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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

HOUSE DEMOCRATIC POLICY COMMITTEE HEARING
Topic: Fair Chance Housing
Philadelphia Museum of Art's Perelman Building – Philadelphia, PA
July 20, 2016

AGENDA

- 3:00 p.m. Welcome and Opening Remarks
- 3:10 p.m. Panel One:
- Phyllis Chamberlain, Executive Director, Housing Alliance of Pennsylvania
 - Angela McIver, CEO, Fair Housing Rights Center in Southeastern Pennsylvania
- 3:40 p.m. Panel Two:
- Rasheedah Phillips, Managing Attorney, Community Legal Services
 - Patricia McGlone, Social Worker/Community Education Coordinator, Community Legal Services
 - Dina Schlossberg, Deputy Director/Senior Attorney for Multifamily Housing, Regional Housing Legal Services
- 4:10 p.m. Panel Three:
- Victor Pinckney, Senior Executive VP, Homeowners Association of Philadelphia
 - Darrell Zaslow, Legal Counsel, Homeowners Association of Philadelphia
- 4:30 p.m. Closing Remarks



Housing Alliance
of Pennsylvania

Good afternoon. My name is Phyllis Chamberlain and I am the Executive Director of the Housing Alliance of Pennsylvania. The Housing Alliance is a statewide coalition working to provide leadership and a common voice for policies, practices, and resources to ensure that all Pennsylvanians, especially those with low incomes, have access to safe, decent, and affordable homes. Thank you for this opportunity to testify today about Fair Chance Housing.

This is a country of second chances. For so many people, that is the American dream, a chance to start over, to remake oneself. It is the dream of people who have lost jobs or faced other economic hardships. It is also the dream of those who have served their time for earlier transgressions and are ready to move forward.

Too often, even after having paid their debt to society, people with criminal backgrounds are punished again and again. For those with criminal records it is difficult to find a job or a place to live. Restrictions of housing may even prevent family re-unification.

According to the Bureau of Justice Statistics of the US Department of Justice, "As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort."¹ It is imperative that we find ways to help these people rejoin society. Failing to do so has far-reaching ramifications, including divided families and higher crime rates.

While it is understandable that property owners and other tenants are fearful of a new resident with a criminal background, it is important for us to make policy decisions based on the facts. Having a stable home actually *reduces* the likelihood that a person will commit another crime. Research shows that two-thirds of people released from prison without stable housing will be re-arrested within 12 months, while only a quarter of those who have a good place to live are re-arrested. In other words, homelessness or housing instability makes a person 2-1/2 times more likely to be re-arrested.

The nation is starting to recognize that policies that prohibit returning citizens from renting homes may actually make our communities less safe. Ensuring a safe, stable place to live is not only good for the returning citizen, it makes all of us safer and saves taxpayer dollars that would otherwise be spent on policing, trials, and incarceration. It also reduces homelessness, another costly social ill with wide-reaching effects.

There are many good models across the country for helping returning citizens find homes. They include Housing First, Supportive Housing, rental assistance, master leasing, incentives for landlords, and housing placement services.

¹ Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems*, 2012, 3 (Jan. 2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

Any legislative effort will be more impactful if coupled with education of property owners to address their concerns and even misconceptions on strategies to ensure public safety. I do not believe that property owners create policies that intentionally discriminate against people with a criminal history. Instead, they create these policies out of concern. They want to ensure that the people that live in communities are safe and this interest in ensuring public safety is admirable. There are a number of excellent programs and models that can directly address these concerns while still providing opportunity to people that have already paid their debt to society. These programs can create an understanding that people with a criminal record can be of great benefit to a community rather than a burden. For many, they only want and need a second chance and they require stable housing to have that second chance.

Pennsylvania has several good examples. With funding from the PA Commission on Crime and Delinquency (PCCD), the Union County Housing Authority developed the Justice Bridge Housing Program to provide short term rental assistance to parolees. The PCCD funded rental assistance carried the individuals until they were able to obtain federally funded Housing Choice Vouchers. The Columbia County Housing Authority followed suit with its own justice housing program.

For several years now, PCCD's Mental Health Justice Advisory Committee has awarded grants for housing initiatives for returning citizens with mental health or substance abuse diagnoses. Programs have included rental assistance like those in Union, Columbia, and Fayette Counties, and master leasing in Philadelphia, Montgomery, Greene, and Fayette Counties, among other programs.

But the real key to housing the thousands of Pennsylvanians who have been incarcerated is to help them find homes in the private rental market. The US Department of Housing and Urban Development's (HUD) Office of General Counsel recently issued "Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions". The Guidance states that under the Fair Housing Act it is illegal to have a blanket policy of not renting or selling to people with criminal backgrounds because such a policy would have a disparate impact on African-Americans and Hispanics who are "arrested, convicted and incarcerated at rates disproportionate to their share of the general population."² A property owner may have a policy on criminal background, but the policy must be related to the interests of the property and must take into account the circumstances of the individual, such as how long ago the crime occurred and what the individual has done since that time.

Pennsylvania must ensure that HUD's new Guidance on the Fair Housing Act is made known to all property owners and real estate professionals. Through education and enforcement, the commonwealth can be a leader in ensuring safe, stable housing for all Pennsylvanians, including returning citizens.

Thank you.

² HUD; Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions; April 4, 2016.

Angela McIver, CEO/Board Secretary, Fair Housing Rights Center in Southeastern PA

Good afternoon State Representative Donna Bullock, guests, colleagues, and friends. I am Angela McIver, chief executive officer and board secretary of the Fair Housing Rights Center in Southeastern Pennsylvania (FHRC). It is an extraordinary honor to speak in this space and on this topic, which means so much to me professionally and privately. Thank you for scheduling this important forum.

In 1990 the FHRC organized and in 1992 it incorporated. The mission of the FHRC is to ensure equal access to housing opportunities for all persons. FHRC is also a qualified Fair Housing Enforcement Organization (QFHO) that is authorized by the U.S. Department of Housing and Urban Development (HUD) to investigate and enforce fair housing laws including: the federal Fair Housing Act (FHA), and the housing provisions of the Pennsylvania Human Relations Act (PHRA). Additionally, the organization provides: complaint resolution, testing investigations, advocacy, education and outreach, information and referral and bi-weekly Homeseekers List.

