



For economic and racial justice

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November 22, 2021

Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity
451 7th Street, S.W.
Washington, DC 20410

Re: Subregulatory suggestions to enhance housing access for those with criminal records

Dear FHEO,

Thank you for continuing to prioritize enhancing access to housing for those with criminal records. While we continue to push for HUD to use its formal regulatory authority under the Fair Housing Act in this area, this letter and the accompanying suggestions focus upon how FHEO can use subregulatory guidance and enforcement action to further ensure that housing providers do not use criminal histories in a way that unlawfully discriminates against members of protected classes. As the Shriver Center on Poverty Law stated in its [comments](#)¹ to the Reinstated Discriminatory Effects Standard, in the modern day, use of criminal records is a primary driver of housing inequity.² Thus, reining in such practices is integral to FHEO's mission.

FHEO should take a four-prong approach to further the promise of the 2016 Criminal Records Guidance ("Guidance" or "2016 Guidance"). FHEO should protect the Guidance, improve the Guidance, uplift entities that serve as models of compliance, and take enforcement action against those who violate the Guidance. These steps are summarized immediately below and elaborated upon in the body of this letter:

- **Improve the Guidance** by updating and strengthening the 2016 Guidance. Specific suggestions are attached as Exhibit 1, with the suggested language highlighted;
- **Protect the Guidance** by widely incorporating the principles underlying the 2016 Guidance into FHEO subregulatory documents (e.g., handbooks, manuals). This letter provides recommended language below;

¹ Comment Submitted by Shriver Center on Poverty Law, posted by HUD on Aug. 25, 2021, HUD-2021-0033-0278, <https://www.regulations.gov/comment/HUD-2021-0033-0278>.

² See Terry-Ann Craigie, et al., Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality, Brennan Center for Justice (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>.

- **Uplift Models of Compliance** by further uplifting housing providers and housing authorities who serve as models of compliance with the 2016 Guidelines;
- **Take Enforcement Action** against housing providers and authorities who have failed to comply with the 2016 Guidance and undertaking compliance reviews, especially for public housing authorities.

Improve the 2016 Criminal Records Guidance

FHEO should update and improve the Guidance. Our specific suggestions for how FHEO should improve the 2016 Criminal Records Guidance can be loosely summarized as follows:

- Explicit application of the Guidance’s protections to persons with disabilities;
- Application of the Guidance to criminal records beyond arrest and conviction records;
- Clarification that the recidivism studies cited in the Guidance do not themselves provide a basis for determining a permissible criminal background check lookback period;
- Clarification of the Guidance’s applicability to tenant screening companies;
- Additional clarification of how national statistics can be used to further a plaintiff’s prima facie case for disparate impact and how use of such statistics can be rebutted;
- Addressing of the argument that federally-subsidized housing providers are shielded from liability by federal statutes providing discretion to exclude applicants based on criminal backgrounds;
- Use of illustrative examples.

1. Explicit Application of the Guidance to Persons with Disabilities

The attached suggestions advocate that FHEO use Guidance to explicitly analyze how housing provider criminal history policies may discriminate against persons with disabilities. Importantly, as stated by footnote 9 to the 2016 Guidance, “[The Guidance] focuses on race and national origin discrimination, although criminal history policies may result in discrimination against other protected classes.” Data consistently demonstrates that, like the protected classes specifically discussed in the existing Guidance, persons with disabilities are especially vulnerable to being excluded from housing based on criminal history; notably, some such studies were published subsequent to the 2016 Guidance.³

The attached suggestions also advocate that HUD clarify that reasonable accommodation requirements may, in some instances, obligate housing providers, not only to overlook past

³ See, e.g., Laura M. Maruschak, Disabilities Reported by Prisoners: Survey of Prison Inmates, 2016, March 2021, <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016>; The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender, American Journal of Public Health, December 2017, <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2017.304095>.

conduct when it is symptomatic of a disability, but also to accommodate criminal records, including conviction records based on such conduct. This is already made implicit by the examples in the joint DOJ/HUD 2004 statement.⁴ At least one court has applied this joint statement in holding that housing providers may at times be obligated to overlook past conviction history as a reasonable accommodation.⁵ However, the joint statement does not specifically address conviction records and only somewhat circuitously states housing providers' obligation to accommodate arrest records.⁶ Explicit clarification thus avoids ambiguity and uncertainty.

2. Application to Criminal Records beyond Conviction and Arrest Records

The current Guidance applies its analysis only to arrest records and conviction records, but its logic readily applies to other criminal records. 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."⁷ Similarly, other pre-conviction records, such as indictments, pre-trial release status, charging documents, and the like, as well as records of convictions which have been vacated on appeal or otherwise, do not constitute "proof of past unlawful conduct."⁸

Housing provider use of other types of records also cannot further a substantial, legitimate non-discriminatory interest.⁹ For example, when a record has been sealed, expunged, or otherwise made publicly unavailable by statute or court order, the use of such records by housing providers cannot be considered necessary to further a legitimate interest.¹⁰ The same can be said for convictions for which the applicant has been pardoned. The decision to pardon indicates a lack of substantial legitimate interest in continuing to hold the conviction against the applicant.¹¹

Similarly, housing providers' use of juvenile records should generally not be deemed necessary 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

⁴ Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations under the Fair Housing Act, available at <https://www.hud.gov/sites/documents/hud DOJ statement.pdf>, pp. 5-6, Examples 1 and 2.

⁵ *Simmons v. Tm. Assoc. Mgmt., Inc.*, 287 F. Supp. 3d 600, 603 (W.D. Va. 2018); *see also, e.g., Walsted v. Woodbury Co.*, 113 F. Supp. 2d 1318 (N.D. Iowa 2000).

⁶ See Joint Statement, at *supra* note 4, p. 5, Example 2.

⁷ 2016 Guidance, p. 5.

⁸ *Id.*

⁹ See *Collins, at id*; *Coleman, infra* note 13, at pp. 4, 9 ("[A]ll state have laws require confidentiality throughout juvenile justice processing with some exceptions.").

¹⁰ See *Andrea R. Coleman, infra* note 13, noting on page 2 that "The goal of expungement is to make it as though the records never existed."

¹¹ 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").

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, the state of Illinois Public Housing Access Bill prohibits Public Housing Authorities from excluding households from public housing based upon “(A) an arrest or detention; (B) criminal charges or indictments, and the nature of any disposition arising therefrom, that do not result in a conviction; (C) a conviction that has been vacated, ordered,

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). Again, this citation speaks to the problems of using juvenile criminal history but does not imply or speak to what may constitute a proper criminal history ‘lookback period.’

¹³ Andrea R. Coleman, Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices, Dept. of Justice Office of Juvenile and Delinquency Prevention December 2020, pp. 8-9 <https://ojjdp.ojp.gov/publications/expunging-juvenile-records.pdf>.

¹⁴ See, e.g., 775 Ill. Comp. Stat. §§ 5/1-103, 3-102 (2020) (prohibiting, in real estate transactions, 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 housing providers from making inquiries regarding an applicant’s criminal record—including arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom—prior to the provision of a conditional offer); 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); Seattle, Wash., Code § 14.09.025 (2021) (prohibiting the categorical exclusion of individuals with any arrest record, conviction record, or criminal history from any rental housing); La. Hous. Corp., [Memorandum on Fair Housing and Tenant Selection with Regard to Criminal Record Screening](#) (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>.

expunged, sealed, or impounded by a court; (D) matters under the jurisdiction of the Illinois Juvenile Court”¹⁵

3. Clarification of Relevance of Recidivism Studies

In footnote 34 (page 7) of its 2016 Guidance, HUD cites Megan Kurlychek’s criminological study towards the proposition that “after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record.” An unintended consequence has been that some housing providers have interpreted this citation to be HUD’s endorsement of a lookback period of 6-7 years. This period of time contradicts a growing trend of public housing authorities and local governments adopting lookback periods of three years or shorter.

Moreover, recidivism rates should not be the basis for setting a lookback period for several reasons. First, they are based on incomplete and skewed data.¹⁶ Second, they fail to account for the impact of critical supports, such as access to affordable housing. Finally, because of the lack of nuance, recidivism rates are a more appropriate measure of the success (or lack thereof) of the prison system than of individuals themselves.¹⁷ A clarifying footnote is necessary to make clear that HUD’s citation to these studies should not serve to justify lengthy lookback periods. Further, the more pertinent statistic is that generally past justice involvement plays no role in predicting one’s ability to act as a responsible tenant, which is far more relevant to the legitimate interests of housing providers.¹⁸

FHEO should thus add context to the 2016 Guidance about recidivism rates and why they should not form the basis of a housing provider’s lookback period.

4. Clarification of the Guidance’s Applicability to Tenant Screening Companies

Like the Fair Housing Act itself, the Disparate Impact Rule and Guidance do not specifically address their potential application to tenant screening companies, thus leaving room

¹⁵ 310 ILCS 10/25(e-5)(1)(A).

¹⁶ See Prison Policy Initiative, Recidivism and Reentry (“[R]elying too much on rates of recidivism . . . can result in incomplete conclusions, because recidivism data is skewed by inconsistencies in policing, charging, and supervision.”) (last visited Oct. 10, 2021) https://www.prisonpolicy.org/research/recidivism_and_reentry/.

