

October X, 2022

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To Principal Deputy Assistant Secretary McCain and Senior Advisor Cho:

We, the undersigned X national, state, and local organizations, write to thank you for spearheading the Department of Housing and Urban Development's (HUD's) review of its programs and policies to identify barriers to housing access for people with prior criminal-legal system involvement, and to urge the department to issue new regulations and guidance that reaffirms the right to assisted housing for those impacted by the criminal-legal system. We also write to support the policy suggestions in the September 13 [letter](#) from the National Housing Law Project and Housing Justice Network, and in the September 1 [letter](#) from Voice of the Experienced (VOTE) and signed by a multitude of organizations led by people with arrest and conviction histories.

Safe, affordable, accessible housing is the foundation upon which we build our lives, but millions of people with conviction or arrest records are routinely denied access to a safe place to call home because of their involvement with the criminal-legal system – in fact, 79% of formerly incarcerated people and their families reported being denied housing because of a previous conviction.<sup>1</sup> The systemic bias inherent to the criminal-legal system has led Black, Latino, and Native people, as well as people with disabilities and members of the LGBTQ community, to be disproportionately impacted by these barriers.<sup>2,3,4</sup> As such, removing tenant screening practices that unfairly discriminate against those with arrest and conviction histories is foundational to the Biden Administration's goal of "affirmatively advancing equity, civil rights, racial justice, and equal opportunity."<sup>5</sup>

Those exiting incarceration typically return to underinvested communities where resources, particularly affordable, accessible housing, are scarce – nationally, there is an estimated shortage of 7 million homes affordable and available to the lowest-income renters, and there is not a single state or congressional district in the country with enough affordable homes to meet demand.<sup>6</sup> When people with conviction or arrest histories are unable to find safe, affordable housing, they are at an increased risk of housing

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<sup>1</sup> Enterprise Community Partners. 2022. "How the Criminal Legal System Exacerbated Racial Housing Disparities." Retrieved from: <https://www.enterprisecommunity.org/blog/how-criminal-legal-system-exacerbates-racial-housing-disparities#:~:text=A%20study%20found%20that%2079,homeless%20than%20the%20general%20public>.

<sup>2</sup> The Sentencing Project. 2019. *Report to the United Nations on Racial Disparities in the US Criminal Justice System*. Retrieved from: <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

<sup>3</sup> Oberholtzer, E. 2017. "Police, courts, jails, and prisons all fail disabled people." Prison Policy Initiative. Retrieved from: <https://www.prisonpolicy.org/blog/2017/08/23/disability/>

<sup>4</sup> Griffith, D. "LGBTQ youth are at greater risk of homelessness and incarceration." Prison Policy Initiative. Retrieved from: [https://www.prisonpolicy.org/blog/2019/01/22/lgbtq\\_youth/](https://www.prisonpolicy.org/blog/2019/01/22/lgbtq_youth/)

<sup>5</sup> The White House. 2021. *Advancing Equity and Racial Justice Through the Federal Government*. Retrieved from: <https://www.whitehouse.gov/equity/>

<sup>6</sup> Aurand, A., Emmanuel, D., Clarke, M., Rafi, I., and Yentel, D. 2022. *The Gap: A Shortage of Affordable Homes*. National Low Income Housing Coalition. Retrieved from: <https://reports.nlihc.org/gap>

instability and homelessness.<sup>7</sup> Homelessness, in turn, increases the likelihood of interacting with the criminal-legal system, as unhoused individuals may need to engage in crimes of survival like theft, loitering, or sex work.<sup>8</sup> An increasing number of communities have also enacted laws penalizing people experiencing homelessness for engaging in life-sustaining activities in public, including sleeping, sitting and lying down in public.<sup>9</sup> Conversely, housing access is foundational to employment, education, health, upward mobility, and long-term stability.<sup>10</sup>

Across the country, 3,300 public housing authorities (PHAs) provide affordable public housing, vouchers and rental subsidies to approximately 4.3 million low-income households.<sup>11</sup> This stock of affordable housing is an invaluable asset for combatting housing insecurity and homelessness, but too often PHAs impose barriers to housing access that lock people with a conviction or arrest record out of the opportunity to live in federally assisted housing. The same discriminatory and unjust barriers exist in HUD's Multifamily housing stock.