The FHRC has identified multiple impediments to fair housing choice, which include: discrimination and segregation based on race and/or national origin; language and cultural differences; a lack of understanding of the fair housing laws; a shortage of accessible housing for individuals with disabilities; and a lack of affordable housing.

FHRC provides services throughout southeastern Pennsylvania (SEPA), which includes five counties: Bucks, Chester, Delaware, Montgomery and Philadelphia. It is estimated that as of July 2014, over four million individuals, approximately 32% of Pennsylvania's total population, reside in SEPA. Racial and ethnic diversity spans across the SEPA area: approximately 913,558 people

(or 22.53%) are Black or African American individuals; approximately 328,974 individuals (or 8.11%) are of Hispanic or Latino origin; and approximately 237,851 residents (or 5.87%) are of Asian origin. Additionally, as of March 2014 Philadelphia was named the 5th most segregated city in the United States.

Housing discrimination based on disability is also a significant problem in SEPA. Fifty-five percent (55%) of the allegations of discrimination that FHRC received in 2015 were based on disability. Additionally, Philadelphia's Analysis of Impediments to Fair Housing Choice (AI) indicates that approximately one in six Philadelphians has some kind of disability. Further, according to a report by the Philadelphia Department of Public Health issued in May 2014, 19.9% of adults in Philadelphia report having been diagnosed with a mental health condition, and the prevalence of mental health diagnoses increased by 90% between 2000 and 2012,

Further, according to the Urban Institute, there continues to be a scarcity of available, affordable housing. For every 100 extremely low-income (ELI) renter households in Philadelphia County, PA, there are about 35 affordable units available (35:100). In Montgomery County, PA there are approximately 22 affordable units per 100 ELI renter households (22:100). This lack of affordable housing makes it imperative that residents of SEPA have equal access to housing opportunities regardless of race, color, religion, national origin, sex, disability, familial status, or age.

An additional barrier to housing for many people is the existence of a criminal record. It is estimated that 80% of landlords use background checks to exclude prospective renters with criminal histories. A report by the Center for American Progress recognized that “[m]any landlords refuse to rent to individuals with criminal records based on concerns about public safety or the perception that tenants with criminal histories are less likely to meet rental obligations . . . However, a growing body of research finds that these concerns are misplaced.”

A large portion of the population may be prevented from accessing housing due to these tenant screening policies. At the national level, more than 100 million people in the United States have some kind of criminal history. Contact with the criminal justice system can have a particularly profound impact on the classes of people protected under the FHA. For example, the U.S. Department of Housing and Urban Development (HUD) has recognized that Black and Hispanic individuals are arrested, convicted, and incarcerated at rates that are disproportionate to their segment of the general population. People of color comprise more than 60 percent of the incarcerated population, with black men and Hispanic men being incarcerated at rates six times higher, and 2.5 times higher, respectively, than that of white men. In addition, families with children are deeply affected by the rising prison population, with more than half of adult inmates having minor children. In 2012, 2.6 million, or 1 in 25 children in the United States, had a parent in prison. Further, The Sentencing Project has noted that since 1980, the number of women in prison has increased at a rate 50 percent higher than men, which has a significant impact on female-led households.

Regarding local statistics, in 2014, the rate of incarceration for Philadelphia County was 809.6 per 100,000 county residents, which greatly exceeds the rate for Pennsylvania (425.7 per 100,000 residents) and the national rate (341.4 per 100,000 residents). In Philadelphia, 68% of all male inmates are African American, and approximately 30% of inmates in Philadelphia jails experience mental illness.

Housing provider policies that reject any applicant with a criminal history are significant impediments to fair housing choice, and they perpetuate the segregation problem in Philadelphia. On June 25, 2015, the U.S. Supreme Court affirmed the cognizability of the disparate impact standard under the Fair Housing Act in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, a case challenging the disparate impact doctrine of the

(FHA). The Court's ruling expressed the continued relevance of the FHA and affirmed its ability to address systemic housing discrimination. Because individuals in the FHA's protected classes come into contact with the criminal justice system at disproportionately high rates, policies banning rental applicants based on criminal history will likely have a discriminatory effect, and will thus violate the FHA.

After the assassination of the Rev. Dr. Martin Luther King, Jr., Senator Edward Brooke, a key drafter of the Fair Housing Act, remarked on the structural and institutional barriers to housing choice that were largely invisible to most Americans. Although they may not be intentionally discriminatory, these barriers still exist and affect millions of families determined to send their children to the best schools, live near where they work, and make long-lasting contributions in the community of their choice. Therefore, expecting families, with members that have arrest or conviction histories, to reunify may be difficult to achieve when structural and institutional barriers to housing choice are thwarted by housing providers that are unaware of or refuse to adhere to HUD's Office of General Counsel on the Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.

Proposed Solution

Various reports and guidance issued by HUD and others also indicates the need for continued fair housing education in SEPA. The report issued by the Urban Institute and others, which analyzed the results of HUD's 2012 Housing Discrimination Study (HDS), shows the vast need for continued fair housing activities in SEPA. The report indicated that rental agents tell black applicants about fewer available units than white applicants who are equally qualified, and that in the Philadelphia metropolitan area the differences are statistically significant and substantially above the national average. Additionally, the difference between the number of units shown to

