding if they refuse to comply with the new requirements.”<sup>390</sup> According to advocates involved with the state-level response to CFNOs in Iowa, a similar initiative targeting CFNOs proposed in the current political environment faces the risk of being weighed down and stalled by unrelated detrimental preemption proposals.<sup>391</sup>

Understanding these practical and political considerations, state-level advocates and policymakers should not be discouraged from pursuing state preemption legislation to curb the spread of CFNOs. Where there is evidence of a statewide trend of CFNOs harming tenants and communities, this authority remains well suited to rein them in, and should be employed where appropriate as part of a broader range of policy responses to harmful CFNOs.<sup>392</sup>

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<sup>384</sup> Video Interview with Cynthia Witman Daley, *supra* note 334.

<sup>385</sup> *Id.*; see also H.B. 1796, Gen. Assemb., 2013 Reg. Sess. (Pa. 2013) (introduced for consideration on March 11, 2014, including the paid leave amendment).

<sup>386</sup> Video Interview with Cynthia Witman Daley, *supra* note 334.

<sup>387</sup> See S. JOURNAL, 198th Gen. Assemb., 2014 Sess. 2421 (Pa. 2014).

<sup>388</sup> Video Interview with Rita Bettis Austen, *supra* note 342.

<sup>389</sup> Scott Stewart, *Iowa Part of National Trend Placing Limits on Local Control*, DES MOINES REG. (June 25, 2018), <https://www.desmoinesregister.com/story/news/politics/2018/06/24/iowa-legislature-home-rule-legislation-limiting-local-control-national-league-cities/729175002/>.

<sup>390</sup> *Id.*

<sup>391</sup> Video Interview with Rita Bettis Austen, *supra* note 342.

<sup>392</sup> See *supra* Part III (discussing local- and federal-level responses to CFNOs).



## B. Enforcement and Regulatory Responses

Particularly in light of the challenges associated with state legislative enactments targeting CFNOs,<sup>393</sup> state advocates and policymakers interested in taking action in response to CFNOs should consider the full range of state-level authority that can be leveraged on this issue. State AGs have a broad range of authority, including the power to litigate on behalf of the state using *parens patriae* standing. States can also employ specialized state agencies and state fair housing planning processes to hold municipalities accountable for discriminatory CFNOs.

### 1. State Attorneys General

State AGs have a wide range of powers. While the specific scope of their authority can vary from state to state based on statute, common law, and state constitutional authority,<sup>394</sup> these powers generally include litigating on behalf of the state, providing formal opinions clarifying the law, public advocacy, law reform, and investigative authority.<sup>395</sup> One important power of state AGs is the authority to litigate on behalf of the state to protect the public interest using *parens patriae*—parent of the country—standing.<sup>396</sup>

The seminal U.S. Supreme Court case discussing the scope of this doctrine is *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.<sup>397</sup> In this case, the Court set out guidelines for when states may permissibly invoke *parens patriae* standing to bring a lawsuit to protect the “well-being of its populace.”<sup>398</sup> States invoking *parens patriae* standing generally must demonstrate a quasi-sovereign interest. The Supreme Court declined to provide “an exhaustive formal definition [or] a definitive list of qualifying interests [that] can be presented in the abstract.”<sup>399</sup> However, one

<sup>393</sup> See *supra* Section IV.A.4.

<sup>394</sup> Emily Myers, *Origin and Development of the Office*, in STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 1, 10–11 (Emily Myers ed., 3d ed. 2013).

<sup>395</sup> *Id.* at 11.

<sup>396</sup> The doctrine of *parens patriae* standing sets out criteria for a state AG to be able to satisfy the requirements of Article III standing to bring suit in federal court. State courts may have standing requirements that differ from Article III standing. However, state court standing doctrines permitting state AGs to bring suit to protect the public interest generally follow the same or similar principles as *parens patriae* standing, and regularly rely on federal precedent. See, e.g., Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1883 (2000); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae*, 49 BOS. COLL. L. REV. 913, 934 (2008).

<sup>397</sup> 458 U.S. 592 (1982).

<sup>398</sup> *Id.* at 602.

