



State of California
Office of the Attorney General

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Submitted via Federal eRulemaking Portal

Damon Smith, General Counsel
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Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

RE: Comment on Proposed Rule Regarding Reducing Barriers to HUD-Assisted Housing, Docket No. FR-6362-P-01, RIN 2501-AE08, Document No. 2024-06218, 89 Fed. Reg. 70, 25332 (Apr. 10, 2024)

Dear General Counsel Smith:

As the Attorney General of the State of California, I write in response to the Department of Housing and Urban Development's (HUD) April 10, 2024, request for public comment regarding its Proposed Rule "Reducing Barriers to HUD-Assisted Housing." Like HUD, the California Department of Justice strongly believes that individuals with criminal records (justice-involved individuals) should have the opportunity to obtain housing, earn a living, and participate in civic life. For this reason, we applaud HUD for its Proposed Rule and are confident that it will eliminate unnecessary and counter-productive barriers to affordable housing for justice-involved individuals and their families, which will in turn reduce recidivism and increase public safety. We have provided much of our feedback in response to HUD's specific "Questions for Public Comment."

Consistent with HUD's observation that nearly a third of adult Americans have a criminal record,¹ eight million Californians have a criminal record.² Although affordable housing is vital to the successful reentry of justice-involved individuals and reducing recidivism, a significant

¹ Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 25332, 25340 (proposed Apr. 10, 2024) [hereinafter Proposed Rule] (citations omitted) (noting that "as many as one in three adult Americans has been arrested at least once").

² Californians for Safety and Justice (CSJ), *Repairing the Road to Redemption in California* 1 (2018), https://safeandjust.org/wp-content/uploads/CSJ_SecondChances-ONLINE-May14.pdf

proportion of these individuals and their families will face difficulty in obtaining stable, affordable housing during their lifetimes.³ California is also experiencing an unprecedented housing affordability crisis, and HUD-subsidized housing is a crucial tool in the fight to prevent and end homelessness. The need for affordable housing is especially great for justice-involved individuals, who face significant barriers to employment and lack the income and financial resources necessary to afford market-rate housing. Accordingly, equal access to HUD programs is integral to eliminating housing barriers for justice-involved individuals, helping them to avoid homelessness, and reducing their likelihood of re-offending.

As California's top law enforcement official, I have a strong interest in ensuring the successful reintegration of justice-involved individuals and equal access to housing without discrimination. These interests are an inextricable part of the California Department of Justice's responsibility to safeguard Californians from harm, promote community safety, and enforce our Nation's and California's civil rights laws. To further these interests, my office:

- Convenes statewide roundtables to address reentry barriers and potential solutions;
- Enforces federal and state fair housing laws to increase housing opportunity;
- Supports the development of innovative reentry-focused housing programs;
- Protects the consumer rights of justice-involved individuals when their criminal record information has been unlawfully disseminated; and
- Combats employment discrimination by maintaining, clearing, and sealing criminal records.

Although we strongly support the Proposed Rule, further changes are necessary to strengthen its effectiveness (detailed below). In summary, we urge HUD to:

- Clarify the Proposed Rule's preemption language to promote compliance with, and ensure the effectiveness of, California's strong legal protections in this area;
- Exclude the use of non-conviction records; juvenile records; records of service calls to law enforcement; and conviction records where the person has obtained an expungement, pardon, or other post-conviction relief in housing decisions, as California law provides;
- Clarify that individualized assessment is required in eviction and termination decisions;
- Apply the Proposed Rule to owners in the Section 8 Housing Choice Voucher (HCV) and Project-Based Voucher (PBV) Programs; and
- Require individualized assessment where automated decision-making tools such as artificial intelligence and algorithms are used to help make housing decisions.

These recommendations and suggestions will help HUD more effectively reach its articulated goals of promoting second chances and minimizing the unnecessary exclusion of justice-involved individuals from HUD's programs.

³ *Id.* at 8.

I. BACKGROUND

A. HUD Housing Programs Are Integral to Providing Housing to Low-Income Californians and Their Families

California has a substantial interest in HUD’s Proposed Rule due to the vast and extensive administration and operation of HUD-subsidized housing and housing choice vouchers within the State. California—along with its various local jurisdictions, public housing agencies (PHAs) and non-profit housing developers—is one of the largest recipients of HUD funds.⁴ Additionally, these entities in California operate some of the largest federally subsidized housing programs in the United States. There are over half-a-million HUD-subsidized housing units in California, housing nearly one million low-income individuals and families.⁵ Over 300,000 households use housing choice vouchers to rent their homes in California.⁶ The Proposed Rule impacts many Californians, especially low-income Californians of color. Thus, California has an important interest in ensuring that HUD-subsidized housing programs are administered in the State in a manner that comports with fair housing law and reduces barriers to housing.

B. Access to Affordable Housing is Essential to Successful Reentry, Reduces Recidivism, and Promotes Public Safety in California

1. Overview of Justice-Involved Californians

California also has a substantial interest in reducing barriers to HUD programs for justice-involved individuals living in our State. Eight million Californians, or one in five people, have some form of criminal record,⁷ and nearly 200,000 people are currently incarcerated in California.⁸ A significant proportion of justice-involved individuals in California are in the early stage of reentry, and thus likely have a greater need for housing and other basic life needs. Over 250,000 Californians are currently on probation, parole, or some form of court-ordered

⁴ HUD Exchange, HUD Awards and Allocations, <https://www.hudexchange.info/grantees/allocations-awards/> (filter by state-California) (last visited May 28, 2024).

⁵ HUD, Off. of Pol’y Dev. & Res., HUD Assisted Housing: National and Local Data Set, <https://www.huduser.gov/portal/datasets/assthsg.html> (last visited May 30, 2024).

⁶ HUD, Off. of Hous. Choice Vouchers, Housing Choice Voucher (HCV) Data Dashboard, https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/dashboard (last visited May 30, 2024).

⁷ CSJ, *Repairing the Road to Redemption in California*, *supra* note 2, at 1.

⁸ Prison Pol’y Initiative, *California Profile*, <https://www.prisonpolicy.org/profiles/CA.html> (last visited May 30, 2024).

supervision,⁹ and almost one million people are released from jail or prison in California each year.¹⁰

Reflecting trends nationwide, reentry barriers to housing disproportionately impact people of color and people with disabilities in California. African Americans, Hispanics/Latinos/Latinas, and Native Americans in California are arrested,¹¹ convicted,¹² and incarcerated¹³ at rates disproportionate to their share of the population. In a 2018 study of reentry barriers facing justice-involved individuals in California, while nearly 25 percent of survey respondents reported facing difficulty in finding housing because of their criminal record, respondents of color were 61 percent more likely to have difficulty finding housing.¹⁴ Noting the disproportionate impact of reentry housing barriers on African Americans, California's Reparations Task Force has recommended that California "[p]rovide clean and secure public housing for . . . persons who are formerly incarcerated" to reduce the segregative effect of these barriers on African-American communities.¹⁵

Relatedly, criminal record-related housing restrictions also have a disparate impact on justice-involved individuals with disabilities, particularly those with mental health- and substance use disorder-related disabilities. In 2021, the Council of State Governments (CSG) Justice Center reported that, "roughly one-third of people in [California's] prisons and jails have some level of mental health diagnosis."¹⁶ Further, 29 percent of people in California's prisons have been diagnosed with a serious mental illness and up to 70 percent of prisoners may have a substance use disorder.¹⁷ Similarly, 27 percent of people in California's jails have an "open mental health case."¹⁸

⁹ Prison Pol'y Initiative, *Punishment Beyond Prisons 2023, Incarceration and Supervision by State* (2023), <https://www.prisonpolicy.org/reports/correctionalcontrol2023.html>.

¹⁰ Leah Wang, *Since you asked: How many women and men are released from each state's prisons and jails every year?* Prison Pol'y Initiative, (Feb. 28, 2024), <https://www.prisonpolicy.org/blog/2024/02/28/releases-sex-state/>

¹¹ Magnus Lofstrom et al., *Arrests in California*, Public Pol'y Inst. of Cal. (2024), <https://www.ppic.org/wp-content/uploads/arrests-in-california.pdf>.

¹² Colleen V. Chien et al., *Proving Actionable Racial Disparity Under the California Racial Justice Act*, 75 *Hastings L.J.* 1, 37-38 (Tables 2-3) (2024), https://hastingslawjournal.org/wp-content/uploads/1-%E2%80%93ARTICLE-%E2%80%93Chien-et-al._Final.pdf.

¹³ Prison Pol'y Initiative, *California Profile*, *supra* note 8.

¹⁴ CSJ, *Repairing the Road to Redemption in California*, *supra* note 2, at 8.

¹⁵ Cal. Task Force to Study and Develop Reparation Proposals for African Americans, *Interim Report: Executive Summary 20* (2022), <https://oag.ca.gov/system/files/media/ab3121-interim-report-executive-summary-2022.pdf>.

¹⁶ Charles Francis et al., CSG Justice Ctr., Melville Cmty. Trust, *Reducing Homelessness for People with Behavioral Health Needs Leaving Prisons and Jails 4* (2021), https://csgjusticecenter.org/wp-content/uploads/2021/02/Reducing-Homelessness-CA_Final.pdf.

¹⁷ *Id.* at Appendix.

¹⁸ *Id.*

Because people of color and people with disabilities are disproportionately represented amongst Californians with a criminal record, they are also at a greater risk of homelessness as a result of their criminal record. For example, in the Los Angeles area, nearly two-thirds of African Americans experiencing homelessness report past involvement with the criminal justice system.¹⁹ Unhoused African American families with children were also more likely to report criminal justice system involvement than families of other racial and ethnic groups.²⁰ As aptly noted by the Los Angeles Homelessness Services Authority, “[w]hen one family member is incarcerated, particularly the primary wage earner or head of household, the entire family unit is at risk of homelessness.”²¹

Similarly, people with disabilities face a heightened risk of homelessness as compared to those without disabilities. In 2020, over 40 percent of Californians who accessed homeless services reported having a disability.²² In some cities, this risk is even higher: in Los Angeles County, 67 percent of the homeless population in 2019 had a mental health disability or substance use disorder.²³ Consequently, housing barriers to reentry likely elevate the risk of homelessness for justice-involved people with disabilities.

2. Housing Reentry Barriers in California Are Multifaceted and Interconnected

California also has a strong interest in increasing justice-involved individuals’ access to HUD programs in light of the numerous, interrelated housing barriers faced by this population. Justice-involved individuals in California face significant stigma in nearly every facet of their lives, including housing.²⁴ In a recent study focusing on housing barriers to reentry in California, “[i]nterviewees with lived experience cited exceptional difficulties finding landlords willing to rent to them due to their criminal records, often preventing them from moving to neighborhoods of their choice that they felt would help them put their past behind them.”²⁵ Furthermore, this study found that “[e]ven among [housing] providers who explicitly serve vulnerable populations, such as people with behavioral health needs, there can still be significant stigma against people leaving incarceration because of a perception that they are more difficult clients to serve.”²⁶

¹⁹ L.A. Homeless Servs. Auth., *Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness* 24 (2018), <https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness>.

