June 10, 2024

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U.S. Department of Housing and Urban Development
Office of General Counsel
Regulations Division
451 7th Street SW
Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-6362-P-01 Reducing Barriers to HUD-Assisted Housing

Thank you for the opportunity to provide public comment on the Department of Housing and Urban Development's Proposed Rulemaking: Reducing Barriers to HUD-Assisted Housing. We, the undersigned members and allies of the Formerly Incarcerated, Convicted People and Families Movement (FICPFM), in collaboration with the Partnership for Just Housing (PJH), write to support, as well as encourage the strengthening of, the proposed rule.

FICPFM is a national movement of directly impacted people speaking in our own voices about the need to end mass incarceration, America's current racial and economic caste system. To that extent, we are committed to transforming society by transforming the criminal legal system. Working in and with community, our work not only ensures alternatives to incarceration and criminalization but also addresses head-on the collateral consequences of living with a conviction by restoring civil rights to those who have had them taken away. Currently, we are leading the national Housing4All Campaign, a national coalition of grassroots organizations advocating to end housing discrimination against people with records. This comment is based on the collective experience of FICPFM members and is endorsed by both FICPFM and its allies.

As stated, we collaborated with PJH in formulating this comment. FICPFM helps convene PJH, as do our partners at the Shriver Center on Poverty Law, National Low Income Housing Coalition (NLIHC), VOICE of the Experienced, Florida Justice Center, Justice Impact Alliance, and National Housing Law Project (NHLP). PJH is a national collaborative of directly impacted leaders and other advocates working to end housing discrimination against people impacted by the criminal legal system.

This rulemaking presents a pivotal opportunity to confront significant challenges affecting many communities. Among the myriad obstacles faced by people living with arrest and/or conviction histories, housing instability emerges as prominent, often pushing individuals towards homelessness or back into harmful environments. The proposed changes seek to address these hurdles by expanding access to HUD-assisted housing for this vulnerable population.

This is a significant step forward in advancing housing access. Endorsing the proposed rule acknowledges the fundamental role housing stability plays in facilitating successful reentry. Access to safe and stable housing serves as a cornerstone upon which formerly incarcerated

and/or convicted people can secure and maintain employment, meet the conditions of probation, and help with family reunification.

Moreover, embracing these changes signifies a commitment to upholding principles of inclusivity, fairness, and opportunity for all members of society, regardless of their past mistakes. By advocating for expanded access to housing for people with criminal records, one affirms housing as a basic human right rather than a privilege contingent upon a clean legal history. This stance acknowledges the inherent dignity and worth of every individual and works towards dismantling systemic barriers that perpetuate cycles of disadvantage and marginalization.

In essence, supporting this proposed rule is not just about advocating for policy change; it's about championing a more equitable and compassionate approach to housing policy. By lifting restrictions based on criminal records, we take a significant step towards fostering a society where everyone has the chance to thrive and contribute positively. While these changes are crucial, we will need many more on our path towards creating a more inclusive and fair society. Ultimately, this rule has the potential to transform the lives of countless individuals and families affected by the criminal legal system, offering hope, opportunity, and safer communities for all.

Housing is a cornerstone for stability and security in any individual's life. Yet, for formerly incarcerated/convicted people and their families, it often becomes one of the most daunting challenges. Without stable housing, individuals face a heightened risk of homelessness, unemployment, and even recidivism. The absence of a safe and secure home not only impacts individuals and their families, but their communities as well. Everyone is ultimately impacted when people cannot access housing.

It is imperative to recognize that a criminal record alone should not serve as a barrier to accessing housing or determining one's potential as a tenant. Extensive research and lived experiences have consistently shown that there's no direct correlation between having a conviction history and negative outcomes as a tenant. Excluding individuals with conviction histories from housing not only perpetuates cycles of housing insecurity and homelessness but also fails to contribute to community safety. In fact, such exclusionary practices can exacerbate housing instability and compromise overall public safety.

While overall, FICPFM and PJH support the proposed regulations, we have concerns that must be addressed, and recommendations that would strengthen the final rule.

Support with concerns

I. Limitations on disqualifying criminal activity

We support restricting the types of criminal activity that housing providers can use to deny housing. The current regulations give housing providers too much discretion, leading to denials for criminal activity that has nothing to do with tenancy. By restricting denials to three categories of criminal activity – drug-related, violent, or a threat to health, safety, or peaceful enjoyment – the proposed regulations provide a helpful narrowing that will hopefully steer housing providers away from arbitrary and nonsensical denials.

Threat to health, safety, and right to peaceful enjoyment remains too broad. By failing to define "other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises," the proposed rule perpetuates ambiguity and leaves open another opportunity for housing providers to abuse their discretion.[1] It is not a stretch to imagine the perverse outcomes of leaving this phrase broadly open to interpretation. Indeed, in practice, Public Housing Authorities (PHAs) use this provision as a catch-all and institute blanket bans for offenses such as trespass, possession of materials deemed 'obscene by community standards,' driving under the influence, or outstanding municipal fines.[2] The recently updated Public Housing Occupancy Guidebook's section on admissions and criminal history is vastly improved from the 2003 version. However, it still lacks clarity around when a PHA has the discretion to screen for criminal activity that "would adversely affect the health, safety, or welfare of other tenants or drug related criminal activity."[3] As a result, too often PHAs use "health, safety and welfare" as a catch-all for criminal offenses, including those with no bearing on an applicant's success as a tenant, like shoplifting or civil disobedience.[4] The term, left open-ended, could lead housing providers to make arguments that even something as benign as being ticketed for sitting in one's car constitutes a threat to health, safety, or peaceful enjoyment. **We strongly encourage HUD to be explicit about the meaning and scope of this phrase in both regulations and subregulatory guidance, including clarifying that an individualized review would still be required for an applicant with such an offense.**

II. Arrests & non-conviction records

We support the steps the rule takes to prohibit the use of arrest records as a basis to exclude people from subsidized housing. As stated in HUD's 2016 Guidance, "An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."[5] Further, per HUD guidance, housing providers likely engage in illegal fair housing discrimination on the

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[1] 89 Fed. Reg. 25332, 25361 (2024).

[2] *See*, *e.g.*, Admissions and Continued Occupancy Policy for the Public Housing Program: 2022 Update, S. Nev. Reg'l Hous. Auth., 2-18 through 2-22 (2022), https://www.snvrha.org/docs/Acop.pdf (automatic bans of varying lengths for, e.g., trespass, resisting arrest, DUI, felony hit and run, active parole or probation status, *any* conviction within a year of completion of sentence) (last visited June 9, 2024); Administrative Plan for the Holyoke Housing Authority's Section 8 Housing Choice Voucher Program, Appendix B, Holyoke Housing Authority (last visited Apr. 1, 2024) (automatic exclusion for misdemeanors); Chapter 3 Eligibility: HCV Administrative Plan, Fairfield Metro. Hous. Auth., 3-14, 3-15, https://www.fairfieldmha.org/hcv-administrative-plan (last visited June 9 , 2024) (automatic exclusion for "a felony conviction of any type," as well as, e.g., trespass, theft of less than $50, resisting arrest, tampering with coin machines); Tenant Selection Criteria, Hous. Auth. of Jackson Cnty., Or., 2 (Aug. 9, 2020), https://hajc.net/wp-content/uploads/2021/01/Tenant-Selection-criteria-80-income-english.pdf (exclusion from subsidized housing if applicant has municipal fines exceeding $1,000); see also

[3] HUD, Public Housing Occupancy Guidebook 15 (June 2022). https://www.hud.gov/sites/dfiles/PIH/documents/PHOG_Eligibility_Det_Denial_Assistance.pdf.

[4] Tran-Leung, M. 2015. When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing. Shriver Center on Poverty Law. Retrieved from: https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf

[5] HUD, *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* 5 ("2016 Guidance") (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

basis of race, ethnicity, and/or disability by excluding people from housing based on arrests not resulting in conviction.[6] With these precepts in mind, we believe the rule can be strengthened.

Arrest records should not be used as a basis for further inquiry. While the rule states that an arrest does not sufficiently prove criminal activity, the rule still allows covered housing providers to search for arrest records and, in turn, to use these records as the basis for further investigation. This is problematic because it effectively condones PHAs engaging in a practice that HUD found discriminatory in its 2016 guidance, sending a mixed signal to housing providers.