Recognizing the foundational role of housing, in April 2022 HUD Secretary Marcia Fudge directed staff to review HUD's existing policies to identify regulations and guidance that could be amended to decrease barriers to HUD-assisted housing for people with conviction or arrest records.<sup>12</sup> Much of HUD's current guidance on evaluating current and potential tenants is advisory rather than mandatory, giving PHAs and project owners broad discretion in screening out tenants with a conviction or arrest history. HUD's review of its policies and procedures presents the opportunity for a revision to HUD's admissions policies so they align with HUD's 2015 and 2016 guidance for PHAs and owners of federally assisted housing on the use of criminal and arrest records in tenant screening.

These changes would also bring HUD into compliance with the recommendations established in a 2018 Government Accountability Office report,<sup>13</sup> and would reign in PHA's ability to arbitrarily screen out potential tenants. Moreover, mitigating the collateral consequences of a conviction or arrest history would expand housing access to millions, help move the needle on racial equity, and is supported by an overwhelming majority of voters.<sup>14</sup>

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<sup>7</sup> Cusack, M. and Montgomery, A.E. 2017. "Examining the bidirectional association between veteran homelessness and incarceration within the context of permanent supportive housing." *Psychological Services 14*(2). Retrieved from: <https://pubmed.ncbi.nlm.nih.gov/28481612/>

<sup>8</sup> McLaughlin, L. 2011. "The Poverty-Crime Connection." *Jackson Free Press*. Retrieved from: <https://www.jacksonfreepress.com/news/2011/oct/19/the-poverty-crime-connection/>

<sup>9</sup> National Homelessness Law Project. 2019. *Housing Not Handcuffs 2019: Ending the criminalization of Homelessness in the US*. Retrieved from: <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>

<sup>10</sup> Opportunity Starts at Home. 2019. "Housing Affordability Challenges Fact Sheet." Retrieved from: <https://www.opportunityhome.org/resources/unaffordable-homes-drive-poor-people-deeper-poverty/>

<sup>11</sup> Department of Housing and Urban Development. "Questions and Answers About HUD." Retrieved from: <https://www.hud.gov/about/qaintro#:~:text=More%20than%207%20million%20families,rental%20subsidy%20and%20voucher%20programs>

<sup>12</sup> Fudge, M. L. 2022. "Eliminating Barriers that May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs." Department of Housing and Urban Development. Retrieved from: [https://www.hud.gov/sites/dfiles/Main/documents/Memo\\_on\\_Criminal\\_Records.pdf](https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf)

<sup>13</sup> Government Accountability Office. 2018. "Rental Housing Assistance: Actions Needed to Improve Oversight of Criminal History Policies and Implementation of the Fugitive Felon Initiative." Retrieved from: <https://www.gao.gov/assets/gao-18-429.pdf>

<sup>14</sup> University of Maryland School of Public Policy. 2021. "Limiting the Negative Consequences of Criminal Records: A National Survey of Registered Voters." *Voice of the People*. Retrieved from: <https://vop.org/criminalrecords/>

Listed below are recommendations that HUD should consider while making these crucial updates to admissions policies:

- **Arrests and sealed or expunged records may not be the basis of any adverse action.** HUD should revise its regulations and subregulatory guidance (including its guidebooks) to make clear that PHAs and other HUD housing providers cannot use arrest records or sealed/expunged records at all as the basis of any adverse action against a tenant including denial of admission, as stated in its 2015 Notice.<sup>15</sup>
- **Explicitly state blanket bans are not allowed.** HUD should revise its regulations and subregulatory guidance to explicitly state that blanket bans in admission are not allowed. Per HUD’s 2016 Fair Housing Guidance<sup>16</sup> and reiterated in a June 2022 memo,<sup>17</sup> blanket admission bans against people with a conviction or arrest history are illegal under the Fair Housing Act (FHA). PHAs may not broadly screen out tenants with a criminal record because of the disproportionate impact of the criminal-legal system on protected classes, including Black, Native, and Latino people, as well as people with disabilities.
- **Clarify the meaning of criminal activity that “would adversely affect the health, safety, or welfare of other tenants.”** 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.” 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.<sup>18</sup> HUD should be explicit about the types of offenses that “adversely affect the health, safety, or welfare of other tenants” in both regulations and subregulatory guidance.
- **Further define lookback periods.** While federal law instructs housing providers to look back in an applicant’s conviction history within a “reasonable time,” neither statute nor HUD guidance explicitly define what constitutes a reasonable time. In the absence of formal guidance, many housing providers establish admissions policies that have no time limit on using a person’s conviction history to evaluate their application, or set unreasonable time limits (99 years, for example).<sup>19</sup> No available data suggests such overly long lookback periods contribute to the health and safety of other residents. Rather, extensive lookback periods can act as a de facto ban on people with a conviction or arrest