²⁰ *Id.*

²¹ *Id.*

²² Matt Levin et al., *California’s Homelessness Crisis — and Possible Solutions — Explained*, CalMatters (Dec. 31, 2019), <https://calmatters.org/explainers/californias-homelessness-crisis-explained/> (last updated May 2, 2022).

²³ Doug Smith and Benjamin Oreskes, *Are Many Homeless People in L.A. Mentally Ill? New Findings Back the Public’s Perception*, L.A. Times (Oct. 7, 2019), <https://www.latimes.com/california/story/2019-10-07/homeless-population-mental-illness-disability>.

²⁴ Francis, *supra* note 16, at 10.

²⁵ *Id.*

²⁶ *Id.*

This stigma is magnified by a housing market in which criminal background screening is ubiquitous and routine. A 2017 study by TransUnion, one of the largest providers of tenant screening tools, found that “90% of private landlords run background checks on applicants for housing.”²⁷ Indeed, the cities of Oakland and Berkeley have enacted legislation largely banning the use of criminal background checks to address this barrier.²⁸

Justice-involved individuals in California have a significant need for affordable housing, and the lack of affordable housing in California is a significant barrier to reentry. Many justice-involved individuals experience homelessness before their incarceration. “[B]etween 17 and 39 percent of people in California jails report experiencing homelessness within 30 days prior to their incarceration” “Another 15 to 42 percent report a history of homelessness within the year before their incarceration”²⁹ This need for housing remains after release—for people exiting California’s prisons, up to 39 percent of all people entering parole . . . report ‘moderate or high rental instability,’”³⁰ and “one in three individuals in jail expect to go to homeless shelters upon their release.”³¹

Further, subsidized affordable housing is often the only financially-accessible housing for justice-involved individuals, especially those who were recently released. More than 50 percent of the people entering the criminal justice system live at or below the poverty line when sentenced, and formerly incarcerated individuals earn 41 percent less than non-incarcerated individuals of similar ages.³² California prisoners receive only \$200 upon release from prison,³³ and 50 percent of justice-involved individuals in California will experience difficulty in finding a job, with people of color 29 percent more likely to face difficulty in finding employment.³⁴ Further, studies show “that formerly incarcerated men take home an average of 40% less pay annually than if they had never been incarcerated, resulting in an earnings loss of nearly \$179,000 by age 48.”³⁵ Consequently, these financial constraints severely limit justice-involved individuals’ ability to afford housing.

²⁷ TransUnion Rental Screening Solutions, *TransUnion Independent Landlord Survey Insights*, <https://www.mysmartmove.com/blog/landlord-rental-market-survey-insights-infographic> (last updated Aug. 7, 2017).

²⁸ Oakland, Cal. Mun. Code § 8.25.040 (2020); Berkeley, Cal. Mun. Code § 13.106 (2020).

²⁹ Francis, *supra* note 16, at 12.

³⁰ *Id.*

³¹ CSJ, *Repairing the Road to Redemption in California*, *supra* note 2, at 24 (internal citations omitted).

³² *Id.*

³³ Cal. Penal Code § 2713.1.

³⁴ CSJ, *Repairing the Road to Redemption in California*, *supra* note 2, at 8; *see also* Cal. Dep’t of Corr. and Rehab. (CDCR), Cal. Corr. Health Care Servs., and Council on Crim. Just. and Behavioral Health, *Successful Reentry/Transition from the California Department of Corrections and Rehabilitation: Identification of Barriers + Solutions to Address Them 1* (2021) (“individuals transitioning from incarceration can experience material hardship and poverty that is exacerbated by limited financial literacy and limited access to conventional financial institutions”), https://www.cdcr.ca.gov/ccjbh/wp-content/uploads/sites/172/2021/08/SB-369-Barriers-Report_Final-ADA.pdf.

³⁵ CSJ, *Repairing the Road to Redemption in California*, *supra* note 2, at 24.

Given California’s well-documented and severe shortage of affordable housing,³⁶ many justice-involved individuals and their families end up homeless. Indeed, they do so at disproportionate rates; 70 percent of unhoused people report a history of incarceration.³⁷ This trend is especially acute in certain parts of the State. For example, a 2019 survey estimated that 73 percent of people living in Oakland encampments were formerly incarcerated.³⁸ In Alameda County, a 2022 homelessness survey revealed that 30 percent of respondents had experienced interactions with the criminal legal system in the past year, and 7 percent directly attributed their homelessness to incarceration.³⁹

3. Housing Reduces Other Reentry Barriers and Reduces Recidivism in California

California has a strong interest in reducing housing barriers for justice-involved individuals because housing access in general—and HUD’s housing programs in particular—is essential to promoting successful reentry, and reducing recidivism in California. To wit, helping justice-involved people secure housing increases their ability to find employment. For example, the Los Angeles County Probation Department piloted a reentry housing program in which it provided time-limited rental housing subsidies, housing navigation, and case management services over a two-year period. An evaluation of the program found that “[r]eceipt of the rental subsidy was associated with increased employment” and after “controlling for other participant characteristics, the portion of clients employed was estimated to increase from 16 percent to 36 percent for those who were housed for 18 months compared with those housed for six months.”⁴⁰

Increasing access to housing also improves health outcomes for justice-involved individuals, especially those exiting incarceration. Although many justice-involved individuals are eligible for state and county healthcare programs, they “often fall through the cracks in the

³⁶ Pub. and Affordable Hous. Research Corp., Nat’l Low Income Hous. Coal., *2023 Preservation Profile: California* (2023), https://preservationdatabase.org/wp-content/uploads/2023/12/PD-Profile_2023_MERGED-CA.pdf (documenting California’s shortage of nearly one million homes that are affordable to renters with extremely low-incomes).

³⁷ Cal. Health Pol’y Strategies, *Criminal Justice System Involvement and Mental Illness Among Unsheltered Homeless in California* 3 (2018), <https://calhps.com/wp-content/uploads/2023/03/policy-brief-unsheltered-homelessness-11.20.2018.pdf>.

³⁸ Tim Tsai, *Standing Together: A Prevention-Oriented Approach to Ending Homelessness in Oakland* 23 (2021), https://static1.squarespace.com/static/5c09723c55b02cf724c3d340/t/5dbae967993e6469934fb8b1/1572530544919/WHITE+PAPER+Standing+Together_+A+Prevention-Oriented+Approach+to+Ending+Homelessness+in+Oakland.pdf.

³⁹ Applied Survey Res., *2022 Alameda County Homeless Count and Survey Comprehensive Report* 56 (2022), https://everyonehome.org/wp-content/uploads/2022/12/2022-Alameda-County-PIT-Report_9.22.22-FINAL-3.pdf.

⁴⁰ Sarah B. Hunter, et al., RAND Evaluation Rep., *Breaking Barriers: A Rapid Re-Housing and Employment and Employment Pilot Program for Adults on Probation in Los Angeles County* x (2020), https://www.rand.org/pubs/research_reports/RR4316.html.

[healthcare] delivery system as they transition from prison and jail to the community.”⁴¹ This gap in healthcare coverage can be deadly for some. Studies have shown “a 12-fold increase in the risk of death in the two weeks following release,” “that 1 in 12 individuals leaving prisons and jails with Medicare coverage were hospitalized within 90 days of release,” and that “the risk of death from all drug overdoses within the first two weeks after release from prison was 129 times that of other state residents.”⁴² Accordingly, helping justice-involved individuals find stable housing is essential to address their health-related needs.⁴³

Reducing barriers to housing is also crucial to reducing recidivism and increasing public safety in California. Despite the challenges faced by justice-involved individuals, recidivism rates in California have nevertheless declined steadily since 2004; the three-year re-conviction rate for people released from incarceration in California dropped from 49 percent in 2004 to 42 percent in 2018-2019.⁴⁴ When measured by re-incarceration, California recidivism rates have dropped even more dramatically, from 67 percent in 2004-2005 to 17 percent in 2018-2019.⁴⁵

This marked decline in recidivism rates is partly due to California’s increased investment in housing-based reentry programs. California community-based reentry programs offer participants the opportunity to complete their sentences in the community in supportive housing that provides substance use disorder treatment, mental health and medical care, employment, education, housing, family reunification, and social supports. These programs are highly effective in reducing the recidivism rates of their participants. Indeed, a 2021 Stanford University study found that nine months of participation in a California Department of Corrections and Rehabilitation (CDCR) community reentry program decreased the likelihood of rearrest by 13 percent and reconviction by 11 percent.⁴⁶ Similarly, the Los Angeles County Probation Department’s reentry housing pilot program’s participants had a significantly lower two-year felony re-conviction rate than probationers statewide.⁴⁷ Simply put, these programs demonstrate that stable housing helps justice-involved individuals avoid re-offending and makes our communities safer.

⁴¹ Cal. Health Pol’y Strategies, *California Advancing and Innovating Medi-Cal (CalAIM): Opportunities and Implications for the Reentry & Justice-Involved Population* 5 (2020), <https://calhps.com/wp-content/uploads/2020/02/CalAIM-and-Reentry-Final-.pdf>.

⁴² *Id.*

⁴³ *Id.* (“Homelessness is another factor that aggravates the severity of health and behavioral health conditions and impedes effective efforts to provide ongoing treatment.”)

⁴⁴ Cal. Dep’t of Corr. and Rehab. (CDCR), *Recidivism Report for Individuals Released From the California Department of Corrections and Rehabilitation in Fiscal Year 2018-19* vi-vii (2024), <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2024/02/Statewide-Recidivism-Report-for-Individuals-Released-in-Fiscal-Year-2018-19.pdf>.

⁴⁵ *Id.* at vii (Figure B).

⁴⁶ Kimberly Higuera, et al., Stanford Univ., *Effects of the Male Community Reentry Program (MCRP) on Recidivism in the State of California* 10 (2021), https://stacks.stanford.edu/file/druid:bs374hx3899/MCRP_Final_060421.pdf.

⁴⁷ Hunter, *supra* note 40, at x.