<sup>399</sup> *Id.* at 607.

category of interests upon which a state may base its *parens patriae* standing is the health and well-being of its residents.<sup>400</sup>

In addition to demonstrating a sufficient “quasi-sovereign” interest, states must also show the alleged injury is sufficiently widespread among the population of the state to justify the invocation of *parens patriae* standing. The Court in *Snapp* did not attempt “to draw any definitive limits” on what proportion of the population must be adversely affected,<sup>401</sup> and instructed courts to consider “indirect effects of the injury” in determining whether a sufficiently substantial segment of the state’s population is affected.<sup>402</sup> Discriminatory policies and practices may be particularly likely to justify the invocation of *parens patriae* standing, as they carry significant indirect effects.<sup>403</sup>

Discriminatory policies and practices harm both the individuals who have been discriminated against, as well as the broader segment of the population who may be subject to discrimination.<sup>404</sup> They may also undermine state values in preventing discrimination and allowing all people in the state to “maintain personal dignity, realize their full productive capacities, and further their interests, rights, and privileges as residents of [the state].”<sup>405</sup> Discriminatory housing policies and practices also have ripple effects beyond the borders of the community where they are enforced, as they inevitably increase residential segregation and marginalization regionally.<sup>406</sup>

The important state interest in protecting residents from discrimination was discussed by the Court in *Snapp*.<sup>407</sup> In *Snapp*, Puerto Rico invoked *parens patriae* standing to sue Virginia apple growers for discriminating against Puerto Rican

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<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 618 (2017).

<sup>404</sup> *Id.*; see also Complaint at 4–6, State v. City of Chicago, No. 17-cv-6260, 2019 WL 398703 (N.D. Ill. Jan. 31, 2019) [hereinafter Chicago Complaint] (setting out basis for *parens patriae* standing to challenge discriminatory policies and practices of the Chicago Police Department based on the alleged harms to those directly impacted, as well as those at risk of discrimination in the future).

<sup>405</sup> See, e.g., Chicago Complaint, *supra* note 404, at 5–6 (citing the Illinois Human Rights Act, 775 ILL. COMP. STAT. 5 / 1-102(E) (2022), to establish the state’s broader interest in preventing the discrimination at issue).

<sup>406</sup> See *supra* Section I.D.

<sup>407</sup> *Snapp*, 485 U.S. at 609 (“Just as we have long recognized that a State’s interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, we recognize a similar state interest in securing residents from the harmful effects of discrimination.”).

workers, alleging violations of federal law.<sup>408</sup> The Court approved this use of *parens patriae* standing, recognizing the state's interest in protecting its residents from the "harmful effects of discrimination" as part of its obligation to protect the "health and well-being of its residents."<sup>409</sup> It noted that the Court "has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils."<sup>410</sup>

Relying on these principles, several state AG's have invoked *parens patriae* standing to challenge discriminatory actions taken by local governments, including discriminatory law enforcement practices. For example, several state AGs have relied on *parens patriae* standing to bring litigation alleging widespread patterns and practices of unconstitutional policing pervading a municipality's police department—many of which have resulted in broad consent decrees reforming police procedures in those cities.<sup>411</sup> In one prominent example, the Illinois AG filed a federal lawsuit against the Chicago Police Department (CPD) in 2018, alleging that CPD had engaged in "a repeated pattern of using excessive force, including deadly force, and other misconduct that disproportionately harms Chicago's African American and Latino residents."<sup>412</sup>

The Illinois AG asserted that the state had a quasi-sovereign interest in the prevention of harm to the "individuals who are, have been, or would be victims" of the CPD's discriminatory policies and practices.<sup>413</sup> Other state AGs, including in Pennsylvania<sup>414</sup> and New York,<sup>415</sup> have similarly invoked the doctrine of *parens patriae* to seek consent decrees to remedy the discriminatory conduct of local police departments. The New York AG also successfully relied on *parens patriae* standing to challenge discriminatory zoning practices which violated the FHA.<sup>416</sup>

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<sup>408</sup> *Id.* at 594–97. The Court treated Puerto Rico as a state for the purpose of this analysis. *Id.* at 608 n.15.

<sup>409</sup> *Id.* at 609.

<sup>410</sup> *Id.*

<sup>411</sup> See Chicago Complaint, *supra* note 404; Pennsylvania v. Porter, 659 F.2d 306, 315–17 (3d Cir. 1981) (en banc); State v. Town of Wallkill, No. 01-Civ-0364, 2001 U.S. Dist. LEXIS 13364, at \*2 (S.D.N.Y. Mar. 16, 2001); Mazzone & Rushin, *supra* note 366, at 1006–08, 1063–67 (summarizing state AG litigation challenging discriminatory policies and practices by local police departments).

<sup>412</sup> Chicago Complaint, *supra* note 404, at 1; see also Consent Decree, State v. City of Chicago, No. 17-cv-6260, 2019 WL 398703 (N.D. Ill. Jan. 31, 2019).