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<sup>15</sup> Department of Housing and Urban Development. 2015. *Notice PIH 2015-19/H 2015-10*. Retrieved from: <https://www.hud.gov/sites/documents/15-10HSGN.PDF>

<sup>16</sup> Department of Housing and Urban Development. 2016. *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*. Retrieved from: [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF)

<sup>17</sup> McCain, D. L. 2022. “Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.” Department of Housing and Urban Development. Retrieved from: <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>

<sup>18</sup> 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>

<sup>19</sup> Ibid

history from receiving housing assistance, and conflict with HUD's long held assertion that permanent admissions bans contradict federal policy and may violate the FHA.<sup>20</sup> HUD should explicitly define permissible lookback periods based on type of conviction, and should generally limit lookback periods to three years or less from the date of the criminal offense that resulted in conviction,<sup>21</sup> and encourage shorter look back periods based on circumstances.

- **Limit the kinds of criminal activity PHAs and project owners can consider in admissions and evictions decisions.** Housing providers utilize overly broad categories of criminal activity, casting a wide net over almost any criminal activity even if it has little bearing on an applicant's potential success as a tenant.<sup>22</sup> HUD should establish clear rules limiting PHA's use of criminal history to only convictions for felonies likely to have an impact on an applicant's success as a tenant, and should consider the crime's severity, time passed since the crime was committed, and risk of potential harm to others. PHAs should be required to make explicit the types of convictions considered in their screening processes. For terminations because of family break-ups due to gender-based violence, HUD should advise PHAs not to require conviction records and instead educate PHAs on how best to provide due process for all parties.
- **Conduct individualized assessments of applicants with criminal records, and provide applicants with a copy of their screening report.** When assessing an applicant who has a conviction that is permitted to be considered, PHAs and owners of federally assisted housing should be required to perform an individualized review of the applicant that considers the totality of circumstances surrounding a conviction and gives the prospective tenant the opportunity to present mitigating evidence, either in person or in writing. Consistent with due process principles and HUD's 2015 guidance,<sup>23</sup> PHAs should provide written notice to applicants of their screening policies and, in the event an applicant is denied, should provide written notice detailing the reasons for denial as well as how the tenant can appeal. Tenants should be provided a copy of their screening report so they may refute any inaccurate, incomplete, or incorrect information. HUD should also prohibit PHAs from using drug and alcohol testing as a condition of admission.
- **Prohibit subsidized housing providers from charging excessive application fees.** These fees often deter people with conviction or arrest records from applying to safe and stable housing. Further, housing providers may use excessive application fees to turn a profit, which is especially harmful to people recently released from incarceration who likely have little money and who are more likely to have their applications rejected. As such, HUD should clarify that subsidized housing providers are not permitted to charge application fees in excess of the actual cost of evaluating an application; those whose applications don't receive full evaluation should receive a full or partial refund.

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<sup>20</sup> Ibid

<sup>21</sup> Altamirano Marin, J., Crew, E., and diZerega, M. 2021. *Looking Beyond Criminal History: Recommendations for Public Housing Authority Admissions Policies*. Vera Institute of Justice. Retrieved from: <https://www.vera.org/downloads/publications/looking-beyond-conviction-history.pdf>

<sup>22</sup> Warren, C. 2019. *Success in Housing: How Much Does Criminal Background Matter?* Wilder Research. Retrieved from:

[https://www.wilder.org/sites/default/files/imports/AEON\\_HousingSuccess\\_CriminalBackground\\_Report\\_1-19.pdf](https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf)

<sup>23</sup> Department of Housing and Urban Development. 2015. *Notice PIH 2015-19/H 2015-10*. Retrieved from: <https://www.hud.gov/sites/documents/15-10HSGN.PDF>