Indeed, if exclusions based on arrest records have a discriminatory effect, then exclusions based on investigations prompted by arrest records have a similarly discriminatory effect. If Black people are five times as likely as white people to face arrest, then Black people are five times more likely to face further inquiry stemming from those arrests.[7] By allowing housing providers to access arrest records and use them as a basis for further inquiry, the rule recreates the inequities that both it and the 2016 guidance are designed to prevent.

Similarly, use of an arrest record as a basis for further investigation does not substantially advance a legitimate purpose. Generally, if an arrest does not result in a conviction, that is because an investigation has already taken place, and either the police, prosecutor, judge, or jury has concluded that a conviction is not warranted. Such a determination should not, in effect, be reopened or second-guessed by a PHA with far less investigatory resources and experience than criminal enforcement agencies. Similarly, as noted by HUD, arrest records and rapsheets are incomplete, inaccurate, and difficult to interpret.[8] Just as inaccurate and opaque records should not serve as an independent basis for exclusion, housing providers should not be launching investigations based on inaccurate or unclear information. In short, telling housing providers that it is discriminatory for them to exclude applicants based on arrests but, at the same time, that they may exclude applicants based on investigations stemming from arrests will lead to confusion on the part of housing providers, applicants, and advocates.

Furthermore, allowing the use of arrest records as a basis for investigation is problematic because it encourages housing providers to conduct background checks for arrest records. Once a housing provider sees an arrest record, the arrest risks biasing the provider and thus prejudicing the applicant. Likewise, in practice, excluding an applicant based on an arrest record versus excluding an applicant based on an investigation stemming from an arrest record provides a distinction without a difference. The following hypothetical is illustrative: an applicant's arrest record prompts a housing provider to reach out to the arresting officer who, in

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[6] *See generally* 2016 guidance, at id.; https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf.

[7] Anagha Srikanth, *Black people 5 times more likely to be arrested than whites, according to new analysis*, The Hill, Jun. 11, 2020, https://thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites/.

[8] *See* Rosenbaum, at *infra*; 2016 Guidance, p. 5 (noting arrest records are incomplete); https://citylimits.org/2015/03/03/the-rap-sheet-trap-mistaken-arrest-records-haunt-millions/.

turn, briefly perfunctorily summarizes the basis for arrest. On this basis, the housing provider rejects the applicant. Has the housing provider violated the rule? If so, then the rule sets up housing providers for confusion and failure. If not, then the rule's limits on the use of arrest records are meaningless. Similarly, PHAs can too easily claim a rejection is based not on an arrest record, but on some token investigation stemming from the arrest record. At the very least, it will be difficult, if not impossible, for advocates and applicants to demonstrate that a housing provider illegally rejected an applicant based on an arrest record, as opposed to legally rejecting the applicant based on the investigation stemming from an arrest record. The clearest and most equitable solution is for housing providers to be prohibited from screening applicants for arrest records. This is already how, for example, Cook County's Just Housing Ordinance operates.

Enhanced limitations should apply to other records in addition to arrest records. The rule imposes additional limitations on the use of arrest records, but not other records which, applying similar logic, should not serve as a basis to exclude someone from housing. As stated in the 2016 Guidance, "Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (e.g., by failing to indicate whether the individual was prosecuted, convicted, or acquitted), the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual."[9] Similarly, other pre-conviction records, such as indictments, pretrial release status, charging documents, and the like, as well as records of convictions that have been vacated on appeal or otherwise, do not constitute "proof of past unlawful conduct." And some phases of the criminal process do not permit the accused to defend themselves. For example, the accused generally has no chance to contest a warrant before it is issued. It would also be unclear when the "criminal activity" triggering the rule's lookback period took place if the applicant has not actually been convicted of engaging in criminal activity, or where that conviction has been overturned.

There is also no sufficient justification for excluding people from housing based on convictions that have been pardoned. The decision to pardon indicates a lack of substantial legitimate interest in continuing to hold the conviction against the applicant.[10] The same can be said for records which have been expunged, sealed, or otherwise made publicly unavailable.[11]

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[9] 2016 Guidance, p. 5.

[10] *See, e.g.,* Herrera v. Collins, 506 U.S. 390, 415 (1993)(noting that pardons are often used to correct for incorrect convictions); People ex rel. Symonds v. Gualano, 260 N.E.2d 284, 290 (Ill. App. Ct. 1970) (noting that the purpose of a pardon is to either (1) rectify imperfections in the judiciary that lead to wrongful convictions or (2) "encourag[e] guilty persons to become upstanding citizens of the community and to prove by exemplary conduct that they [are] worthy of public confidence").

[11] Andrea R. Coleman, Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices, Dept. of Justice Office of Juvenile and Delinquency Prevention December 2020, pp. 2 ("The goal of expungement is to make it as though the records never existed."), https://ojjdp.ojp.gov/publications/expunging-juvenile-records.pdf; *see also* See Ariel Nelson, Fertile Ground for FCRAClaims: Employee& Tenant Background Checks, National Consumer Law Center (Dec. 16, 2019), *https://library.nclc.org/fertile-ground-fcra-claims-employee-tenant-background-checks* (use of publicly unavailable records especially prone to inaccuracy).

Similarly, housing providers' use of juvenile records should generally not be deemed necessary to further a legitimate interest. The Supreme Court has stated and cited studies toward the proposition that "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth."[12] And, as stated by a publication with the Department of Justice, "criminal and juvenile justice systems, educational institutions, employers, landlords, and the public all have an ongoing role to play in ensuring that youthful transgressions do not lead to permanent collateral consequences."[13]

The approach outlined here is supported by a growing trend of states and municipalities adopting laws limiting housing providers' discretion to base decisions on applicants' criminal records.[14] For example, Illinois' Public Housing Access law prohibits PHAs from excluding households from public housing based on "(A) an arrest or detention; (B) criminal charges or indictments, and the nature of any disposition arising therefrom, that do not result in a

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[12] *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012) (citing Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003), with quotations and other citations omitted).

[13] Coleman, *supra,* at 8-10.

[14] See, e.g., 775 Ill. Comp. Stat. §§ 5/1-103, 3-102 (2020) (prohibiting use of arrest records, which includes arrests not leading to a conviction, juvenile records, and criminal history record information ordered expunged, sealed, or impounded); N.J. Fair Chance in Housing Act, Pub. L. 2021, c. 110, secs. 2, 3 (prohibiting consideration of arrests or charges that have not resulted in a criminal conviction; expunged convictions; convictions erased through executive pardon; vacated and otherwise legally nullified convictions; juvenile adjudications of delinquency; and records that have been sealed); S.F., Cal., Police Code § 4906(1) (2021) (prohibiting consideration by housing providers of arrests not leading to conviction; participation in diversion or deferral of judgment programs; convictions that have been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; juvenile records or convictions; convictions more than seven years old; information pertaining to offenses other than a felonies or misdemeanors; and convictions for now-decriminalized conduct); Cook County, Ill., Code § 42-38(a), (e)(1)–(2) (2021) (prohibiting denial of housing based upon arrest and other pre-conviction records, requiring individual assessment before denial based on conviction; imposing three year maximum lookback period (see Just Housing Amendment:FAQs for Landlords, #5)); Detroit, Mich., City Code § 26-5-5 (providing that housing providers may only ask questions regarding an applicant's criminal history after the potential tenant has been deemed qualified and offered a conditional lease; prohibiting adverse action based on arrests not leading to a conviction, participation in a diversion or deferral of judgment program, convictions that have been rendered inoperative by a court of law or by executive pardon, juvenile records, misdemeanor convictions over five years old, or information pertaining to an offense or violation other than a felony or misdemeanor); La. Hous. Corp., Memorandum on Fair Housing and Tenant Selection with Regard to Criminal RecordScreening (July 14, 2021) (prohibiting consideration by housing providers of arrests; criminal charges resolved without conviction; juvenile records, or any expunged, vacated, or sealed records; nonviolent misdemeanor convictions; violent misdemeanor convictions and nonviolent felony convictions over three years old; and violent felony convictions over five years old); Hous. Auth. of New Orleans, Admissions and Continued Occupancy Policy 23–24 (2019), http://hano.org/plans/ACOP2019.pdf (eliminating ban on providing housing assistance to people with criminal records); *see also* John Bae, Kate Finley, Margaret diZerega, and Sharon Kim, "Opening Doors: How to develop reentry programs using examples from public housing authorities," Sept. 2017, https://www.vera.org/publications/opening-doors-public-housing-reentry-guide.