<sup>413</sup> Chicago Complaint, *supra* note 404, at 5.

<sup>414</sup> Pennsylvania v. Porter, 659 F.2d 306, 315–17.

<sup>415</sup> State v. Town of Wallkill, No. 01-Civ-0364, 2001 U.S. Dist. LEXIS 13364, at \*2.

<sup>416</sup> Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford, 799 F. Supp. 272, 277 (N.D.N.Y. 1992) (holding that a state AG had *parens patriae* standing to challenge alleged

In light of the discriminatory impact many CFNOs have on several protected classes,<sup>417</sup> the doctrine of *parens patriae* provides a strong basis for state AGs to assert standing to challenge them in some circumstances. However, this approach is not without its pitfalls, and careful work is required both pre-filing and during the course of the litigation to develop a compelling record of a sufficiently widespread problem to justify the use of *parens patriae* standing.

To date, there is only one example of a state AG invoking *parens patriae* standing to challenge the discriminatory effect of CFNOs. In 2019, the Washington AG filed suit against the city of Sunnyside, raising an array of state and federal claims which alleged that Sunnyside’s CFNO was enforced in a discriminatory manner.<sup>418</sup> This lawsuit followed an investigation by the Washington AG, which discovered Sunnyside’s CFNO had resulted in a pattern of unlawful evictions without due process, disproportionately impacting Latinx communities and women.<sup>419</sup>

In support of its claimed *parens patriae* standing, the Washington AG alleged that a significant number of Washington residents live in cities with similar programs,<sup>420</sup> and that this gave Washington a “compelling interest in protecting its residents—especially its most vulnerable—from enforcement of [CFNOs] in ways that deprive residents of their federal and state constitutional and statutory rights and adversely impact their health and well-being.”<sup>421</sup>

The court initially rejected the Washington AG’s standing argument at the motion to dismiss stage, concluding that the State had failed to show harm to a sufficiently substantial population.<sup>422</sup> The court noted that the complaint only alleged a handful of incidents of harm in Sunnyside itself, and that Sunnyside is a

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discriminatory zoning practices by village officials against individuals with AIDS under the Fair Housing Act and 42 U.S.C. § 1983).

<sup>417</sup> See *supra* Sections I.C–II.B.

<sup>418</sup> Complaint for Declaratory Relief, Injunctive Relief, and Damages at 1, 10–11, *State v. City of Sunnyside*, No. 1:19-cv-03174 (E.D. Wash. dismissed without prejudice Dec. 6, 2019) (on file with U.S. Dist. Ct. E. Dist. of Wash.) [hereinafter 2019 Sunnyside Complaint].

<sup>419</sup> Press Release, Wash. State Off. of Att’y Gen., Attorney General Ferguson Files Federal Civil Rights Lawsuit Against City of Sunnyside (July 30, 2019), <https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-files-federal-civil-rights-lawsuit-against-city>.

<sup>420</sup> 2019 Sunnyside Complaint, *supra* note 418, at 2 (noting that “Tacoma, Bellingham, Spokane, Pasco, Yakima, Prosser, Tukwila, Kent, Walla Walla, University Place, Othello, and Port Orchard all currently have some form of [CFNO]. Other cities, such as Shelton and Moses Lake, are considering implementing [one]”).

<sup>421</sup> *Id.*

<sup>422</sup> Order Granting Defendants’ Motion to Dismiss and Dismissing Without Prejudice at 10–11, *State v. City of Sunnyside*, No. 1:19-cv-03174 (E.D. Wash. Dec. 6, 2019) (on file with U.S. Dist. Ct. E. Dist. of Wash.).

relatively small municipality, with a population of only 16,000.<sup>423</sup> The court concluded that it could not “infer from allegations limited to a small city the size of Sunnyside that there are widespread discriminatory actions” at issue.<sup>424</sup> The court dismissed the lawsuit without prejudice, permitting the Washington AG to refile with additional details to support its standing argument.<sup>425</sup>

In 2020, the Washington AG did just that, refileing the claims against Sunnyside with expanded factual allegations about the breadth of the harms caused by the CFNO in support of its *parens patriae* standing.<sup>426</sup> For example, it alleged that “there are approximately 2,800,000 occupied housing units in the state of Washington and over 37 percent of them are rental properties,” and that the majority of the state’s Latinx population lives in rental housing.<sup>427</sup> It also alleged that at least 14 Washington cities have similar programs, and three have “terms that are materially identical to the Sunnyside ordinance.”<sup>428</sup> It noted, in particular, that “neighboring Othello . . . enacted a nearly identical ordinance,” suggesting that Sunnyside’s ordinance could serve as a model for other municipalities in the state, expanding its harms to residents throughout the state.<sup>429</sup>

