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Beyond Affordability: Combating Systemic Housing Barriers for Formerly Incarcerated People

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The ability to secure stable housing is critical to an individual's success after incarceration. Yet, formerly incarcerated individuals face structural barriers that extend beyond the broader housing affordability crisis. One of the most pervasive challenges is discrimination based on criminal records by both public housing authorities (PHAs) and private landlords, which often results in automatic denials regardless of rehabilitation or actual tenant risk.

People who have been incarcerated are nearly ten times more likely to experience homelessness than the general population, with rates even higher among those recently released.[1] This disparity cannot be explained by housing instability alone. Barriers to employment and a lack of adequate mental health care, substance use treatment, and social support all contribute to the increased risk of homelessness

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1. Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, Prison Pol'y Initiative (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html [https://perma.cc/94HV-JVBJ].

among formerly incarcerated individuals.[2] Addressing housing instability, however, is a necessary foundation for reducing these broader risks. Without stable housing, formerly incarcerated individuals face an increased risk of recidivism and perpetual cycles of incarceration and homelessness.[3]

This Note argues that eliminating criminal history-based discrimination in housing is both a moral imperative and a pragmatic reform. Drawing on social science research, federal regulatory frameworks, and emerging Fair Housing Act (FHA) litigation, it advocates for a dual strategy: reviving a version of U.S. Department of Housing and Urban Development's (HUD) 2024 proposed rule to require individualized assessments in public housing and voucher program admissions, and strengthening the use of disparate impact and discriminatory intent claims under the FHA to challenge exclusionary private screening policies. Together, these legal and policy tools provide a path to dismantle criminal history-based housing discrimination and promote a more equitable, evidence-based approach to reentry.

I. Housing Instability, Homelessness, and Recidivism among Formerly Incarcerated People

While housing insecurity is a widespread crisis, formerly incarcerated people face additional compounding factors that make the issue especially severe. Aside from increased rates of homelessness, returning citizens experience the highest levels of residential instability among all documented demographics, averaging approximately 2.6 moves per year.[4] These frequent moves disrupt critical aspects of reentry, including employment, access to healthcare, and social support, all of which are crucial for successful reintegration.

The barriers formerly incarcerated people face are both unique and systemic. Unlike other low-income individuals, those with criminal records face widespread discrimination from both PHAs and private landlords. In the Section 8 Housing Choice Voucher Program, applicants may face discrimination not only due to their criminal history but also due to stigma against voucher holders more broadly.[5] Current HUD regulations do not prohibit local PHAs or private landlords from categorically denying applicants based on certain types of criminal convictions.[6]

While public and private housing providers have a legitimate interest in ensuring the safety of their properties and tenants, blanket bans that exclude applicants based on past convictions without considering individual

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2. *See id.*

3. Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism: Evidence From a Sample of People on Probation in San Francisco*, 47 Crim. Just. & Behav. 1097, 1106 (2020).

4. Claire W. Herbert, Jeffrey D. Morenoff & David J. Harding, *Homelessness and Housing Insecurity Among Former Prisoners*, 1 Russell Sage Found. J. Soc. Sci. 44, 72 (2015).

5. *See generally* U.S. Dep't of Hous. & Urb. Dev., Landlord Acceptance of Housing Choice Vouchers (2018), https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf [https://perma.cc/HYC2-LYSN].

6. Eleanor J. Bader, *HUD Targets Public Housing Discrimination Against Formerly Incarcerated People*, Truthout (May 18, 2024), https://truthout.org/articles/proposed-hud-rules-would-protect-convicted-tenants-from-public-housing-eviction/[https://perma.cc/K9TW-TLFR].

circumstances such as the type of offense, the time since the offense, and evidence of rehabilitation do not necessarily serve that interest.[7] These policies often function as a form of extrajudicial punishment, extending the consequences of incarceration long after a sentence has ended.[8] Further, such blanket policies disproportionately impact communities of color—especially Black Americans—who are overrepresented in the criminal justice system.[9] Eliminating these discriminatory policies is crucial to ensuring fair access to housing based on individual risk, not stereotypes or outdated records.

Beyond fairness, addressing housing discrimination against formerly incarcerated people yields substantial societal benefits. One of the most well-documented advantages is the reduction in recidivism, or the rate at which people reoffend following release.[10] Housing insecurity is not simply correlated with recidivism; it actively drives it by increasing exposure to policing and making compliance with probation and parole conditions more difficult.[11] People without stable housing are more visible in public spaces, leaving them more susceptible to arrest for low-level 'quality-of-life' offenses such as loitering or sleeping in prohibited areas.[12] Further, probation and parole often impose technical conditions, such as keeping scheduled appointments and providing a current residential address to a supervising officer.[13] These requirements are inherently harder to meet without stable housing.[14] As a result, housing instability increases the risk of reincarceration for conduct that would not otherwise be criminal.[15]

A 2020 study found that housing circumstances predicted recidivism "above and beyond demographic markers, criminal risk, behavioral health problems, social support, and financial insecurity."[16] In other words, even after controlling for all other risk factors, individuals who experienced homelessness during

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7. U.S. Dep't of Hous. & Urban Dev., 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 (Apr. 2016) [hereinafter 2016 HUD Guidance].

8. Sandhya Kajeepeta, *Barred from Housing: The Discriminatory Impact of Criminal History Restrictions in Tenant Screening,* Thurgood Marshall Inst. Legal Def. Fund 4 (Apr. 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5260181 ("[T]he consequences of contact with the criminal legal system do not end after a case has concluded. Instead, the collateral consequences of an arrest or a conviction can follow someone over the course of their lifetime.").

9. Nazgol Ghandnoosh, *One in Five: Ending Inequity in Incarceration*, The Sent'g Project (Oct. 2023), https://www.sentencingproject.org/app/uploads/2024/02/One-in-Five-Ending-Racial-Inequity-in-Incarceration.pdf [https://perma.cc/4M4J-GMVL].

10. *See generally* Jacobs & Gottlieb, *supra* note 3.

11. Dallas Augustine & Margot Kushel, *Community Supervision, Housing Insecurity, and Homelessness*, 701 Annals Am. Acad. Pol. & Soc. Sci. 152, 16162 (2022); *see generally* Kajeepeta, *supra* note 8.