C. The Proposed Rule Aligns Strongly with California’s Efforts to Reduce Reentry Housing Barriers

1. Expansion of Expungement and Criminal Record Clearing Remedies

HUD’s Proposed Rule aligns strongly with California’s policy interest in reducing barriers to housing through expungement and criminal record clearing. In California, expungement and other criminal record clearing relief often restores most of the rights lost due to the conviction and mitigates the effect of the record when seeking housing. In essence, expungement releases the person from “all penalties and disabilities” resulting from the conviction⁴⁸ and restores the defendant to their former status in society.⁴⁹ To achieve this result, state law requires courts to seal expunged conviction records from public review,⁵⁰ and prohibits background check companies from reporting expunged convictions on background checks.⁵¹ As to employment, California prohibits most employers and occupational licensing agencies from denying a person a job or occupational license based on an expunged conviction, which helps justice-involved individuals find jobs and obtain stable incomes.⁵²

Specifically citing the housing barriers faced by justice-involved individuals,⁵³ California has embarked on a first-in-the-nation expansion of its expungement and other criminal-record-clearing laws over the past fifteen years. Since the late 2000s, California has enacted over a dozen laws in this area, including expungement laws,⁵⁴ adult arrest and juvenile record sealing

⁴⁸ *E.g.*, Cal. Penal Code § 1203.4(a).

⁴⁹ *Stephens v. Toomey*, 51 Cal. 2d 864, 870-871 (1959).

⁵⁰ Cal. Penal Code § 1203.425(a)(3)(A).

⁵¹ Cal. Civ. Code § 1786.18(a)(7) (prohibiting the reporting of records of “arrest, indictment, information, or misdemeanor complaint [where] a conviction did not result”).

⁵² Cal. Labor Code § 432.7(a)(1); Cal. Gov’t Code § 12952(a)(3)(C); Cal. Bus. & Prof. Code § 480(c).

⁵³ *E.g.*, Cal. State Sen. María Elena Durazo, *Press Release - Senator Durazo Introduces Groundbreaking Legislation to Seal Conviction & Arrest Records in California* (Mar. 14, 2021), <https://sd26.senate.ca.gov/news/senator-durazo-introduces-groundbreaking-legislation-seal-conviction-arrest-records-california> (“The fact that current law causes millions of Californians who pose no threat to public safety to be thwarted in their ability to get jobs, find housing, or access education is just wrong . . . I’m proud to co-author SB 731 to finally lift an obstacle that has blocked so many from fully re-entering society and leading productive lives.”); Cal. State Assemb. Phil Ting, *Press Release - First-In-The-Nation Legislation Introduced to Automate Arrest and Conviction Relief* (Mar. 7, 2019), <https://a19.asmdc.org/press-releases/20190307-first-nation-legislation-introduced-automate-arrest-and-conviction-relief> (“Everybody deserves a second chance. We must open doors for those facing housing and employment barriers and use available technology to clear arrest and criminal records for individuals already eligible for relief.”).

⁵⁴ *E.g.*, A.B. 134, 2023-2024 Reg. Sess. (Cal. 2023) (expanding automatic expungement relief for most conviction types); S.B. 731, 2021-2022 Reg. Sess. (Cal. 2022) (expanding expungement relief for most felony convictions resulting in a state prison sentence).

laws,⁵⁵ laws permitting the re-designation of certain drug- and theft-related convictions,⁵⁶ and laws allowing for the vacatur of some non-violent convictions.⁵⁷ In 2022, California enacted its broadest expungement law to date, making most felony convictions, even those resulting in prison sentences, eligible for expungement.⁵⁸ Moreover, in 2019, California enacted one of the nation's first automatic expungement laws in which a person's convictions and arrest records are automatically expunged and/or sealed so long as certain conditions are met.⁵⁹ The Legislature has since twice expanded the coverage of this law, and now most convictions qualify for automatic relief.⁶⁰

2. Promulgation of Fair Housing Regulations Aimed at Criminal Record-Related Housing Discrimination

The Proposed Rule also compliments California's efforts to reduce housing reentry barriers through its fair housing laws. The California Civil Rights Department (CRD)⁶¹, California's fair housing and employment enforcement agency, has also recognized that equal access to housing is essential to reentry.⁶² Accordingly, the CRD's regulatory arm, the Civil Rights Council (CRC)⁶³, has interpreted California's Fair Employment and Housing Act (FEHA) to limit the use of criminal records in housing-related decisions.⁶⁴ The CRC found that "individuals who have been arrested or who have criminal records often face difficult barriers in obtaining housing because of their criminal records, even if their criminal history bears no relationship to their ability to be a responsible tenant, housing consumer or borrower."⁶⁵ As a

⁵⁵ *E.g.*, S.B. 393, 2017-2018 Reg. Sess. (Cal. 2017) (expanding arrest sealing relief for most arrest records); S.B. 1038, 2013-2014 Reg. Sess. (Cal. 2014) (creating automatic juvenile record sealing relief); A.B. 2040, 2011-2012 Reg. Sess. (Cal. 2012) (creating juvenile record relief for minors with adjudications for prostitution-related crimes).

⁵⁶ Cal. Health & Safety Code § 11361.8 (creating process for the re-designation of certain cannabis felony convictions to lower offenses); Cal. Penal Code § 1170.18 (same for certain simple drug possession and theft-related convictions from felonies to misdemeanors).

⁵⁷ S.B. 357, 2021-2022 Reg. Sess. (Cal. 2022) (creating vacatur, dismissal, and sealing relief for loitering for prostitution convictions); A.B. 124, 2021-2022 Reg. Sess. (Cal. 2021) (expanding vacatur relief for non-violent conviction, arrest, and juvenile records resulting from sexual assault and domestic violence); S.B. 823, 2015-2016 Reg. Sess. (Cal. 2016) (creating vacatur relief for non-violent conviction, arrest, and juvenile records resulting from human trafficking).

⁵⁸ S.B. 731, *supra* note 54.

⁵⁹ A.B. 1056, 2019-2020 Reg. Sess. (Cal. 2019).

⁶⁰ A.B. 134, *supra* note 54.

⁶¹ CRD was formerly known as the California Department of Fair Employment and Housing.

⁶² Cal. Fair Emp. & Hous. Council, Cal. Dep't of Fair Emp. & Hous., Initial Statement of Reasons, Proposed Fair Housing Regulations 89 (2018) ("Unlawful housing discrimination under FEHA, when based on criminal history information, runs contrary to significant public policies which support the facilitation of re-entry of former prisoners, and the importance of housing in that regard.")

⁶³ CRC was previously known as the California Fair Employment and Housing Council.

⁶⁴ Cal. Off. of Admin. Law, OAL Matter Number: 2019-0802-01SR, Notice of Approval of Regulatory Action (2019).

⁶⁵ Cal. Fair Emp. & Hous. Council, Initial Statement of Reasons, *supra* note 62, at 89.

result of these barriers, CRC found that people with criminal records “have a high risk of becoming homeless, which is in turn linked to a greater propensity to reoffend.”⁶⁶ These regulations expressly build off HUD’s 2016 Guidance regarding the application of the Fair Housing Act (FHA) to the use of criminal records in housing decisions.⁶⁷

The FEHA regulations, however, go further to protect tenants’ rights than the Guidance. The FEHA regulations make it unlawful to (1) maintain criminal record policies that have a discriminatory effect on the basis of a protected characteristic under FEHA⁶⁸ or (2) use criminal record policies to intentionally discriminate on the basis of a protected characteristic.⁶⁹ These regulations expressly prohibit criminal record policies that impose a blanket ban on all individuals with criminal records from accessing housing.⁷⁰ These regulations also mandate that housing providers conduct an individualized assessment of a tenant’s criminal records when making housing decisions and only allow housing providers to consider “directly-related” convictions when making such decisions.⁷¹ These regulations further define a “directly-related conviction” as one “that has a direct and specific negative bearing on the identified interest [of the housing provider] or [the housing provider’s] purpose supporting the practice.”⁷² In assessing whether a given conviction is “directly-related,” the regulations encourage housing providers to consider “the nature and severity of the crime and the amount of time that has passed since the criminal conduct occurred.”⁷³

Importantly, because the FHA sets the floor, rather than the ceiling, for fair housing rights, these regulations appropriately provide additional rights than those outlined in HUD’s 2016 Guidance.⁷⁴ For example, while HUD has interpreted the FHA to prohibit policies/practices

⁶⁶ *Id.*

⁶⁷ *Id.* at 90.

⁶⁸ Cal. Code Regs. tit. 2, §§ 12265(a), 12266.

⁶⁹ Cal. Code Regs. tit. 2, §§ 12265(b), 12267.

⁷⁰ Cal. Code Regs. tit. 2, § 12269(a)(5) (prohibiting housing providers from implementing a “blanket ban’ or categorical exclusion practice that takes adverse action against all individuals with a criminal record regardless of whether the criminal conviction is directly related to a demonstrable risk to [an] identified substantial, legitimate, nondiscriminatory interest or purpose”).

⁷¹ Cal. Code Regs. tit. 2, § 12266(b)(2), (c)(2).

⁷² Cal. Code Regs. tit. 2, § 12005(k).

⁷³ Compare Cal. Code Regs. tit. 2, § 12266(b)(2), (c)(2) with Off. of Gen. Couns., HUD, *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 7 (2016) [hereinafter 2016 Criminal Records Guidance] (“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”).

⁷⁴ Cal. Gov’t Code § 12955.6 (“Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.) . . . This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.”)

that exclude people based on prior arrests alone,⁷⁵ the FEHA regulations additionally prohibit housing providers from denying housing based on non-conviction records generally and convictions for minor offenses. Most notably, the regulations make it unlawful to seek, use, consider, or take an adverse action based on “information indicating that an individual has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, military, or prosecutorial agency;” diversion program participation records; infraction convictions; sealed, vacated, or expunged convictions; convictions where the person has obtained a pardon; and juvenile records.⁷⁶ Further, these regulations encourage housing providers to use shorter lookback periods⁷⁷ and prohibit discriminatory advertisements related to criminal record history.⁷⁸

D. HUD’s Proposed Rule Is Timely in Light of Continued Housing Discrimination Against Justice-Involved Individuals Through Nuisance Laws and Crime-Free Housing Programs

Despite California’s efforts to reduce and eliminate barriers to housing for justice-involved individuals, this population continues to face significant housing discrimination, especially in cities and counties that maintain nuisance laws and/or so-called “crime-free housing” policies. Because these laws are widespread in California, they inevitably impact the administration of HUD’s programs statewide. In fact, our office has received reports that these local laws impose significant barriers to entry and continued participation in HUD’s programs throughout the State.

1. Nuisance Laws and Crime-Free Housing Programs Are Widespread in California

Nuisance Ordinances

Reflecting trends nationwide, nuisance laws in California “often label various types of conduct associated with a property—whether the conduct is by a resident, guest or other person—a ‘nuisance’ and require the landlord or homeowner to abate the nuisance.”⁷⁹ In many cities, the focus of nuisance laws is on the abatement of criminal activity, or specifically drug-

⁷⁵ 2016 Criminal Record Guidance, *supra* note 73, at 5 (“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.”)

⁷⁶ Cal. Code Regs. tit. 2, § 12269(a)(1)-(4).

⁷⁷ Cal. Code Regs. tit. 2, § 12269(b).