black home seekers and the number of units shown to equally qualified white home seekers, with agents showing white applicants more units than black applicants, is above the national average in the Philadelphia metropolitan area. Furthermore, the HDS report stated that “on average blacks are informed of \$425 higher payments required at move-in, and \$115 higher security deposits, than comparable whites are. Moreover, the average net cost quoted to black testers was \$480 higher, on average, than the net cost quoted whites. . .” In addition, the Race/Ethnicity map (Map 1) of Philadelphia, which can be found using HUD’s Affirmatively Furthering Fair Housing (AFFH) Data and Mapping Tool, clearly illustrates the racial segregation problem in Philadelphia. Of particular interest is how direct and indirect participants of Community Development Block Grant (CDBG) funding will respond to the HUD Guidance. Under the new Affirmatively Furthering Fair Housing rule (AFFH), each recipient of federal CDBG funding is required to conduct a periodic Assessment of Fair Housing, which replaced the Analysis of Impediments to Fair Housing Choice on July 15, 2016. According to the NFHA, the AFFH rule sets out a framework for local governments, States and Insular Areas, and public housing agencies to take meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination. The rule is designed to help programs participants better understand what they are required to do to meet their AFFH duties and enables them to assess fair housing issues in their communities and then to make informed policy decisions. This requirement under the FHA is meant to expand access to opportunity for all in our society and to ensure that all federal programs used to build and sustain communities are run in a manner that tackles the entrenched residential segregation that has limited housing choice in the United States for so long.

Further, on April 4, 2016, HUD published guidance regarding the fair housing implications of policies that ban rental applicants having any kind of arrest or conviction record also supports

the need for education on this topic. HUD's new guidance recognizes that African Americans and Hispanics are arrested, convicted and incarcerated at higher rates than non-Hispanic Whites. Therefore, it is likely that a blanket policy prohibiting anyone with a criminal background from renting a home will have a discriminatory effect based on race or national origin. Further, according to the HUD guidance, a policy that categorically prohibits anyone with a prior arrest or any kind of criminal conviction cannot be justified, and would violate the FHA.

HUD recognizes that when individuals are released from prisons and jails, their ability to access safe, secure, and affordable housing is critical to their successful reentry to society. Because across the United States African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal records is not a protected characteristic un the FHA, criminal history-based restrictions on housing opportunities violate the Act if, without jurisdiction, their burden falls more often on renters or other housing market participants of one race or national origin over another.

Because the United State Supreme Court affirmed the cognizability of the disparate impact standard under the Fair Housing Act the disparate impact theory safeguards the right to a fair shot for everyone. Therefore, it is imperative for policy makers to enact legislation that aligns with the FHA, HUD guidance, and PHRA.

Guidance issued by HUD will have significant meaning for many individuals in SEPA, as well as for housing providers and organizations that work with people who have had contact with the criminal justice system. Some of those organizations include: the Mayor's Office of Reintegration Services (RISE); Philadelphia Lawyers for Social Equity (PLSE); the Philadelphia Prison System; community-based organizations; and public housing agencies.

In anticipation of funding from a grant, FHRC will work with these groups to educate as many people as possible about their rights and responsibilities when it comes to screening housing applicants for criminal backgrounds.

FHRC proposes to distribute educational materials, conduct workshops and trainings, and coordinate multiple events to address the problem of housing discrimination in SEPA, with a particular emphasis on how the use of blanket criminal record bans exacerbates that problem. In addition to the trainings and workshops, the specific events that FHRC will coordinate as part of this project include two symposia, one attorney roundtable discussion, and one inter-agency housing and reentry cross training. All of these activities will serve multiple purposes. First, FHRC and its community partners will educate consumers about their fair housing rights and options for seeking relief if they believe they have experienced housing discrimination. Second, FHRC's education and outreach activities will supply service providers, and others who assist people in the criminal justice system, with the fair housing knowledge they need to advocate for individuals with criminal records. The third goal that FHRC's proposed activities will achieve is to educate housing providers about their responsibilities under the FHA, particularly when dealing with people who have any kind of criminal history. These activities may result in an increase in fair housing enforcement, and an increase in housing opportunities for all people, regardless of race, color, religion, national origin, sex, disability, familial status or age.

Philadelphia recently was awarded a grant by the MacArthur Foundation to cut the city's jail population by 34% over the next three years. Those who are reentering the community from jail will need to have equal access to housing in order to reduce the risk of recidivism and to have a chance to thrive. The imminent influx of reentering citizens, which will result from this reform, highlights the urgent need for fair housing reform and activities.

As previously discussed in this testimony, there are significant barriers to fair housing in SEPA, which limit housing choice for many individuals and families. Some of the impediments previously identified include: discrimination based on race and national origin; insufficient accessible and affordable housing; and policies that reject a potential renter with any kind of criminal record. Further, as noted, Philadelphia is one of the most segregated cities in the United States.

In addition, the housing discrimination complaints received by FHRC from March 1, 2014 through February 29, 2016 demonstrate the growing need for extensive fair housing activities in SEPA. The number of complaints increased from 172 in Year 1 to 190 in Year 2. The primary bases of discrimination reported in those complaints were disability, race, and national origin. Moreover, four of the complaints that FHRC received in the first quarter of the current FHIP-PEI grant year were from consumers who have been prevented from securing housing because of a criminal record.

In closing, Title VIII of the Civil Rights Act of 1968, which is also known as the Fair Housing Act, 42 U.S.C. 3602 says, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The PHRA guarantees the right to freedom from discrimination in housing. And recent HUD guidance offers ample ways that housing providers can comply with the FHA. FHRC is looking forward to working with policy makers, advocates, and the public in ways that promote the FHA, HUD guidance, PHRA for reentering persons.



COMMUNITY LEGAL SERVICES
OF PHILADELPHIA

**TESTIMONY OF COMMUNITY LEGAL SERVICES, INC., ON
PROPOSED “FAIR CHANCE AT HOUSING” AMENDMENT TO LANDLORD-
TENANT ACT TO PROHIBIT DISCRIMINATION AGAINST TENANTS WITH
CRIMINAL RECORDS**

Housing Unit, Community Legal Services, Inc.

July 20, 2016

Good afternoon Representative Johnson-Bullock and members of the Committee. My name is Rasheedah Phillips, and I am the Managing Attorney of Community Legal Services’ (CLS) Housing Unit, which provides free legal advice and representation to low-income tenants living in private and public housing in Philadelphia. Thank you for the opportunity to testify today. CLS strongly supports this legislation, which would amend the Landlord-Tenant Act to provide a fair chance at housing for citizens with criminal records seeking housing.