12. Augustine & Kushel, *supra* note 11, at 161–62; Kajeepeta, *supra* note 8, at 16.

13. Kajeepeta, *supra* note 8, at 16; Claire W. Herbert, Jeffrey D. Morenoff, & David J. Harding, *Homelessness and Housing Insecurity Among Former Prisoners*, 1 Russell Sage Found. J. Soc. Sci. 44, 52 (2015), https://www.rsfjournal.org/content/rsfjss/1/2/44.full.pdf.

14. Augustine & Kushel, *supra* note 11, at 161–62.

15. *Id.*; Kajeepeta, *supra* note 8, at 16.

16. Jacobs & Gottlieb, *supra* note 3, at 1106.

probation were 44% more likely to recidivate, those who lacked an address at the start of probation were 35% more likely to recidivate, and each residential transition increased an individual's risk of recidivism by 12%.[17] Providing stable housing reverses these trends. For formerly incarcerated individuals, stable housing has been linked to a 40% reduction in arrests, a 40% reduction in unique shelter visits, a 35% reduction in days spent in shelters, and a 40% reduction in emergency room visits—collectively cutting public expenditures across the criminal justice, homelessness, and healthcare systems.[18]

Crime and criminalization in the United States imposed an estimated economic burden of approximately $2.6 trillion in 2017, including $620 billion in direct monetary costs (such as medical expenses, lost productivity, property damage, and legal system costs) and an additional $1.95 trillion in quality-of-life losses borne by victims, family members, and society at large.[19] Expanding housing access for returning citizens helps reduce these expenses by decreasing the likelihood of repeated interactions with law enforcement, court systems, and correctional facilities.

Admittedly, removing discriminatory barriers may involve some public costs—such as increased demand for housing vouchers, additional administrative oversight, and, in some cases, supportive services like counseling or case management. However, the public expenditures associated with these housing interventions are typically far lower than the costs of homelessness, emergency medical care, or reincarceration. For example, it costs $1.2 billion more to incarcerate the 2,589 people imprisoned on Rikers Island than it would to provide them with supportive housing.[20] The average annual cost of supportive housing per person was estimated at $41,833, compared to $544,425 per person for incarceration.[21]

There are also perceived social costs: some community members may express concern about safety, neighborhood cohesion, or lower property values when individuals with criminal records move in.[22] However, studies of reentry housing and landlord practices suggest that these concerns are often overstated. There is little evidence that allowing formerly incarcerated people to access housing—particularly when combined with basic screening and lease enforcement—leads to increased neighborhood crime or decreased property values.[23] In fact, stable

17. *Id.*

18. Mary K. Cunningham et al., *Housing First Breaks the Homelessness-Jail Cycle*, URB. INST. (July 15, 2021), https://www.urban.org/features/housing-first-breaks-homelessness-jail-cycle [https://perma.cc/H5P5-5P8P].

19. TED R. MILLER ET AL., *Incidence and Costs of Personal and Property Crimes in the USA, 2017*, 12 J. BENEFIT-COST ANALYSIS 24, 41–42 (2021).

20. CORP. FOR SUPPORTIVE HOUS., ADVANCING SUPPORTIVE HOUSING SOLUTIONS TO REDUCE HOMELESSNESS FOR PEOPLE IMPACTED BY THE CRIMINAL LEGAL SYSTEM 3 (2022), https://www.csh.org/wp-content/uploads/2018/06/Cost-Effectiveness-FAQ.pdf [https://perma.cc/UWT9-VDNC].

21. *Id.* at 23.

22. IVIS GARCÍA, *The Value of Reentry Housing, Zoning, and "Not in My Back Yard" (NIMBY) Obstacles, and How to Overcome Them*, 13 LAND 275, 276, 286 (2024).

23. *Id.* at 4.

housing has been shown to reduce the likelihood of reoffending and promote better outcomes for individuals, families, and communities.[24]

The interplay between housing insecurity and recidivism has become particularly relevant in the wake of the Supreme Court's *City of Grants Pass v. Johnson* decision, which gave local governments more leeway to enact and enforce criminal penalties against homeless individuals for camping in public spaces.[25] This ruling intensifies the risks faced by formerly incarcerated people who, due to existing housing discrimination and other factors, are especially vulnerable to homelessness and its criminalization. Denying these individuals access to stable housing through policies that exclude people with criminal histories contributes to a vicious cycle of criminalization and homelessness.[26]

II. PHA Discretion in Screening Applicants for Public Housing and Voucher Programs

A. The Current Regulatory Landscape

Across the United States, 3,300 PHAs determine applicants' eligibility for public housing and Section 8 Housing Choice Vouchers under regulations set by HUD.[27] HUD regulations impose mandatory bans on admission to both public housing and voucher programs for two categories of applicants: (1) individuals convicted of manufacturing or producing methamphetamine on federally assisted housing premises, and (2) sex offenders subject to lifetime registration under a state sex offender registration program.[28] These mandatory exclusions are required by federal statute, meaning PHAs have no discretion to admit applicants who fall into these categories.[29]

Beyond these mandatory exclusions, HUD regulations also impose qualified (i.e., not absolute) exclusions in two distinct circumstances related to illegal drug use. These exclusions presumptively require denial unless specific exceptions apply. First, PHAs must deny admission to any public housing or voucher

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24. *Id.*

25. *See* City of Grants Pass v. Johnson, 603 U.S. 520 (2024); Jasmyn Hardin, *Stay Awake or Be Arrested: The Increasing Criminalization of Homelessness*, U. Cin. L. Rev. Blog (Jan. 6, 2025), https://uclawreview.org/2025/01/06/stay-awake-or-be-arrested-the-increasing-criminalization-of-homelessness/ [https://perma.cc/8NUW-UDWN].

26. Sam McCann, *Will the Supreme Court Criminalize Homelessness?*, Vera Inst. of Just. (June 6, 2024), https://www.vera.org/news/will-the-supreme-court-criminalize-homelessness [https://perma.cc/65XY-ZCMU]; Robert Davis, *Understanding the Potential Impact of* Johnson v. Grants Pass, Invisible People (May 20, 2024), https://invisiblepeople.tv/understanding-the-potential-impact-of-johnson-v-grants-pass/[https://perma.cc/H9RQ-EF8P].