- **Hold the available unit open while an individualized review is being conducted.** In the event 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 to prevent the unit from being lost during review, unless a comparable unit will be available when or shortly after the review is completed.
- **Allow people on probation, parole, or completing a diversion program to live in public housing.** Individuals released on parole, probation, or completing a diversion or alternative-to-incarceration program have already met the court’s standards for release. PHAs should admit people under court supervision using an individualized review process that takes into consideration the totality of circumstances and provides prospective tenants the opportunity to present mitigating evidence. Explicitly allowing people on probation or parole to live in public housing is also a key factor in family reunification and can help provide the support needed for successful reentry.<sup>24</sup>
- **Limit denials related to illicit drug use.** Current HUD guidance allows PHAs to deny a prospective household if a member is “currently engaged in illegal drug use or alcohol abuse,” but fails to define “currently engaged.” HUD should recognize that some individuals “currently engaged” in drug or alcohol use have also been diagnosed with Substance Use Disorder, a common symptom of which is relapse and recurrent use. HUD should make clear that denying someone based on their current drug or alcohol use alone, without any concerns related to the health, safety, and welfare of other tenants, is impermissible, and a potential violation of the Americans with Disabilities Act. Denials based on a prospective household member’s current drug or alcohol use should be put in writing and subject to an appeal. In addition, HUD should clarify that whether or not drug use is illegal is a consideration under both state and federal law. In no circumstances should the use of medical marijuana be considered drug use as the basis for any adverse action in the federal housing programs.
- **Expand the definitions of “homelessness” and “at risk of homelessness” to be widely inclusive of those exiting incarceration.** The April 12 memo was issued largely because people reentering society from incarceration are especially likely to face homelessness. It is thus counterintuitive that the definition of “homeless” only includes these individuals if they were homeless before incarceration and sentenced to less than 90 days. The definitions of “homeless” and “at risk of homelessness” should broadly encompass those being released from incarceration so that funding may be properly allocated towards this population frequently facing housing instability. Additionally, HUD should request Congress allocate appropriately expanded funding to HUD for its homelessness diversion programs and Homeless Assistance Grants account to ensure it is able to serve the reentry population.
- **Include absence as a result of incarceration as a permitted temporary absence.** PHAs typically have policies allowing tenants to be absent from their unit for brief periods if they notify the PHA in advance and provide information requested by the PHA. PHAs should expand these policies to allow people who are in jail, pretrial detention, or whose sentences allow them to stay in their community to retain their housing.<sup>25</sup>

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<sup>24</sup> Bae, J., diZerega, M., Kang-Brown, J., Shanahan, R., & Subramanian, R. 2016. *Coming Home: An Evaluation of the New York City Housing Authority’s Family Reentry Pilot Program*. Vera Institute of Justice. Retrieved from: [https://www.vera.org/downloads/publications/NYCHA\\_report-032917.pdf](https://www.vera.org/downloads/publications/NYCHA_report-032917.pdf)

<sup>25</sup> Ibid

- **Ensure people exiting incarceration can be added to a household's lease.** People exiting incarceration and attempting to reunite with their families living in subsidized housing are sometimes barred from doing so or not permitted to be added to the household's lease. Although HUD has no prohibition on adding returning citizens to a lease, it is widely believed that PHAs and project owners are not permitted to do so. HUD should reassert PHAs' and project owners' responsibility to perform an individualized review of prospective tenants with conviction histories and should clarify that PHAs and project owners cannot implement blanket bans on adding a family member with a conviction or arrest history to a lease.
- **Utilize the AFFH certification process to promote and monitor equity in tenant screening.** Per the March 2 letter to HUD from the National Low Income Housing Coalition, National Housing Law Project, and Shriver Center on Poverty Law, HUD should use the AFFH certification process specifically to disincentivize PHAs from adopting and allowing inequitable criminal record screening practices. Federal law only requires housing authorities to exclude applicants based on their criminal history in very limited circumstances; the more housing authorities adopt or permit additional exclusions, the greater their reporting obligations should be. Similarly, HUD should flag such PHAs for compliance reviews.

We urge you to take these suggestions into consideration and thank you for your time. If you have any questions or would like to discuss this further, please reach out to Bruce Reilly, deputy director of Voice of the Experienced, at [Bruce@vote-nola.org](mailto:Bruce@vote-nola.org), Kim Johnson, senior policy analyst at the National Low Income Housing Coalition, at [kjohnson@nlihc.org](mailto:kjohnson@nlihc.org), or Eric Sirota, director of housing justice at the Shriver Center on Poverty Law, at [ericsirota@povertylaw.org](mailto:ericsirota@povertylaw.org).

Sincerely,

[Signatures]