As a result of these and other expanded allegations, the court concluded at the motion to dismiss stage that, “unlike in the prior lawsuit,” the Washington AG “articulated a sufficient basis” for *parens patriae* standing.<sup>430</sup> It reasoned that the lawsuit furthered the goals of protecting the health and welfare of Washington residents and avoiding the “strain on public resources posed by increased homelessness, displacement, and family separation” resulting from the CFNO.<sup>431</sup> It also found it compelling that the State pointed to a “discriminatory pattern of conduct” by Sunnyside that could spread statewide by creating a model for other communities to follow.<sup>432</sup> It thus concluded that the state AG “unmistakably assert[ed] interests separate from

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<sup>423</sup> *Id.* at 11.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.* at 12–13.

<sup>426</sup> Complaint for Declaratory Relief, Injunctive Relief, and Damages, State v. City of Sunnyside, No. 20-2-00411-39 (Sup. Ct. Yakima Cnty. removed Feb. 6, 2020) [hereinafter 2020 Sunnyside Complaint]; Order Denying Defendants’ Motion to Dismiss, No. 1:19-cv-03018, 2020 U.S. Dist. LEXIS 251805, at \*1–11 (E.D. Wash. July 22, 2022) [hereinafter 2020 Sunnyside MTD Order]. This lawsuit was initially filed in Yakima County Superior Court and subsequently removed to the Eastern District of Washington. Notice of Removal of Action, State v. City of Sunnyside, No. 1:19-cv-03018, 2021 U.S. Dist. LEXIS 94473 (E.D. Wash. Feb. 6, 2020).

<sup>427</sup> 2020 Sunnyside Complaint, *supra* note 426, at 2, 11–12.

<sup>428</sup> *Id.* at 13.

<sup>429</sup> *Id.*

<sup>430</sup> 2020 Sunnyside MTD Order, *supra* note 426, at \*17.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

the interests of those directly affected,” and allowed the lawsuit to proceed based on *parens patriae* standing.<sup>433</sup>

However, at the summary judgement stage, the court reversed course, concluding that the Washington AG had failed to develop evidence in the record of a harm to a sufficiently substantial segment of the population to support *parens patriae* standing.<sup>434</sup> The Washington AG argued that it had developed significant evidence in the form of declarations from impacted tenants and property owners and police reports documenting informal evictions carried out pursuant to the CFNO.<sup>435</sup> However, the court scrutinized the individual incidents cited by Washington, and concluded that the evidence did not support a causal connection between the documented misconduct and the challenged CFNO.<sup>436</sup> The court noted, for example, that no notices were issued under the CFNO in several of the cases, so the evidence did not establish that the evictions at issue resulted directly from the CFNO.<sup>437</sup> Thus, the court found there was no evidence in the record of a pattern of discrimination flowing from enforcement of the CFNO, and thus no quasi-sovereign interest sufficient to support *parens patriae* standing.<sup>438</sup>

The court’s conclusion in *Sunnyside* highlights the challenge of demonstrating harm caused by CFNOs when many of the enforcement mechanisms employed by municipalities with CFNOs are informal.<sup>439</sup> However, it should not dissuade state AGs from pursuing litigation challenging CFNOs on the basis of *parens patriae* standing. Rather, the *Sunnyside* litigation demonstrates that the statewide scope of harms posed by CFNOs can support a *parens patriae* claim, provided that sufficient

<sup>433</sup> *Id.*

<sup>434</sup> Order Granting Defendants’ Motion for Summary Judgement, No. 1:19-cv-03018, 2021 U.S. Dist. LEXIS 94473, at \*31–33 (E.D. Wash. May 18, 2021).

<sup>435</sup> *Id.* at \*7–8.

<sup>436</sup> *Id.* at \*15–30.

<sup>437</sup> *Id.* at \*16–17, \*19–20, \*22–23, \*25.