27. *HUD's Public Housing Program*, U.S. Dep't Hous. & Urb. Dev., https://www.hud.gov/topics/rental_assistance/phprog [https://perma.cc/2KMV-GLRL] (last visited Mar. 10, 2025); *Housing Choice Vouchers Fact Sheet*, U.S. Dep't Hous. & Urb. Dev., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [https://perma.cc/6TWQ-YSQ7] (last visited Mar. 10, 2025).

28. 24 C.F.R. § 960.204(a)(3) (2025), (4); 24 C.F.R. § 982.553(a)(1)(ii)(C), (a)(2)(i) (2025).

29. *See* 42 U.S.C. § 13663(a) (1998); 42 U.S.C. § 1437n(f) (2016).

applicant who has been "evicted from federally assisted housing for drug-related criminal activity" within the past three years.[30] However, PHAs may override the presumption if they determine that the evicted household member has successfully completed a PHA-approved drug rehabilitation program or that "the circumstances leading to eviction no longer exist," for example, if the individual responsible for the drug-related activity is deceased or incarcerated.[31] If any of these exceptions apply, PHAs may exercise discretion in approving eligibility.

Separate from the eviction-based exclusion, HUD regulations also impose a qualified exclusion for applicants engaged in illegal drug use. PHAs must deny admission to public housing or the voucher program if they determine that a household member is "currently engaging in illegal use of a drug" or if they have "reasonable cause to believe that a household member's illegal drug use . . . may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents."[32] Unlike the eviction-based exclusion, this provision applies regardless of whether the household has been evicted and does not include explicit exceptions for rehabilitation or changed circumstances. However, this exclusion remains qualified rather than absolute, as PHAs retain some discretion in determining whether an applicant's drug use qualifies as "current" under HUD's regulatory definition.[33] Additionally, the "reasonable cause" standard introduces a subjective element, which may lead to varying interpretations across PHAs regarding what constitutes a risk to residents or property. Like the drug-related eviction provision, this prohibition is presumptively mandatory, as PHAs must deny admission in these cases unless they determine the drug use does not meet the regulatory definition of "current" or does not pose a threat.

Apart from these mandatory and presumptively mandatory denials, HUD regulations also grant PHAs broad authority to deny admission based on certain fully discretionary factors. Such discretionary denials are permissible when a household member has engaged in: (1) "drug-related criminal activity;" (2) "violent criminal activity;" (3) "other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents;" or (4) "other criminal activity which may threaten the health or safety of the owner," PHA, or any employee, contractor, subcontractor, or agent of the PHA or owner.[34] For PHAs administering vouchers, this discretion is explicitly limited to conduct that a household member is "currently engaged in, or has engaged in during a reasonable time before the admission," though HUD regulations do not define a fixed "reasonable" time frame, leaving PHAs to determine their own standards.[35]

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30. 24 C.F.R. § 982.553(a)(1)(i); 24 C.F.R. § 960.204(a)(1).

31. 24 C.F.R. § 982.553(a)(1)(i)(A), (B); 24 C.F.R. § 960.204(a)(1)(i), (ii).

32. 24 C.F.R. § 982.553(a)(1)(ii)(A), (B); 24 C.F.R. § 960.204(a)(2)(i), (ii).

33. 24 C.F.R. § 982.553(a)(2) and 24 C.F.R. § 960.204(a)(2) contain language that states, "For purposes of this section, a household member is "currently engaged in" criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current."

34. 24 C.F.R. § 982.553(a)(2)(ii).

35. *See id.*

Voucher regulations broadly state that a household member is "currently engaged in" criminal activity "if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current."[36] Public housing regulations, by contrast, allow PHAs to consider an applicant's past conduct more broadly, provided they determine that the conduct is "relevant."[37]

Both programs use the same substantive categories of criminal activity for permissive denials—drug-related, violent, and other activities that threaten the health, safety, or peaceful enjoyment of residents or PHA-affiliated personnel—but the discretion PHAs have in evaluating applicants differs depending on whether they are evaluating applicants for public housing or vouchers.[38] In the context of public housing admission, PHAs can review an applicant's full criminal history without a "reasonable time" limitation but are required to consider mitigating factors such as rehabilitation before issuing a denial.[39] However, current regulations do not require PHAs to conduct a structured or documented individualized assessment, nor do they provide specific, detailed procedural guidance on how mitigating factors should be weighed.[40] As a result, while denials must not be arbitrary, PHAs retain broad discretion in how they interpret and apply these standards. This can lead to significant variation in outcomes across jurisdictions and housing authorities, contributing to a lack of consistency and transparency in the admissions process.

In contrast, when evaluating applicants for the Housing Choice Voucher program, PHAs may only review conduct that occurred within a "reasonable time" before admission.[41] While PHAs may consider mitigating circumstances before making fully permissive denials, the voucher program regulations do not require them to do so explicitly, granting PHAs even broader discretion than in the public housing context.[42] This distinction reflects the fact that in the voucher program, eligibility screening by the PHA is separate from a landlord's decision to rent to a voucher holder. Once a PHA issues a voucher, private landlords participating in the program conduct their own independent screening process to choose among voucher holders to occupy their unit.[43]

B. The 2024 Proposed Rule

As they are currently written, HUD regulations do not prevent PHAs from categorically denying applicants based on certain criminal convictions, nor do they require PHAs to conduct an individualized assessment before issuing a

36. 24 C.F.R. § 982.553(a)(2)(ii)(C)(2).
37. 24 C.F.R. § 960.203(c).
38. 24 C.F.R. § 982.553(a); 24 C.F.R. § 960.204.
39. 24 C.F.R. § 960.203(d).
40. *See id.*
41. 24 C.F.R. § 982.553(a)(2)(ii)(A).
42. *See* 24 C.F.R. § 982.553.
43. 24 C.F.R. § 982.307(a)(2) ("The owner is responsible for screening and selection of the family to occupy the owner's unit.").

denial.[44] This allows PHAs to apply bright-line rules rather than evaluate applicants holistically.[45] As a result, PHAs may reject formerly incarcerated individuals solely based on past convictions, even when those convictions are not linked to tenant risk.[46] For example, current regulations would not prohibit a PHA from automatically denying a public housing or voucher applicant based on a seven-year-old shoplifting conviction, regardless of the fact that the applicant has no other criminal history, has completed a rehabilitation program, has maintained steady employment, and has a positive rental history.[47] As discussed in more detail below, while individualizing assessments may require more resources and training, the extra administrative costs can be minimized, and a holistic assessment will ultimately promote fairness in housing decisions.