¹⁷ Cecelia Klingele, Measuring Change: From Rates of Recidivism to Markers of Desistance, 109 J. of Crim. L. & Criminology 769 (2019), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7658&context=jclc>.

¹⁸ Suzanne Zerger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, 2009, <https://www.homelesshub.ca/resource/ga-daniel-malone-criminal-history-does-not-predict-housing-retention>, referencing Malone DK, Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders. *Psychiatr Serv.* 2009;60(2):224–230. A more recent study found that, out of 15 broad categories of offense, conviction records for 11 have no statistically significant consequences for housing outcomes. Even within the four remaining categories, a misdemeanor conviction has no statistically significant predictive effect after two years and a felony has no statistically significant predictive effect after five. In fact, the authors concede that even the findings of statistical significance are largely uncertain and are likely over estimations. Cael Warren, “Criminal Background’s Impact on Housing Success: What We Know (And What We Don’t),” Wilder Foundation, Jul. 16, 2019, <https://www.wilder.org/articles/criminal-backgrounds-impact-housing-success-what-we-know-and-what-we-dont>.

for statutory ambiguity and confusion amongst screening companies, housing providers, tenants, and advocates. As made clear by the analysis of the District Court of Connecticut in *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions*, screening companies should be potentially liable under the 2016 Guidance, especially where the screening company provides a rental recommendation:

Defendant argues that these HUD regulations limit FHA liability to entities with control over a housing provider or “other legal responsibility” to correct the landlord’s behavior. *See* 24 C.F.R. § 100.7(a)(iii). Defendant claims that Plaintiffs failed to allege that it controlled the behavior of WinnResidential in setting the screening criteria and this is a necessary element to establish liability. However, as explained above, HUD regulations also create liability for a person’s “own conduct that results in a discriminatory housing practice” and “a discriminatory housing practice by the person’s agent or employee.” *Id.* at §§ 100.7(a)(1)(i), (b).

The Court finds that Plaintiffs sufficiently allege Defendant’s liability under both theories. Defendant held itself out as a company with the knowledge and ingenuity to screen housing applicants by interpreting criminal records and specifically advertised its ability to improve “Fair Housing compliance.” Plaintiffs allege it failed to do so by categorizing as disqualified a qualified applicant. Defendant had a duty not to sell a product to a customer which would unwittingly cause its customer to violate federal housing law and regulations

[T]he challenged practice [of Defendant CoreLogic] is directly related to the real estate transaction because it determined who was qualified to occupy a housing unit.¹⁹

Making this point explicit in the Guidance will set a clear standard and help generate industry reform and case law to further ensure artificial barriers do not prevent members of protected classes from obtaining stable housing. It will also help prevent housing providers and screening companies from circumventing the FHA by ‘pointing the finger’ at each other, making clear that “[p]arties cannot escape liability by sharing decision making and shielding one another because no single entity is wholly responsible.”²⁰

CoreLogic is a natural outgrowth of the Supreme Court’s directive that the Fair Housing Act must be “carried out ‘by a generous construction’” towards the goal of eradicating housing discrimination.²¹ More specifically, the *CoreLogic* decision follows from the body of caselaw applying the Fair Housing Act to third parties and intermediaries who may play a large role in making housing “otherwise unavailable” to applicants, just as screening companies do in the

¹⁹ *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions*, 369 F.Supp.3d 362, 372 (D. Conn. 2019).

²⁰ *Corelogic*, 478 F.Supp.3d, at 291.

²¹ *Corelogic*, 369 F.Supp.3d., at 370 (quoting *Trafficante*, 409 U.S., at 209, 212).

current market.²² Landlord use of tenant screening algorithms have become a dominant practice in the industry.²³ Direct regulation of this industry is essential to furthering housing equity.

5. Use of National Statistics

The attached suggestions lay out a burden-shifting framework to assist courts in evaluating whether an FHA plaintiff's or complainant's attempt to make out a prima facie case for disparate impact liability regarding a housing provider's use of criminal history is properly supported by statistical evidence. The current Guidance acknowledges that "[w]hile state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics."

Clarity is needed, however, regarding how this should play out. FHEO should thus clarify that, generally, a complainant may meet its initial burden through the presentation of national statistics, which then shifts the burden to the respondent to demonstrate either that the policy or practice does not cause a disparate impact upon a protected class, that more appropriately specific and accurate statistics were readily available to the complaining party, or that the statistics employed by the complaining party are likely to differ markedly from the specific population at issue.

This establishes a more intuitive and workable allocation of burden. For example, it makes little sense for the complainant to have the burden to show that "state or local statistics are not readily available," as this requires the complainant to prove a negative. Similarly, complainants should not be saddled with the negative burden of showing that national statistics do not "differ markedly" from state or local statistics. Rather, it is more logical and efficient for the defendant to bear the burden, once the complainant has provided national statistics, of showing that local statistics are different from national statistics. Similarly, requiring the defendant to show that more localized data is readily available creates little burden for defendants. If such data is readily available, and was for example missed by the complainant, it will be easy for the defendant to present. Indeed, courts often implicitly adopt a similar allocation of burden.²⁴

It is likewise untenable to require the plaintiff to, at the outset, control for all possible variables that may affect its statistical analysis or outcomes. Rather, if the plaintiff

²² See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1357-58 (6th Cir. 1995); see also, e.g., *Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F.Supp.3d 1272, 1293-94 (S.D. Fla. 2014) (Individual board members or agents such as property managers can be held liable when they have "personally committed or contributed to a Fair Housing Act violation," quoting *Falin v. Condominium Association of La Mer Estates, Inc.*, 2011 WL 5508654, at *3 (S.D. Fla. Nov. 9, 2011)); *Georgia State Conference of the NAACP v. City of LaGrange*, 940 F.3d 627, 634-35 (11th Cir. 2019). Shivangi Bhatia, To "Otherwise Make Unavailable:" Tenant Screening Companies' Liability under the Fair Housing Act's Disparate Impact Theory, 88 *Fordham L. Rev.* 2551, 2579-80 (May 2020);

²³ Tex Pasley et al., *Screened Out*, *Shriver Ctr. on Poverty Law* (Jan. 2021), p. 22 www.povertylaw.org/report/tenant-screening-report/.

²⁴ See, e.g., Dothard, *infra* note 28, at 330; *CoreLogic, infra*, at 291.

provides readily available statistics showing adverse effects or likely adverse effects against a protected class, the defendant may demonstrate that there is no discrepancy if, for example, one controls for other factors which would then return the burden to the plaintiff. However, to avoid placing too onerous an initial burden on the complainant, the defendant should not be permitted to defeat this prima facie case simply by arguing that the complainant failed to control for certain additional factors without actually showing that such factors affect the outcome.²⁵

Such an approach is consistent with the disparate impact analysis in the employment context, upon which disparate impact under the Fair Housing Act is largely based.²⁶ In *Griggs*, the Supreme Court relied on national standardized test data.²⁷ In *Dothard*, the Court elaborated, making clear, first, that it was proper for the plaintiff to make out her prima facie case using “general national statistics,” and that, citing *Griggs*, “there is no requirement . . . that a statistical showing be based on analysis of the characteristics of actual applicants.”²⁸ The Court acknowledged that, while such statistics did not control for all potential variables, it was not necessary for them to do so; if defendant believed local statistics differed from national statistics or that controlling for additional variables would change the outcome, it was defendant’s burden to demonstrate this: “For these reasons we cannot say that the District Court was wrong in holding that the statutory height and weight standards had a discriminatory impact on women applicants. The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement’s grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, *he is free to adduce countervailing evidence of his own.*”²⁹

Similarly, in *EEOC v. Joint Apprenticeship Committee*, the Second Circuit, relying on general population data, upheld the District Court’s granting of partial summary judgment to the EEOC.³⁰ There, the Second Circuit went so far as to reject the District Court’s use of applicant pool data but upheld the decision based on more generalized statistics.³¹ Determining that applicant data was based on too small a pool to be useful, the Second Circuit instead, citing *Griggs*, relied upon “studies based on general population data and potential applicant pool data.”³² As in *Dothard*, the court placed the burden on the defendant to meaningfully support its argument that such a data set was inadequate: “[L]ike the District Court, we are not persuaded by

²⁵ For example, in *Alexander v. Edgewood Mgmt. Corp.*, Civil Case No. 15-1140 (D.D.C., Jun. 25, 2019), www.leagle.com/decision/infdc020190708691, the District Court granted summary judgment for the housing provider, holding that plaintiff failed to make out a prima facie disparate impact case based on criminal records exclusions because plaintiff’s data did not account for the “qualified applicant pool” taking into account “credit history, prior rental history, alcohol and/or substance abuse history, immigration status, sex-offender status, and family size.” But the district court admits that even this list of factors is not exhaustive, and it would be arbitrary to stop there. As such, the court’s reasoning requires plaintiff to undergo tremendous effort and expense, and control for a seemingly indefinite number of unpredictable factors, to simply make its prima facie case showing that exclusion of applicants based upon their criminal history disproportionately injures Black homeseekers.

²⁶ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, fn. 6 (1970).

²⁷ *Id.*; see also *Dothard*, *infra* note 28.

²⁸ *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (citing *Griggs*, 401 U.S., at 430).

²⁹ *Id.*, at 331 (emphasis added).