conviction; (C) a conviction that has been vacated, ordered expunged, sealed, or impounded by a court; (D) matters under the jurisdiction of the Illinois Juvenile Court.[15]

Perceived and/or actual violations of probation or parole should not be used to deny housing. The rule gives PHAs seemingly unfettered discretion to terminate assistance or a tenancy because the PHA believes the resident is violating a condition of their probation or parole. This allowance presents a number of serious problems. First, PHAs are not in a good position to independently adjudicate whether a resident is violating probation or parole. The rule reads as if PHAs may make this determination independently of the parole, probation, or judicial system and use this determination as a basis to evict families. It is, in fact, likely that the PHA does not even know the details of a resident's parole or probation conditions. Further, probation and parole violations do not constitute independent convictions, and people may violate their parole or probation through activity that is not otherwise criminal, and is thus especially unlikely to bear on their suitability for continued tenancy. At the very least, there is no reason PHAs should be more able to evict residents for perceived parole or probation violations than for any other criminal activity. Yet the rule does not even obligate PHAs to evaluate mitigating circumstances or meet the preponderance of the evidence standard before evicting someone for a perceived probation or parole violation. In this sense, allowing eviction for parole or probation violations is a red herring. If the parole or probation violation constitutes activity warranting eviction, then the PHA can evict regardless of the presence of a parole or probation violation. If the alleged violation does not, then the PHA cannot use it as a basis for eviction. The PHA should have to prove the violation by a preponderance of evidence and account for mitigating circumstances just like they must for any other alleged criminal activity.

Probation sentences should be a presumptively unreasonable basis to impact the admissions or continued occupancy in HUD programs. We would recommend that HUD provide guidance for PHAs that reflects consistency with the court system. Following an arrest, a prosecutor and an accused party will negotiate a plea agreement in over 95% of guilty verdicts. This agreement must then satisfy the discretion of the judge, who will, like the prosecutor, weigh factors such as the seriousness of a crime, life circumstances of the accused, rehabilitative expectations, and impacts on public safety. Probation is an alternative to incarceration that requires someone to live in the community, and courts do not expect that someone may be evicted or barred from housing due to a probation sentence.

Making it presumptively unreasonable to deny housing based on probation sentences allows for rebuttal evidence and extreme circumstances to overcome the presumption.The longstanding use of probation sentences as grounds for denial of admission is a contradiction to due process and equal protection, as none of these residents (or prospective residents) were counseled regarding the potential impact on their housing status prior to pleading guilty. The situation is similar to Padilla v. Kentucky, 559 U.S. 356 (2010), where the Supreme Court determined that automatic deportations, triggered by felony convictions, lacked notice of losing such a vital thing

[15] 310 ILCS 10/25(e-5)(1)(A).

as “Green Card” status. People’s homes, whether through a lease or an immigration status, are things that should not be taken lightly, and not without explicit prior notice to pleading guilty.

Police reports should not be used as evidence of criminal activity. HUD has suggested that “police reports that detail the circumstances of the arrest” may provide evidence of criminal activity independent of an arrest record.[16] Police reports, however, are not uniformly reliable. Because of the inherently adversarial nature of the relationship between law enforcement and an individual being arrested for an alleged crime, police reports can be “one-sided and self serving.”[17] Police reports have long been considered as inadmissible hearsay when offered to prove illegal conduct at a criminal trial.[18] In civil cases, they do not always prove that the underlying criminal activity occurred by the preponderance of the evidence, often because the level of detail in police reports varies. Some simply restate the date and offense for which a person is arrested, making them no more reliable than an arrest record. Others provide more information about the circumstances and individuals involved. Further, the criminal process is largely dedicated to investigating the allegation in a police report. Where a police report does result in a conviction, that may be because there was insufficient verification for the allegations in the police report. Similar to an arrest, a police report indicates that criminal activity has been alleged but does not constitute evidence that it took place.

Witness statements should be treated with caution. HUD has also suggested that “statements made by witnesses or by the applicant or tenant that are not part of the police report” may provide evidence of criminal activity independent of an arrest record.[19] Like arrest records and police reports, however, statements by witnesses who have not been cross-examined may be similarly unreliable as sufficient evidence of criminal activity. Police methods of obtaining the witness statement can also heavily influence its reliability.[20] Scientific research has demonstrated that the fallibility of memory and stress can contribute to faulty witness statements.[21] Extensive guardrails are required in criminal proceedings when eyewitness

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[16] HUD, *FAQs: Excluding the Use of Arrest Records in Housing Decisions*, https://www.hud.gov/sites/documents/FAQ_EXCLUDE_ARREST_RECORDS.PDF (last visited Jun. 5, 2024).

[17] Erica D. Rosenbaum, Relying on the Unreliable: Challenging USCIS’s Use of Police Reports and Arrest Records in Affirmative Immigration Proceedings, 96 N.Y.U. L. Rev. 256 (2021) (citing H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 7098, 7108–11 (Statement by the Hon. William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, upon Presenting the Conference Report on H.R. 5463 to the House for Final Consideration) (discussing the unreliability of police reports in the context of formulating evidentiary rules).

[18] “Prejudicial and Unreliable: The Role of Police Reports in U.S. Immigration Detention & Deportation Decisions” (noting that “[n]early every federal circuit court of appeals and Congress has recognized the inherently unreliable or prejudicial nature of police reports for revealing what actually occurred in any given incident.”) Available at: https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2022-07/Prejudicial-and-Unreliable-policy-brief-FINAL_July-2022.pdf

[19] HUD, *supra* note 9.

[20] See. e.g.,Katherine Sheridan, Excluding Coerced Witness Testimony to Protect A Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct, 38 Fordham Urb. L.J. 1221 (2011)

[21] See, e.g. “Why Science Tells Us Not to Rely on Eyewitness Accounts.” Available at: https://www.scientificamerican.com/article/do-the-eyes-have-it/

testimony is introduced to prove criminal conduct.[22] Implicit bias, including the race of the accused and the race of the eyewitness, heavily influences the person making an assessment about the value of witness testimony.[23]

Inclusion in a "gang database" should not be used as evidence of criminal activity. So-called "gang databases" have long been criticized as being unreliable evidence of whether a person is a member of a gang, let alone whether they have engaged in criminal activity. Police can often include young people in a database for arbitrary reasons that have nothing to do with criminal activity, such as what they wear, whether they are victims of assault, or simply whether they associate with another person suspected to be part of a gang.[24] In many places, there is little transparency into how or why a person is included on the database, and no way to challenge their inclusion once it takes place. Such evidence often does not rise to the level of a reasonable suspicion of criminal activity, let alone the preponderance of the evidence. HUD should advise PHAs and owners, therefore, against relying on a person's inclusion in a gang database to take adverse action against them on the basis of criminal activity.

Hearsay evidence should not be used as evidence of criminal activity. PHAs are typically not trained in rules of evidence or legal procedure. As such, they should be mindful of any "additional" evidence they may be reviewing. Arrests are not indicative of guilt, and statements made on a police report are not sworn under oath. Rumor, hearsay, or "word on the street" should not be given probative value in a decision with such grave consequences as housing.

III. Self-disclosure

We support the proposed limitation on when PHAs and owners may deny admission based on an applicant's failure to disclose their criminal record. The proposed policy goes a long way toward addressing so-called "gotcha" screening practices that housing providers may use to arbitrarily deny housing to applicants due to what may amount to odd quirks within records.