In 2024, HUD proposed a rule that would have amended existing HUD regulations to prohibit PHAs from categorically denying applicants based on their criminal records.[48] Although commonly referred to as a "proposed rule," HUD's April 2024 action is technically a set of proposed regulatory amendments to multiple sections of the Code of Federal Regulations, including 24 C.F.R. §§ 960.203 and 982.553, which govern admissions to the public housing and voucher programs, respectively.[49] Rather than establishing a new standalone rule, the proposal represents a comprehensive overhaul of HUD's existing criminal records screening policies—modifying the regulatory text line by line to standardize how PHAs evaluate criminal history and require individualized assessments.[50] The proposed changes were published in the Federal Register as part of the formal notice-and-comment rulemaking process.[51]

The stated rationale for the proposed rule was to reduce arbitrary exclusions and ensure that criminal history-based denials more accurately reflect actual tenant risk.[52] Under this framework, PHAs would still be permitted to consider an applicant's criminal history for certain offenses, but only after conducting a case-by-case assessment of relevant mitigating circumstances.[53] The proposal would have also established a three-year lookback period—in other words, it would have

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44. Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 25332, at 25341 (proposed Apr. 9, 2024), available at https://www.regulations.gov/document/HUD-2024-0031-0001 [https://perma.cc/DVY3-RLHJ] ("PHAs and owners generally retain discretion in setting admission, termination of assistance, and eviction policies for their programs and properties.") [hereinafter 2024 Proposed Rule].

45. *See generally id.*

46. *Id.*

47. *See* U.S. Dep't Hous. & Urb. Dev., Regulatory Impact Analysis, Reducing Barriers to HUD-Assisted Housing, at 5 (Apr. 9, 2024), available at https://www.regulations.gov/document/HUD-2024-0031-0012 [https://perma.cc/538P-3M9Q] (providing examples of cases in which tenants have been denied housing based on irrelevant or outdated criminal history) [hereinafter Regulatory Impact Analysis].

48. 2024 Proposed Rule, *supra* note 44, at 25332.

49. *Id.* at 25332, 25349, 25355.

50. *Id.* at 25361–75.

51. *See generally id.*

52. *Id.* at 25332.

53. *Id.* at 25333.

created a rebuttable presumption that denying an applicant based on a criminal conviction more than three years old is unreasonable.[54] Further, it would have explicitly prohibited applicant denials based solely on arrest records and made other changes to strengthen due process and evidentiary standards.[55]

After receiving over 1,000 public comments—including a mix of strong support from civil rights organizations and sharp criticism from housing providers and landlord associations—HUD formally withdrew the proposed rule in the final days of the Biden administration in January 2025.[56] While HUD's official withdrawal notice did not provide a detailed explanation, analysts have pointed to both stakeholder opposition and the shifting political landscape after the 2024 election as key factors.[57] According to LeadingAge, HUD likely withdrew the rule to avoid its nullification by the incoming Congress and presidential administration under the Congressional Review Act (CRA), which allows Congress to overturn recently finalized regulations through a streamlined resolution process.[58] Once a rule is nullified under the CRA, the agency is barred from issuing a "substantially similar" rule in the future without new congressional authorization.[59] By voluntarily withdrawing the proposal, HUD preserved the option for a future Democratic administration to reintroduce similar reforms without being barred by the CRA's constraints.[60]

HUD should resurrect the proposed rule with minor refinements, as it largely strikes the proper balance between public safety and fair access to housing.[61] The rule would not prevent PHAs from considering criminal history, but it would require them to evaluate it in context, taking into account factors such as the nature of the offense, the time elapsed, and evidence of rehabilitation.[62] This approach avoids the overreach of categorical exclusions that can deny housing to individuals who pose no meaningful threat to resident safety or property.[63] By requiring individualized assessments and limiting the use of outdated convictions,

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54. *Id.*

55. *Id.*

56. *See* Reducing Barriers to HUD-Assisted Housing; Withdrawal, 90 Fed. Reg. 4686 (Jan. 16, 2025), https://www.govinfo.gov/content/pkg/FR-2025-01-16/pdf/2025-00996.pdf [https://perma.cc/YK6X-JB3W].

57. Linda Couch, *HUD Withdraws Two Proposed Rules*, LeadingAge (Jan. 18, 2025), https://leadingage.org/hud-withdraws-two-proposed-rules/ [https://perma.cc/J8US-YC37].

58. *Id.*

59. *See* 5 U.S.C. § 801.

60. Couch, *supra* note 57.

61. *See* Multi State Att'y Gen. Coal., Comment Letter on Proposed Rule for Reducing Barriers to HUD-Assisted Housing (June 10, 2024), at 7, https://www.nj.gov/oag/newsreleases24/2024-0611_Hud-Comments-14-AG.pdf [https://perma.cc/A85B-W3AA] ("Restricting the use of criminal records in evaluating housing applications will not only help close the revolving door of criminal system involvement and housing insecurity, it will help achieve the States' overall goal of promoting healthy communities and ensuring public safety.").