³⁰ *EEOC v. Jnt. Apprenticeship Commt. of the Jnt. Ind. Brd. of the Electrical Ind.*, 186 F.3d 110 (2d Cir. 1999)

³¹ *Id.*, at 118-9.

³² *Id.*, at 119 (citing *Dothard*, *supra* note 28, at 329-330 & *Griggs*, *supra* note 26, at 430 and noting *Griggs*’ reliance on “general population data in finding disparate impact of diploma requirement on Blacks.”)

[defendant’s] unsupported and peripheral challenges to these statistics. For instance, [defendant] argues that EEOC’s statistics are based on stale census data, [sic] but *makes no showing* that more recent census data would produce significantly different results.”³³

In *CoreLogic*, the District Court effectively synthesized such reasoning as applied to the 2016 Guidance:

National or state general population statistics may be used as the appropriate comparison groups in at least three situations: First, national or state statistics are appropriate where there is no reason to suppose that the local characteristics would differ from the national statistics Second, studies based on general population data and potential applicant pool data” may be the “initial basis of a disparate impact claim, especially in cases [where] the actual applicant pool might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as discriminatory” Third, national or state general statistics are appropriate where actual applicant data is not available.³⁴

It is, indeed, well-supported common knowledge across the political spectrum that use of criminal records has a severe disparate impact against Black and Latinx persons and persons with disabilities.³⁵ These discrepancies exist in every state.³⁶ It is inequitable and impractical to force the complainant in each case to incur great expense reproving what has already been well-established many times over.

6. Application of 2016 Guidance to Public Housing Authorities and Subsidized Housing Providers

In *Inclusive Communities*, the Supreme Court made clear that the disparate impact standard applies as readily to housing authorities and providers of subsidized housing as it does to those in the private market.³⁷ When the Court states, “An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies,” it speaks of housing authorities and private developers in a single breath.³⁸ More importantly, in its next sentence, the Court states that “this step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability,”

³³ *Id.*, at 119-20.

³⁴ *CoreLogic Rental Property Solutions*, 478 F.Supp.3d, at 291 (citing/quoting Dothard, *supra* note 28, at 330; Int. Apprenticeship Comm’t., *supra* note 30, at 119; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308-09 n.13 (1977) (other citations omitted)).

³⁵ See, e.g., Donald Trump, State of the Union Address, Feb. 5, 2019, available at <https://time.com/5521860/2019-state-of-the-union-trump-transcript/>.

³⁶ State by State Data, The Sentencing Project, <https://www.sentencingproject.org/the-facts/#map?dataset-option=BWR> (citing U.S. Bureau of Justice Statistics (2016)).

³⁷ See *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015).

³⁸ *Id.*

which is, in turn, equivalent to the second step in the disparate impact burden shifting framework.³⁹

Notably, however, in some instances housing authorities and federally-subsidized housing providers cite their discretion to exclude applicants based on criminal records under federal law as a shield to disparate impact liability for their criminal screening practices. Advocates and home seekers have experienced subsidized housing providers citing this discretion to justify criminal records policies inconsistent with the 2016 Guidance, and local housing authorities have published rules which flagrantly violate the Guidance.⁴⁰ Such an approach ignores that housing authorities and federally-subsidized housing providers are still wholly accountable under the Fair Housing Act. Indeed, HUD and local government entities overseeing HUD programs have a duty to affirmatively further fair housing.⁴¹ More to the point, HUD-issued rules regarding subsidized housing make clear that subsidized housing providers must exercise discretion subject to the Fair Housing Act.⁴²

As such, the attached suggestions advocate that HUD clarify that the discretion of subsidized housing providers to deny applicants based on criminal history is not a shield from, but rather is informed and limited by, the obligations set forth by the Fair Housing Act.

Protect the Guidance by Incorporating the Guidance into Existing FHEO Subregulatory Documents

HUD should also integrate the 2016 Guidance's principles into other FHEO subregulatory documents, such as handbooks, manuals, and FAQs (specific examples are provided below). Doing so will greatly bolster Fair Housing enforcement and compliance. By contextualizing the 2016 Guidance within existing documents, HUD also helps housing providers gain a better practical understanding of how the 2016 Guidance should be applied. Further, by proliferating the principles of the 2016 Guidance throughout its subregulatory documents, FHEO makes clear that it intends to continue applying the principles of the 2016 Guidance in specific contexts even if a future administration were to roll back the Guidance itself.

1. HUD's Authority to Improve and Proliferate the Guidance into other Subregulatory Documents

³⁹ *Id.* (“see 78 Fed.Reg. 11470 (explaining that HUD did not use the phrase ‘businessnecessity’ because that ‘phrase may not be easily understood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities.’)”).

⁴⁰ See discussion of Holyoke Housing Authority and Chicago Housing Authority, at *infra*.

⁴¹ 24 C.F.R. 5.151.

⁴² See, e.g., Public Housing Occupancy Guidebook, June 2003, at 9-10, available at https://www.hud.gov/sites/documents/DOC_10760.PDF (“HUD rules require recipients of Federal housing assistance to comply with civil rights related program requirements that affect nearly every aspect of PHA operations. Examples include affirmative fair housing marketing, waiting lists, selection for admission, residency preference, relocation, record keeping Public Housing Occupancy Guidebook and maintenance. The major civil rights laws and their implementing regulations to which public housing agencies must adhere.”).

HUD is well within its administrative authority to both improve the 2016 Guidance and integrate the principles of the Guidance throughout FHEO subregulatory documents. The Fair Housing Act endows HUD with broad rule-making and enforcement authority.⁴³ HUD's authority to interpret the FHA is especially broad.⁴⁴ HUD's authority to interpret its own regulations is broader still;⁴⁵ the 2016 Guidance and suggestions here serve to interpret HUD's to-be reinstated 2013 Disparate Impact Rule. While HUD interpretive guidance, as opposed to formal regulation, does not have the force of law, it often commands significant deference and is found highly persuasive by courts.⁴⁶ Courts have specifically found HUD's 2016 Guidance to be of high persuasive value.⁴⁷ In this sense, HUD's authority to expand and proliferate the principles underlying the Guidance flows from HUD's authority to adopt the guidance itself.⁴⁸

2. Examples and Sample Language

We thus strongly encourage FHEO to integrate the principles behind the 2016 Guidance into its subregulatory documents (such as handbooks, policy manuals, FAQs, and the like). This letter focuses on FHEO subregulatory documents; future letters will be addressed to other divisions of HUD. Generally, we recommend that FHEO include both language and examples articulating the potentially discriminatory nature of housing providers' use of criminal history. Immediately below we provide suggested general language that can be adapted throughout existing subregulatory documents:

⁴³ See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015); *Johnson v. Jennings*, 772 Fed. Appx. 822, 825–26 (11th Cir. 2019) (citing *Bhogaita v. Altamonte Heights Condominium Ass'n, Inc.*, 765 F.3d 1277, 1286 (11th Cir. 2014)); *Austin v. Town of Farmington*, 826 F.3d 622, 628 n.7 (2d Cir. 2016); *Castillo Condominium Ass'n v. U.S. Dept. of Housing and Urban Development*, 821 F.3d 92, 99 n.6 (1st Cir. 2016); *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions, LLC*, 478 F. Supp. 3d 259, 298–99 (D. Conn. 2020); *Fair Housing Justice Center, Inc. v. JDS Development LLC*, 443 F. Supp. 3d 494, 503 (S.D. N.Y. 2020); *Simmons v. T.M. Associates Management, Inc.*, 287 F. Supp. 3d 600, 605 (W.D. Va. 2018); *Kuhn by and through Kuhn v. McNary Estates Homeowners Association, Inc.*, 228 F. Supp. 3d 1142, 1149 (D. Or. 2017); *Giardiello v. Marcus, Errico, Emmer & Brooks, P.C.*, 261 F. Supp. 3d 86, 96 n.8 (D. Mass. 2017); *Arnal v. Aspen View Condominium Association, Inc.*, 226 F. Supp. 3d 1177, 1184 (D. Colo. 2016); *Bone v. Village Club, Inc.*, 223 F. Supp. 3d 1203, 1214 n.5 (M.D. Fla. 2016); *Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798, 807 (E.D. Cal. 2016); *Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272, 1281 n.10, 1283 n.13 (S.D. Fla. 2014); *Forest City Residential Management, Inc. ex rel. Plymouth Square Ltd. Dividend Housing Ass'n v. Beasley*, 71 F. Supp. 3d 715, 729–730 (E.D. Mich. 2014); *Warren v. Delvista Towers Condominium Ass'n, Inc.*, 49 F. Supp. 3d 1082, 1088 n.5 (S.D. Fla. 2014); *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, 668 F. Supp. 2d 548, 563 (S.D. N.Y. 2009).

⁴⁴ See, e.g., *id.*; *Fair Housing Justice Center, Inc. v. JDS Development LLC*, 443 F. Supp. 3d 494, 503 (S.D. N.Y. 2020) (citing *Meyer v. Holley*, 537 U.S. 280, 281 (2003)).

⁴⁵ See, e.g., *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 614 (2013) (“It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation.” (internal quotations omitted)).

⁴⁶ See fn. 43, at *supra*.