⁷⁸ Cal. Code Regs. tit. 2, § 12268(a).

⁷⁹ Off. of Gen. Couns., HUD, *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 2* (2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

related criminal activity on the premises.⁸⁰ In others, nuisance is defined, in part, by excessive calls for emergency services to the property.⁸¹ If housing providers fail to abate the nuisance (i.e. evict the tenant), they often face significant financial penalties, loss of rental permits, and city attorney-led enforcement actions.⁸² As a result, these laws often incentivize housing providers to evict tenants whenever they suspect criminal activity on the premises, regardless of whether the tenant has engaged in such conduct and even where the tenant is the victim. Thirty-seven of the 40 largest U.S. cities have a nuisance ordinance.⁸³ Based on a recent review by our office, 10 of the 20 largest cities in California (Chula Vista, Fresno, Los Angeles, Long Beach, Modesto, Oakland, Sacramento, San Bernardino, San Jose, and Stockton) have a nuisance ordinance.

Crime-Free Housing Programs

Many California cities also offer voluntary crime-free housing programs, and some cities mandate participation in such programs either directly or as a condition for housing providers to operate rental housing. Advertised as tools to help municipalities reduce crime in residential areas, these programs involve training classes for housing providers led by law enforcement agencies on residential crime prevention strategies, screening applicants for criminal record histories, and evicting tenants for alleged criminal activity.⁸⁴ Often, the linchpin of these programs is the use of a crime-free lease addendum, which makes any alleged criminal activity by tenants, household members, their guests, or anyone under their control a material breach of the lease and grounds for eviction.⁸⁵ In many cities, the goal of these programs is to exclude people with criminal records from housing writ large: “[l]andlords and property managers receive direct guidance and training from law enforcement on how to legally deny housing to individuals who have had contact with law enforcement and how to initiate eviction proceedings against tenants using supplemental lease agreements.”⁸⁶ By 2019, an estimated 2,000 municipalities nationwide had a crime-free housing program.⁸⁷ Crime-free housing programs have been especially popular in California: between “1995 and 2020, 104 municipalities (21 percent of municipalities in the state) adopted crime-free housing policies.”⁸⁸

The prevalence of nuisance ordinances and crime-free housing programs in California has also impacted the administration of HUD’s programs in the State. The California Department

⁸⁰ Cf. Max Griswold et al., RAND Corp., *An Evaluation of Crime-Free Housing Policies 2-3* (2023), https://www.rand.org/pubs/research_reports/RRA2689-1.html.

⁸¹ Off. of Gen. Couns., HUD, *Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances*, *supra* note 79, at 2-3.

⁸² *Id.* at 3; *see also*, e.g., L.A., Cal. Mun. Code § 47.50(d)(2).

⁸³ Max Griswold, *Opinion: California Just Banned ‘Crime-Free’ Housing. Here’s Why Other States Should Too*, L.A. Times (Jan. 5, 2024), <https://www.latimes.com/opinion/story/2024-01-05/crime-free-housing-california-nuisance-property-evictions-homeless>.

⁸⁴ Griswold, et al., *supra* note 80, at 3.

⁸⁵ *Id.*

⁸⁶ *Id.* at 17.

⁸⁷ *Id.* at 1.

⁸⁸ *Id.*

of Justice has received information that PHAs and other HUD-subsidized housing providers utilize crime-free lease addenda. Further, as stated previously, many HUD-subsidized housing providers operate in cities where participation in crime-free housing programs is either formally or functionally required to operate rental housing.⁸⁹ Consequently, nuisance and crime-free housing programs pose a significant roadblock to HUD's goal of ensuring that its programs and funding recipients are as inclusive as possible toward people with criminal records.⁹⁰

2. Nuisance Ordinances and Crime-Free Housing Programs Are Ineffective, Create Reentry Housing Barriers, and Raise Significant Fair Housing Concerns

Despite their stated crime prevention purposes, nuisance laws and crime-free programs do not significantly reduce criminal activity in housing.⁹¹ Rather, these ordinances and programs increase evictions and reduce housing opportunity.⁹² Further, they increase housing barriers for justice-involved individuals. A recent RAND study of these programs in California found that crime-free housing programs “have the greatest impact on individuals with previous criminal justice involvement. Landlords and property managers will often automatically rule out rental applications if they see a past offense on the applicant's background check.”⁹³

Moreover, as illustrated by United States Department of Justice's (DOJ) recent enforcement action against the City of Hesperia in California in 2019,⁹⁴ these programs raise significant fair housing issues. Municipalities often enact these programs in direct response to demographic changes in their cities and often enforce and operate crime free housing programs in a racially discriminatory manner. Even policies that are neutral on their face can have a disparate impact on the basis of protected characteristics such as race and national origin. To wit, a Los Angeles Times analysis of the 20 California cities that experienced the largest influx of

⁸⁹ *E.g.*, Lancaster, Cal. Mun. Code §§ 5.40.050, 5.40.070 (requiring landlords to obtain rental license to lease rental units in city and requiring participation in crime free housing program for properties with sixteen or more rental units).

⁹⁰ *Cf.* HUD Sec'y Marcia L. Fudge, HUD, Letter to Principal Staff Regarding Eliminating Barriers that May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs 1 (2022), https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf.

⁹¹ Griswold, et al., *supra* note 80, at 13 (finding “no statistically significant difference in mean absolute crime rates in 2009 and 2019 between municipalities that eventually adopted CFHPs [crime free housing programs] and municipalities without CFHPs” and no “statistically significant mean difference in the absolute rate for any of the crime outcomes across municipalities with and without CFHPs in 2019.”)

⁹² *Id.* at 14 (finding that “CFHPs have a statistically significant and large effect on executed evictions,” and “that CFHPs increased the number of executed evictions in average municipal-block groups that contain CFHP-certified rental units by 21.2 percent.”)

⁹³ *Id.* at 16.

⁹⁴ U.S. Dep't of Just.(DOJ), Press Release: Justice Department Secures Landmark Agreement with City and Police Department Ending “Crime-Free” Rental Housing Program in Hesperia, California (2022), <https://www.justice.gov/opa/pr/justice-department-secures-landmark-agreement-city-and-police-department-ending-crime-free>.

African-American and Latino residents since 1990 found that the overwhelming majority enacted “crime-free” housing policies. About 85 percent of cities that saw a large increase in their share of Black residents enacted the policies, as did 75 percent of those with the largest increases in Latino residents.⁹⁵ In the City of San Diego, which operates one of the largest crime-free housing programs in the state, “there are 117 crime-free apartment complexes—the vast majority of which are located in the city’s urban core. The predominantly lower-income, Black and Latino neighborhoods that stretch from downtown to southeastern San Diego have some of the highest concentrations of [units subject to San Diego’s crime free housing program].”⁹⁶ California’s Reparations Task Force cited these policies as a contributing factor in housing segregation and called for their repeal because of their disproportionate effect on African American housing seekers and tenants.⁹⁷

Similarly problematic, laws that penalize people for calls for emergency services disproportionately impact crime victims, domestic violence victims, and people with disabilities, raising additional fair housing issues. Most recently, in November 2023, the Civil Rights Division of the DOJ found that a Minnesota city’s crime-free housing policy discriminated against people with mental health disabilities by penalizing calls for emergency services.⁹⁸

3. California’s Efforts to Regulate Nuisance Laws and Crime-Free Housing Programs to Combat Discrimination

California has taken several steps to combat the discrimination that results from crime-free housing programs. As part of its 2019 Fair Housing regulations, the CRC promulgated regulations that prohibit land use practices “requiring persons to take actions against individuals based upon broad definitions of nuisance activities (such as considering a phone call to, or receipt of a visit or service by, law enforcement or emergency services as a nuisance), or based upon broad definitions of unlawful conduct or criminal activity.”⁹⁹ These regulations were a

⁹⁵ Liam Dillon et al., *Black and Latino Renters Face Eviction, Exclusion Amid Police Crackdowns in California*, L.A. Times (Nov. 19, 2020), <https://www.latimes.com/homeless-housing/story/2020-11-19/california-housing-policies-hurt-black-latino-renters>.

⁹⁶ Jesse Marx, *County’s ‘Crime-Free Housing’ Programs Walk Fine Line Between Safety, Surveillance*, Voice of San Diego (Mar. 16, 2021), <https://voiceofsandiego.org/2021/03/16/countys-crime-free-housing-programs-walk-fine-line-between-safety-surveillance/>.

⁹⁷ Reparation Report, *supra* note 15, at 20 (recommending that California “[r]epeal or counteract the effects of crime-free housing policies that disproportionately limit Black residents’ access to housing”).

⁹⁸ Civ. Rts. Div., DOJ, Letter Regarding the United States’ Findings and Conclusions Based on its Investigation of the City of Anoka, Minnesota, under the Americans with Disabilities Act and the Fair Housing Act, DJ No. 204-39-198 (2023), https://www.justice.gov/d9/2023-11/final_anoka_letter_of_findings_for_11.07.23.pdf; *see also* Civ. Rts. Div., DOJ, Press Release, Justice Department Secures Landmark Agreement with City of Anoka, Minnesota, to End Disability Discrimination in “Crime-Free” Housing Program (2024), <https://www.justice.gov/opa/pr/justice-department-secures-landmark-agreement-city-anoka-minnesota-end-disability>.

⁹⁹ Cal. Code Regs. tit. 2, § 12162(a).

direct response to the rise of nuisance ordinances and crime-free housing programs in California.¹⁰⁰

In 2023, California enacted Assembly Bill 1418 (AB 1418), the first law in the nation that regulates crime-free housing programs. AB 1418 prohibits local governments from enacting ordinances, regulations, and rules that impose penalties on tenants and landlords solely for contacts with law enforcement.¹⁰¹ Additionally, it prohibits rules that require or encourage landlords to: (1) evict or penalize tenants based on their (A) association with people who have contact with law enforcement agencies or who have criminal convictions or (B) alleged unlawful conduct; (2) use lease provisions that conflict with state or federal law; or (3) perform a background check of a tenant or a prospective tenant.¹⁰² It also prohibits local governments from defining as a nuisance “contact with a law enforcement agency [and] request[s] for emergency assistance.”¹⁰³

Given the significant risk that crime-free housing policies pose to the civil rights of Californians, the California Department of Justice has taken several steps to address these risks as part of our mandate to ensure equal access to housing without discrimination. In April 2023, the Civil Rights Enforcement Section’s Racial Justice Bureau issued guidance to California cities and counties directing them to review and modify or repeal their crime-free housing policies to ensure compliance with federal and state civil rights laws.¹⁰⁴ After the enactment of AB 1418, our office issued additional guidance in February 2024 that outlined cities’ and counties’ obligations under AB 1418.¹⁰⁵

¹⁰⁰ Cal. Fair Emp. & Hous. Council, Initial Statement of Reasons, *supra* note 62, at 62 (“The Council proposes to add this subdivision regarding when a governmental body’s adoption of certain ordinances or practices related to nuisances may constitute a discriminatory public land use practice under FEHA. . . . Typically these practices are ordinances, sometimes named ‘nuisance’ or ‘crime-free housing’ ordinances, which define “nuisance” broadly and require landlords to take adverse action (e.g. institute eviction) against tenants whose actions meet these definitions.”)