The purpose of the proposed amendment is to create systemic approaches that will help break down the barriers to stability faced by people with criminal records. An estimated 1 in 3 adults have a criminal record, one that bars them from accessing employment, housing, benefits, and other stabilizing measures, while Pennsylvania has a higher corrections population than all but eight states, resulting in large numbers of people whose backgrounds include past criminal convictions.¹ Stable housing decreases the likelihood that previous offenders will reoffend, while research shows that recidivism declines over time. A criminal record is not predictive or indicative of successful tenancy, or future criminal activity, after 7 years of committing the offense, and therefore does not provide a legitimate basis for an automatic adverse housing decision.

Persons with criminal records suffer from pervasive discrimination in many areas of life, including employment, housing, education, and eligibility for social benefits. Recently released guidance from The Department of Housing and Urban Development states that policies which place blanket bans on tenants with criminal history may constitute potential violations of the Fair

¹ <https://www.americanprogress.org/issues/criminal-justice/report/2014/12/02/102308/one-strike-and-youre-out/>

Housing Act.² Such policies disproportionately impact African-Americans and Hispanics, who are more likely to have a criminal record; African American men, for example, are incarcerated at a rate more than six times that of white men.³ Because of Black and Hispanic overrepresentation in the criminal justice system, housing policies eliminating applicants based on criminal records create a discriminatory effect, absent any discriminatory intent on the part of the landlord. In order for a housing provider to satisfy its burden that its screening mechanisms are necessary to protect a legitimate interest, it must show that its policy actually protects property and resident safety.⁴

Other data shows that many arrest records are simply incorrect. The US Department of Justice has stated that the FBI's Interstate Identification Index system does not contain final disposition information for roughly half of its records, and it is the most comprehensive criminal records database in the country.⁵ FBI reports frequently fail to include the outcome of cases, resulting in cases being reported as pending that have been long resolved, often in the applicant's favor. Therefore relying on arrests not resulting in conviction as a basis for denying applicants may result in unfair denials.

The HUD guidance supports amendments to existing laws that would ensure that arrests records or unrelated or remote convictions do not keep people from accessing affordable, stable housing, or rejoining with family members. Housing is crucial to securing and maintaining employment, health care benefits, overcoming substance abuse, behavioral health, and other challenges. Improved practice would be beneficial for individuals of all genders and would improve family stability. Although Black and Hispanic men are overrepresented in the prison population, between 1980 and 2010, the number of women incarcerated in the U.S. increased by 646%, and two thirds of incarcerated women are mothers of children under the age of 18.⁶ Men

² *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, U.S. DEP'T OF HOUSING AND URB. DEV. at 2 (April 4, 2016) https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf [hereinafter *HUD Guidance*] (citing 24 C.F.R. § 100.500).

³ <https://www.americanprogress.org/issues/criminal-justice/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/>

⁴ HUD Guidance

⁵ Department of Justice, Attorney General's Report on Criminal History Background Checks (June 2006)

⁶ <https://www.laprogressive.com/wp-content/uploads/2015/05/Fair-Chance-at-Housing-Fact-Sheet.pdf>.

and women who struggle to find work and care after re-entering society for their families should be supported and encouraged, not denied access to housing. This amendment would also benefit seniors who are routinely denied access to affordable housing for old and minor offenses.

The proposed amendment also aligns with The Fair Credit Reporting Act (FCRA), which already bans the posting of arrests that did not lead to convictions and that occurred more than 7 years prior in commercial credit reports. The FCRA alone does not provide adequate protection to prospective tenants, however, because it only requires the screening company, not the landlord, to provide a copy of the report. Many tenants rarely do that, nor do they know that they can do it. In their Fair Chance at Housing laws, some cities have included provisions requiring the landlord to post notice of what tenant screening company they are using and how the tenant can get a copy, while other laws require the landlord to provide a copy of the screening report upon denial.

In making such an amendment to the Landlord-Tenant Act, Pennsylvania would be joining the states of Washington, Oregon, Ohio, California, as well as New York City in passing a fair chance at housing or “ban the box” measure intended to address the issue of unfair and tenuous decisions based on criminal records.⁷ Rep. Maxine Waters recently introduced the federal Fair Chance at Housing Act of 2016, which recommends against blanket bans on arrests records and instead provides for a “totality of the circumstances” review.⁸

The proposed amendment strikes a fair balance between a landlord’s needs to maintain appropriate health and safety standards for their property with an applicant’s right to be considered fairly against all screening factors. The law does not require housing providers to rent to all applicants with conviction histories. Instead, the legislation creates a process for a landlord to determine if the applicant is legally eligible and if the applicant is qualified to rent the housing unit under the housing provider’s criteria for assessing rental and credit history. CLS has also provided a list of recommendations that we believe will help strengthen the legislation and which

⁷ RCW 59.18.257; ORS 90.295(3), ORS 90.304(1); California State Fair Employment and Housing Act; Los Angeles Fair Chance At Housing Act AB 396; 24 CFR 960.204(c)

⁸ Rep. Maxine Waters, *Fair Chance at Housing Act of 2016*, HOUSE FINANCIAL SERVICES COMM. http://democrats.financialservices.house.gov/uploadedfiles/fair_chance_at_housing_act_executive_summary.pdf.

mirror the provisions of successful legislation in other cities and states.

An amendment to the Pennsylvania Landlord-Tenant Act providing for a fair chance at housing would create necessary protections and ensure compliance with the Fair Housing Act, HUD guidelines, the Fair Credit Reporting Act, and similar legislation around the country. A conviction should never bar access to basic necessities such as food, clothing, housing, and education. People who have already paid their debts to society should not face additional barriers to stability when they already have limited options. Stable housing for citizens with criminal records enhances the health and security of the community as a whole. For these reasons, CLS stands in strong support of this legislation.