62. Regulatory Impact Analysis, *supra* note 47, at 3.

63. *See id.*; *see also* 2024 Proposed Rule, *supra* note 44, at 25359 ("This proposed rule would . . . ensure that providers are relying only on relevant information that indicates an actual threat to health, safety or quiet enjoyment of the premises; and not relying on irrelevant information . . .").

the rule would help prevent unnecessary exclusions while still allowing PHAs to assess legitimate risks.[64]

To be sure, implementing these requirements would impose additional administrative burdens on housing authorities, including the need for more staff training, documentation, and time-intensive evaluations.[65] However, as discussed in more detail in the sections that follow, these burdens can be mitigated through clear federal guidance, standardized assessment templates, and technical assistance—resources HUD already offers to program participants through its HUD Exchange online platform.[66] Moreover, the rule's emphasis on targeted review would reduce arbitrary denials and litigation risk, potentially lowering long-term administrative costs.[67]

Alternatively, in the absence of federal action, state and local governments can enact laws limiting the use of criminal history in housing decisions, as several jurisdictions—including Cook County, Illinois, New York City, New York, and Oakland, California—have already done.[68] While such laws cannot override federal regulations that govern PHA eligibility determinations, they can shape local PHA policies where discretion exists and can bind private landlords within their jurisdictions, including those who participate in the Section 8 voucher program.[69]

In the sections that follow, this Note will analyze the proposed changes in more detail, respond to critiques of the proposed rule, and explain why its adoption, with modest revisions, would promote both equitable access to housing and effective tenant screening practices in the public housing market.

1. The Individualized Assessment

While existing HUD regulations allow PHAs to conduct a fact-specific inquiry into each applicant, they do not require it, giving PHAs leeway to categorically reject applicants with criminal history that falls under a category of mandatory or permissive denials.[70] The proposed rule would not have changed this with respect to mandatory denials.[71] For example, under the proposed rule, if a prior conviction resulted in lifetime registration as a sex offender, the PHA would still be required to deny the applicant and therefore would not need to conduct a holistic assessment before doing

64. Regulatory Impact Analysis, *supra* note 47, at 3.

65. *Id.* at 12–13, 16–17 (estimating "Upfront $4,700,000" and "Annual $2,036,000–$2,888,000" in costs for training, documentation, and plan updates).

66. See *Program Support*, HUD Exchange, available at https://www.hudexchange.info/program-support/[https://perma.cc/Q892-EY2E] (offering guidance, training, tools, and technical assistance to HUD-funded program participants).

67. Regulatory Impact Analysis, *supra* note 47, at 18 (explaining that the benefits of the proposed rule likely outweigh the costs, in part because the rule "would reduce the risk of violating nondiscrimination laws for PHAs and assisted housing owners.").

68. *See, e.g.*, COOK COUNTY, ILL., CODE OF ORDINANCES § 42-38 (2020) (JUST HOUSING AMENDMENT); N.Y.C. ADMIN. CODE § 8-102a (2024) (Fair Chance for Housing Law); OAKLAND, CAL. MUN. CODE § 8.25.010 et seq. (2020) (Fair Chance Housing Ordinance).

69. *See* 24 C.F.R. § 982.52(a).

70. 2024 Proposed Rule, *supra* note 44, at 25333–34.

71. *Id.* at 25333–34.

so.[72] However, the rule would have significantly changed how PHAs approach discretionary denials, requiring a formal, individualized assessment before denying admission based on criminal activity falling under one of the four permissive denial categories.[73] Further, it would have clarified that PHAs may not expand the list of disqualifying offenses beyond those specifically enumerated in HUD regulations.[74] Notably, the individualized assessment requirement would have only applied to PHAs evaluating public housing and voucher applicants, not to private housing providers participating in the Housing Choice Voucher program.[75]

The proposed rule would have required PHAs to formally evaluate multiple factors before issuing a discretionary denial based on criminal history. Specifically, it would have required each assessment to consider the nature and severity of the offense, the time elapsed since the conduct occurred, and the extent to which the offense is relevant to tenancy suitability.[76] PHAs would also be required to consider evidence of rehabilitation, such as successful substance use treatment, stable employment, and positive housing history.[77] Additionally, applicants would have the right to present mitigating circumstances related to medical conditions or disabilities, and PHAs would be obligated to consider reasonable accommodations where appropriate.[78]

During the notice and comment period, housing industry groups expressed concern that the proposed individualized assessment framework would inhibit the discretion PHAs currently exercise in evaluating applicants.[79] However, that critique slightly mischaracterizes the requirement. The proposed rule would not have eliminated PHA discretion to deny applicants; rather, it would have channeled that discretion through a structured, individualized assessment process.[80] PHAs would still retain the authority to deny applicants after considering all required factors, but they could no longer rely on categorical exclusions without first engaging in a case-by-case evaluation.[81]

A more substantial objection to the proposed rule concerns the administrative burdens it would place on PHAs.[82] Requiring individualized assessments, along

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72. *See id.* at 25333.
73. *Id.*
74. *Id.*
75. *Id.* at 25357.
76. *Id.* at 25369, 25373.
77. *Id.*
78. *Id.*
79. Csl. for Affordable & Rural Hous. et al., Comment Letter on Proposed Rule for Reducing Barriers to HUD-Assisted Housing (June 10, 2024), at 8, https://www.regulations.gov/comment/HUD-2024-0031-1172 [https://perma.cc/N34A-2UCL] [hereinafter Associations Joint Comment].
80. 2024 Proposed Rule, *supra* note 44, at 25333 (explaining that the proposed rule would require "a fact-specific and individualized assessment of the applicant" but that "the ultimate decision as to whether to deny tenancy or admission would remain within [the provider's] discretion").
81. *Id.*
82. Associations Joint Comment, *supra* note 79, at 8 (arguing that the proposed rule would "impose an additional burden on owners and PHAs, cause unnecessary delay and expense, and would require an expertise beyond that which most owner and PHA staff possess").

with expanded notice and documentation obligations, would undoubtedly increase the time and effort required to process applications.[83] Housing authorities would need to train staff on how to conduct these assessments consistently, develop internal procedures for collecting and evaluating rehabilitation evidence, and maintain adequate documentation to demonstrate compliance.[84] Commenters in the housing industry emphasized that many PHAs—particularly small and mid-sized agencies—lack the staffing and resources to implement these requirements effectively.[85] For example, the Public Housing Authorities Directors Association (PHADA) described the proposed system as a potential "compliance nightmare," expressing concern not only about the increased workload but also about the absence of clear documentation standards and the risks of inconsistent or legally vulnerable decisions.[86] A joint comment submitted by several housing industry groups similarly warned that the rule would require additional staff with specialized knowledge and significantly increase the time required to process applications.[87]