¹⁰¹ Cal. Gov’t Code § 53165.1(b)(1).

¹⁰² Cal. Gov’t Code § 53165.1(b)(2).

¹⁰³ Cal. Gov’t Code § 53165.1(b)(3).

¹⁰⁴ Cal. Dep’t of Justice, Off. of the Att’y Gen., *Guidance to All Cities and Counties Regarding Crime-Free Housing Policies* (2023), https://oag.ca.gov/system/files/attachments/press-docs/Crime%20Free%20Housing%20Guidance_4.21.23.pdf.

¹⁰⁵ Cal. Dep’t of Justice, Off. of the Att’y Gen., *Updated Guidance to All Cities and Counties Regarding Crime-Free Housing Policies* (2024), <https://oag.ca.gov/system/files/attachments/pressdocs/2.7.2024%20Crime%20Free%20Housing.pdf>.

II. COMMENT

A. The Proposed Rule Will Increase Housing Opportunity for Justice-Involved Individuals and Promote Equal Access to HUD's Housing Programs

As stated previously, the State of California and the California Department of Justice strongly support the aims of HUD's Proposed Rule and believe that its provisions will reduce the housing barriers faced by justice-involved individuals and make our communities safer. In particular, the Proposed Rule properly balances justice-involved individuals' need for safe, affordable housing with housing providers' interest in maintaining the safety of their tenants and staffs. Most importantly, the Proposed Rule reflects current research on recidivism and the importance of housing to successful reentry as well as the lived experience of justice-involved individuals and their families.

1. The Proposed Rule's Presumptive Three-Year Lookback Period Will Prevent Unnecessary Exclusions from HUD Programs

In response to Question for Comment #2, we strongly support the Proposed Rule's presumptive three-year lookback period, which is consistent with research showing that recidivism rates and the risk of future criminal activity decrease over time and with age, especially in households receiving housing subsidies.¹⁰⁶ Stale convictions do not reflect current fitness for tenancy, and owners should not be relying on them for decisions related to admission and eviction. Overbroad screening and eviction policies based on old and stale convictions or other criminal records likely have a disparate impact on protected classes in violation of the FHA, given the long history of racial disparities in incarceration and conviction rates. Thus, the Proposed Rule's research-based lookback provision will promote compliance with the FHA and similar state and local fair housing laws, which encourage shorter lookback periods. Further, the lookback provisions are also consistent with research showing that housing subsidies, housing generally, and other reentry supports significantly deter future criminal activity.¹⁰⁷

This provision also promotes uniformity, which will encourage participation in HUD's programs. Because existing regulations do not prescribe a specific lookback rule, PHAs and other HUD-subsidized housing providers maintain a wide variety of formal and informal lookback policies. Some of these lookback periods are very lengthy, which may promote misconceptions about program eligibility and discourage justice-involved individuals from applying to housing programs. The Proposed Rule directly addresses both of these concerns: it provides a clear, consistent lookback rule that will apply in most circumstances and prevent justice-involved individuals from self-selecting themselves out of housing to which they have a

¹⁰⁶ E.g., Proposed Rule, *supra* note 1, at 25343; Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?* 16 (2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

¹⁰⁷ See *supra* Section I.B.3.

right to apply. Furthermore, increased participation in HUD’s programs—especially in low-poverty, high opportunity areas—serves HUD’s overarching mandate to deconcentrate poverty through its programs.¹⁰⁸

In response to Question for Comment #2a, we believe that the Proposed Rule’s three-year lookback period is also appropriate when screening prospective tenants with convictions for more serious and violent offenses. In those situations, more than three years will have likely passed since the criminal activity occurred given (1) the length of time it takes to resolve criminal cases¹⁰⁹ and (2) the length of their prison sentence. Further, for such individuals, the risks of future criminal conduct are often mitigated by probation, parole, or other forms of court-ordered supervision as well as other rehabilitation activities that are required as part of their criminal sentence and incarceration.

The Proposed Rule’s lookback provision appropriately gives housing providers the flexibility to craft longer lookback provisions, while requiring such provisions to be based on empirical research as opposed to stereotype and anecdotal evidence. To bolster the protections that justify this flexibility, HUD should require that housing providers applying longer lookback provisions document the reasons for, and empirical research supporting, their policy. HUD should also amend the Proposed Rule to require that housing providers make this documentation publicly available to promote compliance with the Proposed Rule.

2. The Preponderance of Evidence Requirement Provides Needed Guidance to HUD-subsidized Housing Providers

The Proposed Rule requires that determinations of criminal activity satisfy a preponderance of the evidence standard. These provisions provide clear guidance to housing providers making admission, program termination, and eviction decisions. They also promote fairness by requiring that housing providers meet the same evidentiary standard that is required in most civil housing matters. Indeed, most courts use the preponderance of the evidence standard in eviction cases and other civil cases involving housing laws (i.e., housing discrimination).¹¹⁰ Further, these provisions discourage housing providers from making housing decisions based on stereotype and suspicion.

¹⁰⁸ Cf., e.g., 42 U.S.C. § 1437n(a)(3)(B) (requiring PHAs to create and submit annually admissions policies that “provide for deconcentration of poverty and income-mixing by bringing higher income tenants into lower income projects and lower income tenants into higher income projects”).

¹⁰⁹ Brian J. Ostrom, Ph.D. et al., Nat’l Ctr. for St. Cts., *Delivering Timely Justice in Criminal Cases: A National Picture 2* (2020) (noting that the average time to disposition for felony cases is 256 days and 193 days for misdemeanor cases), https://www.ncsc.org/data/assets/pdf_file/0017/53216/Delivering-Timely-Justice-in-Criminal-Cases-A-National-Picture.pdf.

¹¹⁰ Cf. Cal. Evid. Code § 115 (stating that preponderance standard is baseline burden of proof standard in California); *Lioudas v. Sahadi*, 19 Cal.3d 278, 288 (1977) (“issues of fact in civil cases are determined by a preponderance of testimony”) (internal citations omitted).

Although the Proposed Rule largely meets its goal of specifying the standards of proof that should apply in admission and termination decisions based on criminal activity, some ambiguities remain:

- Proposed Section 5.100 clearly defines what it means to be currently engaged or engaged in criminal activity and that housing providers must base findings of criminal activity on a preponderance standard, but this standard is not clearly incorporated in the Proposed Rule's more specific eviction section, Section 5.861 ("What evidence of criminal activity must I have to evict?"). In fact, Section 5.861 does not specifically state that housing providers must have evidence satisfying a preponderance standard to evict tenants.¹¹¹
- The Proposed Rule's Section 8 Moderate Rehabilitation owner termination provisions do not explicitly impose a preponderance standard. By comparison, analogous termination sections in the Proposed Rule's Section 8 Moderate Rehabilitation Program (PHAs only), Public Housing Program, and Section 8 HCV Program specify that the preponderance standard applies.¹¹²
- The Proposed Rule's Section 8 HCV provisions do not impose a preponderance standard on owners' decisions to deny a tenancy based on criminal activity. By contrast, the Proposed Rule imposes this standard on owners in this Program seeking to terminate a tenancy based on criminal activity.¹¹³ Further, the Proposed Rule imposes this standard on PHAs in admission and terminations decisions based on criminal activity.¹¹⁴

¹¹¹ Proposed 24 C.F.R. § 5.861.

¹¹² Compare Proposed 24 C.F.R. § 882.519 with Proposed 24 C.F.R. §§ 882.518(c)(3), 966.4(l)(5)(iii)(A), § 982.310(c)(3), § 982.553(c).

¹¹³ Compare Proposed 24 C.F.R. § 982.307 with Proposed 24 C.F.R. §§ 982.310(c)(3), 553(a)(1).

¹¹⁴ Proposed 24 C.F.R. §§ 982.553(a)(1), (c); see also Proposed 24 C.F.R. §§ 882.518(a)(1)(i) (imposing preponderance standard on PHA admission decisions in Section 8 Moderate Rehabilitation Program); 882.519(e)(4) (same for owners in Section 8 Moderate Rehabilitation Program); 960.203(b)(3)(ii) (same for PHAs in Public Housing Programs).

HUD should specifically impose a preponderance standard across the board to ensure that people with criminal records are treated consistently and fairly across all its programs.

3. The Proposed Rule’s Enhanced Procedural Requirements Promote Fairness

a. The Enhanced Procedural Requirements Give Applicants a Fairer Opportunity to Challenge Admission Denials

In response to Question for Comment #3, we believe that the Proposed Rule’s requirement that housing providers provide applicants with notice of the proposed denial, a copy of their criminal record, and the opportunity to challenge the accuracy and relevance of their criminal records is appropriate and promotes fairness. Further, the fifteen-day notice requirement will help to ensure that applicants have the opportunity to gather the documents and information necessary to challenge the accuracy and/or relevance of the materials upon which a housing provider bases a denial. These enhanced procedural requirements also promote compliance with the FHA and similar state and local fair housing laws, which strongly encourage housing providers to adopt safeguards in addition to individualized assessment.¹¹⁵

b. Further Procedural Protections Are Necessary to Reduce Housing Barriers to Admission

While these enhanced procedural requirements will help to reduce admission barriers to HUD’s programs for justice-involved individuals, in response to Question for Comment #3’s query whether the proposal “adequately balance[s] the needs of applicants and housing providers? If not, what additional processes or measures would be helpful?”, we believe that HUD should adopt additional procedural requirements to ensure that applicants have a fair opportunity to apply for these programs.

First, HUD should require that housing providers provide notice of the proposed denial in writing, and that the notice specifically state the convictions and/or criminal records at issue. Specific, written notice is required in admission decisions in HUD’s Section 8 Programs¹¹⁶ and termination/eviction decisions in the Public Housing¹¹⁷ and Section 8 Programs.¹¹⁸ Additionally,

¹¹⁵ 2016 Criminal Record Guidance, *supra* note 73, at 7; Cal. Code Regs. tit. 2, § 12266(d).

¹¹⁶ 24 C.F.R. §§ 880.603(b)(2) (requiring written notice in the Section 8 Moderate Rehabilitation Program); 982.5 (same in the Section 8 HCV Program); 982.554(a) (requiring that PHAs denial notices “contain a brief statement of the reasons for the PHA decision in Section 8 HCV Program”); 983.2 (incorporating by reference Section 982.5 in the Section 8 PBV Program).