⁴⁷ See, e.g., *Jackson v. Tyron Park Apartments*, 2019 WL 331635, at *1 (W.D. N.Y. 2019); *Corelogic*, 478 F. Supp. 3d, at 298–99.

⁴⁸ See *Corelogic*, at *id.*

(1) General description:

Data demonstrates that, in many instances, barriers to housing based upon the criminal history of applicants or residents has a disproportionate exclusionary effect on Black and Hispanic persons and persons with disabilities. The practice of excluding applicants or residents from housing based on criminal history thus likely violates the Act unless the housing provider proves the practice was needed to accomplish some substantial, legitimate non-discriminatory interest. Housing providers, however, cannot meet this burden regarding certain types of records, including arrests not resulting in conviction, records of conviction which have been vacated, set aside, overturned, sealed, or expunged or those that are not publicly available, records that have been pardoned, juvenile records, and records of conviction where the housing provider fails to conduct an individualized assessment regarding the applicant.

(2) Example 1: Blanket Ban on Felony Convictions (admission context)

A landlord owns a rental property and markets to geographic areas where readily available applicable data indicates that a protected class (People of Color or persons with disabilities, for example) are disproportionately likely to have at least one felony conviction. The landlord uses an online application process for its multi-family housing. Before determining whether an applicant meets any other criteria, such as financial qualifications, the application asks the following question: “Have you or any member of your household ever been convicted of a felony conviction?” If a person answers “yes,” the online application process automatically ends.

The application very likely violates the Fair Housing Act under the disparate impact theory. Although the ban on applicants with prior felony convictions is facially neutral, a plaintiff could likely show through national data that the policy has a disparate impact on a protected class (e.g., race, disability) who are overrepresented among the population of individuals with a felony conviction. If the defendant-landlord is unable to rebut this data by demonstrating that more relevant and localized data was readily available to the plaintiff or by presenting more relevant data (or a superior interpretation of plaintiff’s data) rebutting the existence of the disparate impact, the burden would shift to defendant to prove that the blanket ban on those with a felony conviction was necessary to serve a substantial, legitimate, non-discriminatory purpose, such as enhancing tenant safety. A defendant, however, would generally not meet this burden for a ban which does not take into account, for example, the nature, severity, and recency of the conviction. Even if the defendant could meet its burden and return the burden to plaintiff, a plaintiff could likely demonstrate that there were less discriminatory alternatives available, such as providing applicants a meaningful opportunity to offer mitigating evidence demonstrating the applicant’s ability to fulfill the responsibilities of tenancy. The outcome would be similar for a housing provider that denied housing for convictions within a specific timeframe (e.g.,

10, 25 years) if the policy operated as a ban with no opportunity for the applicant to provide mitigating evidence.

This example is derived from *Equal Rights Center v. Mid-America Apartment Communities, Inc.* (D.D.C. 2017): complaint, consent order, press release. For a case with a similar blanket ban on felonies, see *Housing Opportunities Made Equal of Virginia v. Wisely Properties, LLC* (E.D. Va. 2019): complaint, settlement agreement, press release.

(3) Example 2: Evictions Based on Arrests

A tenant rents from a landlord in an area where readily available applicable data indicates that persons with mental health disorders are disproportionately likely to have criminal records. Tenant is a war veteran with PTSD. Tenant has been arrested a number of times while living at the property, but he has never been convicted. A new property management company takes over and decides to rescreen all tenants, electing not to renew the lease of all households with multiple arrests while residing at the property. Tenant does not request a reasonable accommodation because he is unable to articulate the nexus between his disability and his arrests. Based on Tenant's multiple arrests, the property management company elects not to renew Tenant's lease. The property management company has likely engaged in conduct which violates the Fair Housing Act, as the practice of evicting a tenant based upon arrest disproportionately excludes persons with disabilities from housing, and arrests do not evidence wrongdoing. The landlord's practice of moving to evict a tenant based upon an arrest is not narrowly tailored to a legitimate, non-discriminatory interest.⁴⁹

(4) Example 3: Blanket Bans on People on Probation

A housing authority has adopted a policy of denying any applicants who are currently on probation. Although this policy is facially neutral, it essentially operates as a blanket ban on anyone who has a conviction and is serving probation because it offers no opportunity for the applicant to show why he can meet his obligations as a tenant despite his conviction. Because Black men are overrepresented nationally in probation, such a policy would have a disparate racial impact, and the defendant-housing authority would not likely meet its burden given the sweeping nature of the policy.

We welcome the opportunity to make more suggestions concerning how the principles underlying the 2016 Guidance can be incorporated into specific FHEO subregulatory documents.

⁴⁹ Such examples are by no means intended to be exhaustive or to impliedly exclude coverage of situations not specifically addressed in the examples. For example, though the specification that Tenant did not request a reasonable accommodation would not be relevant, this example would otherwise be applicable to other protected classes disproportionately likely to have arrest records.

We provide a few specific suggestions below as examples, but we welcome the opportunity to make additional/more specific suggestions:⁵⁰

- Updating the entire FHEO Handbook 8024.1, though the principles underlying the Guidance are particularly applicable to [Chapter 8](#), where the Guidance, or a truncated version of it, could be included as “Section 8-10 Criminal Records Screening Practices”;
- Using criminal records discrimination as an illustration of disparate impact discrimination and providing more explicit citation to the Guidance within the preamble to the reinstated Discriminatory Effects Standard;
- Updating the DOJ/HUD joint statement on *Reasonable Accommodations under the Fair Housing Act* or providing supplementary clarifying guidance noting that, where a housing provider is obligated to overlook past behavior as a reasonable accommodation to a housing seeker, the housing provider maintains that obligation even where the housing seeker was arrested and/or convicted for the underlying behavior.⁵¹ While the current guidance uses an illustration involving an arrest record, the example is phrased in an ambiguous way on this point, and the analysis is not explicitly extended to conviction records. See proposed language in suggested updates to 2016 Guidance, attached.

3. Bolstering the Authority of the Guidance

While the Guidance is not entitled to *Chevron* deference, HUD can take steps to increase the persuasive value of the Guidance. Generally, interpretive statements, such as the Guidance, are entitled to *Skidmore* deference. The degree of deference such guidance is afforded exists along a sliding scale depending upon “(1) the thoroughness of the agency’s investigation; (2) the validity of the agency’s reasoning; (3) the consistency of the agency’s interpretation over time; and (4) other persuasive powers of the agency.”⁵² In the process of making improvements to the Guidance, HUD should also take steps to bolster the authority of the Guidance.

Generally, courts afford HUD guidance, including the 2016 Guidance, significant deference. However, the “thoroughness of the investigation” can be greatly enhanced by subjecting the Guidance to hearings.⁵³ These hearings can be used to assess the above-requested changes as well as the continuing relevance and necessity of the original guidance. Perhaps most

⁵⁰ The principles of the 2016 Guidance can also readily be integrated into AFFH Guidance, but that will be addressed separately in subsequent correspondence.

⁵¹ See attached suggestions to HUD 2016 Guidance; *see, e.g.*, *Simmons v. Tm. Assoc. Mgmt., Inc.*, 287 F.Supp.3d 600, 603 (W.D.Va. 2018); *see also, e.g.*, *Walsted v. Woodbury Co.*, 113 F.Supp.2d 1318 (N.D. Ia. 2000); *but see also, c.f.*, *Evans v. UDR, Inc.*, 644 F. Supp. 2d 675 (E.D.N.C. 2009).

⁵² *Austin v. Town of Farmington*, 826 F.3d 622, fn. 7 (2d Cir. 2016) (summarizing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).

⁵³ See *Fenwick-Shafer v. Sterling Homes Corp.*, 774 F.Supp. 361, 365 (D. Md. 1991) (affording enforcement regulations persuasive deference).

importantly, conducting hearings regarding the Guidance would allow HUD to integrate them into the subsidized housing guidebooks.

Organizing a listening session would be an essential first step. HUD has previously expressed interest in conducting such a session in the coming months. Members of this Working Group would be very happy to assist in this effort in any way possible.

Outreach and Enforcement

HUD should both uplift those who model compliance and take enforcement action against those who don't comply with the Guidance:

1. Uplift Models of Compliance

While far too many housing providers have not complied with the 2016 Guidance, several have served as models of compliance. HUD should further elevate and promote these model entities.⁵⁴ For example, the Housing Authority of Champaign County does not permit the exclusion of applicants from housing unless required by federal law.⁵⁵ The Louisiana Housing Corporation has recently implemented the cited policy to ensure its Low Income Housing Tax Credit program complies with the 2016 Guidance, which, for example, prohibits housing providers from considering an array of criminal records, including any criminal record over five years old.⁵⁶ The Housing Authority of New Orleans' criminal screening policy includes:

- Only the mandatory conviction bans required by federal law
- Potential exclusion only based upon conviction records
- Look-back periods based on type of conviction, chance of recidivism
- Individualized review of certain convictions of concern – prior to any denial
- Look at the totality of the circumstances
- Consideration of mitigating circumstances
- Right to informal review of denial⁵⁷

⁵⁴ Cf. fn. 14, at *supra* (citing examples of progressive policies enacted by states, municipalities, and housing authorities)

⁵⁵ History & Important Facts FY2020 Housing Authority of Champaign County's Accomplishments, Housing Authority of Champaign Cook County, <https://hacc.net/history/> ("Criminal Background Policy – in 2020 HACC utilized special flexibilities authorized by HUD under the Coronavirus Relief Act to streamline housing services to populations most in need. We modified our criminal background screening policy to only review those offenses mandated by HUD being a Lifetime sex offender, or producing methamphetamines on public housing properties.")