<sup>438</sup> *Id.* at \*32. The federal court remanded the State’s claims to Washington state court for determination under state court standing doctrine. *See* Order Granting Plaintiff’s Motion to Amend Judgment, No. 1:19-cv-03018, 2021 U.S. Dist. LEXIS 161999, at \*6–7 (E.D. Wash. Aug. 26, 2021). However, the state court ultimately granted Sunnyside’s motion for summary judgment on standing grounds as well. *See* Order Granting Defendants’ Motion for Summary Judgment at 3, *State v. City of Sunnyside*, No. 20-2-0041-39 (Yakima Cnty. Super. Ct. filed June 16, 2022). The Washington AG’s appeal to the Washington Supreme Court is pending. Notice of Appeal to the Washington Supreme Court, *State v. City of Sunnyside*, No. 20-2-0041-39 (Yakima Cnty. Super. Ct. filed Aug. 8, 2022).

<sup>439</sup> *See, e.g.,* Smith, *supra* note 48 (describing day-to-day enforcement activities of officials charged with CFNO enforcement in several states, which often involves informal information sharing between police and property owners leading to evictions); Desmond & Valdez, *supra* note 54, at 123 (discussing the prevalence of informal evictions and threats of eviction as a response to CFNO enforcement).

evidence can be developed in discovery to document the harms. It also provides guidance on the circumstances under which state AGs should pursue these claims.

Arguments to invoke *parens patriae* standing to pursue claims against CFNOs will be particularly strong in jurisdictions where CFNOs are prevalent throughout the state and share common features or structures that lend themselves to statewide analysis or generalities between municipalities. Proof of a large number of residents directly impacted or potentially impacted by CFNO enforcement is also likely to help support this standing argument. State AGs interested in challenging CFNOs should gather evidence regarding the direct harms they cause, including evidence of notices sent by local governments to landlords imposing penalties or encouraging eviction to abate a “nuisance” activity, testimony from property owners who were pressured to evict tenants as a result of CFNO enforcement, and testimony from tenants displaced as a result of CFNO enforcement. This kind of evidence could be used to demonstrate a pattern of harmful conduct, likely to spread from one community to others—satisfying the requirement of a quasi-sovereign interest sufficient to support *parens patriae* standing.

Even short of litigation, there are several steps that state AGs can take to respond to the proliferation of harmful CFNOs. For example, state AGs have significant investigative authority, often including pre-litigation subpoena power.<sup>440</sup> State AGs can employ this power to investigate and monitor for statewide trends in CFNO enactment and enforcement. State AGs also have a significant “bully pulpit” to shape public discourse and draw attention to issues of public concern. State AGs can leverage this ability to publicize the results of their investigations, and convene meetings with stakeholders—including representatives of local governments, property owners, tenants, advocates for survivors of domestic violence and individuals with disabilities—to press more informally for needed local policy change.<sup>441</sup>

Another important power of state AGs is their authority to provide legal and policy advice and interpretations to the governor, legislators, and administrative

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<sup>440</sup> Lainie Rutkow & Stephen P. Teret, *The Potential for State Attorneys General to Promote the Public's Health: Theory, Evidence, and Practice*, 30 ST. LOUIS U. PUB. L. REV. 267, 275 (2011); see also Myers, *supra* note 394, at 11.

<sup>441</sup> Rutkow & Teret, *supra* note 440, at 276–77. For example, the Illinois AG recently made a public statement regarding the civil rights threats posed by CFNOs in the state, in light of their impact on “domestic violence survivors, individuals with disabilities, persons with arrest records and others” in a press release urging local governments with CFNOs to assess them to ensure they are meeting their obligations under state and federal civil rights law. See IDHR Press Release, IDHR Releases Public Safety and Fair Housing Guidebook with UIC Law Fair Housing Legal Support Center and Clinic (Jan. 30, 2023), available at <https://dhr.illinois.gov/content/dam/soi/en/web/dhr/publications/documents/Final-Nuisance%20and%20Crime-free%20Guidebook-V5-vv.pdf> [hereinafter *IDHR Press Release*].

agencies. State AGs often complete this task through written advisory opinions.<sup>442</sup> Typically, before a state AG may issue a written opinion, a state official or agency must request one.<sup>443</sup> Once such a request has been made and an opinion issued, is the advisory opinion is generally given great deference—both by other state agencies and by courts called upon to address the legal issue on which the state AG has opined.<sup>444</sup> Indeed, state AG opinions have both a “direct effect on the administration of state government” and are granted significant deference and consideration by state courts considering legal issues addressed by the opinion.<sup>445</sup> State AG opinions could be another useful tool in curbing the harms of CFNOs, by offering interpretations of existing state laws that prohibit certain harmful aspects of CFNO enforcement.<sup>446</sup> State AGs are also well positioned to amplify their work by sharing resources and strategies nationally. While CFNOs and the problems they raise vary from state to state, common themes arise throughout the country.<sup>447</sup> State AGs engaged in CFNO investigation and enforcement could share resources gathered with other state AGs through organizations like the National Association of Attorneys General.<sup>448</sup>

## 2. *Specialized State Agencies*

States can also employ specialized state agencies, such as state departments of human rights or fair housing, to tackle the problems caused by CFNO enforcement. Nearly all states have adopted their own fair housing laws, often expanding on the protections in the federal FHA.<sup>449</sup> Anticipating that state governments will enact and enforce their own housing statutes, HUD also facilitates a Fair Housing Assistance Program (FHAP), which provides annual funding to agencies that administer

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<sup>442</sup> Emily Myers, *Opinions*, in STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 394, at 75.

