



March 2, 2022

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

Re: Applicability of Affirmatively Furthering Fair Housing mandate to criminal records screening

Dear Office of Fair Housing and Equal Opportunity:

The Fair Housing Act of 1968 (FHA) imposes a duty to Affirmatively Further Fair Housing (AFFH), not only upon HUD, but also upon jurisdictions, subrecipients, and public housing agencies (PHAs) receiving federal funding for housing and urban development activities (such entities will collectively be referred to as “program participants”). We write to request that HUD act to ensure that program participants are specifically taking steps to increase housing access for those with criminal records in furtherance of their duty to AFFH. Specifically, we urge HUD to more acutely focus program participants’ AFFH fair housing planning obligations, reporting requirements, and assessment tools around identifying barriers to housing faced by those with records. We, similarly, urge HUD to flag certain criminal screening and crime-free housing policies adopted by program participants for especially rigorous scrutiny.

Addressing and dismantling systemic racism is at the core of the Biden-Harris Administration’s agenda, and it is a goal that cannot be realized without significant reforms to the country’s criminal-legal system. However, these reforms must reach beyond prison walls and ensure the needs of people exiting incarceration and those involved in the criminal-legal system are met so that these individuals have a full and equal opportunity to thrive. Successful reentry is impossible without safe, secure, affordable, and accessible housing, but those with conviction histories and individuals exiting incarceration often face insurmountable hurdles to meet this basic need. In the absence of safe, stable housing, people with a criminal record are significantly more likely to experience homelessness and reincarceration.¹

Background and the Current Context

The FHA obligates HUD to administer its programs in a way that affirmatively furthers fair housing. States, counties, cities, and PHAs that receive HUD funding must not only prevent discrimination. They must also take meaningful action to undo discriminatory policies and

¹ Matthew Doherty, Incarceration and Homelessness: Breaking the Cycle, COPS OFF. NEWSLETTER (Dept. of Justice/U.S. Interagency Council on Homelessness, Wash., D.C.), Dec. 2015, www.cops.usdoj.gov/html/dispatch/12-2015/incarceration_and_homelessness.asp.

practices that result in segregated communities and to foster inclusive communities free from barriers that restrict access to opportunity based upon protected characteristics. Guidance in HUD's 1996 "Fair Housing Planning Guide"² clarified that the obligation to affirmatively further fair housing applies to all housing and housing-related activities in a jurisdiction receiving federal housing and community development dollars, regardless of whether federal housing and community development funds are used for the particular activity or practice in question.

In July 2015, HUD published its final rule on implementation of the FHA's affirmatively furthering fair housing obligation. The 2015 rule established basic parameters to help guide public sector housing and community development planning and investment decisions and created a standardized fair housing assessment and planning process to give program participants a more effective means of affirmatively furthering the Fair Housing Act's mandates. The Trump administration attempted to enact regulation gutting the duty to AFFH. Fortunately, in response, the Biden Administration published an Interim Final Rule "Restoring Affirmatively Furthering Fair Housing Definitions and Certifications" in June 2021. Importantly, the 2021 interim rule rescinded the Trump rule and reiterated the importance of the AFFH obligation, reinstating a robust requirement for certifying that a program participant is affirmatively furthering fair housing. The interim rule states that program participants may engage in fair housing planning to support their AFFH certifications, and while they do not have to submit a specific form, they may use the 2015 assessment tools. The 2021 rule also reiterated the 2015 AFFH rule's definition of what it means for a jurisdiction to "affirmatively further fair housing":

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics [i.e., race, color, national origin, religion, sex, disability, and/or familial status]. Specifically, it means taking meaningful actions that:

1. Address significant disparities in housing needs and access to community opportunity.
2. Replace segregated living patterns with truly integrated and balanced living patterns.
3. Transform racially and ethnically concentrated areas of poverty into areas of opportunity.
4. Foster and maintain compliance with civil rights and fair housing laws.³