⁵⁶ [Memo: Fair Housing and Tenant Selection with Regard to Criminal Record Screening 7/14/21](#), Louisiana Housing Corp.

⁵⁷ Admission and Continued Occupancy Plan, Housing Authority of New Orleans, May 28, 2019, available at <https://hano.org/plans/ACOP2019.pdf>; "The Housing Authority of New (HANO) Criminal Background Screening

Positively evaluating these programs and uplifting and collaborating with these entities will encourage other housing providers to follow suit.

2. Enforcement against Entities Out of Compliance

As importantly, HUD should take prompt enforcement action against those who do not follow its Guidance. Housing providers, including housing authorities, have continued to publish rules in flagrant violation of the Guidance. For example, the Holyoke Housing Authority's Administrative Plan includes lengthy automatic bans based on the nature of a given conviction, with no individual assessment.⁵⁸ The Chicago Housing Authority has a number of policies which fly in the face of the Guidance, by, for example, excluding applicants and terminating residents based upon arrests or automatically banning applicants/residents on parole or with certain convictions without providing an individualized assessment.⁵⁹ The CHA maintains these policies despite the Cook County Just Housing Amendment, which prohibits such practices.⁶⁰ Such practices are all too commonplace among subsidized and private market housing providers alike even since HUD published the 2016 Guidance.⁶¹ FHEO is especially encouraged to require housing providers to hold open units while investigating allegations that a provider violated the Guidance. In some instances, this may require the FHEO to work with the Department of Justice in obtaining a temporary restraining order. More frequently, however, the FHEO can request that the landlord hold the property open and potentially consider refusal to be an aggravating factor. It is essential that HUD proactively uplift model compliant housing providers and take enforcement action against non-compliant housing providers without relying on references from advocates.

Policy: Assessment of Risk and Individualized Review," HANO presenting to the Housing Justice Network, March 2019, available at <https://www.nhlp.org/wp-content/uploads/Housing-Justice-Network-Conference-March-2019.pdf>.

⁵⁸ [Administrative Plan](#), Holyoke Housing Authority, Ex. B.

⁵⁹ See, e.g., [CHA Residential Lease](#), p. 16 (prohibiting any person on house arrest or electronic monitoring from residing in public housing); [CHA Admin. Plan](#), p. 18-13 (allowing termination of Housing Voucher based upon arrests for crimes of violence to persons or property); [CHA Admissions and Continued Occupancy Policy](#), p. 20 (CHA may deny public housing to or terminate public housing access for "[a]ny applicant or household member has been paroled or released from a facility within the last three years for violence to persons or property.").

⁶⁰ Cook County, Ill., Code § 42-38.

⁶¹ See, e.g., How Automated Background Checks Freeze Out Renters, N.Y. Times, May 28, 2020, <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>. Further, while larger management companies and tenant screening companies are generally savvy enough to avoid explicitly admitting online to violations of the 2016 Guidance, they advertise in a way that suggests and encourages a lack of compliance. For example, TransUnion's tenant screening system, SmartMove, provides a "Resident Score" while also providing landlords with information "including any criminal report that an applicant may have," <https://www.mysmartmove.com/SmartMove/tenant-background-report.page>. Without stating any of the limitations imposed by the Fair Housing Act, Blackstone Group Leasing and Management encourages landlords to screen co-applicants because they "may have a record". "3 Common Mistakes Made by Landlords When Screening Tenants," Blackstone Group Leasing and Management, Aug. 19, 2019, <https://blackstoneri.com/3-common-mistakes-made-by-landlords-when-screening-tenants/>.

Conclusion

Thank you again for your continued engagement on this issue. FHEO's 2016 Guidance was an essential step forward. FHEO is now in a position to bolster and proliferate that Guidance and the principles underlying it. We would very much appreciate the chance to meet to further discuss. Please reach out to Eric Sirota at (847) 903-1930 or at ericsirota@povertylaw.org.

Best Regards,

Formerly Incarcerated Convicted People and Families Movement
National Housing Law Project
National Low Income Housing Coalition
Operation Restoration
Shriver Center on Poverty Law
Sponsors, Inc.
Uptown People's Law Center
Upturn
Voice of the Experienced (VOTE) – Louisiana



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

**Office of General Counsel Updated Guidance on
Application of Fair Housing Act Standards to the Use of Criminal Records by
Providers of Housing and Real Estate-Related Transactions**

I. Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin.¹ HUD’s Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual’s criminal history.

On April 4, 2016, the Office of General Counsel issued Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (“2016 Guidance”). This Guidance focused primarily upon the application of disparate impact and disparate treatment analysis to housing providers’ use of applicant and resident criminal history information in rental transactions. The 2016 Guidance focused on discrimination based upon race or national origin, specifically regarding African-Americans and Hispanics, though the 2016 Guidance did not exclude any protected classes under the Fair Housing Act from its analysis.

This Guidance seeks to improve upon and clarify the 2016 Guidance in multiple ways, and thus supersedes the 2016 Guidance where the two are at odds.

II. Background

As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.² The United States prison population of 2.2 million adults is by far the largest in the world.³ As of 2012, the United States accounted for only about five percent of the world’s population, yet almost one quarter of the world’s prisoners were held in American prisons.⁴ Since 2004, an average of over 650,000 individuals have been released annually from federal and state

¹ 42 U.S.C. § 3601 *et seq.*

² Bureau of Justice Statistics, U.S. Dep’t of Justice, *Survey of State Criminal History Information Systems, 2012*, 3 (Jan. 2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

³ Nat’l Acad. Sci., Nat’l Res. Couns., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 2 (Jeremy Travis, et al. eds., 2014), available at: <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

⁴ *Id.*

prisons,⁵ and over 95 percent of current inmates will be released at some point.⁶ When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.⁷ Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing, because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

Across the United States, African Americans and Hispanics, as well as persons with disabilities, are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.⁸ Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers and home seekers with disabilities.⁹ While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).¹⁰ or if, without justification, their burden falls more often on renters or other housing market participants with disabilities. Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin, disability status or other protected characteristic (i.e., disparate treatment liability).

III. Discriminatory Effects Liability and Use of Criminal History to Make Housing Decisions

A housing provider¹¹ violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.¹⁰ Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular

⁵ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at 29, appendix tbls. 1 and 2, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

⁶ Bureau of Justice Statistics, U.S. Dep't of Justice, *Reentry Trends in the United States*, available at <http://www.bjs.gov/content/pub/pdf/reentry.pdf>.

⁷ See, e.g., S. Metraux, et al. "Incarceration and Homelessness," in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research, #9* (D. Dennis, et al. eds., 2007), available at: <https://www.huduser.gov/portal/publications/pdf/p9.pdf> (explaining "how the increasing numbers of people leaving carceral institutions face an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.").

⁸ See *infra* nn. 16-20 and accompanying text.

⁹ The Fair Housing Act prohibits discrimination based on race, color, religion, sex, disability, familial status, and national origin. This memorandum focuses on race, and national origin, and disability discrimination, although criminal history policies may result in discrimination against other protected classes.

¹⁰ 24 C.F.R. § 100.500; accord *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507 (2015).

¹¹ While this guidance often uses the phrase "housing provider," use of such a term is not intended to constrict the scope of who the Fair Housing Act, and thus this interpretive Guidance, may apply to. For example, in many instances, the Fair Housing Act may apply to a wide range of entities such as public housing authorities, tenant screening companies, and others, which are encompassed by the term "housing provider" for the purpose of this Guidance. See, e.g., *Conn. Fair Hous. Ctr. v. Corelogic Rental*, 369 F. Supp. 3d 362, 371-75 (D. Conn. 2019).

race, national origin, **disability status** or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.¹² Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.¹³

The following sections discuss the three steps used to analyze claims that a housing provider's use of criminal history to deny housing opportunities results in a discriminatory effect in violation of the Act. As explained in Section **IV**, below, a different analytical framework is used to evaluate claims of intentional discrimination.¹⁴

A. Evaluating Whether the Criminal History Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their **disability status**, race or national origin.¹⁵ This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial, ethnic, or **disability-related disparities** in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.¹⁶ **More specifically, use of national statistics by the**

¹² 24 C.F.R. § 100.500; *see also Inclusive Cmty. Project*, 135 S. Ct. at 2514-15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500); *id.* at 2523 (explaining that housing providers may maintain a policy that causes a disparate impact "if they can prove [the policy] is necessary to achieve a valid interest.").

¹³ *See* 24 C.F.R. § 100.500.