However, these burdens are not insurmountable—particularly because many stem not from the principle of individualized review itself, but from the lack of clarity in how PHAs are expected to implement it. As written, the proposed rule requires PHAs to conduct a "fact-specific and individualized assessment" based on several factors.[88] Yet it does not specify how PHAs should weigh them, what constitutes sufficient documentation of the assessment for compliance purposes, or what types of evidence applicants must submit to demonstrate mitigating circumstances. This ambiguity increases the risk of confusion, inconsistent implementation, and exposure to legal liability—especially for agencies with limited administrative capacity.[89]

To mitigate these concerns, HUD could adopt several refinements to preserve the rule's core protections while simplifying implementation. First, HUD should issue standardized forms, checklists, and case examples to guide PHAs in applying the assessment requirement and reduce the administrative burden of designing new internal procedures from scratch. HUD should also amend the proposed rule to include a safe harbor provision protecting PHAs that follow HUD regulations in good faith from liability if their decisions are later challenged. This would also help address another concern housing providers have raised: that admitting applicants with criminal histories under the proposed framework could increase exposure to tort liability if those individuals later caused harm.[90] At a time when

83. *Id.*

84. Pub. Hous. Authorities Dir. Ass'n (PHADA), Comment Letter on Proposed Rule for Reducing Barriers to HUD-Assisted Housing (Jun. 10, 2024), at 3, 10, https://www.regulations.gov/comment/HUD-2024-0031-1145 [https://perma.cc/MK4C-CSWN] [hereinafter PHADA Comment].

85. *Id.* at 10.

86. *Id.*

87. Associations Joint Comment, *supra* note 79, at 15.

88. 2024 Proposed Rule, *supra* note 44, at 25333.

89. Associations Joint Comment, *supra* note 79, at 15–16.

90. *See id.* at 16; *see also* Consumer Data Indus. Ass'n Pro. Background Screening Ass'n & Nat'l Consumer Reporting Ass'n, Comment Letter on Proposed Rule for Reducing Barriers to HUD-Assisted

liability insurance is increasingly expensive and difficult to obtain—especially in the affordable housing sector—clarifying the legal protections available to PHAs and landlords will be crucial.[91] These refinements would not only alleviate the short-term administrative burden, but also promote consistency, defensibility, and fairness in housing admissions practices over the long term.

2. Three-Year Lookback Period

The proposed rule would establish a three-year lookback period, significantly changing how PHAs evaluate applicants with criminal histories. Currently, voucher program regulations allow PHAs to determine their own "reasonable time" period for considering past criminal activity, while public housing regulations impose no explicit time limit.[92] Under the proposed rule, PHAs would still have some discretion in defining a "reasonable time before admission," but any exclusion based on convictions more than three years old would be presumptively unreasonable.[93] PHAs could override this presumption only if they provide empirical evidence showing that a longer lookback period is necessary to protect resident safety and property security.[94] This language would be replicated in the regulations governing public housing admissions.[95]

A presumptive lookback period is necessary to ensure that PHAs consider only convictions that are probative of an applicant's current risk as a tenant. However, when considered alongside the proposed rule's individualized assessment requirement, a three-year lookback period may be too rigid. In its proposed rule, HUD cites studies indicating that recidivism risk decreases over time, but also acknowledges that individuals with prior convictions do not reach recidivism rates comparable to those without a criminal record until approximately six or seven years have passed.[96] Reflecting this concern, the National Association of Housing and Redevelopment Officials (NAHRO) argues in its comment that a lookback period closer to seven years would better align with empirical research on recidivism while still allowing PHAs to assess applicants on a case-by-case basis.[97] NAHRO also emphasizes that the lookback period functions as a ceiling,

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Housing (June 10, 2024), at 4, https://www.regulations.gov/comment/HUD-2024-0031-1178 [https://perma.cc/4F2M-E5FN] [hereinafter Consumer Data Comment].

91. *See* Associations Joint Comment, *supra* note 79, at 16; *see, e.g.*, Consumer Data Comment, *supra* note 90, at 4–6.

92. *See* 24 C.F.R. §§ 982.553; 960.203(c).

93. 2024 Proposed Rule, *supra* note 44, at 25374.

94. *Id.*

95. *Id.* at 25370.

96. 2024 Proposed Rule, *supra* note 44, at 25343 (citing Megan Kurlychek et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQ. 64 (2007)).

97. Nat'l Ass'n of Hous. & Redevelopment Officials, Comment Letter on Proposed Rule for Reducing Barriers to HUD-Assisted Housing (Jun. 10, 2024), at 4–5, https://www.regulations.gov/comment/HUD-2024-0031-1185 [https://perma.cc/3XJC-PAMA].

not a floor, as PHAs would retain full discretion to adopt shorter time frames if they choose.[98]

Given this, a longer presumptive lookback period—such as five to seven years—may better reflect the research HUD relies on while still supporting individualized review. Importantly, the ideal lookback period is unlikely to be the same for every type of conviction that PHAs may consider in their admissions decisions. Some offenses may remain probative for a longer period when assessing a person's suitability for tenancy, while others may lose predictive value more quickly. The proposed rule already recognizes the importance of individualized assessments by requiring PHAs to consider the nature, severity, and timing of past criminal conduct. By layering a universal three-year presumptive limit on top of that process, the rule risks undermining its own rationale for individualized review.

3. Strengthening Due Process and Evidentiary Standards

The proposed rule introduces several changes designed to strengthen due process protections for applicants and establish clearer evidentiary standards for PHAs. First, it would clarify that PHAs cannot deny an applicant based solely on an arrest record, recognizing that an arrest alone is not sufficient to prove criminal conduct.[99] PHAs would need evidence to prove that criminal conduct occurred before considering the behavior.[100] This change ensures that applicants are not unfairly denied housing based on unproven allegations while still allowing PHAs to consider relevant criminal history when supported by sufficient and reliable evidence.