The notion that HUD and program participants must affirmatively further fair housing both imposes distinct obligations and is foundational to specific FHA dictates, such as those expressed in HUD's reinstated 2013 disparate impact rule⁴ and HUD's 2016 guidance limiting the

² US Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity. "Fair Housing Planning Guide: Volume 1." 1996. <https://www.hud.gov/sites/documents/FHPG.PDF>

³ Affirmatively Furthering Fair Housing; Final Rule, 80 Fed. Reg. 42282 (July 16, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-07-16/pdf/2015-17032.pdf>

⁴ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013), www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF

discriminatory use of criminal background checks⁵ and crime free/nuisance ordinances (CFNO).⁶ Generations of biased policing policies and practices and structural discrimination have led Black and Latino people,⁷ as well as people with disabilities⁸ and members of the LGBTQ+ community,⁹ to be disproportionately represented in the criminal-legal system. As such, tenant criminal screening practices and use of CFNOs pose significant barriers to AFFH. Any future AFFH guidance, criteria, fair housing planning guidance, and technical assistance tools must devote particular attention to encouraging program participants to maximize housing access for those with records. An essential step is discouraging program participants from employing criminal screening practices and CFNOs in ways which erect barriers to fair housing.

Criminal Screening Practices

Commonly, both subsidized and private-market housing providers adopt screening policies¹⁰ which broadly exclude those with criminal records. The barriers to housing faced by those with criminal records, and the principles underlying the 2016 Criminal Records Guidance and Notice H 2015-10, should be central to the AFFH reporting and compliance process. Specifically, HUD should issue guidance and formulate its compliance review process to encourage participants to adopt “fair chance policies” and discourage participants from adopting overly restrictive screening practices.

HUD should incentivize states and municipalities with the duty to AFFH to adopt fair chance laws which narrow housing providers’ discretion to exclude tenants and applicants based upon their criminal histories. Several states and municipalities across the country have already adopted such laws, which often draw from HUD’s 2016 Criminal Records Guidance.¹¹ Additionally, multiple states have adopted policies specifically targeted towards enhancing access to public

⁵ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, U.S. DEPT. OF HOUSING AND URBAN DEV. (April 4, 2016), www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

⁶ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, U.S. DEPT. OF HOUSING AND URBAN DEV. (Sept. 13, 2016), www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.

⁷ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (Sentencing Project, October 13, 2021). <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>

⁸ Becky Crowe and Christine Drew, *Orange is the New Asylum: Incarceration of Individuals with Disabilities* (Behavior Analysis in Practice, 14, 387-395, February 22, 2021). <https://link.springer.com/article/10.1007/s40617-020-00533-9>

⁹ Alexi Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System* (Prison Policy Initiative, March 2, 2021). <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/>

¹⁰ Please note that, throughout this letter, “policies” refers not only to formal, written policies but also to those carried out or permitted in practice.

¹¹ *See, e.g.*, Or. Revised Statute §§ 90.303(2), 90.110 (2018); New Jersey P.L. 2021, c. 110 (June 18, 2021); 775 ILCS § 5/3-102 (2020); District of Columbia Code § 42-3541.02(e); Ann Arbor, Mich. Code §§ 9:603, 9:605; Berkeley, Cal., Municipal Code § 13.106.040; Oakland, Cal., Municipal Code § 8.25.030(A); 40 Urbana, Ill., Code of Ordinances, §§ 12-37, 12-64; Champaign, Municipal Code, §§ 17.2, 17.3, 17.4.5; Ypsilanti, Mich., City Code §§ 58-61(a), 58-62; Minneapolis, Minn., Code § 244.2030(c); Richmond, Cal. Municipal Code § 7.110.050; San Francisco, Cal., Police Code, § 4906; Cook County, Ill., Code § 42-38(a), (e)(1)–(2); Newark, N.J., Ordinance 14-0921 (2017).

housing¹², housing funded by the state¹³, or housing funded by the Low Income Housing Tax Credit program.¹⁴ HUD should make clear that, by adopting such laws and policies, states and municipalities take a “meaningful action” towards AFFH.