¹¹⁷ 24 C.F.R. § 966.4(l)(3)(ii) (“The [written] notice of lease termination to the tenant shall state specific grounds for termination”).

¹¹⁸ 24 C.F.R. §§ 882.511(d)(2)(i) (requiring owners in Section 8 Moderate Rehabilitation Program to provide written tenancy termination notice that “[s]tates the reasons for such termination with enough specificity to enable the Family to prepare a defense.”); 982.555(c)(2)(i) (requiring that PHAs in Section 8 HCV Program use written termination notices that contain “a brief statement of reasons for the

courts have long interpreted the Housing Act of 1937 to require that PHAs provide specific, written notice in denial proceedings.¹¹⁹ Requiring written, specific notice also aligns the Proposed Rule with HUD's existing sub-regulatory guidance, which encourages this type of notice.¹²⁰ Specific information about the criminal records at issue will help applicants better address the concerns of the housing providers and present evidence of mitigating circumstances. For public housing providers, these additions will also promote procedural due process.¹²¹

Second, the Proposed Rule should encourage public housing providers to provide these denial notices in applicants' primary language and include information about the housing providers' language access policies. This addition is consistent with HUD's previous language access guidance,¹²² ensures that justice-involved individuals with limited English proficiency can effectively challenge potential denials, and promotes compliance with Title VI of the Civil Rights Act of 1964 and similar language access laws.

Third, HUD should amend sections 5.855(c), 888.519(e)(3), and 960.204(d) to require that the housing provider provide the applicant with a copy of the criminal record free of charge. This is consistent with HUD's Section 8 Housing Choice Voucher Program admission rules, which require PHAs to provide applicants with a copy of their criminal records free of charge.¹²³ Providing applicants with a free copy of their criminal records is also consistent with the Federal Fair Credit Reporting Act and similar state laws regulating background check reports, which often require the housing provider to provide information about where the applicant can obtain a free copy of the background check relied upon by the housing provider.¹²⁴

decision"); 982.310(e)(2) (same for owners in Section 8 HCV Programs); 983.2(c)(i) (applying Section 8 HCV termination regulations to Section 8 PBV Programs).

¹¹⁹ *Billington v. Underwood*, 613 F.2d 91, 94 (5th Cir. 1980); *Johnson v. Hous. Auth. of Richmond*, No. 80-155, 1986 U.S. Dist. LEXIS 31134, at *4-5 (E.D. Ky. Feb. 14, 1986); *McNair v. N.Y.C. Hous. Auth.*, 613 F. Supp. 910, 914-915 (S.D.N.Y. 1985); *Singleton v. Drew*, 485 F.Supp. 1020, 1024 (E.D. Wis. 1980).

¹²⁰ *E.g.*, Pub. Hous. Mgmt. & Occupancy Div., HUD, Eligibility Determination and Denial of Assistance, Public Housing Guidebook 22-23 (2022), https://www.hud.gov/sites/dfiles/PIH/documents/PHOG_Eligibility_Det_Denial_Assistance.pdf; Off. of Pub. & Indian Hous., HUD, FAQs: Excluding the Use of Arrest Records in Housing Decisions 5 (2015), <https://www.hud.gov/sites/documents/FAQEXCLUDEARRESTREC33116.PDF>; HUD, HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, 4-26 to 4-28 (2013), <https://www.hud.gov/sites/documents/43503HSGH.PDF>.

¹²¹ *Cf. Billington*, 613 F.2d at 94 (discussing due process case law).

¹²² Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Individuals, 72 Fed. Reg. 2732, 2744 (Jan. 22, 2007) (listing denial notices as an example of a document that should be translated under HUD's multi-factor analysis).

¹²³ 24 C.F.R. § 982.553(d)(3).

¹²⁴ 15 U.S.C. § 1681m(a)(4) (requiring users of criminal background checks to provide the subject of the report written, oral, or electronic notice of their right to obtain free copy of report from background check company).

Fourth, HUD should clarify that the notice timeline in the Proposed Rule is fifteen business days as opposed to fifteen calendar days. Because the purpose of this notice period is to give applicants the opportunity to obtain the court records and other documents necessary to challenge the accuracy and/or relevance of their criminal record, using business days to calculate this notice period reflects the reality that many of these documents can only be obtained on weekdays and during regular business hours. For example, court records and related documents can typically only be obtained when the courts are open and not on weekends and holidays.

B. HUD Should Clarify the Proposed Rule’s Pre-Emption Provisions to Ensure the Continued Effectiveness of State and Local Housing Laws that Provide Greater Protections to Justice-Involved Individuals

We also commend the Proposed Rule’s provisions relating to the pre-emption of state and local laws in the Public Housing and Section 8 Housing Choice Voucher Programs (Sections 960.103(e) and 982.53(d)). California provides robust protections for housing seekers and tenants, including those who are justice-involved; thus, we strongly support HUD’s efforts to support state and local innovation in reducing barriers to housing. These provisions will increase compliance with such state and local laws. Indeed, the California Department of Justice has received complaints from advocates that PHAs and other HUD-subsidized housing providers are reluctant to follow California laws that provide additional housing protections for justice-involved people. The Proposed Rule directly addresses this issue by making clear that the Proposed Rule does not “pre-empt [the] operation of State and local laws that provide additional protections to those with criminal records.”¹²⁵

While we believe that these provisions will increase compliance with state and local laws that provide additional protections for justice-involved individuals, we strongly recommend that HUD further clarify the Proposed Rule’s pre-emption provisions to resolve potential ambiguities in favor of more protection and fewer barriers. Specifically, the limiting language of these provisions is unclear: these provisions do not further define when a state or local law sufficiently “change[s] or affect[s] any requirement of this part, or any other HUD requirements for administration or operation of the program,” to warrant pre-emption. We are concerned that without clarity regarding this limiting language, many HUD-subsidized housing providers will continue to be reluctant to apply state and local rules that provide additional protections to housing-seekers and tenants. To add clarity, we encourage HUD to amend this provision to clarify that such laws are not pre-empted unless they are inconsistent with the purpose of or any provision of the laws or regulations creating HUD’s requirements related to the administration or operation of its programs.¹²⁶

¹²⁵ Proposed Rule 24 C.F.R. §§ 960.103(e); 982.53(d).

¹²⁶ Compare Proposed Rule with 24 U.S.C. § 2000h-4 (making clear in the context of Title VII of the Civil Rights Act of 1964 that state and local employment discrimination laws are not preempted unless “inconsistent with any of the purposes of this Act [Title VII], or any provision thereof”).

Relatedly, we also recommend that HUD amend the Proposed Rule to update the more general equal opportunity provisions of HUD's regulations (24 C.F.R. § 5.105) with the pre-emption language in Sections 960.103(e) and 982.53(d), as well as the language recommended above to ensure that state/local laws are not preempted in other HUD programs covered by the Proposed Rule. As currently written, this more general provision is silent on the pre-emption of state and local laws that provide additional housing protections for justice-involved individuals.

C. HUD Should Amend the Proposed Rule to Prohibit the Use of Non-Conviction and Other Criminal Records that Are Poor Predictors of Future Criminal Conduct

1. The Proposed Rule's Provisions Regarding the Use of Arrest Records Promotes Compliance with Fair Housing Laws, but Further Guidance Is Necessary

We also strongly support the Proposed Rule's provisions prohibiting housing providers from making admission, termination, and eviction decisions based on arrest records alone. These provisions properly reflect that an arrest record is not conclusive proof that criminal activity has occurred, and thus is an inappropriate basis by itself for an adverse housing decision. Further, these provisions promote compliance with the FHA and similar state laws, which contain analogous prohibitions.

However, the Proposed Rule does allow housing providers to make housing decisions based on the criminal conduct underlying an arrest record, so long as there is additional proof of the conduct. While this could be necessary in some circumstances, the prospect of individual housing providers making such decisions without further guidance is concerning, given that most housing providers have little familiarity with the criminal justice system or what would constitute proof; in addition, housing providers' bias could infect those decisions without clear guidance. Thus, in response to Question for Comment #7, we strongly recommend that HUD provide additional guidance regarding how to assess whether such criminal conduct has occurred.

2. The Proposed Rule's Arrest Provisions Should Be Expanded to Prohibit the Use of Non-Conviction Records and Conviction Records that Are Not Probative of Future Risk

Like arrest records, other forms of non-conviction criminal records are not conclusive proof of criminal activity, and certain conviction records are poor risk indicators of future criminal conduct. We strongly encourage HUD to amend the Proposed Rule to prohibit housing providers from using such records when making housing decisions. The following are some examples of non-conviction records that do not prove criminal activity and conviction records that are not predictive of future criminal conduct.

Records Documenting Law Enforcement Calls for Emergency Services and Mere Contact with Law Enforcement

Records that document law enforcement contacts or calls for emergency services to an individual's residence or property are not conclusive proof of criminal conduct. Similarly, records that an individual has been detained or investigated by law enforcement do not prove that the subject person engaged in criminal conduct in the absence of other evidence. Indeed, both types of records may be equally consistent with a finding that the person is a victim of crime. Despite California's effort to prevent individuals from being penalized for calling for emergency services, we have heard reports that housing providers sometimes use such records to penalize tenants in HUD programs. For this reason, HUD should amend the Proposed Rule to expressly prohibit housing providers from using these records as the sole basis to determine if criminal activity has occurred.

Prohibiting the use of such records would serve other federal laws and policies, such as HUD's Violence Against Women Act guidance, which expressly recognizes noise complaints, and even criminal activity, as "adverse factors" resulting from domestic violence, which cannot be used as a basis for eviction or termination.¹²⁷ Similarly, excluding the use of such records also promotes compliance with the Americans with Disabilities Act (ADA), which mandates equal access to emergency services for people with disabilities.¹²⁸ As the DOJ Civil Rights Division's recent enforcement actions in Anoka, Minnesota (discussed above) demonstrate, housing policies that penalize people with disabilities for calls for emergency services likely violate both the ADA and the FHA.

Juvenile Records

It is also problematic for housing providers to base housing decisions on juvenile records. It has long been recognized that criminal conduct by children is distinguishable from adult criminal conduct and that the aims of our juvenile justice system are exclusively rehabilitation and reform as opposed to punishment.¹²⁹ As HUD has noted,¹³⁰ this belief stems from a long-

¹²⁷ *E.g.*, 24 C.F.R. § 5.2005(b)(1)-(2); *see also* HUD, *Violence Against Women Reauthorization Act of 2013 Guidance*, PIH Notice 2017-08, 6-7 (2017) (specifically noting noise complaints and criminal activity as common "adverse factors" resulting from domestic violence), <https://www.nhlp.org/wp-content/uploads/2018/05/1-PIH-2017-08.pdf>.