¹⁴ **While this guidance often cites denials of a dmission to housing as an example of an adverse housing action, this Guidance applies with equal force to any conduct covered by the Fair Housing Act, including but not limited to housing terminations and evictions.**

¹⁵ 24 C.F.R. § 100.500(c)(1); *accord Inclusive Cmty. Project*, 135 S. Ct. at 2522-23. A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

¹⁶ *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.") with *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.") (citation omitted). *See also, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1970) (relying on general population data in finding disparate impact of diploma requirement on Black applicants); *EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus.*, 186 F.3d 110, 119-120 (2d Cir. 1999) (finding that actual applicant pool data was based upon too small a sample size and use of general population and potential applicant data was thus appropriate); *El v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S.).

complaining party which demonstrate that the policy or practice in question has a discriminatory effect on a protected class will generally shift the burden back to the housing provider or other complained of entity to demonstrate either that the policy or practice does not cause a disparate impact upon a protected class, that more appropriately specific and accurate statistics were readily available to the complaining party, or that the statistics employed by the complaining party are likely to differ markedly from the specific population at issue.¹⁷ Regardless of the data used, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.¹⁸ Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population.¹⁹ Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population.²⁰ In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.²¹ In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.²² Across all age groups, the imprisonment rates for African American males is almost six times greater than for

Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that People of Color were substantially more likely than Whites to have a conviction), *aff'd on other grounds*, 479 F.2d 232 (3d Cir. 2007).

¹⁷ See *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols.*, 478 F. Supp. 3d 259, 291 (D. Conn. 2020) (internal quotations omitted):

National or state general population statistics may be used as the appropriate comparison groups in at least three situations: First, national or state statistics are appropriate where there is no reason to suppose that the local characteristics would differ from the national statistics Second, studies based on general population data and potential applicant pool data" may be the "initial basis of a disparate impact claim, especially in cases [where] the actual applicant pool might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as discriminatory Third, national or state general statistics are appropriate where actual applicant data is not available.

¹⁸ Cf. *El v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that non-Whites were substantially more likely than Whites to have a conviction), *aff'd on other grounds*, 479 F.2d 232 (3d Cir. 2007).

¹⁹ See FBI Criminal Justice Information Services Division, *Crime in the United States, 2013*, tbl.43A, available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43> (Fall 2014) (reporting that African Americans comprised 28.3% of all arrestees in 2013); U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2013 to December 1, 2013, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html> (reporting data showing that individuals identifying as African American or Black alone made up only 12.4% of the total U.S. population at 2013 year-end).

²⁰ See E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at tbl. 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>; and U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2014 to December 1, 2014, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html>.

²¹ See *id.*

²² See *id.*

White males, and for Hispanic males, it is over twice that for non-Hispanic White males.²³

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact. Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a housing provider may offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes. If factors not controlled for in the plaintiff's or complainant's data would change the result, the respondent may demonstrate as such through its own data. But to make its prima facie case, a complainant or plaintiff should not be expected both to present relevant data and preempt any arguments against that data or counterfactual data.²⁴

Similarly, national statistics demonstrate that persons with disabilities face disproportionately high rates of arrest, conviction, and imprisonment. A March 2021 publication by the Department of Justice based upon a 2016 survey stated that "State and federal prisoners (38%) were about two and a half times more likely to report a disability than adults in the U.S. general population (15%)."²⁵ A study conducted by the American Journal of Public Health further found that persons with disabilities are significantly more likely to face arrest by age 28 than those without.²⁶ The discrepancies faced by those with disabilities are significantly compounded along certain racial and gender lines. For example, incarcerated women are especially likely to report having a disability,²⁷ and Black people with disabilities are especially likely to face arrest.²⁸

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.²⁹ The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate,

²³ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at table 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

²⁴ It should also be noted that what constitutes the "specific population at issue" is a fact-specific inquiry. While in some instances this may refer to the actual applicant pool, case law indicates that the actual applicant pool may not be the most accurate sample, especially as housing providers almost necessarily market to a population and geographic scope which is broader than the actual applicant pool. See *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols.*, 478 F. Supp. 3d 259, 291 (D. Conn. 2020); *EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus.*, 186 F.3d 110, 119-120 (2d Cir. 1999).

²⁵ Laura M. Maruschak et al., Bureau of Just. Stat., U.S. Dep't of Just., *Disabilities Reported by Prisoners: Survey of Prison Inmates, 2016*, at 2 (Mar. 2021), available at <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016>.

²⁶ Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, *Am. J. Pub. Health* (Nov. 8, 2017), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2017.304095>.

²⁷ Maruschak et al., *supra* note 25, at 1.

²⁸ McCauley, *supra* note 26.

²⁹ 24 C.F.R. § 100.500(c)(2); see also *Inclusive Cmty. Project*, 135 S. Ct., at 2523.

nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.³⁰

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices.³¹ Ensuring resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.³² A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.

1. Exclusions Because of Prior Arrest

A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.³³ As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”³⁴ Because arrest records do not constitute

³⁰ See 24 C.F.R. § 100.500(b)(2); see also 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

³¹ See, e.g., Answer to Amended Complaint at 58, *The Fortune Society, Inc. v. Sandcastle Towers Hsg. Dev. Fund Corp.*, No. 1:14-CV-6410 (E.D.N.Y. May 21, 2015), ECF No. 37 (“The use of criminal records searches as part of the overall tenant screening process used at Sand Castle serves valid business and security functions of protecting tenants and the property from former convicted criminals.”); *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009) (noting, based on a affidavit of property owner, that “[t]he policy [against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds ... [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property.”); see also J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, Washington, 61 Fed. Probation 12, 20 (1997) (finding in a survey of 196 landlords in Seattle that of the 43% of landlords that said they were inclined to reject applicants with a criminal history, the primary reason for their inclination was protection and safety of community).

³² As explained in HUD’s **2021-13 Reinstated Discriminatory Effects Standard**, a “substantial” interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an interest be “legitimate” means that a housing provider’s justification must be genuine and not false or fabricated. See 78 Fed. Reg. at 11470; see also *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005) (recognizing that, “in the abstract, a reduction in the concentration of low income housing is a legitimate goal,” but concluding “that the Housing Authority had not shown a need for deconcentration in this instance, and in fact, had falsely represented the density [of low income housing] at the location in question in an attempt to do so”).

³³ HUD recently HUD previously clarified that arrest records may not be the basis for denying a admission, terminating assistance, or evicting tenants from public and other federally-assisted housing. See Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD PIH Notice 2015-19, (November 2, 2015), available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>.

³⁴ *Schwabe v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957); see also *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (“[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) (“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”).

proof of past unlawful conduct and are often incomplete (e.g., by failing to indicate whether the individual was prosecuted, convicted, or acquitted),³⁵ 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. For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction³⁶ cannot prove that the exclusion actually assists in protecting resident safety and/or property.

Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.³⁷

2. Exclusions Because of Prior Conviction

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.³⁸ But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.

First, like arrest records, use of certain types of conviction records cannot be considered necessary to further a substantial, legitimate, non-discriminatory purpose. Such records include records of convictions which have been vacated, set aside, overturned, sealed, or expunged or those that are not publicly available, records that have been pardoned, and juvenile records.

When convictions records are expunged, sealed or are otherwise made publicly unavailable, either by law, court order, or otherwise, implicit (or sometimes explicit) in the expungement, sealing or public unavailability of these records is the fact that use of these records cannot be shown as

³⁵ See, e.g., U.S. Dep't of Justice, *The Attorney General's Report on Criminal History Background Checks* at 3, 17 (June 2006), available at http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (reporting that the FBI's Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and "the most comprehensive single source of criminal history information in the United States," is "still missing final disposition information for approximately 50 percent of its records").

³⁶ Similar logic applies to other pre-conviction records, such as complaints, indictments, or bond or supervised release status, as well as convictions that have been overturned or otherwise vacated by either the trial court or an appellate court, juvenile records, convictions that have been pardoned, and convictions made unavailable to the general public either by law or court order.

³⁷ See U.S. Equal Emp't Opportunity Comm'n, *EEOC Enforcement Guidance, Number 915.002*, 12 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; see also *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that defendant employer's policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII because there "was no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees," such that "information concerning a . . . record of arrests without conviction, is irrelevant to [an applicant's] suitability or qualification for employment"), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

³⁸ There may, however, be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. See generally SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), available at <http://www.search.org/files/pdf/RNTEFCSCJRI.pdf>.

necessary to advance a substantial and legitimate purpose so as to meet the housing provider's burden.³⁹ Use of such records is also especially prone to inaccuracy or incompleteness because these records are not publicly available.⁴⁰

Largely similar logic applies to criminal convictions which have been pardoned, as a pardon indicates that consideration of such convictions is not necessary to advance a substantial and legitimate purpose.⁴¹

Moreover, a housing provider cannot show that use of juvenile records is necessary to advance a substantial, legitimate, non-discriminatory purpose.⁴²

A housing provider that imposes a blanket prohibition on any person with any conviction⁴³ record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden. One federal court of appeals held that such a blanket ban violated Title VII, stating that it “could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”⁴⁴ Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as “not empirically validated.”⁴⁵

A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest.” To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.⁴⁶

A policy or practice that fails to take into account the nature and severity of an individual's

³⁹ Andrea R. Coleman, U.S. Dep't of Just. Off. Juv. Just. and Delinq. Prevention, *Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices 2* (Dec. 2020), available at <https://ojdp.ojp.gov/publications/expunging-juvenile-records.pdf> (“The goal of expungement is to make it as though the records never existed.”)

⁴⁰ See Ariel Nelson, *Fertile Ground for FCRA Claims: Employee & Tenant Background Checks*, National Consumer Law Center (Dec. 16, 2019), <https://library.nclc.org/fertile-ground-fcra-claims-employee-tenant-background-checks>.