Similarly, HUD should disincentivize PHAs with the duty to AFFH from adopting and allowing unreasonable screening practices. Federal law only requires housing authorities to exclude applicants based on their criminal history in very limited circumstances.¹⁵ The more housing authorities adopt or permit additional exclusions, the greater their reporting obligations should be. Similarly, HUD should flag such PHAs for compliance reviews. Indeed, the more a housing authority adopts policies which erect barriers to equitable housing access, the more scrutiny the AFFH compliance process should afford the PHA.

Guidance and data collection. While HUD has made previous assessment tools available to program participants, HUD has not restored mandatory assessments tools or other standardized planning and review mechanisms. Regardless of what planning guidance or documents HUD adopts, HUD should issue additional guidance targeted at program participants. This guidance should require program participants with mandatory or discretionary criminal screening criteria that substantially exceed criteria mandated by federal law to complete a fair housing planning document and submit it to HUD’s Office of Fair Housing and Equal regarding the following:

- Data breaking down the demographics of individuals with criminal records and households with members with criminal records in the area served by the PHA, including a breakdown by type of criminal records and type of offense (e.g., arrest v. conviction, type of crime or alleged crime);
- Data breaking down the number of persons and households excluded (either by denial of admission, eviction, refusal to renew or the like) from housing or housing programs administered by the PHA due to their criminal records, the demographics of these persons and households, and a breakdown by type of crime and criminal record. PHAs should have to provide this data from as far back and their longest lookback period;
- Data regarding the effects of these screening policies on protected classes; and

¹² See, e.g., 310 ILCS § 10/25(e-5) (2021); 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>.

¹³ See, e.g., New York State Office of Homes and Community Renewal, Management Memorandum- Access to Reduce Housing Barriers for New Yorkers with Criminal Convictions (April 20, 2016) available at: <https://hcr.ny.gov/system/files/documents/2018/11/2016-b-05.pdf>.

¹⁴ See, e.g., Georgia Dept. of Comm. Affairs, Qualified Allocation Plan, § 18(K) (2022); Pennsylvania Hous. Finance Agency, Qualified Allocation Plan at 20 (2021); Louisiana Hous. Corp., Memorandum on Fair Housing and Tenant Selection with Regard to Criminal Record Screening (July 14, 2021). Other states are considering adoptions of similar policies, see, e.g., Ohio Hous. Finance Agency, Draft Qualified Allocation Plan (2022-2023), <https://www.novoco.com/sites/default/files/atoms/files/ohio-lihtc-full-draft-2022-2023-qap-08032021.pdf>.

¹⁵ 42 U.S.C. § 13663(a) (“lifetime registration requirement under a State sex offender registration program”); 42 U.S.C. § 1437n(f)(1) (manufacture or production of methamphetamine on the premises of federally-assisted housing); see also 42 U.S.C. § 13661(a) (eviction for drug-related offense from federally assisted housing within three years, with opportunity to show change of circumstances).

- Analysis of whether the screening policies create impediments to fair housing, identification of those impediments, and what steps the PHA will take to overcome the identified impediments, including repeal of the policy.

The planning document should also require PHAs to report:

- Information regarding the rationale for the adoption of the screening policies (including attachment of public comments regarding the screening policies);
- Whether the PHA is using public housing operating funds or Housing Choice Voucher administrative funds to enforce these screening policies;
- All efforts to engage individuals with records and their families in the setting of screening policies and AFFH planning; and
- Any study performed or data collected or used in formulating the mandatory and permissive screening policies, including but not limited to any study or data supporting a correlation between such screening policies and increased positive housing outcomes.