¹²⁸ 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a); *see also* Civ. Rts. Div., DOJ, ADA Best Practices Tool Kit for State and Local Governments, Ch. 7- Emergency Management Under Title II of the ADA (2007), <https://archive.ada.gov/pcatoolkit/chap7emergencymgmt.htm>.

¹²⁹ *E.g.*, *In re Gault*, 387 U.S. 1, 15-16 (1967) (summarizing efforts to reform the juvenile justice system to focus on children's rehabilitation rather than punishment).

¹³⁰ Proposed Rule, *supra* note 1, at 25343 ("Studies on brain development suggest that adolescents are more likely to take more risks, be more influenced by their peers, and act on instant gratification. Human brains do not develop completely until approximately age 26, and the rational decision-making centers are the last to develop. As people age, they tend to become more future-oriented,

held understanding, now backed by science, that criminal activity by children is driven by immaturity, impulsivity, and the inability to properly assess risk.¹³¹ Reflecting these policy goals and scientific facts, nearly all States, including California,¹³² afford juvenile records some degree of confidentiality.¹³³ Despite these efforts, it is well documented that many PHAs access, inquire about, and use juvenile records to determine housing eligibility even though they cannot legally obtain such records.¹³⁴

Because of these realities, HUD should amend the Proposed Rule to prohibit housing providers from relying on juvenile records when making housing decisions. It is counterproductive to the rehabilitative goals of our juvenile justice system to allow housing providers to use juvenile records in a punitive fashion to exclude justice-involved children and their families from HUD's programs, especially where these housing providers do not have a legal right to obtain these records in most contexts. Further, it is equally problematic to exclude adults from housing based on their juvenile records, as this past conduct is not predictive of their likelihood to engage in criminal conduct as an adult, consistent with the Proposed Rule's findings that likelihood of such conduct significantly decreases as people get older.¹³⁵

Expunged Convictions and Records Cleared Through Criminal Record Clearing Relief Laws

Similarly, HUD should amend the Proposed Rule to prohibit housing providers from excluding justice-involved people from HUD's programs based on conviction records that have been expunged, vacated, pardoned or subject to some other criminal record clearing relief. In most states, including California, people must often abstain from criminal conduct for several years as well as successfully complete their sentence and show proof of rehabilitation to obtain an expungement or pardon.¹³⁶ Accordingly, an individual's expunged or pardoned conviction is

better able to manage their emotions, and more able to assess the consequences of their actions.”)
(internal citations omitted)

¹³¹ Juv. Just. Ctr., *Failed Policies, Forfeited Futures, Revisiting a Nationwide Scorecard on Juvenile Records* 2 (2020) (“Modern science confirms that children’s brains are not fully developed until they reach their mid-twenties. Until a child’s brain has fully matured, the child is likely to exhibit more impulsive behavior and an inability to assess and act on risks; be influenced by peer pressure and easily manipulated; but also have the capacity to reform and rehabilitate their behavior as they grow into adulthood.”), <https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/executive-summary-2020.pdf>.

¹³² Cal. R. Ct. 5.552 (outlining the confidentiality of juvenile records).

¹³³ Andrea R. Coleman, Off. of Juv. Just. & Delinq. Prevention, Off. of Just. Programs, DOJ, *Juvenile Justice Bulletin - Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices* 4 (2020), <https://ojjdp.ojp.gov/publications/expunging-juvenile-records.pdf>.

¹³⁴ *Id.* at 8.

¹³⁵ Proposed Rule, *supra* note 1, at 25343 (“[S]tudies have shown that crime commission typically peaks in the mid-20s and then drops sharply as a person ages.”)

¹³⁶ *E.g.*, 28 C.F.R. § 1.2 (requiring that individuals wait at least five years and not be on probation, parole, or supervised release to be eligible for pardon); Cal. Penal Code § 4852.03 (requiring that a person wait between seven and ten years to be eligible for a Certificate of Rehabilitation and Pardon); Cal. Penal

not a reliable predictor of their risk of future criminal activity. Similarly, courts often vacate convictions after later finding the person innocent of the crime or due to circumstances that significantly mitigate their culpability, and thus, such convictions have little bearing on whether the individual will commit a crime in future.¹³⁷ In fact, a recent University of Michigan study found that individuals with expunged convictions have low recidivism rates, on par with the general population.¹³⁸

Furthermore, exclusion of such records is in line with HUD's previous statements on this issue as well as other federal and state policy interests. HUD actively encourages justice-involved renters to clear their criminal records to increase their opportunities to find housing.¹³⁹ Thus, it would be inconsistent to allow housing providers in HUD programs to use expunged convictions and similar records in housing decisions. Similarly, the Equal Employment Opportunity Commission (EEOC) has encouraged public employers to disregard expunged records when making employment decisions.¹⁴⁰

Such an amendment is also in line with state fair housing and criminal record clearing laws, which aim to provide second chances to justice-involved individuals in accessing housing. As stated previously, California has interpreted its fair housing laws to expressly prohibit adverse actions based on expunged records and other non-conviction records.¹⁴¹ Further, California and at least 12 other states have enacted laws significantly expanding criminal record clearing relief,

Code § 1203.41 (requiring that a person wait at least two years after their release from prison, not be on probation, parole or have any pending cases, and prove that expungement (dismissal) serve the interests of justice to obtain expungement relief).

¹³⁷ *E.g.*, Cal. Penal Code §§ 1473.7(a)(2) (permitting vacatur where “[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice”); 236.14-236.15 (permitting vacatur of non-violent convictions resulting from being a victim of human trafficking, domestic violence, or sexual assault because victim “lacked the requisite intent to commit the offense.”)

¹³⁸ J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: an Empirical Study*, 133 Harv. L. Rev. 2461, 2466 (2020) (finding in a study of Michigan residents that “just 7.1% of all expungement recipients are rearrested within five years of receiving their expungement (and only 2.6% are rearrested for violent offenses)” and lower re-conviction rates—“4.2% for any crime and only 0.6% for a violent crime.”), <https://harvardlawreview.org/print/vol-133/expungement-of-criminal-convictions-an-empirical-study/>.

¹³⁹ HUD, *Finding Housing with Convictions: Utah*, (stating, “[h]aving convictions on your record can make finding a place to live more difficult. If you can have convictions removed from your record it will make you[r] housing search easier.”), [https://www.hud.gov/states/utah/renting/convictions \(last visited May 28, 2024\)](https://www.hud.gov/states/utah/renting/convictions%20(last%20visited%20May%2028,%202024)).

¹⁴⁰ U.S. Equal Emp. Opportunity Comm’n, Informal Discussion Letter to the Department of Veteran Affairs (Jan. 11, 2016) (recommending that VA consider narrowing its definition of conviction in Proposed Rule regarding hiring policies in community residential care facilities to exclude “expunged convictions and [records of] participation in first offender, deferred adjudication, or other arrangements or programs in which a judgment of conviction has not been made” when making hiring decisions involving people with criminal records), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-314>.

¹⁴¹ Cal. Code Regs. tit. 2, § 12269(a)(3).

in large part to increase housing opportunity for justice-involved people.¹⁴² Consistent with these policy initiatives, HUD should amend the Proposed Rule to prohibit housing providers from using expunged convictions, other convictions subject to criminal record clearing relief, and non-conviction records in housing decisions. We encourage HUD to use California’s successful Fair Housing regulations¹⁴³ on this issue as a model.

D. The Proposed Rule Should Make Clear that Individualized Assessment Is Required in Eviction and Program Termination Decisions

In response to HUD’s Question for Comment #4, we strongly support the proposed changes to expressly mandate a fact-specific and individualized assessment before a decision to deny admission based on criminal history, including the mitigating factors set forth in the Proposed Rule. This requirement, and the Proposed Rule’s accompanying new definition of “individualized assessment,” will help increase housing access and prevent unnecessary and unwarranted exclusions from housing for justice-involved individuals. Individualized assessment limits the overbroad use of criminal records and limits the discretion that is often widely exercised by housing providers. Further, it would require holistic consideration of multiple points of data and information rather than blanket decisions based on speculation or stereotypes about individuals with a criminal history.

Because people of color and people with disabilities face disproportionately high rates of arrest and incarceration,¹⁴⁴ the individualized assessment mandate will also help prevent fair housing violations based on disparate impact. Indeed, HUD has previously advised that individualized assessment of relevant information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than exclusions without such an individualized assessment.¹⁴⁵ And since PHAs specifically have a duty to operate their programs in a manner that affirmatively furthers fair housing,¹⁴⁶ individualized assessment will aid in reversing the harmful impacts of historical redlining and racial segregation in housing.

The Proposed Rule does not expressly mandate individualized assessment before evictions and termination decisions. In fact, the newly proposed definition of “individualized assessment” in Section 5.100 limits the process to evaluation for admission to a federally assisted

¹⁴² See *supra* Section I.C.1; see also The Clean Slate Initiative, Clean Slate in the States, <https://www.cleanslateinitiative.org/states#states> (last visited May 30, 2024).

¹⁴³ Cal Code Regs. tit. 2, § 12269(a).

¹⁴⁴ See, e.g., Racial & Identity Profiling Advisory Bd., *Annual Report 7-8* (2024) (finding disparities in police stops and searches in California between individuals perceived to be White and individuals perceived to be non-White), <https://oag.ca.gov/system/files/media/ripa-board-report-2024.pdf>; Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, Prison Pol’y Initiative (2020) (finding, according to U.S. Census and Bureau of Justice Statistics data, that African Americans are disproportionately stopped by police and arrested, and people of color are disproportionately incarcerated compared to White individuals), <https://www.prisonpolicy.org/blog/2020/07/27/disparities>.

¹⁴⁵ 2016 Criminal Records Guidance, *supra* note 73, at 7.

¹⁴⁶ 42 U.S.C. § 3608(e)(5); see also 24 C.F.R. § 5.150.

housing program.¹⁴⁷ By comparison, the Proposed Rule only requires a consideration of circumstances relevant to a particular termination or eviction before making such a decision.¹⁴⁸ While the Proposed Rule correctly identifies the list of factors housing providers should consider before exercising discretion to terminate or evict, it stops short at expressly labeling this process an “individualized assessment.” This is puzzling in light of HUD’s belief that the “proposed rule is intended to be consistent with existing law and does not intend to suggest that a lesser degree of consideration for mitigating circumstances should be given in evictions or termination than in admissions.”¹⁴⁹ Indeed, HUD’s previous guidance does not limit the term “individualized assessment” to the admission context. In fact, HUD’s 2016 guidance expressly anticipated that its provisions, including individualized assessment, would apply to any adverse housing action.¹⁵⁰ Further, its 2022 Guidance expressly recommends that housing providers conduct an individualized assessment before evicting tenants.¹⁵¹ California’s Fair Housing regulations similarly impose individualized assessment on “[a]ny practice of a person that includes seeking information about, consideration of, or use of criminal history information.”¹⁵² Analogously, the EEOC strongly encourages a similar assessment in all employment decisions involving the use of criminal records, including at both hiring and discharge.¹⁵³

The absence of “individualized assessment” in the Proposed Rule in relation to evictions and terminations is likely to cause confusion, as it suggests that individualized assessment is not required in such decisions. It may also communicate to PHAs and owners that discretion with evictions and terminations can be more broadly exercised than discretion with admission. Such a practice would be inconsistent with the purpose of the Proposed Rule, which is to not only reduce barriers to obtaining housing for people with criminal histories, but also to prevent the unnecessary loss of housing.¹⁵⁴

¹⁴⁷ Proposed Rule, *supra* note 1, at 25361.