<sup>443</sup> *Id.* at 75.

<sup>444</sup> Winthrop Jordan, Comment, *The State Attorney General's Duty to Advise as a Source of Law*, U. RICH. L. REV. 1139, 1140, 1152 (2020).

<sup>445</sup> *Id.* at 1140, 1152-1154 (explaining the significant power that state AG opinions have to alter the rights, duties, and relations of parties before state courts).

<sup>446</sup> Regardless of whether a state has passed a preemption law specifically targeting CFNOs, their enforcement implicates a range of state and federal laws. For a summary of those laws, see *supra* Section II. For this reason, a state official or agency could request a legal opinion interpreting the laws implicated by CFNOs as they apply to local CFNOs in general or specific CFNOs. Such an opinion could assist with policy advocacy or litigation.

<sup>447</sup> See *supra* Section I.C.

<sup>448</sup> NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/> (last visited Apr. 26, 2023).

<sup>449</sup> See *State Fair Housing Protections*, *supra* note 208 (under Filter “1. Does the state prohibit discrimination in housing-related transactions?”, select “Yes”).



fair housing laws.<sup>450</sup> In most states, the FHAP is administered by a specialized state agency, for example, state departments of fair housing,<sup>451</sup> equal opportunity or antidiscrimination,<sup>452</sup> civil rights,<sup>453</sup> or human rights, human relations, or human affairs.<sup>454</sup>

Depending on their scope and focus, specialized state agencies may be able to enforce existing state laws, such as state civil rights or antidiscrimination statutes, or legal protections specifically targeting CFNOs.<sup>455</sup> Specialized state agencies may also be able to initiate investigations or enforcement actions, or issue regulations or informal guidance targeting CFNOs.

For example, California's Department of Fair Employment and Housing (DFEH) promulgated regulations to respond to the harms caused by CFNOs.<sup>456</sup> The DFEH regulations prohibit local policies or practices that require action based on "broad definitions of nuisance activities . . . or based upon broad definitions of unlawful conduct or criminal activity."<sup>457</sup> The DFEH regulations also prohibit ordinances that mandate the initiation of eviction proceedings against tenants who are arrested for, or suspected or convicted of, criminal activity.<sup>458</sup> The DFEH regulations could provide guidance for other specialized state agencies interested in enacting regulations targeting discriminatory CFNOs.

In 2023, the Illinois Department of Human Rights (IDHR) issued a "Guide for Units of Local Government" on the "Fair Housing Implications of

<sup>450</sup> *Fair Housing Assistance Program (FHAP)*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/partners/FHAP#FHAP1](https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP#FHAP1) (last visited Apr. 26, 2023).

<sup>451</sup> *Fair Housing Assistance Program (FHAP) Agencies*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/partners/FHAP/agencies](https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP/agencies) (last visited Apr. 26, 2023) [hereinafter *FHAP Agencies*] (noting that the FHAP is housed within departments of fair housing in Arkansas, California, and Virginia).

<sup>452</sup> *Id.* (noting that the FHAP is housed within departments of equal opportunity or antidiscrimination in Georgia, Massachusetts, Nebraska, and Utah).

<sup>453</sup> *Id.* (noting that the FHAP is housed within departments of civil rights in Colorado, Hawaii, Iowa, Maryland, Michigan, New Jersey, and Ohio).

<sup>454</sup> *Id.* (noting that the FHAP is housed within departments of human rights, relations, or affairs in Connecticut, Delaware, Florida, Illinois, Kentucky, Maine, Minnesota, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia).

<sup>455</sup> See Section II.B (setting out federal fair housing challenges to CFNOs); *State Fair Housing Protections*, *supra* note 208 (reporting comparable fair housing protections provided under state law); Section IV.A (discussing state-level preemption statutes).

<sup>456</sup> See CAL. CODE REGS. tit. 2, § 12162 (2022).