Compliance Reviews. We urge HUD to prioritize compliance reviews and enforcement actions against PHAs that employ and/or allow participating housing providers to employ restrictive criminal screening practices. Given the number of such participating PHAs, HUD should prioritize compliance reviews and enforcement actions against those with criminal screening policies that have the following features:

- Policies that are not based upon a significant, verifiable relationship between criminal history and negative housing outcomes;
- Policies that allow for ‘1-strike’ evictions;
- Policies that allow or mandate the exclusion of persons from housing based on the consideration of arrests and other pre-conviction records (e.g., indictments, charging documents, supervised release status, etc.) not resulting in conviction;
- Policies that allow or mandate the exclusion of persons from housing based upon their failure to disclose arrests not resulting in conviction;
- Policies that allow or mandate the exclusion of persons from housing before a meaningful individual assessment is conducted and/or before the housing applicant or resident is provided a meaningful opportunity for mitigation and to dispute the accuracy of the criminal background check;
- Policies that allow or mandate the exclusion of persons from housing based on broad categories of criminal history such as “felonies,” “property crimes,” “gun crimes,” “drug crimes” or the like;
- Policies that fail to reasonably limit and tailor the discretionary categories of exclusions enumerated in 42 USCA § 13661(c);

- Policies that allow or mandate the exclusion of persons from housing based on post-conviction status, such as probationary status;
- Policies that mandate or allow the use of lookback periods that are either excessive, unspecified, lacking in meaningful limits, disproportionate, or which are triggered by an event subsequent to the conviction date (such as the release date); and
- Policies that allow or mandate the exclusion of persons from housing based upon juvenile records, records which have been sealed, expunged, or otherwise made publicly unavailable, or records of convictions which have been pardoned, reversed, or overturned.

HUD should also prioritize conducting compliance reviews of PHAs in instances where an advocate or resident brings the policies or practices of a PHA or landlord participating in a program administered by that PHA to HUD's attention.

While HUD should prioritize compliance reviews for participating PHAs with the above-listed policies, HUD should also make it clear that PHAs with certain policies cannot meet their duty to AFFH, for example:

- Policies that mandate or allow persons to be excluded from housing based on arrest records or other pre-conviction records not resulting in conviction;
- Policies that mandate or allow persons to be excluded from housing without an individual assessment (except the exclusions mandated by federal law) or which employ overbroad categorical exclusions in policy or practice (i.e., "no felonies" or the like); and
- Lookback periods exceeding five years from the conviction date.

HUD should similarly ensure that all fair housing planning guidance and technical assistance made available to program participants substantially account for the dangers criminal screening policies can pose for fair housing. HUD should also highlight as best practices those program participants that have taken proactive steps to enhance housing access for those with justice involvement. HUD should offer additional technical assistance and direct support to program participants to assist them to reformulate their criminal history screening policies.

CFNOs

We write here to add our support to the recommendations regarding the intersection of the duty to AFFH and CFNOs made by our colleagues at the American Civil Liberties Union – Women's Right Project and the National Housing Law Project, attached here as Exhibit 1. We make our support explicit in this letter to acknowledge that, as a whole, policies which serve to exclude from housing those with contact with the criminal justice system pose major impediments to fair housing. As with criminal screening policies, any assessment tool or compliance mechanism should not only include, but devote focus to, the threat posed by CFNOs.

Any effort to affirmatively further fair housing is woefully incomplete without significant focus upon this "New Jim Crow." Please feel free to reach out to Kim Johnson of the National Low

Income Housing Coalition at kjohnson@nlihc.org, Eric Sirota of the Shriver Center on Poverty Law at ericsirota@povertylaw.org, Kate Walz of the National Housing Law Project at kwalz@nhlp.org, or Deborah Thrope of the National Housing Law Project at dthrope@nhlp.org. We welcome any opportunity to further discuss.