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[22] Cite to Manson v. Brathwaite? Described further here: https://eyewitness.projects.law.duke.edu/eyewitness-identification-procedures/#:~:text=The%20%E2%80%9Creliability%E2%80%9D%20factors%20adopted%20by,the%20eyewitness's%20level%20of%20certainty. The Innocence Project finds that "eyewitness misidentification contributes to an overwhelming majority of wrongful convictions. https://innocenceproject.org/eyewitness-misidentification/

[23] See, e.g. "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence," Justin D. Levinson and Danielle Young, West Virginia University the Research Repository Volume 112 Issue 2 January 2010; see also Cornell University Law School Social Science and Law, Defining Implicit Bias, available at: https://courses2.cit.cornell.edu/sociallaw/student_projects/Definingbias.html

[24] *See, e.g.,* Unmasking the Boston Police Department's Gang Database: How an Arbitrary System Criminalizes Innocent Conduct, 137 Harv. L. Rev. 1381 (Mar. 2024), https://harvardlawreview.org/print/vol-137/unmasking-the-boston-police-departments-gang-database-how-an-arbitrary-system-criminalizes-innocent-conduct/; Targeted, Labeled, Criminalized: Early Findings on the District of Columbia's Gang Database (Jan. 2024), https://www.washlaw.org/wp-content/uploads/2024/01/Edited-TARGETED%5EJ-LABELED%5EJ-CRIMINALIZED-Final-Conforming-Edits-01-11-24.pdf;City of Chicago Office of Inspector General, Review of the Chicago Police Department's "Gang Database" (Apr. 2019), https://igchicago.org/wp-content/uploads/2023/08/OIG-CPD-Gang-Database-Review.pdf

However, to avoid loopholes, we strongly urge HUD to eliminate the two exceptions it lays out in the proposed rule as well: for owners who rely exclusively on self-disclosure and for records that would have been material to the decision.

For instance, in Texas, a plea of "nolo contendere" is considered a guilty plea, not a conviction. However, these pleas routinely appear as convictions in tenant screening reports. Applicants in Texas with this kind of record may have no reason to believe that they had any conviction to disclose. Additionally, many states have processes for "first-time" or "youthful" conviction status.[25] Under these laws, the intent is for an expungement at the completion of a probation sentence; however, a background screening company may not log it as such, and may not process the expungement. Further, in Louisiana, for instance, the expungement is not automated, but this process is also not well explained. Many people will incorrectly presume their conviction "went away" without having taken the required administrative steps (including processing fees) to make it happen.

Reliance on self-disclosure. HUD should eliminate the first exception for PHAs and owners who only rely on self-disclosure. Given the wide availability of criminal background checks, it is rare for a HUD-assisted housing provider to screen solely on the basis of self-disclosed records. Further, self-disclosure is an unreliable means of collecting criminal history information, not because people lie, but rather because people often misinterpret or misremember the details of their interactions with the criminal legal system. The criminal legal system is a vast bureaucracy composed of different government agencies (police, courts, corrections) in overlapping levels of government (city, county, state, federal), which means that applicants will sometimes report their record incorrectly through no fault of their own. An exception for self-disclosure will incentivize PHAs and owners to adopt such a policy despite its shortcomings.

Material to the decision. HUD should also eliminate the second exception allowing PHAs and owners to bar admission for failure to disclose a criminal record that would have been material to the decision. If a person's criminal record provides sufficient evidence of disqualifying criminal activity, then the PHA or owner has grounds to deny admission based on the criminal activity. HUD should not provide a way for the PHA or owner to bypass the individualized assessment requirement when denying applicants, which would happen if HUD fails to eliminate this second exception. Indeed, the HUD Office of Fair Housing and Equal Opportunity (FHEO) advises both subsidized and private housing providers to adopt the following best practice: "Housing providers who use automated screenings should consider not asking applicants *any* questions about their history (i.e., not even within the scope of their policies) because such questions can confuse or discourage applicants while not giving the housing provider any information beyond that which they will learn from the automated screening."[26]

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[25] *See, e.g.* Ala. Code § 15-19; Iowa Code Ann. § 907.3A (West); S.C. Code Ann. § 22-5-920; N.Y. Crim. Proc. Law § 720.30 (McKinney); Fla. Stat. Ann. § 958.03 (West); Kan. Stat. Ann. § 21-6708 (West); 720 Ill. Comp. Stat. Ann. 570/410.

[26] U.S. Dep't of Housing & Urban Development, Office of Fair Housing and Equal Opportunity, Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing 12-13 (Apr. 29, 2024).

IV. Three-Year Lookback Period

FICPFM and PJH support HUD in adopting a presumption that a lookback period of more than three years is unreasonable, as it represents a concerted effort to ensure fairness and consistency across housing providers. A uniform lookback period would help mitigate biases that may arise during the screening process, ensuring equitable treatment for individuals with conviction histories while still acknowledging rehabilitation and progress over time. That said, a three-year lookback period still limits far too many people's access to housing. While the proposed rule goes a long way toward opening up housing access to people who have served longer sentences, even a three-year lookback period could still pose a barrier to someone who was incarcerated for only a year or two.

We appreciate HUD stating that housing providers are free to use lookback periods shorter than three years. As HUD points out, studies have found that the risk of homelessness is greatest and the need for housing is often most critical in the year or two after someone leaves incarceration.[27] Additionally, someone sentenced to probation will need stable housing immediately following their conviction. There are numerous examples of PHAs or states that have adopted successful admissions policies with lookback periods shorter than 3 years. In Illinois, the Public Housing Access bill caps the lookback period at 6 months for federally subsidized housing, prohibiting subsidized housing providers from considering "convictions occurring more than 180 days prior to the date the applicant submitted his or her application for housing" (310 ILCS 10/25 (e-5)(1)(F)). In 2020, the Champaign Housing Authority announced that it would no longer use criminal background checks in admissions decisions outside of the federal requirements.[28] For some conviction records, the Housing Authority of New Orleans (HANO) uses a one- or two- year lookback period.[29]

However, there is still too much discretion for housing providers to use longer lookback periods. Overcoming the three-year presumption should be a high bar, and it should only be done based on evidence that there is a significant relationship between specific criminal activity more than three years old and negative outcomes in a tenancy. Studies that suggest certain types of criminal history – or just criminal activity broadly – increase the risk of recidivism, for example, should not be enough to clear this bar.

We support HUD's decision to begin the lookback period at the date of criminal activity, not the date of release or end of probation or parole. This puts the PHA's focus on the illegal conduct in question, rather than serving as an extension of punishment. Many PHAs and owners use admissions policies that look back to the "end of sentence." Especially in an era of mandatory minimums and three-strike laws, it is entirely possible for someone to have not engaged in criminal activity for decades, yet still be serving their sentence. Denying that person housing

[27] 89 Fed. Reg. 25343 (2024). "... formerly incarcerated individuals are nearly ten times more likely to be homeless than the general public, and the rates are significantly higher among those released from jail or prison within the past two years."

[28] Taber et. al., https://www.huduser.gov/portal/periodicals/cityscape/vol25num2/ch4.pdf

[29] *Housing Authority of New Orleans, Criminal Background Screening Procedures* (2016). https://www.documentcloud.org/documents/23707263-hano-2016-criminal-background-procedures

upon their release from incarceration begs the question: when does the punishment end? Further, housing providers and tenant screening companies are ill-equipped to distinguish between the myriad of different types of records that could be relevant to the end of a sentence, leading to inconsistent, inequitable results from applicant to applicant. Looking back to the date of the criminal activity itself helps to avoid this endless, arbitrary extension of punishment, and is a crucial distinction made by HUD.

However, as many housing authorities currently begin their lookback periods from the date of release, we are concerned about this distinction being lost in implementation. We ask that HUD prioritize technical assistance to make clear that lookback periods begin at the date of criminal activity, including any lookback periods longer or shorter than three years that a housing provider may adopt. Especially because the current common practice among housing providers is to start the lookback period at the end of a sentence or the date of release, clear guidance and enforcement mechanisms – including monitoring PHA's Admissions and Continued Occupancy Policies (ACOP) – will be essential to ensure this practice changes in accordance with the proposed rule.