Thank you for your time, consideration, and the opportunity to testify. If you have any additional questions or require more information, please feel free to contact me at: Rasheedah Phillips, Esq., (215) 981-3774, rphillips@clsphila.org



COMMUNITY LEGAL SERVICES
OF PHILADELPHIA

Testimony of Patricia A. McGlone, MSS, MLSP
Social Worker/Community Education Coordinator
Community Legal Services

July 20, 2016

**Criminal Records Preventing Seniors from Subsidized Housing Admittance
Client Stories**

As a Social Worker at Community Legal Services (CLS), part of my job is to help Philadelphians relocate to subsidized housing if it is not feasible for them to remain in their homes. Most of the time, our clients are facing mortgage foreclosure due to predatory mortgage loans, the death of a partner or family member whose income was vital to the household, or family emergencies. The income limit at CLS is 125% of the Federal Poverty Guidelines; therefore our clients can only afford to rent in the public, subsidized market. Private market rate, or even "affordable" housing hovers around 100% of their incomes. Our clients who do not get into subsidized housing due to criminal backgrounds have very limited housing options: the overcrowded homes of their children or other relatives, a homeless shelter, nursing or group personal care home. Here are two stories I would like to share with you today of our clients who faced these devastating choices:

Ms. W. (age 73) – Denied senior subsidized housing due to criminal record from 1968.

When we met Ms. W. she was losing her home because she could no longer afford to make the mortgage payments on a predatory loan she and her mother were sold. At the time they agreed to the loan, they were desperate to fix their home: the roof leaked, the front stair needed repair and they could not wait the three years it would take for them to reach the top of the PHDC's Basic Systems Repair Program and Adaptive Modification waiting lists. The roof was starting to fall in and the steps were insurmountable for both Ms. W. who was 73 and wheelchair-bound due to the loss of both her legs from complications due to diabetes. Her mother had cancer at the time and was using a walker. They were living on 1,285 per month combined.

The sad day came when Ms. W.'s mother passed away. Ms. W. had not only lost the closest person to her, but she lost her mother's income that was being used to pay off the predatory second mortgage. Ms. W. would have to move.

We applied at 8 subsidized housing units in and around North Philadelphia. Waiting lists for senior subsidized housing are usually a year or more, so our attorneys helped to keep Ms. W. in her home until her name came up on one of the waiting lists.

Much to our surprise, Ms. W. was denied by all but two of the apartments we applied for because of criminal record that surfaced showing that in 1968 in the middle of a riot on Cecil B. Moore Avenue Ms. W., 28 years old at the time saw that a police officer had twisted her

mother's hand behind her back and forced her onto the hood of his police car. Ms. W., in the heat of the moment, instinctually tried to protect her mother and was charged with assaulting an officer, making terroristic threats and resisting arrest.

I helped Ms. W. appeal her denial of admittance and went with her to sit before a panel of property management executives who still denied her the opportunity to become a tenant despite the nature of the incident and how long ago it had taken place. The stress of these denials and appeals compromised her health, state of mind and sense of dignity.

After almost a year of being denied and appealing, we were able to get into a subsidized apartment. For some reason, this particular senior subsidized apartment complex did not bring up the criminal background. Ms. Williams was so relieved that she did not have to go to a nursing home. She did not have any other family with whom to stay. Without our advocacy, it is almost certain that a nursing home is where Ms. W. would be today.

Ms. S. (age 66) - Denied senior subsidized housing because of a "zombie" assault record.

A "zombie" record is a criminal record that was expunged, but comes back to life when criminal background checks are done by private contractors for subsidized housing providers. This year alone, we have seen three of our senior clients get denied admittance to senior subsidized housing due to zombie records.

Ms. S. is 66 and receives \$733 per month in income. When she was with her abusive husband, their combined incomes were not enough to pay a ballooning predatory mortgage loan. When he finally moved out, she knew she would have to leave too. She completed several housing applications, only to be turned down because of a criminal record CLS had expunged years prior. The expunged assault charge was the result of domestic violence. Ms. S. had called the police to stop her husband from beating and possibly killing her, but was arrested herself. Despite explaining to the rental manager that she is a victim of domestic violence and that her record was expunged years ago, the management company chose to believe a private criminal background company.

Once again, the waiting lists for senior subsidized housing are six months to a year. Getting denied housing and appealing rejection after rejection may tack on another year and still may not result in housing unless one has an advocate. Those in Ms. S.'s position without an advocate would have nowhere to go but the shelter system.

To: Representative Donna Johnson Bullock
From: Community Legal Services Housing Unit (CLS)
Re: Recommendations on Fair Chance at Housing Legislation
Date: July 20, 2016

Section 207(a):

- CLS Recommends revising 207(a) to read: *A landlord, regarding applicants or potential tenants and their household members, may not inquire about or require disclosure of, or if such information is received, base an adverse action in whole or in part on:*
- CLS recommends adding a provision that provides for written disclosure of the landlord's rental criteria before an application or screening fee is accepted. This would prevent tenants who meet the screening criteria from being improperly denied based on mistakes or misinterpretations of such criteria. All criteria should relate directly to expectations of tenancy, and should be presumptive, not absolute.
- CLS recommends creating a posting requirement that requires landlords to post a summary of the requirements of this legislation in a conspicuous place on the landlord's website and/or premises, where prospective tenants will be most likely to notice and read it.
- CLS recommends adding in a provision that states that housing providers may only consider directly-related convictions within the past 7 years. A directly-related conviction or unresolved arrest has been defined as "the conduct for which a person was convicted or that is the subject of an unresolved arrest has a direct and specific negative bearing on the safety of person or property, given the nature of the housing."

Section 207(b):

- CLS recommends adding in a provision that requires a landlord to provide written notice of the denial reason and to provide a copy of the screening report and/or any other information used to in taking the adverse action.
- CLS recommends including a provision where the applicant has an opportunity to respond and present mitigating circumstances or to challenge incorrect information before the unit is leased to another applicant. Under this provision, a housing provider cannot deny a tenant without conducting an individualized assessment of each tenant, which involves evidence of rehabilitation and a record of being a good tenant before and/or after the conviction.
- CLS recommends adding a private right of action, Attorney's fees, and damages in the amount of \$500 per each offense or actual damages, whichever is greater. Similar legislation has also vested jurisdiction with the Pennsylvania Human Relations Commission (PCHR) or a Human Relations Commission in a first class city in the Commonwealth. We suggest making reference to jurisdiction of the Pennsylvania Human Relations Commission to receive complaints of housing discrimination, as well as retaining concurrent jurisdiction with a state court to be able to file a private right of action independent of the PCHR.