Best Regards,

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Eric Sirota, Director of Housing Justice, Shriver Center on Poverty Law

Kate Walz, Senior Staff Attorney, National Housing Law Project

Deborah Thrope, Deputy Director, National Housing Law Project

Recommendations on the Department of Justice's Administrative Enforcement of Title VI and the Safe Streets Act

Local Nuisance Ordinances and Crime-Free Housing Programs

Submitted by: the American Civil Liberties Union, National Housing Law Project, Lawyers' Committee for Civil Rights Under Law, NAACP, National Fair Housing Alliance, National Network to End Domestic Violence, and the Shriver Center on Poverty Law

November 19, 2021

We write to you in response to the September 15, 2021 memorandum, *Review of the Department's administrative enforcement of Title VI and the Safe Streets Act*. As the Department of Justice (DOJ) evaluates how to better prevent federal public dollars from financing illegal discrimination, we wanted to provide you with information on an issue of particular concern to our organizations: the growing number of local governments who are recipients of federal financial assistance that have crime-free housing programs and/or nuisance property ordinances. These ordinances target, criminalize, and evict renters of color, persons with disabilities, and survivors of violence, and should be discouraged accordingly.

We ask the Civil Rights Division, the Office of Justice Programs, the Office of Community Oriented Policing Services, and the Office on Violence Against Women to consider these laws and programs when examining criteria for compliance reviews and complaint investigations; making recommendations for improvements to strengthen grantees' data collection and reporting efforts; identifying any measures that would enhance coordination between the Department's grant-making and enforcement components; examining any necessary changes to strengthen the Department's compliance procedures; and assessing whether the Department's Title VI and SSA regulations, coordination regulations, enforcement guidelines, or other regulations or guidance should be revised. An improved set of criteria and methods for compliance reviews, coordination, and enforcement can reduce the prevalence of these discriminatory and harmful crime-free programs and nuisance property ordinances by federal funding recipients.

I. Background on Crime-Free Housing Programs and Nuisance Property Ordinances

Since the 1990s, there has been a proliferation of local jurisdictions adopting crime-free housing programs and nuisance property ordinances targeted at rental property owners and prospective and actual renters. These programs and ordinances threaten the housing of the most vulnerable tenants, particularly low-income tenants of color, survivors of domestic violence, and tenants with disabilities. While they vary slightly by jurisdiction, crime-free programs typically require or encourage property owners to: (1) utilize a "crime free lease addendum," which require the eviction of the entire household if one tenant is accused of violating the lease addendum (typically by having any contact with the police – convictions and often even arrests are not required); (2) conduct criminal background checks of applicants, as well as ongoing screening for new criminal activity by current tenants; and (3) participate in mandatory training on operating "crime-free housing," which encourage landlords to police their property in potentially discriminatory ways. The programs are typically operated by local law enforcement

agencies. Nuisance ordinances, which often go hand-in-hand with crime-free programs, single out properties where alleged “nuisance” activity—such as calls for emergency services, alleged misdemeanor or felony criminal activity, or local ordinance violations such as noise disturbances—has occurred. Such ordinances and programs aim to hold a tenant and/or owner responsible for this alleged conduct by demanding the eviction of all of the tenants in a home and fining or otherwise penalizing landlords who do not comply with that demand.

In 2016, HUD issued Guidance on the Application of Fair Housing Act Standards on the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services.¹ In this guidance, HUD noted that jurisdictions often fail to distinguish between perpetrating acts of domestic violence and being the victim of such violence when identifying “nuisance” conduct. This is especially true when overly broad nuisance and crime-free ordinances define nuisance behavior as “conduct such as disturbing the peace, excessive noise, [or] disorderly conduct,” which may cover domestic violence incidents.² As a result, many nuisance ordinances and crime-free programs impose unreasonable and life threatening choices on survivors of domestic violence, the vast majority of whom are women – forcing them to choose between calling for emergency assistance or putting their housing at risk. HUD also noted that many ordinances and crime-free programs negatively impact communities of color and persons experiencing disabilities.³ It is important to note the intersectional discrimination experienced by survivors of color who often become the target of these laws and programs.⁴ Black women and survivors of gender-based violence are disproportionately harmed.⁵

As has been well-documented by Professor Deborah Archer and others, these programs and ordinances have been used to maintain residential segregation and racial boundaries within a community.⁶ They tacitly authorize discriminatory policing and permit white neighbors to influence the racial make-up of the neighborhood, by invoking the ordinance or program to push for the eviction of Black and Latinx neighbors. This is especially true where the threshold for nuisance enforcement is low. In many jurisdictions, a few calls to the police, even if they do not result in an arrest, charge, or conviction, can result in a person or household being labeled a “nuisance.”