Additionally, it is essential that lookback periods actually operate as lookback periods. A lookback period refers to how long a housing provider may "look back." This is the approach often taken by state and municipal fair chance laws.[30] Under the rule, however, there are no limitations on how far a provider may look back, but rather only restrictions on the age of the record that can be used as the basis for exclusion. The problem is, of course, that, once a provider sees a criminal record, it inevitably biases them regardless of whether they are legally allowed to formally base an exclusion on that record. For example, if a provider sees a record older than five years, that will likely affect their discretion, even if they are not allowed to officially base a denial off that record. Records beyond the permissible lookback period are not relevant to admissions decisions, and thus should not be viewed by housing providers as part of the record in an individualized assessment determination or appeal. Further, because of bias inherent to the criminal-legal system, allowing providers to access reports with records exceeding the lookback period puts both providers and screening companies in a precarious position; indeed, allowing providers to view a longer lookback period especially risks disadvantaging Black and Brown people with disabilities. It does not substantially further a

[30] *See e.g.* Cook County, Ill., Code of Ordinances ch. 42, art. II, §42-38 (2019).; *see also Yim v. City of Seattle,* 63 F.4th 783, 797 (9th Cir. 2023) (listing fair chance laws with "inquiry" limitations). While *Yim* held unconstitutional a provision of a Seattle ordinance prohibiting landlords from conducting background checks ("inquiry restriction"), this holding is inapposite here. First, in *Yim*, the 9th Circuit held that Ordinance's inquiry restriction violated the free speech rights of landlords. HUD's proposed Rule, however, applies largely to PHAs, a government entity that does not have free speech rights. Relatedly, Seattle's inquiry restriction imposed penalties on any landlord that conducted a background check. The proposed Rule, however, only applies to private developers insofar as they have opted to accept Project Based Section 8 subsidies and the rules governing PBS8 landlords. Thus, even as applied to private landlords, an inquiry restriction does not function as a restriction on landlords' speech but rather as one of many rules landlords agree to abide by in accepting PBS8 subsidies. Third, *Yim*, at id., makes clear that Seattle's inquiry restriction does not withstand First Amendment scrutiny because of its near-total ban on landlords conducting background checks. The 9th Circuit distinguishes the ordinance in *Yim* from an array of presumptively constitutional inquiry restrictions, which, like the proposed Rule, impose, for example, a certain lookback period and other limitations instead of a near-total ban. *Id*.

legitimate interest for providers to view records they are not allowed to consider, or for screening companies to provide records that cannot be considered.

V. Individualized Assessments

We support HUD requiring individualized assessments and consideration of mitigating circumstances before denying admission or processing an eviction or termination. Implementing an individualized review process for admission, eviction, or termination decisions based on criminal history provides a fair chance at housing for those with past involvement in the criminal legal system. This approach acknowledges the complexity of individual circumstances and aims to foster opportunities for personal circumstances to play a factor in whether an applicant is ultimately admitted. By prioritizing humanity and dignity in housing access, these regulations contribute to building more inclusive and supportive communities for all residents.

Further, under the current system, some PHAs and owners require applicants to submit additional mitigating evidence and materials before they can request what is essentially an individualized assessment. This sequence of events often disadvantages applicants who do not have ready access to such materials and may deter or intimidate tenants who lack the ability to prepare such review petitions on their own. A "deny first, appeal later" model is a common barrier that keeps people from accessing the housing they need. In mandating an individualized assessment before denial of admission, HUD is helping to catch applicants who might otherwise fall through the cracks.

HUD should revise its proposed definition of "individualized assessment" to adopt more general terms so that the definition can also apply to eviction history and credit history, in addition to criminal history. Furthermore, HUD should remove references to "risk" – a task better left to the criminal legal system – and instead make clear that, in the criminal history context, the key issue for decision in an individualized assessment should be whether reliable evidence shows that the applicant does not, at the time of admission, conform their conduct to relevant laws having a nexus with housing and the health and safety of other residents and neighbors.

We ask that HUD also lay out procedural best practices for conducting individualized assessments in subregulatory guidance to housing providers. For example, HANO conducts individualized assessments using a three-person review panel that includes a resident representative.[31] Ensuring the resident representative has been formerly incarcerated or has lived experience with the criminal legal system is an important best practice. Additionally, the panel must receive fair housing training and may consider outside expertise.[32] We also ask that the required individualized assessments (as well as the other protections laid out in this proposed rule) apply to people under consideration to be added to a HUD household.

VI. Mitigating Circumstances

We support the steps that HUD has taken to improve and build upon the mitigating circumstances listed in the current regulations. This includes distinguishing sample mitigating

[31] *Id.* at 4-5.
[32] *Id.* at 5.

factors that housing providers should consider in an admissions decision vs. a termination or eviction. We especially applaud HUD for instructing covered housing providers to consider "[t]he effect on the community of termination or eviction." It is essential that housing providers consider the fact that eviction or termination may make the surrounding community less safe, not more. Housing providers should be strongly discouraged from carrying out a termination or eviction if doing so will make the surrounding community less safe. HUD should consider adding a similar factor on the admissions side asking housing providers to take into account the outcome of a denial of HUD housing on a low-income family, including the lengthy waiting period for a housing voucher and the impact of a late-stage denial.

We support HUD's inclusion of sample mitigating factors in the proposed rule for housing providers to draw from as they make admissions decisions. We understand that HUD does not intend the list to be exhaustive and notes that housing providers may consider additional mitigating circumstances when making their decisions. However, with no requirement that housing providers look beyond the examples listed in the proposed rule, it is possible that important mitigating circumstances will not be properly evaluated in many cases. In order to strengthen the proposed rule, we would encourage adding factors that take into account the following circumstances:

- The extent to which housing intersects with child support requirements. In the child custody context, some parents are required to provide housing for their families or will lose their children. Leaving this factor out of an admissions, eviction, or termination decision risks undermining the rights of those children to be housed.
- Whether a person's criminal activity is related to their status as survivors of gender-based violence, domestic violence, sexual assault, and stalking, as required by the Violence Against Women Act (VAWA).

We also support the removal of factors that reflect problematic and outdated attitudes toward families with criminal records, such as:

- The deletion of "the demand for assisted housing by families who will adhere to lease responsibilities." This language plays into the trope of "deserving versus non-deserving poor," and is unhelpful for housing providers attempting to evaluate the likelihood that a household with criminal history will be a successful tenant.
- The deletion of language around "personal responsibility" and "integrity of the program," which similarly play into the deservingness trope and ignore the systemic nature of many families' interactions with the criminal legal system.
- The replacement of "successfully completed an approved supervised drug-rehabilitation program" with "participating in or has successfully completed substance abuse treatment services." However, we have concerns about encouraging housing providers to seek evidence that "abuse of alcohol . . . has not recurred." For people recovering from alcohol addiction or dependency, relapse is often a part of the process, and this

language risks creating unreasonable and unrealistic expectations for applicants in recovery.

As part of implementation efforts, HUD could follow the lead of jurisdictions that have created a standardized list of documents, resources, or other information that would speak to mitigating circumstances. This list would benefit housing providers, who may not know of every relevant material that an applicant might be able to produce in support of mitigating circumstances, as well as applicants, who would know ahead of time what types of information and documents they might need to acquire. These documents should not be required nor impose any kind of burden of proof on the applicant. In New Orleans, the list of "Applicant Documents for Panel Consideration" includes the following:

- Letter or comments from a probation/parole officer;
- Letter or comments from a case worker, counselor, or therapist;
- Certificates of treatment completion as relevant to the conduct underlying the conviction(s) (e.g., batterers' intervention, sex offender treatment, drug or alcohol treatment, cognitive behavioral therapy);
- Letter or comments from family members or others who know the applicant well;
- Document from a community organization with which the applicant has been engaged;
- Letter or comments from employers or teachers;
- Certificate of completion of a training program;
- Proof of employment;
- Proof of enrollment in educational programming;
- Other relevant documents;
- Statement from the applicant (see 2.3).[33]

VII. Opportunity to dispute

We support HUD requiring housing providers to give applicants an opportunity to dispute denials and a minimum time period in which to do so. Designating a minimum period of time is appropriate because, while some applicants may already have evidence and be able to present their objections on their own, others may need time to gather documents or other materials or may need an advocate to assist them.

Extension of time. HUD should provide further guidance on when it may be necessary for PHAs and owners to extend the opportunity to dispute beyond the minimum 15 days provided in the proposed regulations. Certainly, where a disputed record requires an applicant to take more elaborate steps, more time should be given. If a criminal record itself is in dispute, an applicant would likely need to go to their local police department or district attorney's office and pay for a copy of their record. This may take time to procure, and it may be one backed-up request among many. Some applicants will need assistance with these steps, so the additional time enables them to apply for and receive help from legal aid or other service providers**.** People who are unfamiliar with mitigating evidence, for example, may not know where to begin. It is likely that many who are denied housing would have received a better outcome if they could have

[33] *Id.* at 6.

articulated their circumstances more effectively. In New Orleans, for example, a local low-income housing legal services organization provides assistance in the majority of all such cases. Even for an applicant who simply needs to access a certificate confirming their participation in or completion of a treatment or rehabilitative program, 15 days may not be enough time. It is common for it to take at least five to seven business days to go through the necessary steps to request the documents. Actually retrieving the documents can take significant additional time, especially if the applicant is homeless or needs to take public transit to get the documents in person. A more reasonable time period for the dispute would be 30 days.