Testimony Fair Chance Housing Amendments

Dina Schlossberg, Esquire

Regional Housing Legal Services

My name is Dina Schlossberg and I am the Deputy Director of Regional Housing Legal Services. Regional Housing is a statewide legal services program with offices in Glenside, Pittsburgh and Harrisburg. We have a unique role within the legal aid community, in that we focus on affordable, sustainable housing and its related components — community and economic development, utility matters and preservation of home ownership. RHLS provides innovative project and policy solutions that help create sustainable communities offering decent, safe and affordable housing for lower-income Pennsylvanians.

Our work is conducted through advocacy for programs and policies that strengthen and expand opportunities for lower income Pennsylvania's to have access to safe affordable housing. In addition, we provide direct representation to nonprofit organizations that are engaged in the development or preservation of affordable housing and other community development initiative, such as the creation of a wellness center or a federally qualified health clinic, or the redevelopment of a commercial corridor to support the small business needs of that particular local community.

While we advocate and work for the creation of housing for all lower income individuals and families, we are especially sensitive to the housing needs of our most vulnerable citizens, those that are in need of and would most benefit from supportive housing, such as persons experiencing homelessness, youth aging out of foster care, or persons that are victims of domestic violence, or frail elderly, persons with physical disabilities and those with mental or behavioral health issues that impede their ability to find or retain housing without subsidized housing and readily available supportive services.

As we all know the United States has the most incarcerated people of any nation. According to the United States Department of Justice it is estimated that 100 million American adults or 1 out of every 3 adults in this country have been involved with the criminal justice system. It is also estimated that of those individuals who have been arrested and convicted, approximately 95% will be released from prisons and jails.

Pennsylvania does not fare better than the national average. In Pennsylvania from 1994-2007 according to one study, the population in PA state prisons rose 63% and population in county jails increased by 77%. By way of example, according to one county official, in Allegheny County alone, about 30,000 individuals per year are arrested and brought into the county jail system.

Access to stable and affordable housing is important to successful community reintegration. Lack of access to housing for persons involved in the criminal justice system is a vicious cycle that results in increased homelessness. According to the US Interagency Council on Homelessness, roughly 48,000 people entering the shelter system each year are coming directly from jails or prisons. Sometimes simply being homeless may trigger a person's involvement with the criminal justice system for such minor infractions as loitering, vagrancy and the like. According to a report issued by the National Health

Care for the Homeless Council, approximately 15% of jailed inmates had been homeless in the year prior to their incarceration, and 54% of homeless individuals report spending time in a correctional facility.

So to break the cycle of homelessness for individuals, we applaud measures that will reduce barriers to access to affordable and stable housing for low income households, including measures to reduce the stigma of criminal background and criminal records as a barrier to housing.

As you are aware, HUD has issued Guidance, to housing providers, both public housing and private federally assisted housing, on the use of criminal records when evaluating a person's application for housing. This Guidance addresses arrests as well as convictions and primarily focuses upon the fair housing implications of blanket denials and overreaching tenant selection policies that have a disproportionate impact on racial minorities.

In preparing for today's hearing, I did reach out to a number of our clients, all of whom are non profit providers of housing for vulnerable populations to assess their thoughts to the proposed Fair Chance Housing amendment to the Landlord Tenant Act. Some commented that good property management companies are already undertaking these measures and also added that an appeal process for a rejection is always something that should be encouraged. Some clients indicated that they wish to retain the right to gain this information but want the underlying systems such as Medicaid or HUD to allow for greater flexibility in allowing person with criminal records to be permitted to reside in their properties. Others were very comfortable with these proposed amendment, so long as they did not extend to person with felony convictions, violent crimes or sex offenders.

We encourage Representative Bullock, to reach out to the nonprofit development community and seek their input as to the specific language and measures that would be most successful in helping to reduce the cycle of homelessness and reduce barriers to private rental housing. They share the mission of wishing to increase opportunities for access to stable affordable housing and have expressed an interest in this proposed Fair Chance Housing amendment.



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July 20, 2016

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House Democratic Policy Committee Fair Chance Housing

Testimony of Darrell M. Zaslow Esq. HAPCO Legal Counsel and Victor H. Pinckney, Sr. Executive Vice President

Good afternoon members of the Committee. My name is Darrell M. Zaslow, Legal Counsel to HAPCO, the Homeowners Association of Philadelphia. With me is Victor Pinckney, Vice President. HAPCO is the largest Association of rental property owners in the state of Pennsylvania.

By the time we have had the privilege to address the Committee, we are certain that you will have heard from many knowledgeable individuals regarding the need to provide a second chance to those convicted of criminal activity. We recognize that this is especially important in the basic need for housing. Any person of good conscience will seek to be forgiving of those who have committed a criminal act and have been released from incarceration.

At the same time, on behalf of Pennsylvania landlords, we trust you will recognize that there are certain significant dangers in enacting by legislative fiat that a landlord may not inquire into the criminal behavior of an applicant for a house or apartment, before making a fair and unbiased judgment as to whether or not the applicant is a safety risk.

Pursuant to long-standing case law, Pennsylvania landlords have significant responsibility for the security of tenants. There have been myriad cases holding a landlord liable for failing to protect against criminal acts by tenants against not just other residents of the building, but other residents of a street. Landlords have responsibility to other occupants and are to some degree responsible to protect the surrounding community from criminal acts of their tenants. Numerous lawsuits in the state of Pennsylvania and in many other jurisdictions impose liability on a landlord for criminal acts committed by a tenant or third parties. In increasing numbers, landlords are held responsible when their tenants have been injured by criminals while living in their rental properties. Settlements from these cases have been millions of dollars, especially when a similar assault or crime occurred previously.