⁴¹ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (noting that pardons are often used to correct for incorrect convictions); see also *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”).

⁴² *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012) (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1014 (2003) (quotations and citations omitted)); see also Coleman, *supra* note 39, at 8-10 (“[C]riminal 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.”).

⁴³ Similar logic applies to blanket bans based on, for example, probationary status and other conviction or post-conviction statuses.

⁴⁴ *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

⁴⁵ *Id.*

⁴⁶ *Cf. El*, 479 F.3d at 245-46 (stating that “Title VII . . . require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level or risk and those that do not”).

conviction is unlikely to satisfy this standard.⁴⁷ Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.⁴⁸

More importantly, empirical research has “found absolutely no criminal background predictors of housing success or failure.”⁴⁹

Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a “substantial, legitimate, nondiscriminatory interest” of the provider.⁵⁰ The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.⁵¹

⁴⁷ Cf. *Green*, 523 F.2d at 1298 (holding that racially disproportionate denial of employment opportunities based on criminal conduct that “does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden” and violated Title VII).

⁴⁸ Cf. *El*, 479 F.3d at 247 (noting that plaintiff’s Title VII disparate impact claim might have survived summary judgment had plaintiff presented evidence that “there is a time at which a former criminal is no longer any more likely to recidivate than the average person...”); see also *Green*, 523 F.2d at 1298 (permanent exclusion from employment based on any and all offenses violated Title VII); see Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol’y* 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

⁴⁹ Suzanne Zerger, *Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention*, Homeless Hub, <https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does-not-predict-housing-retention> (last visited Oct. 7, 2021) (referencing Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 *Psychiatric Servs.* 224 (2009)). As such, while the decreasing predictive value for future offenses of criminal records over time, see *supra* text accompanying note 48, is relevant to this analysis, more pertinent is the fact that one’s criminal record bears no relation to one’s likelihood of housing success. Because housing success is the primary concern of housing providers, a likelihood of recidivism itself likely does not provide ample justification for housing provider policies, such as the duration of criminal history lookback periods. See also Cael Warren, *Criminal Background’s Impact on Housing Success: What We Know (And What We Don’t)*, Amherst H. Wilder Found. (July 16, 2019), <https://www.wilder.org/articles/criminal-backgrounds-impact-housing-success-what-we-know-and-what-we-dont> (finding that, out of a 15 broad categories of offense, conviction records for 11 have no statistically significant consequences for housing outcomes. Within these four remaining categories, a misdemeanor conviction has no statistically significant predictive effect after two years and a felony has no statistically significant predictive effect after five. In fact, the authors concede that even the findings of statistical significance are largely uncertain and are likely over estimations).

⁵⁰ Reports from advocates indicate that, in some instances, housing providers may exclude residents, not because they have criminal records per se but because they failed to disclose such criminal records on a rental application or other paperwork. When analyzing a disparate impact claim, such a practice is indistinguishable from excluding a resident because of the criminal record itself. As such, if a housing provider violates the Fair Housing Act by excluding a resident based upon a criminal record, where doing so has a disparate impact upon members of a protected class and the housing provider cannot meet their burden under prongs two or three of disparate impact analysis, a housing provider similarly violates the Fair Housing Act by asking the resident about this criminal history and then excluding them for refusing to provide an accurate answer. Indeed, if consideration of arrest records, for example, has a disparate impact upon a protected class and does not serve a substantial, legitimate, non-discriminatory purpose, then asking the resident/applicant about their arrest records has a similarly disparate impact upon a suspect class and similarly lacks a legitimate purpose.

⁵¹ The liability standards and principles discussed throughout this guidance would apply to HUD-assisted housing providers just as they would to any other housing provider covered by the Fair Housing Act. See HUD PIH Notice 2015-19 *supra* n. 25. Section 6 of that Notice addresses civil rights requirements.

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.⁵²

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; whether a disability of the tenant or applicant contributed to the criminal conduct; whether the criminal conduct resulted from the fact that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual's financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.

D. Statutory Exemption from Fair Housing Act Liability for Exclusion Because of Illegal Manufacture or Distribution of a Controlled Substance

Section 807(b)(4) of the Fair Housing Act provides that the Act does not prohibit "conduct against a person because such person has been convicted ... of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."⁵³ Accordingly, a housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

Limitation. Section 807(b)(4) only applies to disparate impact claims based on the denial of housing due to the person's *conviction* for drug manufacturing or distribution; it does not provide a defense to disparate impact claims alleging that a policy or practice denies housing because of the person's *arrest* for such offenses. Similarly, the exemption is limited to disparate impact claims based on drug *manufacturing or distribution* convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person's conviction for drug *possession*.

⁵² 24 C.F.R. § 100.500(c)(3); *accord Inclusive Cmty's. Project*, 135 S. Ct. 2507.

⁵³ 42 U.S.C. § 3607(b)(4).

E. Discretion of Public Housing Authorities and Providers of Subsidized Housing to Exclude Applicants or Terminate Residents Based on Certain Criminal History

In some instances, federally-subsidized housing providers are authorized to use their discretion to exclude or evict residents and applicants based upon their contact with the criminal legal system. For example, 42 U.S.C. § 13661 states that applicants may be excluded from federally-assisted housing if they have “engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents.”⁵⁴ In exercising this discretion, federally-subsidized housing providers may consider an applicant’s criminal history from a “reasonable time preceding the date when the applicant household would otherwise be selected for admission.”⁵⁵

Housing providers have contended that these and other grants of discretion protect them from disparate impact liability under the Fair Housing Act for the use of criminal records. However, rather than serving to shield housing providers, such grants of discretion must be read in light of, and informed by, the dictates of the Fair Housing Act, including the discriminatory effects liability standard, as discussed throughout this Guidance.⁵⁶ For example, a PHA’s criminal history lookback period is not “reasonable” insofar as it has an unjustified discriminatory effects upon a protected class, as described in Sections III(A)-(C) above. Similarly, treating an offense as “other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents” is improper insofar as such categorization has an unjustified discriminatory effect upon a protected class, as described in Sections III(A)-(C) above.

It should be noted that such analysis applies just as readily to denials of admission to federally-assisted housing as it does to termination of housing assistance or termination of tenancy. For example, similar to the statute quoted above, HUD regulations state that federally-subsidized housing providers may terminate a tenancy for “[a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises.”⁵⁷ Again, treating an offense as “other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents” as a basis for termination is improper insofar as such categorization has an unjustified discriminatory effect upon a protected class, as described in Sections III(A)-(C) above.

IV. Intentional Discrimination and Use of Criminal History

A housing provider may also violate the Fair Housing Act if the housing provider

⁵⁴ 42 U.S.C. § 13661(c).

⁵⁵ *Id.*

⁵⁶ *See, e.g.*, U.S. Dep’t of Hous. & Urb. Dev., FHEO-2011-1, Guidance on Non-Discrimination and Equal Opportunity Requirements for PHAs 2 (2011) (citing regulations—e.g., 24 C.F.R. § 960.103, 24 C.F.R. § 903.7(o)—that apply Fair Housing Act and other civil rights laws to Public Housing Authorities); *Alexander*, 2016 WL 5957673, at *3 (“42 U.S.C. § 13661 allows for defendants to deny admission on the basis of certain prior criminal activity. The pertinent provision, § 13661(c), allows for denial of an application if ‘during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, [the applicant] engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents.’ However, this is still subject to claims of disparate impact.”)

⁵⁷ 24 C.F.R. 5.859(a)(2).

intentionally discriminates in using criminal history information. This occurs when the provider treats an applicant or renter differently because of race, national origin or another protected characteristic. In these cases, the housing provider's use of criminal records or other criminal history information as a pretext for unequal treatment of individuals because of race, national origin or other protected characteristics is no different from the discriminatory application of any other rental or purchase criteria.

For example, intentional discrimination in violation of the Act may be proven based on evidence that a housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record. Similarly, if a housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans, intentional discrimination exists.⁵⁸ A disparate treatment violation may also be proven based on evidence that a leasing agent assisted a White applicant seeking to secure approval of his rental application despite his potentially disqualifying criminal record under the housing provider's screening policy, but did not provide such assistance to an African American applicant.⁵⁹ Likewise, a disparate treatment violation may be proven based on evidence that a landlord has a policy of evicting and/or refusing to renew the lease if a household member is convicted of certain crimes during the lease term but makes an exception to the policy for households without children but not for households with children.⁶⁰

Discrimination may also occur before an individual applies for housing. For example, intentional discrimination may be proven based on evidence that, when responding to inquiries from prospective applicants, a property manager told an African American individual that her criminal record would disqualify her from renting an apartment, but did not similarly discourage a White individual with a comparable criminal record from applying.

If overt, direct evidence of discrimination does not exist, the traditional burden-shifting method of establishing intentional discrimination applies to complaints alleging discriminatory intent in the use of criminal history information.⁶¹ First, the evidence must establish a prima facie case of disparate treatment. This may be shown in a refusal to rent case, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) the plaintiff or complainant applied for a dwelling from the housing provider; (3) the housing provider rejected the plaintiff or complainant because of his or her criminal history; and (4) the housing provider offered housing to a similarly-situated applicant not of the plaintiff or

⁵⁸ Cf. *Sherman Ave. Tenants' Assn. v. District of Columbia*, 444 F.3d 673, 683-84 (D.C. Cir. 2006) (upholding plaintiff's disparate treatment claim based on evidence that defendant had not enforced its housing code as aggressively against comparable non-Hispanic neighborhoods as it did in plaintiff's disproportionately Hispanic neighborhood).