Jeopardizing the housing stability of people who have had contact with the criminal legal system has broad implications, given the disproportionate rates at which people of color are arrested and incarcerated. Yet this remains a key aspect of many crime-free housing programs and nuisance ordinances, both in terms of aggressive criminal records screening of tenant

¹ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), available at <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

² *Id.* at 3.

³ *Id.* at 13.

⁴ See, e.g., Peter Hepburn, Renee Louis, and Matthew Desmond, *Racial and Gender Disparities among Evicted Americans*, 7 Sociological Science 649-662 (Dec. 2020).

⁵ Matthew Desmond & Nicole Valdez, Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women, 78 Am. Sociological Rev. 117-141 (2013), http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf.

⁶ See, e.g., Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 Mich. L. Rev. 173 (2019); Deborah N. Archer, ‘Crime-Free’ Housing Ordinances, Explained, The Appeal (Feb. 17, 2021), <https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained/>.

applicants, often done by the local government or at their direction, and the aggressive efforts to force the eviction of tenants when the police are called to their homes. These programs and policies are likely to run afoul of the Title VI, the Safe Streets Act, and the Fair Housing Act given the disproportionate contacts that people of color, people with disabilities, survivors of domestic violence, and members of protected classes have with the criminal legal system.⁷ As explained by HUD's 2016 Guidance on the application of the FHA to the use of criminal records by landlords, arrests alone are not evidence of criminal activity and not all criminal convictions are relevant to the inquiry of whether someone would make a good tenant.⁸ Adopting a policy of evicting tenants based on arrests that do not lead to eviction has an unjustifiably discriminatory impact. At the same time, the blanket policy of excluding individuals from housing who have convictions typically violates civil rights protections.⁹

II. Law Enforcement Agencies across the Country are Implementing Policies that Undermine Effective Policing and the Housing Security of Residents in their Communities, Particularly People of Color, Survivors of Domestic Violence, and People with Disabilities.

As explained above, it is usually police departments that are charged with enforcing local nuisance and crime-free ordinances and housing programs.¹⁰ Police officers carry out a wide range of actions, which vary depending on the policy in question, but frequently include notifying landlords of alleged criminal activity, training landlords about the law or program, deciding when properties are in violation of the law or program, and requiring landlords to penalize or evict tenants. Police enforcement of these policies has resulted in individuals being evicted or denied housing throughout the country.

Research has established that the adoption of these laws and policies are often motivated by discriminatory animus, and/or that they are enforced with discriminatory effects. For example, federal lawsuits challenging these ordinances and programs in Hesperia, CA, Bedford, OH, Faribault, MN, and Peoria, IL all detailed the racial animus that led to their adoption.¹¹ Researchers also have demonstrated that these laws and policies particularly harm people of color, survivors of domestic violence, and people with disabilities, endangering their housing and creating greater distrust of law enforcement.¹²

⁷ [Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions](#) (April 4, 2016).

⁸ *Id.* at 5.

⁹ *Id.* at 6.

¹⁰ See, e.g., Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 Mich. L. Rev. 173 (2019); Deborah N. Archer, 'Crime-Free' Housing Ordinances, Explained, *The Appeal* (Feb. 17, 2021), <https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained/>.