<sup>457</sup> *Id.* § 12162(a). The policies or practices covered by the regulations include those that require eviction, prohibit renewal of a tenancy, or otherwise require adverse action against tenants. *Id.*

<sup>458</sup> *Id.* § 12162(b).

[CFNOs].”<sup>459</sup> While the IDHR Guide itself does not have the force of law, it describes the range of existing state and federal laws that CFNOs can violate, including the Illinois Human Rights Act, Illinois Civil Rights Act, and FHA, as well as the Illinois state preemption law prohibiting CFNOs that penalize survivors of domestic violence or individuals with disabilities based on calls for police service.<sup>460</sup> The IDHR Guide also sets out best practices for local governments, including avoiding CFNOs that penalize calls to the police or “alleged or suspected criminal activity” or require landlords to use criminal background screenings.<sup>461</sup> It further recommends that municipalities track CFNO enforcement in order to assess whether they have a discriminatory effect, and provide periodic training to government employees, property owners, and community members on fair housing laws and the risks of CFNO enforcement.<sup>462</sup>

Specialized state agencies may have some advantages over state AGs in pursuing enforcement action against CFNOs. Most state AGs are elected, so their actions are more directly tied to the will of political parties and voters, which may impact their decision-making regarding whether to aggressively pursue an investigation or litigation against a local government. Indeed, the “legal environment in which [a State AG] operates can greatly influence his or her ability to bring about meaningful change.”<sup>463</sup> Specialized state agencies, on the other hand, may be more insulated from political whims and thus may be able to more consistently enforce laws and protections implicated by CFNOs. Due to their specialized focus, state agencies may also be more likely than state AGs to have developed staff expertise and resources to tackle the fair housing issues presented.

One potential downside of relying on specialized agencies to curtail harmful CFNOs is that, unlike state AGs, these agencies are typically structured to focus primarily on receiving and responding to individual complaints. They may be ill-equipped, and may in some instances lack the authority, to initiate broad investigations or issue findings independently.<sup>464</sup> Relying on individual tenant or property owner complaints for enforcement raises the same concerns about the difficulties in finding impacted individuals, due to the mechanisms of enforcement used by most CFNOs. The fact that CFNOs typically impose penalties directly on landlords, who may then be pressured informally to take “abatement” actions leading to eviction,

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<sup>459</sup> See Illinois Department of Human Rights, *Fair Housing Implications of Nuisance and Crime-Free Ordinances: A Guide for Units of Local Government* (2023).

<sup>460</sup> *Id.* at 10 (65 ILL. COMP. STAT. 5 / 1–2–1.5).

<sup>461</sup> *Id.* at 23–24. The IDHR Guide also provides that CFNOs should be “narrowly tailored to apply only to criminal activity that impacts public safety,” and should only pertain to recent criminal activity.

<sup>462</sup> *Id.* at 24.

<sup>463</sup> Rutkow & Teret, *supra* note 440, at 269, 277–78.

<sup>464</sup> See *id.* at 273–74.

means that individual tenants are often unaware that the reason they are facing eviction is related to a CFNO.

Specialized state agencies are also often small and tasked with enforcing a wide range of laws, such that they may be strapped for resources. For example, while DFEH is the largest state civil rights agency in the country and the regulations targeting CFNOs set out a range of protections, California housing advocates have raised practical concerns regarding the lack of active enforcement of the regulations.<sup>465</sup> For these reasons, a combination of state AG and specialized state agency action may be necessary to combat CFNOs effectively at the state level. Some states are already exploring this type of collaboration to combat harmful CFNOs. For example, the Illinois AG's Civil Rights Bureau assisted IDHR with the drafting and issuance of the IDHR Guidebook and has expressed its intention to investigate and take action against local governments with CFNOs that run afoul of civil rights laws.<sup>466</sup>

Specialized state agencies can also employ state fair housing planning processes to combat the enforcement of discriminatory CFNOs. As recipients of federal grants to administer housing programs, states have affirmative obligations to further fair housing under the FHA.<sup>467</sup> The AFFH mandate includes an obligation to conduct an analysis to identify impediments to fair housing.<sup>468</sup> If states identify fair housing issues through their analysis, they are required to take action to overcome these discriminatory effects.<sup>469</sup> In light of the significant fair housing issues CFNOs pose,<sup>470</sup> state assessments of fair housing impediments should include a specific investigation of the scope of, and harms caused by, CFNOs.<sup>471</sup>

As a part of their fair housing planning processes, states should track CFNOs and gather data regarding their impact. This could include tracking the enforcement of existing CFNOs, as well as tracking when new communities enact a CFNO for

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<sup>465</sup> NHLP Interview, *supra* note 338.