PHAs and owners should readily grant additional time when requested by applicants. A request for delay by the applicant suggests a strong need since a delay is against the applicant's self-interest to receive housing expeditiously. Such delays, on the other hand, pose little if any harm to PHAs and owners. Given this imbalance of harm, HUD should encourage PHAs and owners to provide more time to applicants when needed.

Hold the unit open during dispute. The proposed rule should hold the available unit open while an individualized review is being conducted. This will not be an issue where the dispute is regarding a housing choice voucher that will then be applied to the private market. In the event that an individualized review results in a denial being overturned, the tenant should be able to gain access to the housing unit as soon as possible. PHAs and subsidized owners should hold a unit available for at least 30 days to allow the review process to take place and to prevent the unit from being lost during review, unless a comparable unit will be available when or shortly after the review is completed.

Looking to implementation, HUD should consider how it will ensure housing providers and applicants are aware of the opportunity to dispute. As it stands, many unrepresented applicants are unaware of their appeal rights after being denied housing, losing an opportunity to combat discrimination and potentially secure housing. HUD should require that PHAs and owners provide the following procedural safeguards to applicants during the individualized assessment:

- The PHA or owner should provide the applicant with a pre-denial notice that includes the reasons for the proposed denial in as much detail as possible, including the specific standard(s) that the applicant does not meet and how.[34]

- Although applicants are already entitled to a pre-denial copy of the criminal record,[35] HUD should also make explicit that PHAs and owners must provide a copy of the criminal record before the individualized assessment takes place. The PHA or owner should also include an accessible explanation about how it will conduct the

[34] *Id.* ("Denial letters should contain as much detail as possible as to all reasons for the denial, including the specific standard(s) that the applicant did not meet and how they fell short.") If an applicant fails multiple screening criteria, the housing provider should disclose all such criteria. Furthermore, if an applicant has multiple criminal records, the PHA or owner must specify the precise criminal records that contribute to the proposed denial and which records did not.

[35] 24 C.F.R. § 960.204(c). HUD FHEO tenant screening guidance ("All records relied upon should be attached, including any screening reports")

individualized assessment; instructions on how to submit evidence of mitigating circumstances, including the time frame for submission; and instructions on how to make a request for reasonable accommodation for a disability if needed.[36]

- Finally, if the PHA or owner ultimately decides to deny after conducting the individualized assessment, the applicant should receive a written decision that states the evidence relied upon and delineates the evidence found credible from that found not credible.[37] The PHA must also notify the family that it may request an informal hearing.[38]

VIII. Person-first language

We support the various changes to reflect people-centered or "person-first" language. While not the single or most important goal, shifting the way we speak about people who have been impacted by the criminal legal system is an important step that reflects their dignity as human beings.[39] We ask that HUD apply this same shift to the term "sex offender," used throughout the proposed rule, and instead use "people convicted of prior sex offenses."

<u>Oppose</u>

IX. Exclusion of voucher programs

We are disappointed to see private landlords who accept Housing Choice Vouchers (HCVs) excluded from the proposed rule. HUD should extend the rule to HCV landlords so that all HUD-assisted tenants receive the benefits of the proposed rule's goal of increasing housing opportunities for all people with arrest and/or conviction histories. Additionally, adopting different sets of rules across different HUD programs will create confusing inconsistencies that will undermine the efficacy and equity of the important protections in the proposed rule. Applying the protections in the proposed rule to HCV landlords and tenants will help all housing providers better navigate their obligations and tenants better know and enforce their rights.

Aspiring tenants in the HCV program currently face two phases of discrimination. First, they must get past the PHA discretion to receive a voucher. Second, they must take that voucher into

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[36] *Id.* at 13-14. The PHA or owner should also include a detailed description of how they will conduct individualized assessments in the relevant ACOP, administrative plan, or tenant selection plan.
[37] See, e.g., 24 C.F.R. § 960.208(a) ("PHA must promptly notify any applicant determined to be ineligible for admission to a project of the basis for such determination"); § 880.603(b)(2) ("the owner will promptly notify the applicant in writing of the determination and its reasons").
[38] 24 C.F.R. § 882.514(f). According to HUD: "The purpose of the hearing is to permit the applicant to hear the details of the reason for denial, present evidence to the contrary if available, and claim mitigating circumstances when possible. The person who made the original decision to deny, or a subordinate of that person may not conduct the hearing. A written record of the hearing decision should be mailed to the applicant and placed in the applicant's file. If the hearing decision overturns the denial, processing for admission should resume."
https://www.hud.gov/sites/dfiles/PIH/documents/PHOG_Eligibility_Det_Denial_Assistance.pdf, at 22.
[39] Tran NT, Baggio S, Dawson A, O'Moore É, Williams B, Bedell P, Simon O, Scholten W, Getaz L, Wolff H. Words matter: a call for humanizing and respectful language to describe people who experience incarceration. BMC Int Health Hum Rights. 2018 Nov 16;18(1):41. doi: 10.1186/s12914-018-0180-4. PMID: 30445949; PMCID: PMC6240232.

a community of private and corporate landlords who are enrolled in the HCV program. These landlords have acted without oversight, freely conducting their own policies and pushing back against any regulation of their discretion in commerce. In Louisiana, for instance, the lobbyists for realtors and landlords provided objections (without testimony) that blocked state legislation in successive years.

Since HUD has been moving away from "projects" directly administered by the PHA, and towards "vouchers" to be used in the private housing market with landlords who join the voucher program,[40] depriving HCV tenants of the protections that HUD lays out would significantly undermine the goals of the proposed rule. For HCV tenants who are able to clear the hurdles of securing a voucher from HUD, the most discrimination happens when they then apply to a private landlord. While we hear HUD's concerns about disincentivizing landlord participation, these landlords are already required to follow HUD regulations in other domains, such as inspections for conditions issues. Additionally, many voucher landlords are corporate housing entities that own huge swaths of multifamily housing, and often receive considerable federal subsidies and LIHTC loans.

HUD should also weigh the positive fair housing implications of the proposed rule against any potential burden on landlords. The proposed regulations will actually help landlords avoid fair housing and civil rights violations. Lastly, HUD should provide technical assistance to voucher landlords directly to help them comply with the rule, which would mitigate the amount of resources required for implementation.

However, we support HUD's expanded eligibility for owners with records to participate in the HCV program.

X. "Currently engaging in"

HUD should replace "12 months" with 3-6 months in the final definition. The proposed definition states that "conduct that occurred 12 months or longer before the determination date does not support a determination that an individual is currently engaging [in]…the conduct at issue."[41] Since 42 U.S.C. § 13661(b)(1)(A) mandates the denial of any applicant who a PHA or owner determines "is illegally using a controlled substance," a person who used an illegal drug twelve months ago would automatically be denied housing under the proposed rule. It is a stretch of the imagination to characterize activity that took place twelve months ago as "current." A shorter time frame is more aligned with the overall purpose of the proposed rules to reduce automatic denials from HUD-assisted housing on the basis of disqualifying criminal activity.

In the employment and disability context, the length of time constituting "currently engaging in illegal drug use" is unsettled, but caselaw ranges from several weeks to several months, far

[40] HUD PD&R, Assisted Housing: National and Local, Picture of Subsidized Households, https://www.huduser.gov/portal/datasets/assthsg.html#data_2009-2023. ("Currently, tenant based assistance is the most prevalent form of housing assistance provided.")
[41] 89 Fed. Reg. 25361 (2024).

under the yearlong period HUD has proposed.[42] In fact, courts have held that applicants who had not used drugs in three months and nine months did not qualify as "currently engaging in" illegal drug use.[43, 44]

Implementation

XI. Fair chance policies

We support the proposed clarification that these regulations are not "intended to pre-empt operation of State and local laws that provide additional protections to those with criminal records."[45] However, PHAs and owners will need additional and clear guidance on the matter to avoid the pushback that complying with local fair chance policies would somehow put them in violation of their obligations to HUD.