¹¹ See *United States v. City of Hesperia et al.*, First Am. Compl. and Demand for Jury Trial, No. 5:19-cv-02298 (C.D. Cal. Sept. 10, 2020); *Victor Valley Fam. Res. Ctr. v. City of Hesperia*, Compl. For Injunctive and Declaratory Relief and Damages, No. 5:16-CV-00903 (C.D. Cal. May 4, 2016); *Somai v. City of Bedford*, No. 1:19-CV-373, Second Am. Compl. (N.D. Ohio Jan. 30, 2020); *Jones v. City of Faribault*, Am. Compl. For Declaratory and Injunctive Relief and Damages, No. 0:18-CV-01643 (D. Minn. June 29, 2018); *HOPE Fair Housing Center v. City of Peoria, IL.*, No. 17-cv-01360, Compl. (C.D. Ill. Aug. 10, 2017).

¹² See, e.g., NYCLU & ACLU, *More Than A Nuisance: The Outsized Consequences of New York's Nuisance Ordinances* 13 (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf; Joseph Mead et al., *Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio*, Urb. Publ'n (Nov. 8, 2017), https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2513&context=urban_facpub; Gretchen W.

Many residents, once learning that they could be evicted for seeking police or emergency assistance, stop calling 911 and therefore sacrifice access to services and protection. These types of laws and programs thus undermine effective law enforcement, by chilling the reporting of criminal activity and skewing crime data. For that reason, law enforcement officials have recognized that local nuisance ordinances and crime-free housing programs thwart their efforts to build relationships with communities and instead divert police attention from investigating serious criminal activity.

III. Examination of Local Nuisance Ordinances and Crime-Free Housing Programs Raises Significant Intersectional Concerns and Should be Prioritized in DOJ's Implementation of Title VI and the Safe Streets Act.

We urge the DOJ to prioritize this issue while reviewing administrative enforcement and compliance efforts of Title VI and the Safe Streets Act. As explained above, local nuisance ordinances and crime-free housing programs raise serious concerns under both Title VI of the Civil Rights Act,¹³ which prohibits discrimination on the basis of race, color, or national origin, and the Safe Streets Act,¹⁴ which prohibits discrimination on the basis of race, color, national origin, religion, and sex in connection with any program or activity funded with specific law enforcement assistance funds. As an issue that implicates both policing practices and fair housing, and particularly affects people of color and survivors of domestic violence, it would be most effectively addressed through a comprehensive DOJ approach that recognizes the intersectional harms, takes compliance and enforcement action when necessary, and proactively educates funding recipients about these policies' civil rights implications. DOJ could also draw on its prior and current work, including litigation challenging jurisdictions' discriminatory policing practices that also deny housing opportunities and guidance on gender-biased policing of domestic and sexual violence, as well as the body of work HUD has developed.¹⁵

Arnold, *From Victim to Offender: How Nuisance Property Laws Affect Battered Women*, J. of Interpersonal Violence 1 (2016), <https://drive.google.com/file/d/0B4jt0vmC0QwES2NwN1ZFb3kxRVE/view?resourcekey=0-9DrJKiLuBVxzc1Fqk07PBQ>; ACLU, *Silenced: How Nuisance Ordinances Punish Crime Victims in New York 2* (2015), https://www.aclu.org/files/field_document/equ15-report-nuisanceord-rel3.pdf; Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 28 Am. Socio. Rev. 117 (2012), https://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr_0.pdf.

¹³ 42 U.S.C. § 2000d.

¹⁴ 34 U.S.C. § 10228(c)(1).