<sup>466</sup> See *IDHR Press Release*, *supra* note 441.

<sup>467</sup> Interim Final AFFH Rule, *supra* note 202, at 30,781–82; 42 U.S.C. § 3608(d), (e)(5); see *supra* Section II.B (discussing the scope of the AFFH rule of the FHA).

<sup>468</sup> Interim Final AFFH Rule, *supra* note 202, at 30,782.

<sup>469</sup> *Id.* at 30,781–82.

<sup>470</sup> See *supra* Section I.D (discussing the racially discriminatory impacts of CFNOs, as well as their disproportionate impact on individuals with disabilities and survivors of domestic violence); Section II.B. (applying the FHA analysis to CFNOs).

<sup>471</sup> In 2016, HUD proposed a fair housing planning tool for states, which specifically incorporated CFNO assessments in the planning process. See U.S. DEP'T. OF HOUS. AND URBAN DEV., ASSESSMENT OF FAIR HOUSING TOOL FOR STATES AND INSULAR AREAS 10 (30-Day Pub. Comment ed. Sept. 28, 2016). The state assessment tool was never finalized. See *Assessment Tools*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/explore-issues/policy-priorities/fair-housing/assessment-tools> (last visited Apr. 26, 2023). However, it provides guidance for states applying the AFFH rules to their assessment of local policies.

the first time. It could also include surveying local stakeholders in communities with CFNOs to assess their local impact, including outreach to tenants, domestic violence service providers, homeless service providers, fair housing organizations, legal services providers, and property owners.<sup>472</sup> As the greatest harms of CFNOs often occur informally, resulting from local governments incentivizing landlords to evict tenants or discourage them from calling 911, it may be impossible to track the full scope of harms without consulting with local stakeholders.<sup>473</sup> States should then address any fair housing issues identified, including by withholding funding to local governments that persist in enforcing discriminatory CFNOs.

The 2022 VAWA Reauthorization also sets out affirmative obligations on states, as recipients of federal funding, to track and respond to CFNOs. The Act’s broad reporting requirements provide that states and local governments must report any of their own laws that impose penalties based on requests for law enforcement or emergency assistance, or based on criminal activity that occurred at the property.<sup>474</sup> As this reporting requirement covers broad categories of CFNOs, it should result in the collection of a significant amount of data regarding the scope and spread of CFNOs throughout the country. Moving forward, this data can be used to strengthen federal, state, and local efforts to combat harmful CFNOs.

## CONCLUSION

For more than a decade, advocacy organizations have engaged in litigation, local policy advocacy, community outreach and education to mitigate the damaging effects of CFNOs. Through these efforts, they have made critical advancements in combating the most egregious harms. Yet these local ordinances and programs continue to proliferate nationwide, causing harm to Black and Latinx communities, survivors of domestic violence, individuals with disabilities, and low-income tenants and communities more broadly. States have many opportunities to be a part of the solution. States have significant legislative authority, which can be used to rein in discriminatory and harmful CFNOs. States also have broad regulatory and enforcement powers, which can be exercised through state AGs and specialized state agencies. These agencies are well-positioned to pursue regulatory and enforcement action targeting CFNOs. States can also employ their fair housing planning processes to

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<sup>472</sup> See, e.g., OPEN CMTYS. & SARGENT SHRIVER NAT’L CTR. ON POVERTY L., *supra* note 196, at 6–7, 9 (recommending strategies for local tracking and assessment of the harms of CFNO enforcement).

<sup>473</sup> *Id.* at 9.

<sup>474</sup> Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, sec. 603, § 41415(e), 136 Stat. 840, 885 (to be codified at 34 U.S.C. § 12495). The law clarifies that entities that distribute federal funds must “inquire[] about the existence of [such] laws and policies adopted by subgrantees.” *Id.*

hold municipalities accountable for discriminatory CFNOs, consistent with states' obligations under the FHA to act affirmatively to further fair housing.

It is unlikely that any individual intervention standing alone will be sufficient to end the use of CFNOs nationwide. However, the cumulative effect of advocacy by impacted individuals and their organizational allies, combined with legislative and executive action at all levels of government may ultimately convince local governments that repealing their CFNO—or avoiding enacting one in the first place—is the only way to avoid liability and prevent inevitable harm to tenants and communities. State-level legislators and executive branch policymakers have powerful tools available to play a critical role in this effort.