Similarly, the proposed rule would require that any determination regarding an applicant's criminal history be based on a preponderance of the evidence standard and explicitly define this standard. Under the proposed definition, preponderance of the evidence means that, when considering all available evidence together, it must be more likely than not that the alleged conduct occurred.[101] The rule further requires PHAs to assess not only the existence of evidence but also its reliability and credibility, ensuring that denial decisions are grounded in substantial and verifiable information rather than speculation or unverified allegations.[102]

The rule would also clarify the definition of "current" criminal activity, a key factor in determining whether a PHA may mandatorily or discretionarily deny admission. Specifically, the rule would prohibit PHAs from relying solely on

98. *Id.*

99. 2024 Proposed Rule, *supra* note 44, at 25369, 25373; *see also* Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957); 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.").

100. 2024 Proposed Rule, *supra* note 44, at 25369, 25373.

101. *Id.* at 25349.

102. *Id.*

criminal activity that occurred more than twelve months prior to determine that an individual is "currently engaging in" such behavior.[103] As discussed above, a finding that a household member is "currently engaging in" illegal drug use triggers a mandatory exclusion, while the same determination with respect to other criminal activity grants PHAs discretionary authority to deny admission. Under the existing regulations, PHAs have broad discretion to determine what constitutes recent enough behavior to indicate ongoing criminal activity. PHAs would maintain discretion under this rule, but the rule would ensure that decisions are not based solely on outdated conduct. Additionally, under the proposed rule, any determination that an individual is "currently engaging in" criminal activity must be supported by a preponderance of the evidence and consider mitigating factors, such as rehabilitation or other evidence of changed behavior.[104]

HUD should revive its proposed rule with minor refinements to ensure that PHAs evaluate applicants fairly without resorting to blanket denials based on certain types of criminal records. The rule's individualized assessment and lookback period requirements balance the need for public safety with the goal of increasing housing access for those who have rehabilitated. While adjustments such as extending the lookback period to better align with recidivism data could improve the consistency of the rule overall and make it more palatable to housing providers, the core principles of the proposal reflect a necessary shift toward evidence-based and equitable housing policies. In the absence of federal action, state and local governments should enact similar protections to prevent unnecessary housing exclusions that perpetuate cycles of homelessness and incarceration.

III. Discrimination in the Private Market

HUD regulations generally do not apply to private landlords who do not participate in any HUD-sponsored programs. Therefore, most of the changes outlined in the proposed rule would not have affected them, and these housing providers retain broad discretion over tenant selection. As a result, private housing providers have in many cases instituted blanket bans for prospective renters with any criminal history.[105] In recent years, however, the Fair Housing Act (FHA) has emerged as a promising enforcement tool to challenge these policies. This section will discuss the history of the FHA and how it applies to criminal history-based discrimination in the private housing market, analyze recent litigation in this area, and suggest strategies for future litigation that will ultimately help improve housing access for individuals with criminal records.

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103. *Id.* at 25361.

104. *Id.*

105. *See* Nick Diaz, *Lawyers' Committee Opens Nationwide Inquiry Into Housing Providers That Impose "Blanket Bans" Upon Applicants Who Have Had Contact with the Criminal Justice System*, Lawyers' Comm. for Civil Rights Under Law (Apr. 4, 2016), https://www.lawyerscommittee.org/lawyers-committee-opens-nationwide-inquiry-housing-providers-impose-blanket-bans-upon-applicants-contact-criminal-justice-system/ [https://perma.cc/Y6QY-SE4P].

A. The Fair Housing Act

The proposed rule would not have applied to private landlords. However, it would have clarified that private landlords who accept Housing Choice Vouchers must conduct their screening consistent with the FHA.[106] Although HUD regulations do not govern how private landlords screen tenants outside federally assisted housing, developments in FHA case law—alongside interpretive guidance from HUD—have created an important legal pathway for challenging rental policies that rely on criminal history.

The FHA prohibits housing providers from discriminating in the sale or rental of housing on the basis of race, color, religion, sex, disability, familial status, or national origin.[107] Although criminal history itself is not a protected characteristic, policies that exclude applicants based on criminal records can violate the FHA if they disproportionately burden a protected class without adequate justification. This legal theory—known as disparate impact—was explicitly endorsed by the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which held that disparate impact claims are cognizable under the FHA.[108] The Court recognized that facially neutral policies may still violate the FHA if they result in unjustified discriminatory effects.

1. The 2016 HUD Guidance and its Role

Following the *Inclusive Communities* decision, HUD issued a guidance document in April 2016 entitled *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* ("2016 HUD Guidance").[109] The 2016 HUD Guidance clarified how HUD interprets the disparate impact standard under 24 C.F.R. § 100.500 when applied to tenant screening policies that rely on criminal records. It emphasized that blanket bans on renting to individuals with criminal histories are likely to disproportionately affect Black and Hispanic applicants due to systemic racial disparities in the criminal justice system.[110] As a result, it warned, such policies may violate the FHA unless they are necessary to achieve a substantial, legitimate, and nondiscriminatory interest and are supported by evidence.[111]

The 2016 HUD Guidance also outlines the analytical framework for evaluating both disparate impact and discriminatory intent claims under the FHA. For a disparate impact claim, a plaintiff (or HUD in an administrative proceeding) must make a threshold showing that a housing provider's criminal history screening policy results in a disparate impact on a protected group.[112] Plaintiffs typically

106. 2024 Proposed Rule, *supra* note 44, at 25372.
107. Fair Housing Act, 42 U.S.C. § 3604.
108. Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 519 (2015).
109. 2016 HUD GUIDANCE, *supra* note 7.
110. *Id.* at 10.
111. *Id.* at 2.
112. *Id.* at 3; *see also* 24 C.F.R. § 100.500(c)(1).

rely on statistical evidence demonstrating that members of a protected class—particularly Black or Hispanic applicants—are disproportionately affected by the policy.[113] This may include national, state, or local incarceration data showing higher arrest and conviction rates for certain racial or ethnic groups, or housing-specific data reflecting a pattern of disproportionate exclusions.[114] Several courts have accepted this approach. For example, in *Fortune Society v. Sandcastle Towers,* discussed in more detail below, the court allowed expert evidence showing disparities in citywide incarceration rates to support a disparate impact theory, even without site-specific applicant data.[115]