¹⁵ See, e.g., *United States v. City of Hesperia*, First Am. Compl. and Demand for Jury Trial, No. 5:19-cv-02298 (C.D. Cal. Sept. 10, 2020); *United States v. County of Los Angeles*, Compl., No. 2:15-cv-03174 (C.D. Cal. Apr. 28, 2015); Dep't of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* (2015), <https://www.justice.gov/opa/file/799366/download>; Voluntary Compliance Agreement between U.S. Dep't of Hous. and Urb. Dev. Off. of Fair Hous. and Equal Opportunity and the City of Hemet, CA, HUD Case NO. 09-20-0002-6 (Dec. 10, 2020), <https://www.hud.gov/sites/dfiles/FHEO/images/Hemet%20-%20HUD%20Voluntary%20Compliance%20Agreement%20-%20FINAL%20but%20not%20signed.pdf>; U.S. Dep't of Hous. and Urb. Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>; U.S. Dep't of Hous. & Urban Dev., Conciliation Agreement between U.S. Dep't of Hous. and Urb. Dev. and Municipality of Norristown, PA, Secretary Initiated Complaint Nos. 03-13-0277-8 and 03-13-0277-9 (Sept. 17, 2014), <https://www.aclu.org/legal-document/hud-v-norristown-hud-conciliation-agreement>.

The following are factors that DOJ could use to flag recipients' laws or programs for further review:

- A vague or broad definition of disorderly conduct, nuisance, or other activity that triggers violation of the law or program, granting wide discretion to police officers to find violations;
- Inclusion of any number of police calls for service as possibly triggering violation of the law or program;
- Inclusion of domestic violence, criminal trespass, or disturbances as possibly triggering violation;
- Encouragement of evictions of tenants, without regard to whether the underlying conduct related to a protected status such as mental disability, is based on crimes committed against tenants, or is based upon police contact that does not result in a conviction or upon behavior unrelated to the tenant's ability to substantially perform under the terms of the lease;
- Required use of a crime-free lease addendum, authorizing eviction based on any alleged criminal activity, including alleged conduct by minors under state juvenile delinquency laws;
- Encouragement of exclusion of housing applicants based on criminal record screening, without an individualized consideration of the type or age of the record or mitigating circumstances;
- Adoption of an ordinance or program based on a perceived change in the demographics of a community connected to race, national origin, disability, or gender;
- Enforcement of the ordinance or program by police departments accused or suspected of discriminatory policing practices on the basis of race, national origin, and/or gender;
- Ordinances or programs that rely upon complaints by neighbors, who often use the process to exclude and target renters of color in order to remove them from the community.

IV. The DOJ Should Issue Legal and Policy Guidance as well as Data Collection and Reporting Requirements that Could Show the Discriminatory Effects of the Laws and Programs and Discourage Grantees from Adopting them.

In considering whether to revise or update guidance or regulations, the DOJ should prioritize revisions that address the critical intersectional harms we described above. Helpful guidance could include a Dear Colleague letter or joint guidance with HUD which further describes how federal funding recipients' enforcement of these ordinances and programs act contrary to Title VI and other civil rights laws, as well as the Safe Streets Act, and potentially jeopardize their continued access to those funds.

Other than data collected through open records requests or through litigation against local governments with crime free programs and nuisance property ordinances, there is no reporting data from local police, sheriff's offices, or local governments about the level and type of enforcement, any disparities in enforcement by protected class, the impact on housing stability and the racial demographics of communities and neighborhoods, the use of arrests or convictions to automatically deny tenants admission or evict them, the use of databases to track arrests and/or

convictions of tenants/applicants and who has access to those databases, and the impact of these programs on survivors of violence, including the reduction in the number of survivors seeking assistance from law enforcement. Grantees could be asked to report if they have a crime-free program and/or nuisance ordinance, and if they do, be obligated to provide additional data collection in the areas described above.

V. Conclusion

Thank you for the opportunity to provide information on how better to ensure that federal public dollars are not being used to finance illegal discrimination, particularly as it relates to local governments who are recipients of federal financial assistance and have crime-free programs and/or nuisance property ordinances. We welcome the opportunity to continue to discuss this important matter with you. Please feel free to contact Sandra Park of the ACLU (spark@aclu.org) and Kate Walz (kwalz@nhlp.org) and Natalie Maxwell (nmaxwell@nhlp.org) of the National Housing Law Project with any questions.