XII. Crime-free policies

We strongly recommend that HUD state explicitly that these regulations create a policy "floor," which covered housing providers must not undermine by complying with state or local laws that violate the proposed rule. Crime-free programs and nuisance property ordinances (CFNOs) are classic examples of such laws. CFNOs threaten the housing of the most vulnerable tenants, particularly low-income tenants of color, survivors of gender-based violence, and tenants with disabilities. While they vary slightly by jurisdiction, these policies generally operate as either: a) crime-free programs, which require or encourage property owners to deny or evict families based on criminal activity, typically through trainings and the use of a lease addendum, or b) nuisance property ordinances, which label properties a "nuisance" based on things like calls for emergency services or alleged criminal activity and often demand the eviction of tenants (or even entire properties) as a way to "abate the nuisance."

In 2016, HUD took an important first step to address the growth of these laws and programs and the civil rights impediments created by them. HUD's Guidance on the Application of Fair Housing Act Standards on the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who

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[42] *See Quinones v. Univ. of Puerto Rico*, No. CIV. 14-1331 JAG, 2015 WL 631327 (D.P.R. Feb. 13, 2015) (finding that drug use three months ago was current use); *Salley v. Cir. City Stores, Inc.*, 160 F.3d 977 (3d Cir. 1998) (suggesting that drug use three weeks ago was current use); *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995) (finding that use in weeks and months prior to discharge was current use); *Baustian v. State of La.*, 910 F. Supp. 274 (E.D. La. 1996) (finding that a seven-week abstinence was considered current use); *See also United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992) (finding that one-year abstinence was not current use under identical language in the Fair Housing Act).

[43] *Lott v. Thomas Jefferson Univ.*, No. CV 18-4000, 2020 WL 6131165 (E.D. Pa. Oct. 19, 2020) (determining that because plaintiff "had not used illegal drugs in over three months . . . the Court cannot conclude . . . that plaintiff was 'currently engaging [in] the illegal use of drugs' at the time of his termination").

[44] *Herman v. City of Allentown*, 985 F.Supp. 569 (E.D.Pa.1997) (finding that a nine-month abstinence was not current use).

[45] 89 Fed. Reg. 25368 (2024).

Require Police or Emergency Services focused on how these laws and programs harm victims of domestic violence, as acts of violence against survivors can easily be identified as "nuisance" conduct.[46]

Despite this guidance and HUD's guidance on criminal records screening, aggressive criminal records screening remains a key aspect of many CFNOs, often done by the local government or at their direction, as well as the aggressive efforts by local governments to force the eviction of tenants if there is any contact with the police. CFNOs often direct, instruct, or require landlords to refuse to rent to prospective tenants with a criminal history, including arrests without conviction. These exclusions are imposed regardless of whether an applicant's record suggests a present risk to the rental property or the safety of other tenants. For example, one tenant with a 19-year-old conviction was forced to leave because of an ordinance's prohibition on renting to people on probation or parole.

CFNOs also frequently involve the attachment of lease addenda requiring a landlord to automatically terminate the leases of all tenants in a home if there is any alleged criminal activity by any tenant, guest, or other person. The lease addenda and crime-free programs also often require broad and expansive criminal background checks and rely upon some of the very actions HUD is trying to stop with this rulemaking – blanket bans and the use of arrest records to deny admission.

There is no evidence, however, that the CFNOs reduce crime. In California, for example, a Los Angeles Times analysis highlighted how California jurisdictions adopted "crime-free" housing programs following increases in the Black and Latine population in the jurisdictions.[47] The policies are disproportionately enforced against Black and Latine renters leading to housing instability. Further, a study that examined the origin of these policies concluded that "crime-free" policies are primarily used as a tool of racial exclusion and represent the evolution of laws designed to exclude people of color from communities.[48]

Consequently, the California Legislature enacted Assembly Bill 1418, which limits local governments' ability to enact legislation penalizing tenants for their contact with law enforcement. Specifically, the law prohibits cities from evicting tenants based on calls to law enforcement, suspected criminal activity, or other alleged nuisance activity, as well as prohibits municipalities from making landlords conduct criminal background checks as part of tenant

[46] 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 (Sept. 13, 2016), available at https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.

[47] Liam Dillon, Ben Poston, Julia Barajas, Black and Latino renters face eviction, exclusion amid police crackdowns in California, Los Angeles Times, November 19, 2020, available at https://www.latimes.com/homeless-housing/story/2020-11-19/california-housing-policies-hurtblack-latino-renters, Some California housing policies hurt Black people, Latinos - Los Angeles Times (latimes.com).

[48] Deborah N. Archer, American Constitution Society, You Can't Go Home Again: Racial Exclusion Through Crime-Free Housing Ordinances (November 2019) at 3, available at https://www.acslaw.org/wp-content/uploads/2019/11/Racial-Exclusion-Through-Crime-Free-HousingOrdinances, Racial-Exclusion-Through-Crime-Free-Housing-Ordinances.pdf (acslaw.org).

screening, and bans cities from forcing the eviction of an entire family based on a felony conviction of one person in the household. HUD should look to this new law as a guide in crafting language to prohibit complicit behavior with CFNOs, if not in the proposed regulations, possibly in subregulatory guidance.

XIII. Sex Offense Registries

We understand that, in many ways, reforming the blanket ban on those subject to lifetime sex offense registry requirements requires statutory reform.[49] Still, there is still room for HUD to clarify the scope of this exclusion. Specifically, the Rule should clarify the meaning of the statutory phrase "subject to a lifetime sex offender registration requirement." In some states, people convicted of certain sex offenses must automatically register for life. In others, there is a process for registrants to be removed from the registry. The rule should clarify that registrants in states with a process for removal from the registry are not "subject to a lifetime offender registration requirement." Rather, such registrants are subject to registration requirements which end when certain conditions are met, determinations are made, or requirements are satisfied.

XIV. Implementation and enforcement considerations

We strongly recommend that HUD include in any final rule robust implementation and enforcement mechanisms, including resources for PHAs and owners/operators of assisted housing like training and ongoing technical assistance (TA), and resources to ensure applicants and tenants know their rights, and how to report HUD-assisted housing providers found in violation of the new rule. Additionally, both HUD and PHA staff should undergo training that explains the connection between stable housing and crime, including recidivism. There are nuances of the legal system regarding substance use, homelessness, and domestic violence that require support and interventions, not evictions.

Training PHA staff and owners/operators of assisted housing on the new rule, its purpose, and its proper implementation, and providing ongoing technical assistance, will be vital to ensuring the updated rule is implemented successfully. HUD should provide staff with resources, tools, and support, including trainings, guidebooks, frequently asked questions (FAQs), and in-depth program assistance to assist in the rule's implementation. HUD's guidance should address best practices for PHAs and assisted owners/operators in states like Wisconsin, where programs like Wisconsin Circuit Court Access (formerly Consolidated Court Automation Programs, CCAP) provide unbridled access to court records that could be used to unjustly deny someone access to assisted housing. HUD should also provide guidance on how PHAs and owners use court records generally, which can easily be misinterpreted. For example, a PHA may see that an applicant is a defendant in a criminal case, but not factor into its admission decision that the case was subsequently dismissed. Finally, HUD should provide guidance on the information

[49] Importantly, there is no evidence indicating the placing residency restrictions on sex offense registrants enhances public safety and some evidences indicating such residency restrictions make society less safe. *See, e.g.,* "Sex Offender Housing Restrictions," Kansas D.O.C., https://www.doc.ks.gov/publications/CFS/sex-offender-housing-restrictions (citing studies supporting Kansas's choice not to impose statutory residency restrictions on people on sex offense registrants).

that PHAs and owners must provide to applicants and tenants so that they can understand what evidence is being used against them.

HUD should work closely with PHAs, advocates, and other entities that have successfully reduced barriers to assisted housing for formerly incarcerated and convicted people to learn and promulgate best practices related to admissions, terminations, and evictions for alleged criminal activity. Importantly, in shaping its guidance and resources, HUD should continue soliciting input and insights from both currently and formerly incarcerated and convicted people, who have experience navigating reentry systems – including finding safe, affordable, and accessible housing – and are best positioned to identify needed changes and potential solutions. Moreover, HUD should work with the Department of Justice, the Federal Bureau of Prisons, departments of corrections, and other relevant parties to perform proactive outreach to people preparing to leave incarceration and in need of a place to call home. This outreach would help identify people in need of stable housing and pair them with assistance before they exit incarceration into homelessness.