It is a basic activity of good property owners that background checks are performed on prospective tenants for the protection of both the landlord and other occupants. Restricting the right to inquire into prior criminal behavior can create liability for the landlord and danger to other individuals.

As a result a blanket prohibition of inquiry into a prospective tenant's criminal activity is not only unfair to the landlord who may be liable for future criminal acts, but is unfair to other residents of the building or street, who may be subjected to future criminal acts by a recidivist criminal.

In addition to potentially violent criminal behavior, or the commission of crimes against property, the issues of drug use and sexual assault are important. While landlords are frankly not interested in what a tenant does inside his or her dwelling unit, the District Attorney's Office is very interested. Long-standing law in Pennsylvania, implemented by law enforcement officials across the Commonwealth, provide for forfeiture of real estate used for drug activity. Even given the potentially relaxed state of criminal enforcement of certain drug usage here in Philadelphia, it is still a danger to the owner who can lose an entire house if an individual convicted of prior drug use inhabits a house and deals in drugs again. Again, it is not the landlords who care, but you, the State of Pennsylvania, who has enacted Statutes for forfeiture of a landlord's real estate by drug activity committed by tenants.

The implication of renting to those convicted of sexual assault is obvious. While landlords in Pennsylvania did not in any way seek responsibility, potential liability for sexual violence has been foisted upon landlords to be the guardian of the welfare of other tenants and residents. We do not in any way judge convicted individuals, and certainly hope and pray for their full rehabilitation. But until the rehabilitation is guaranteed, the landlord faces liability, and other tenants face potential danger.

It is for these reasons that we urge the Committee to exercise extraordinary caution in any restriction upon inquiry into criminal acts of applicants for rental real estate. To the extent that the state of Pennsylvania will accompany any such Enactment with a *limitation of liability* on the part of a landlord for criminal acts committed, then certainly we embrace the second chance you properly seek to provide, and which we acknowledge is important for the reintegration into society of those who have committed a crime. The problem is we cannot know who will commit a future wrong and who will not. The rate of recidivism is unfortunately very high.

We might suggest as a solution that ex-offenders be encouraged into housing specifically designated as "transitional housing". After a period of time under supervision of appropriate social welfare agencies, reintegration of those convicted of crime would certainly be appropriate. Unless, however, any enactment you contemplate will *absolve landlords of responsibility for criminal acts and liability to third parties*, we cannot support enactment of a law which would make it illegal for landlords to exercise due diligence in protecting their property, and protecting the lives and property of their other tenants.

Victor H Pinckney Sr
1st Vice President
HAPCO

Policy Committee hearing on Fair Chance Housing
7/20/2016

I understand the necessity of allowing someone who has paid their debt to society the ability to live where they wish. Their past transgressions should not prevent them from living where they choose. But, as a property manager, I am responsible for the well being of my tenants.

There are some crimes that I feel I should be aware that a prospective tenant has committed, just for the well being of my current and future tenants. So any law that is being considered to limit the questioning of a rental applicant should not include asking if they have been arrested or convicted of a felony, certain violent misdemeanors, and probation status.

Actually I have found over the years that tenants on probation generally are better behaved especially when I had the name and phone number of their probation officer.

I like to thank Representative Bullock and the members of the Policy Committee for allowing HAPCO's attorney Darrell Zaslow and I the opportunity to speak today.



April 4, 2016

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

I. Introduction

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

II. Background

As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.² The United States prison population of 2.2 million adults is by far the largest in the world.³ As of 2012, the United States accounted for only about five percent of the world's population, yet almost one quarter of the world's prisoners were held in American prisons.⁴ Since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons,⁵ and over 95 percent of current inmates will be released at some point.⁶ When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.⁷ Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing,

¹ 42 U.S.C. § 3601 *et seq.*

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

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

⁴ *Id.*

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

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

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

because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

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

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

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.¹⁰ Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.¹¹ Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.¹²

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

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

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

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

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

¹² See 24 C.F.R. § 100.500.

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

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin.¹³ This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.¹⁴

National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.¹⁵ Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population.¹⁶ Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population.¹⁷ In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the

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

¹⁴ *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.") with *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.") (citation omitted).

¹⁵ *Cf. El v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that non-Whites were substantially more likely than Whites to have a conviction), *aff'd on other grounds*, 479 F.2d 232 (3d Cir. 2007).

¹⁶ See FBI Criminal Justice Information Services Division, *Crime in the United States, 2013*, tbl.43A, available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43> (Fall 2014) (reporting that African Americans comprised 28.3% of all arrestees in 2013); U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2013 to December 1, 2013, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html> (reporting data showing that individuals identifying as African American or Black alone made up only 12.4% of the total U.S. population at 2013 year-end).

¹⁷ See E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at tbl. 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>; and U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2014 to December 1, 2014, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html>.

general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.¹⁸ In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.¹⁹ Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.²⁰

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact. Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a housing provider may offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes.

Regardless of the data used, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

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

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.²¹ The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.²²

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices.²³ Ensuring

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at table 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

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

²² See 24 C.F.R. § 100.500(b)(2); see also 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

²³ See, e.g., Answer to Amended Complaint at 58, *The Fortune Society, Inc. v. Sandcastle Towers Hsg. Dev. Fund Corp.*, No. 1:14-CV-6410 (E.D.N.Y. May 21, 2015), ECF No. 37 (“The use of criminal records searches as part of the overall tenant screening process used at Sand Castle serves valid business and security functions of protecting tenants and the property from former convicted criminals.”); *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009) (noting, based on affidavit of property owner, that “[t]he policy [against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds ... [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property.”); see also J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, Washington, 61 Fed. Probation 12, 20 (1997) (finding in a survey of 196

resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.²⁴ A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.

1. Exclusions Because of Prior Arrest

A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.²⁵ As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”²⁶ Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (e.g., by failing to indicate whether the individual was prosecuted, convicted, or acquitted),²⁷ the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property.

landlords in Seattle that of the 43% of landlords that said they were inclined to reject applicants with a criminal history, the primary reason for their inclination was protection and safety of community).