⁵⁹ See, e.g., *Muriello*, 217 F. 3d at 522 (holding that Plaintiff's allegations that his application for federal housing assistance and the alleged existence of a potentially disqualifying prior criminal record was handled differently than those of two similarly situated white applicants presented a prima facie case that he was discriminated against because of race, in violation of the Fair Housing Act).

⁶⁰ See Devin Rutan & Renee Louis, *To Root Out Segregation, Biden Must Tackle Evictions*, Bloomberg (July 21, 2021), <https://www.bloomberg.com/news/articles/2021-07-12/evictions-are-a-part-of-housing-discrimination> (noting discrimination in eviction rates against numerous protected classes).

⁶¹ See, generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating the concept of a "prima facie case" of intentional discrimination under Title VII); see, e.g., *Allen v. Muriello*, 217 F. 3d 517, 520-22 (7th Cir. 2000) (applying prima facie case analysis to claim under the Fair Housing Act alleging disparate treatment because of race in housing provider's use of criminal records to deny housing).

complainant's protected class, but with a comparable criminal record. Similarly, this may be shown in a termination of tenancy or eviction case by evidence that: (1) the plaintiff or complainant is a member of a protected class; (2) the plaintiff or complainant rented a dwelling from the housing provider; (3) the housing provider evicted or otherwise terminated the tenancy of plaintiff or complainant because of their criminal record; and (4) the housing provider offered housing or continued to rent to a similarly-situated resident not of the plaintiff or complainant's protected class, but with a comparable criminal record.⁶² It is then the housing provider's burden to offer "evidence of a legitimate, nondiscriminatory reason for the adverse housing decision."⁶³ A housing provider's nondiscriminatory reason for the challenged decision must be clear, reasonably specific, and supported by admissible evidence.⁶⁴ Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.⁶⁵

While a criminal record can constitute a legitimate, nondiscriminatory reason for a refusal to rent or other adverse action by a housing provider, a plaintiff or HUD may still prevail by showing that the criminal record was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination. For example, the fact that a housing provider acted upon comparable criminal history information differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that a housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy. Or pretext may be shown where a housing provider did not actually know of an applicant's criminal record at the time of the alleged discrimination. Additionally, shifting or inconsistent explanations offered by a housing provider for the denial of an application may also provide evidence of pretext. Ultimately, the evidence that may be offered to show that the plaintiff or complainant's criminal history was merely a pretextual justification for intentional discrimination by the housing provider will depend on the facts of a particular case.

The section 807(b)(4) exemption discussed in Section III(D), above, does not apply to claims of intentional discrimination because by definition, the challenged conduct in intentional discrimination cases is taken because of race, national origin, or another protected characteristic, and not because of the drug conviction. For example, the section 807(b)(4) exemption would not provide a defense to a claim of intentional discrimination where the evidence shows that a housing provider rejects only African American applicants with convictions for distribution of a controlled substance, while admitting White applicants with such convictions.

⁶² See *Shaw v. Cassar*, 558 F. Supp. 303, 312 (S.D. Fla. 1983) (applying the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) disparate intent framework to eviction).

⁶³ *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (quotations and citations omitted).

⁶⁴ See, e.g., *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039-40 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

⁶⁵ See, e.g., *Muriello*, 217 F.3d at 522 (noting that housing provider's "rather dubious explanation for the differing treatment" of African American and White applicants' criminal records "puts the issue of pretext in the lap of a trier of fact"); *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups [because] 'clever men may easily conceal their [discriminatory] motivations.'" (quoting *United States v. City of BlackJack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974)).

V. Reasonable Accommodation Requests and Use of Criminal History under the Fair Housing Act

Not only does the Fair Housing Act prohibit policies and practices which intentionally discriminate against persons with disabilities or have unjustified adverse effects upon those with disabilities, it also prohibits housing providers from improperly failing to grant reasonable accommodations to persons with disabilities.⁶⁶ In some instances, a housing provider may be obligated to provide a reasonable accommodation by making exceptions to policies or practices which serve to exclude or disadvantage applicants or residents based upon past behavior.⁶⁷ Such analysis does not change because the applicant or resident has a criminal record, including a record of conviction, associated with the behavior in question.⁶⁸ Thus, if for example, the Fair Housing Act obligates a housing provider to provide a reasonable accommodation by overlooking a former landlord's statement that the applicant committed theft, the Fair Housing Act also obligates the housing provider to overlook a criminal conviction for the theft.⁶⁹

VI. Specific Illustrations

Example 1: Blanket Ban on Felony Convictions (admissions context)

A landlord owns a rental property and markets to geographic areas where readily available applicable data⁷⁰ shows that a protected class (People of Color or persons with disabilities, for example) are disproportionately likely to have at least one felony conviction. The landlord uses an online application process for its multi-family housing. Before determining whether an applicant meets any other criteria, such as financial qualifications, the application asks the following question: "Have you or any member of your household ever been convicted of a felony conviction?" If a person answers no, the online application process automatically ends.

The application very likely violates the Fair Housing Act under the disparate impact theory. Although the ban on applicants with prior felony convictions is facially neutral, a plaintiff or complainant could likely show that that the policy has a disparate impact on protected classes (e.g., race, disability) who are overrepresented

⁶⁶ Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability and require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Although Section 504 imposes greater obligations than the Fair Housing Act (e.g., providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas), the principles discussed in this Guidance regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504.

⁶⁷ See, for example, U.S. Dep't of Just., U.S. Dep't of Hous. & Urb. Dev., Reasonable Accommodations Under the Fair Housing Act 5-6, ex. 1-2 (May 17, 2004), <https://www.hud.gov/sites/documents/huddojstatement.pdf>, which notes that, in some instances, a housing provider may be obligated to make an exception to evicting or excluding a resident based upon past activity where that past activity was caused by disability and sufficient assurances are provided that the disability is in remission such that such activity will not recur.

⁶⁸ See, e.g., *Simmons v. T.M. Assocs. Mgmt., Inc.*, 287 F. Supp. 3d 600, 603 (W.D. Va. 2018); *Walsted v. Woodbury Co.*, 113 F. Supp. 2d 1318 (N.D. Iowa 2000).

⁶⁹ *Cf. id.*

⁷⁰ This may be satisfied by national-level data, per the analysis *supra* Section III(A).

among the population of individuals with a felony conviction. Even if the defendant-company could meet its burden, such as by presenting evidence showing that its ban on tenants with prior felony convictions had substantially improved tenant safety at the property, a plaintiff or complainant could likely demonstrate that there were less discriminatory alternative available, such as providing applicants a meaningful opportunity to offer mitigating evidence demonstrating the applicant's ability to fulfill the responsibilities of tenancy. The outcome would be similar for a housing provider that denied housing for convictions within a specific timeframe (e.g., 10, 25 years) if the policy operated as a ban with no opportunity for the applicant to provide mitigating evidence.⁷¹

Example 2: Evictions Based on Arrests

A tenant rents from a landlord in an area where readily available applicable data indicates that persons with mental health disorders are disproportionately likely to have criminal records. Tenant is a war veteran with PTSD. Tenant has been arrested a number of times while living at the property, but he has never been convicted. A new property management company takes over and decides to rescreen all tenants, electing not to renew the lease of all households with multiple arrests while residing at the property. Tenant does not request a reasonable accommodation because he is unable to articulate the nexus between his disability and his arrests. Based on Tenant's multiple arrests, the property management company elects not to renew Tenant's lease. The property management company has likely engaged in conduct which violates the Fair Housing Act, as the practice of evicting a tenant based upon arrest disproportionately excludes persons with disabilities from housing and arrests do not evidence wrongdoing. The landlord's practice of moving to evict a tenant based upon arrests is not necessary to advance a substantial, legitimate, non-discriminatory interest.

Example 3: Blanket Bans on People on Probation

A housing authority has adopted a policy of denying any applicants who are currently on probation. Although this policy is facially neutral, it essentially operates as a blanket ban on anyone who has a conviction and is serving probation because it offers no opportunity for the applicant to show why he can meet his obligations as a tenant despite his conviction. Because Black men are overrepresented nationally in probation, such a policy would have a disparate racial impact, and the defendant-housing authority would not likely meet its burden given the sweeping nature of the policy.

VII. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden

⁷¹ This example is derived from *Equal Rights Center v. Mid-America Apartment Communities, Inc.* (D.D.C. 2017): complaint, consent order, press release. For a case with a similar blanket ban on felonies, see *Housing Opportunities Made Equal of Virginia vs. Wisely Properties, LLC* (E.D. Va. 2019): complaint, settlement agreement, press release.

African Americans and Hispanics **and to disproportionately burden persons with disabilities**. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction. Where a policy or practice excludes individuals with only certain types of convictions, a housing provider will still bear the burden of proving that any discriminatory effect caused by such policy or practice is justified. Such a determination must be made on a case-by-case basis.

Selective use of criminal history as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics violates the Act.