In addition to sufficient guidance, TA, and resources, successful implementation of any final rule will also depend on robust reporting and enforcement mechanisms. In addition to HUD's proposed process for allowing tenants to provide notice and respond to proposed changes to admissions plans, tenants should be made immediately aware of any final changes to their PHA's ACOPs, Administrative Plans, Tenant Selection Plans (TSPs), or similar such plans through written notice, both virtually through email and through a physical notice. HUD should also mandate that these plans be publicly available online and easily accessible to tenants or prospective tenants. Information should be provided in plain language, available in multiple languages, and accessible to people with visual impairments.

HUD must also include information on how tenants can report PHAs and assisted owners/operators who are found in violation of the updated rule. Along with the notice of changed ACOP, Administrative Plans, or TSPs, PHAs and covered providers should be required to provide information on how tenants can file a complaint if they feel their rights under HUD's new rule have been violated. For example, the notice should include contact information for HUD's Office of Fair Housing and Equal Opportunity, any state or local fair housing agencies, and legal aid organizations.

In the spirit of "affirmatively" furthering fair housing, HUD should further incentivize landlord and PHA compliance with the new rule by rewarding PHAs who adopt lower-barrier screening methods. Previous regulations granted PHAs additional points under the Public Housing Assessment System (PHAS) for screening out applicants with conviction histories, a practice that HUD notes in its NPRM is "fundamentally at odds with the purpose" of the updated rule. Much as it once rewarded increased barriers, HUD should now reward more equitable screening, termination, and eviction policies for people with conviction and arrest histories. Compliance with HUD's updated regulations and subsequent guidance should also be taken into account when determining whether a PHA or landlord may be responsible for violating provisions of the *Fair Housing Act*. Although not explicitly a protected class under federal law, discrimination through criminal records has well-documented implications towards other

protected classes. Some have called criminal records a “proxy for race,” and the overall societal impact has become a best-selling title: “The New Jim Crow.” As our culture (and HUD) has made great strides in correcting the over-punitiveness of expansive cradle-to-grave policies, it is essential that HUD take any and all reasonable enforcement tools to bear upon those who prefer not to provide fair housing in their commercial activities.

In addition, in order to determine the effectiveness of the rule changes and identify gaps in implementation and enforcement, we recommend HUD add reporting requirements for PHAs and assisted owners/operators detailing housing decisions after an individualized assessment was performed, including aggregated demographics of tenants denied and accepted. This information will be crucial to identifying patterns in housing denials, including potential violations of the *Fair Housing Act* in which conviction status is used to mask housing denials on the basis of protected characteristics (e.g., race).

Finally, we hope that HUD and fair housing organizations aggressively embrace the opportunity to deploy people with criminal records as housing testers. There are well over 100 million adults with a record, impacting millions more children. This blind spot needs to be revealed, as this is the overt discrimination of our time, cloaked in vague policies and undocumented application.

While FICPFM & PJH recognize that these changes would have a substantial impact to advance access to safe, quality, and affordable housing for all impacted individuals, the changes still provide extensive discretion to people who are not trained or experienced to ultimately review unreliable documents in making decisions on access to housing. FICPFM and PJH would suggest stricter PHA reporting requirements to ensure that decisions are documented for review and that new changes are being implemented accordingly.

XV. Outreach

Engaging in outreach efforts involves disseminating crucial information and educating staff within prisons and jails about the final rule, particularly focusing on dispelling misconceptions and highlighting key aspects for individuals transitioning out of incarceration.

Firstly, it's essential to address misinformation surrounding housing options for individuals leaving incarceration. Many may erroneously believe that they cannot apply for housing while still incarcerated. Dispelling this misconception is vital, as it empowers individuals to take proactive steps towards securing stable housing upon release.

Additionally, emphasizing the correct understanding of the lookback period is crucial. It's important to clarify that the lookback period begins at the date of criminal activity, not the date of release. This distinction ensures that individuals are aware of the timeframe within which their past criminal history may be considered in housing applications, facilitating informed decision-making and planning.

Furthermore, collaboration with agencies involved in the incarceration process is essential for effectively coordinating efforts to assist individuals in finding housing upon release. By working together with these agencies, such as probation or parole offices, social services, and community organizations, it becomes possible to streamline support services and provide

comprehensive assistance tailored to the needs of individuals transitioning from incarceration to community living.

In summary, outreach efforts targeting staff within prisons and jails play a pivotal role in ensuring that accurate information is conveyed, misconceptions are dispelled, and collaborative efforts are undertaken to facilitate housing stability for individuals leaving incarceration. By addressing these key areas, such outreach initiatives contribute to smoother transitions and improved outcomes for individuals reentering society.

Conclusion

Overall, FICPFM and PJH's endorsement of HUD's proposed regulations signifies a dedication to promoting fairness, equality, and opportunity, particularly for those facing challenges in accessing housing. By advocating for policies that address these barriers, there's a concerted effort to ensure that everyone, regardless of background or circumstance, has the fundamental right to safe and stable housing.

This commitment to removing obstacles to housing access aligns with broader societal goals of fostering equity and justice. Housing is not merely a commodity; it's a basic human need and a cornerstone of individual well-being. Lack of adequate housing can exacerbate social and economic inequalities, perpetuate cycles of poverty, and contribute to marginalized communities' disenfranchisement. Therefore, by championing policies that facilitate housing affordability, combat discrimination, and expand housing opportunities, we strive to create a more just and equitable society where everyone has the chance to thrive.

Furthermore, advocating for inclusive housing policies reflects a recognition of the interconnectedness of our communities. When individuals have stable housing, they are better positioned to contribute positively to society, whether through employment, education, or civic engagement. Moreover, diverse and inclusive neighborhoods enrich our social fabric, fostering understanding, empathy, and cooperation among people from different backgrounds.

In essence, endorsing regulations that prioritize housing access underscores a broader commitment to social progress and human dignity. It signifies a collective determination to build communities where everyone, regardless of their circumstances, can live with dignity, pursue their aspirations, and participate fully in society. By promoting housing equity and inclusivity, we move closer to realizing the vision of a compassionate and fair society where every individual has the opportunity to thrive and fulfill their potential.

Thank you for taking this important step to reduce barriers to HUD housing for people who have been impacted by the criminal legal system. For questions, please contact Kimberly Dunne (kimberly@ficpfm.org) or Kim Johnson (kjohnson@nlihc.org).

Sincerely,

Admiral Real Estate
Affordable Housing Conference of Montgomery County
All Square

Allegheny Valley Association of Churches
Born 100 Made 1Thousand
Buena Vista Community Institute
Butler Family Fund
Chicago Area Fair Housing Alliance
Cook County Justice Advisory Council
Davis Opportunity Village
Drug Policy Alliance
EDWINS Leadership and Restaurant Institute
Fair Share Housing Center
Fathers and Families Center
Florida Alliance for Community Solutions, Inc.
Formerly Incarcerated Transitions (FIT) Clinic Initiative
Goodwill of Silicon Valley
Granite State Organizing Project
Homeless Persons Representation Project
Housing Alliance of Pennsylvania
Illinois Justice Project
Legal Action Center
Legal Aid DC
Life Coach Each One Teach One Re Entry Fellowship
MLPB
NAP Unlimited LLC
National Coalition for Latinxs with Disabilities
National Disability Rights Network (NDRN)
National Foundation for Affordable Housing Solutions, Inc
National Health Care for the Homeless Council
National Housing Law Project
Neighborhood Development Foundation (NDF)
NETWORK Lobby for Catholic Social Justice
National Low Income Housing Coalition (NLIHC)
Operation Restoration
Orange County Street Outreach, Harm Reduction and Deflection Program (SOHRAD)
Pennsylvania Association of Housing & Redevelopment Agencies
Public Advocacy for Kids (PAK)
Safe Haven Family Shelter
Safe Return Project
Shriver Center on Poverty Law
Southside Neighborhood Association
Stone Soup Development, Inc.
TASC, Inc. (Treatment Alternatives for Safe Communities)
The First 72+
The Fortune Society
The Legal Aid Society of Cleveland

The Legal Revolution
Uptown People's Law Center
Ventura Social Services Task force
Vera Institute of Justice
Vital Strategies
Voice of the Experienced
Voters Organized to Educate
Welcome House of Northern Kentucky