²⁴ As explained in HUD’s 2013 Discriminatory Effects Final Rule, a “substantial” interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an interest be “legitimate” means that a housing provider’s justification must be genuine and not false or fabricated. *See* 78 Fed. Reg. at 11470; *see also* *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005) (recognizing that, “in the abstract, a reduction in the concentration of low income housing is a legitimate goal,” but concluding “that the Housing Authority had not shown a need for deconcentration in this instance, and in fact, had falsely represented the density [of low income housing] at the location in question in an attempt to do so”).

²⁵ HUD recently clarified that arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing. *See* Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD PIH Notice 2015-19, (November 2, 2015), available at:

<http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>

²⁶ *Schwartz v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957); *see also* *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (“[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) (“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”).

²⁷ *See, e.g.*, U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal History Background Checks* at 3, 17 (June 2006), available at http://www.bis.gov/content/pub/pdf/ag_bgchecks_report.pdf (reporting that the FBI’s Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and “the most comprehensive single source of criminal history information in the United States,” is “still missing final disposition information for approximately 50 percent of its records”).

Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.²⁸

2. Exclusions Because of Prior Conviction

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.²⁹ But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden. One federal court of appeals held that such a blanket ban violated Title VII, stating that it “could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”³⁰ Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as “not empirically validated.”³¹

A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest.” To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.³²

²⁸ See U.S. Equal Emp’t Opportunity Comm’n, *EEOC Enforcement Guidance, Number 915.002*, 12 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; see also *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that defendant employer’s policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII because there “was no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees,” such that “information concerning a ... record of arrests without conviction, is irrelevant to [an applicant’s] suitability or qualification for employment”), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

²⁹ There may, however, be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. See generally SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), available at <http://www.search.org/files/pdf/RNTEFCSCJRI.pdf>.

³⁰ *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

³¹ *Id.*

³² *Cf. El*, 479 F.3d at 245-46 (stating that “Title VII ... require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level or risk and those that do not”).

A policy or practice that fails to take into account the nature and severity of an individual's conviction is unlikely to satisfy this standard.³³ Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.³⁴

Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a "substantial, legitimate, nondiscriminatory interest" of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.³⁵

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.³⁶

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

³³ Cf. *Green*, 523 F.2d at 1298 (holding that racially disproportionate denial of employment opportunities based on criminal conduct that "does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden" and violated Title VII).

³⁴ Cf. *El*, 479 F.3d at 247 (noting that plaintiff's Title VII disparate impact claim might have survived summary judgment had plaintiff presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person..."); see also *Green*, 523 F.2d at 1298 (permanent exclusion from employment based on any and all offenses violated Title VII); see Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol'y* 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

³⁵ The liability standards and principles discussed throughout this guidance would apply to HUD-assisted housing providers just as they would to any other housing provider covered by the Fair Housing Act. See HUD PIH Notice 2015-19 *supra* n. 25. Section 6 of that Notice addresses civil rights requirements.

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

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

Section 807(b)(4) of the Fair Housing Act provides that the Act does not prohibit “conduct against a person because such person has been convicted ... of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).”³⁷ Accordingly, a housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

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

IV. Intentional Discrimination and Use of Criminal History

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

For example, intentional discrimination in violation of the Act may be proven based on evidence that a housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record. Similarly, if a housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans, intentional discrimination exists.³⁸ A disparate treatment violation may also be proven based on evidence that a leasing agent assisted a White applicant seeking to secure approval of his rental application despite his potentially disqualifying criminal record under the housing provider’s screening policy, but did not provide such assistance to an African American applicant.³⁹

³⁷ 42 U.S.C. § 3607(b)(4).

³⁸ Cf. *Sherman Ave. Tenants’ Assn. v. District of Columbia*, 444 F.3d 673, 683-84 (D.C. Cir. 2006) (upholding plaintiff’s disparate treatment claim based on evidence that defendant had not enforced its housing code as aggressively against comparable non-Hispanic neighborhoods as it did in plaintiff’s disproportionately Hispanic neighborhood).

³⁹ See, e.g., *Muriello*, 217 F. 3d at 522 (holding that Plaintiff’s allegations that his application for federal housing assistance and the alleged existence of a potentially disqualifying prior criminal record was handled differently than those of two similarly situated white applicants presented a prima facie case that he was discriminated against because of race, in violation of the Fair Housing Act).

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

If overt, direct evidence of discrimination does not exist, the traditional burden-shifting method of establishing intentional discrimination applies to complaints alleging discriminatory intent in the use of criminal history information.⁴⁰ First, the evidence must establish a prima facie case of disparate treatment. This may be shown in a refusal to rent case, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) the plaintiff or complainant applied for a dwelling from the housing provider; (3) the housing provider rejected the plaintiff or complainant because of his or her criminal history; and (4) the housing provider offered housing to a similarly-situated applicant not of the plaintiff or complainant's protected class, but with a comparable criminal record. It is then the housing provider's burden to offer "evidence of a legitimate, nondiscriminatory reason for the adverse housing decision."⁴¹ A housing provider's nondiscriminatory reason for the challenged decision must be clear, reasonably specific, and supported by admissible evidence.⁴² Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.⁴³

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

⁴⁰ See, generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating the concept of a "prima facie case" of intentional discrimination under Title VII); see, e.g., *Allen v. Muriello*, 217 F.3d 517, 520-22 (7th Cir. 2000) (applying prima facie case analysis to claim under the Fair Housing Act alleging disparate treatment because of race in housing provider's use of criminal records to deny housing).

⁴¹ *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (quotations and citations omitted).

⁴² See, e.g., *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039-40 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

⁴³ See, e.g., *Muriello*, 217 F.3d at 522 (noting that housing provider's "rather dubious explanation for the differing treatment" of African American and White applicants' criminal records "puts the issue of pretext in the lap of a trier of fact"); *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups [because] 'clever men may easily conceal their [discriminatory] motivations.'" (quoting *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974)).

justification for intentional discrimination by the housing provider will depend on the facts of a particular case.

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

V. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

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

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

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