¹⁴⁸ Compare Proposed Section 5.852(a)(1) with Proposed Section 5.852(a)(2); compare Proposed Section 882.518 (a)(1) with Proposed Section 882.518(c); compare Proposed Section 882.519(b)(1) with Proposed Section 882.519(b)(2); compare Proposed Section 960.203(c) with Proposed Section 966.4(1)(5)(vii); compare Proposed Section 982.553(a)(2) with Proposed Section 982.553(b).

¹⁴⁹ Proposed Rule, *supra* note 1, at 25337.

¹⁵⁰ 2016 Criminal Records Guidance, *supra* note 73, at 1 (“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* . . . based on an individual’s criminal history”) (emphasis added).

¹⁵¹ Off. of Fair Hous. and Equal Opportunity, HUD, Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 9 (June 10, 2022).

¹⁵² Cal. Code Regs. tit. 2, §§ 12265-12266.

¹⁵³ See generally, U.S. Equal Emp. Opportunity Comm’n, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (Apr. 25, 2012).

¹⁵⁴ Proposed Rule, *supra* note 1, at 25332-25333.

Relatedly, in relation to Question for Comment #5, HUD proposes, at some places, to replace the word “may” with “would” before the phrase “threaten the health, safety, or right to peaceful enjoyment,” to prevent an overly broad reading of “may,” which could lead to “speculative . . . determinations HUD does not believe were intended by this language.”¹⁵⁵ Our office strongly supports this change; housing providers should assess the actual risk that the alleged criminal activity will adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, owners, or property employees. However, some parts of the Proposed Rule do not make this change,¹⁵⁶ potentially causing confusion and inconsistency in practice.

To prevent confusion, create consistency of practice across HUD programs, and limit overbroad discretion in accordance with the Fair Housing Act, we request that the final rule (1) explicitly state that individualized assessment is required before termination and eviction decisions based on criminal history, criminal activity, illegal drug use, or alcohol use, and (2) replace all instances of “may” with “would” when referencing the interference with health, safety, or right to peaceful enjoyment that would be the touchstone for when criminal activity may be used to take adverse action against a tenant.

E. Extend the Proposed Rule’s Lookback, Procedural Protections, and Individualized Assessment Provisions to Owners in the Section 8 HCV and PBV Programs

Per HUD’s specific request for comment (Question for Comment #10), we request that requirements of individualized assessment, procedural safeguards, and restrictions on lookback periods be applied to owners in the Section 8 HCV and PBV programs. Through the Proposed Rule, HUD is establishing important screening requirements based on obligations under the FHA, and these same requirements should apply to owners in the Section 8 voucher programs. HUD should require that owners participating in the Section 8 HCV and PBV Programs conduct an individualized assessment in both admission and eviction decisions. HUD’s past practice in this area, such as its 2016 HUD guidance, applies to all housing providers, including owners in the Section 8 HCV and PBV Programs.¹⁵⁷ HUD’s 2016 guidance made clear that polices based on criminal records should be narrowly tailored to exclude justice-involved individuals only to the extent necessary to achieve a substantial interest, and that to meet this standard, all housing providers should make an individualized assessment that takes into account relevant information beyond that contained in a criminal record.¹⁵⁸ Thus, requiring individualized assessment for owners in the HCV and PBV programs would be consistent with the FHA, and such owners should be required to engage in individualized assessment before denying applicants and evicting tenants based on criminal history or criminal activity.

¹⁵⁵ *Id.* at 25352.

¹⁵⁶ *See, e.g., id.* at 25362.

¹⁵⁷ 2016 Criminal Records Guidance, *supra* note 73, at 7 n.35.

¹⁵⁸ *Id.* at 4-7.

HUD should also require these owners to adopt the Proposed Rule's enhanced procedural protections for admission denials and lease terminations, along with additions suggested previously.¹⁵⁹ Notice and opportunity to challenge the accuracy and relevance of any criminal record or criminal activity information can increase voucher recipients' access to, and retention of, housing. Most States, including California, require judicial action for eviction and notice to tenants prior to a court filing. However, only four percent of renters nationally are represented by an attorney in court, compared to eighty-three percent of landlords.¹⁶⁰ Thus, any due process requirements prior to court action can facilitate pre-eviction filing negotiations, reduce court costs and resources, and prevent unnecessary evictions based on inaccurate or incomplete information related to criminal activity. Notice and opportunity to challenge the accuracy and relevance of any criminal record or criminal activity information can help keep more tenants in Section 8 voucher programs housed and save time and resources for owners participating in the programs.

Additionally, the presumptive three-year lookback period should also apply to owners in the HCV and PBV programs, consistent with existing research, previous HUD guidance, the FHA, and California's FEHA. Requiring owners to make fact-specific determinations, rather than denying housing based solely on criminal history or activity, would help ensure that stale, inaccurate, or incomplete evidence and stigma surrounding people with criminal justice involvement do not create unnecessary and counterproductive barriers to affordable housing. Also, because owners, not PHAs, are ultimately responsible for screening prospective tenants with housing choice vouchers, it is important that the owners be subject to the same screening requirements as the PHAs.

Extending the Proposed Rule's lookback provisions to owners is also consistent with HUD's previous practice. HUD's Office of Fair Housing and Equal Opportunity 2022 guidance, in discussing the need for transparency in admissions policies and less burdensome application procedures in subsidized multifamily properties, set forth a period of three years prior to the rental application date as a presumptively appropriate criminal screening lookback period.¹⁶¹

Finally, owners in the Section 8 HCV and PBV programs, are subject to the FHA, as are all other housing providers covered by the Proposed Rule. Applying the Proposed Rule's lookback provision will promote such owners' compliance with the FHA and help them avoid liability under the FHA and similar state fair housing laws. Thus, owners participating in the

¹⁵⁹ See *supra* Section II.A.2-3.

¹⁶⁰ Nat'l Coal. for a Civ. Rt. to Couns., Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention 2 (Mar. 2024), https://civilrightscounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC.pdf

¹⁶¹ See Off. of Fair Hous. and Equal Opportunity, HUD, Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties 5-8 (Apr. 21, 2022), <https://www.hud.gov/sites/dfiles/FHEO/documents/HUD%20Title%20VI%20Guidance%20Multifamily%20Marketing%20and%20Application%20Processing.pdf>.

Section 8 voucher programs should be required to institute a three-year lookback policy or justify a longer period with empirical evidence.

F. Clarify that the Proposed Rule Applies to Housing Decisions that Utilize Artificial Intelligence, Algorithms, and Related Advanced Technologies

We appreciate HUD’s recent guidance documents on the application of the FHA to applicants¹⁶² and housing advertising through digital platforms¹⁶³. These are critical and timely, given that many owners and even PHAs are using third-party screening companies that rely on technologies such as machine learning and other forms of artificial intelligence.¹⁶⁴

Increased reliance on tenant screening companies, without transparency, may unjustifiably exclude people from housing opportunities in discriminatory ways. First, many automated systems rely on vast amount of data to find patterns and correlations, and such datasets may incorporate historical bias and lead to discriminatory outcomes.¹⁶⁵ Second, many automated systems operate with opacity; in some cases, even the developers of the systems are not clear on their internal workings.¹⁶⁶ Third, many third-party screening products simply render algorithmic “admit” or “deny” decisions that may not even contain or refer to the detailed records upon which those decisions were based. Thus, despite HUD’s guidance, PHAs and owners may be engaging in screening practices that are contrary to the Proposed Rule and do not engage in individualized assessment, fact-specific analyses, and consideration of total circumstances.

To ensure compliance with the Proposed Rule, HUD should provide specific clarifications and mandates in the Proposed Rule with respect to algorithmic determinations of unsuitability of tenancy, compatible with its recent guidance.

First, HUD should explicitly provide that PHAs and owners may not delegate final decisions regarding admissions to third-party screening companies. Rather, PHAs and owners

¹⁶² HUD, Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing (Apr. 29, 2024), https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf.

¹⁶³ HUD, Guidance on Application of the Fair Housing Act to the Advertising of Housing, Credit, and Other Real Estate-Related Transactions through Digital Platforms (Apr. 29, 2024), https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Advertising_through_Digital_Platforms.pdf.

¹⁶⁴ Lauren Kirchner, *How We Investigated the Tenant Screening Industry*, The Markup (May 28, 2020), <https://themarkup.org/show-your-work/2020/05/28/how-we-investigated-the-tenant-screening-industry>.

¹⁶⁵ U.S. Consumer Fin. Prot. Bureau et al., *Joint Statement On Enforcement of Civil Rights, Fair Competition, Consumer Protection, and Equal Opportunity Laws in Automated Systems* at 2 (Apr. 4, 2024), <https://www.justice.gov/crt/media/1346821/dl?inline>.

¹⁶⁶ *Id.*

should make their own independent determinations related to an applicant's criminal history and suitability of tenancy.

Second, HUD should require that PHAs and owners ensure transparency in how third-party screening companies decide on tenancy suitability. This would include working with the third-party companies to produce and update criteria that are aligned with the Proposed Rule and disclose said criteria. For example, arrest records alone should not be used as a criterion for algorithmic decisions, and criteria that ignore individualized assessment should not be used. Applicants should be provided the criteria used in the admission decisions and a copy of any records that served as a basis for denial.

Third, PHAs and owners should be required to only work with third-party companies that (1) disclose how their software works, (2) use only relevant and accurate data, and (3) conduct regular testing and design updates that ensure they are not screening in a discriminatory manner. While many of these recommendations are raised in HUD's recent guidance, including them in the Proposed Rule would highlight the importance of individualized assessment in the screening process, including screening by third-party companies.

III. CONCLUSION

It is imperative that society provides justice-involved individuals with the opportunity to start over, especially where a significant portion of Americans have some form of a criminal record. Accessing and maintaining housing is key to this process and helps to reduce recidivism. Understanding these realities, the Proposed Rule is a much-needed, positive step in creating housing opportunity for justice-involved individuals and making our communities safer. For these reasons, we enthusiastically express our support for the Proposed Rule, and offer the proposed suggestions to strengthen it further.

Sincerely,



ROB BONTA
Attorney General