Once the plaintiff makes the threshold disparate impact showing, the burden shifts to the housing provider to demonstrate that the policy is necessary to achieve a substantial, legitimate, and nondiscriminatory interest—in other words, it is not a mere pretext for discrimination.[116] As the 2016 HUD Guidance emphasizes, general concerns about safety or property protection, without more, are not enough: the provider must show that the policy actually assists in achieving those goals and that it is based on objective evidence, not assumptions or stereotypes.[117] This means that categorical exclusions based on any criminal record—without considering the nature, severity, and timing of the offense—are unlikely to satisfy the requirement.[118] The 2016 HUD Guidance also cautions that arrest records alone, without subsequent convictions, cannot serve as a valid basis for exclusion—a position grounded in the constitutional presumption of innocence and supported by Supreme Court precedent holding that an arrest, without more, has little probative value.[119]

Even where a provider establishes a substantial and legitimate interest, the plaintiff may still prevail by showing that a less discriminatory alternative could serve that interest equally well. The 2016 HUD Guidance strongly encourages individualized assessments that consider factors like the nature of the offense, time elapsed, and evidence of rehabilitation, rather than relying on automatic exclusions.[120] Courts have affirmed the viability of this approach. For example, in *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions*, the court denied summary judgment on plaintiffs' disparate impact claim, citing the defendant's continued reliance on arrest records and lack of individualized

113. 2016 HUD GUIDANCE, *supra* note 7, at 3.

114. *Id.* at 3–4; *see also* DEMETRIA L. MCCAIN, U.S. DEP'T OF HOUS. & URB. DEV., IMPLEMENTATION OF THE OFFICE OF GEN. COUNS.'S GUIDANCE ON APPLICATION OF FAIR HOUS. ACT STANDARDS TO THE USE OF CRIM. RECORDS BY PROVIDERS OF HOUS. AND REAL EST.-RELATED TRANSACTIONS, at 5–6 (June 10, 2022) [hereinafter 2022 HUD MEMORANDUM].

115. Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp., 388 F. Supp. 3d 145, 164–66 (E.D.N.Y. 2019).

116. 2016 HUD GUIDANCE, *supra* note 7, at 4.

117. *Id.* at 5.

118. *Id.* at 7; *see also Fortune Soc'y*, 388 F. Supp. 3d at 165–66.

119. 2016 HUD GUIDANCE, *supra* note 7, at 5 (citing Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957)).

120. *Id.* at 7.

review as sufficient to raise a triable issue.[121] The court also found that CoreLogic's decision to maintain its policy despite being on notice of HUD's legal interpretation supported a triable issue on discriminatory intent.[122]

A discriminatory intent claim may arise if a housing provider selectively enforces its policy against applicants of a particular race. Because direct evidence of intent is rare, the FHA uses the traditional burden-shifting framework: the plaintiff must show that they are a member of a protected class, applied for housing, were rejected based on criminal history, and that a similarly situated applicant outside the protected class was treated more favorably.[123] If the plaintiff can make this showing, the burden shifts to the housing provider to show evidence of a legitimate, nondiscriminatory reason for the denial.[124] While refusing to rent due to an applicant's criminal record can, in some cases, constitute a valid reason, a plaintiff or HUD may still demonstrate that the stated rationale was merely a pretext for unlawful discrimination. Courts may infer pretext from patterns of inconsistent enforcement. For instance, applying the policy strictly against Black or Hispanic applicants but making exceptions for white applicants, or allowing some applicants to explain their record while denying that opportunity to others, can support an inference of pretext.[125] A shifting or inconsistent explanation for the denial, or evidence that the landlord was unaware of the applicant's criminal history at the time of the decision, may also suggest discriminatory intent.[126] Ultimately, whether discrimination occurred depends on the facts of each case, but the guidance emphasizes that criminal history policies must be applied consistently and fairly to avoid serving as a cover for intentional discrimination.[127]

Importantly, the 2016 HUD Guidance is not a legislative rule and does not carry the force of law. Courts have generally treated it as an interpretive rule—a document meant to clarify how HUD understands and enforces existing law.[128] In *Jackson v. Tryon Park Apartments*, the court explicitly held that the 2016 HUD Guidance was interpretive because it was not issued through notice-and-comment rulemaking and did not independently impose legal obligations.[129] Still, the court relied on the 2016 HUD Guidance in denying a motion to dismiss a disparate impact claim, treating it as a persuasive interpretation of how the FHA applies to criminal history screening.[130]

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121. Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 289–94 (D. Conn. 2020).

122. *Id.* at 304.

123. 2016 HUD GUIDANCE, *supra* note 7, at 8–9.

124. *Id.* at 9 (citing Lindsay v. Yates, 578 F.3d 407, 415 (6th Cir. 2009)).

125. *Id*. at 8–9; *see also* 2022 HUD MEMORANDUM, *supra* note 114, at 3–4.

126. 2016 HUD GUIDANCE, *supra* note 7, at 9.

127. *Id.* at 9–10.

128. *See* Jackson v. Tryon Park Apartments, No. 18-CV-6238, 2019 WL 331635, at *4 (W.D.N.Y. Jan. 25, 2019).

129. *Id.* ("To the contrary, the Court finds that the HUD Guidance Document was at most an interpretive rule.").

130. *Id.* at *5.

Similarly, in *Connecticut Fair Housing Center v. CoreLogic*, the court described the 2016 HUD Guidance as a nonbinding clarification of how disparate impact claims apply to criminal history screening under 24 C.F.R. § 100.500.[131] Nevertheless, the court relied on the guidance in both its motion to dismiss and summary judgment rulings to evaluate the plaintiffs' theory that the defendant's tenant screening policy—which relied heavily on arrest records without individualized review—could have a disparate impact on Black and Hispanic applicants. In its 2020 opinion denying summary judgment in part, the court made repeated reference to the 2016 HUD Guidance in concluding that the plaintiffs raised a triable issue as to whether the defendant's screening policy violated the FHA.[132]

In June 2022, HUD issued a memorandum titled Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records to provide enforcement-focused instructions for HUD investigators and fair housing partners.[133] This memorandum reinforced the legal interpretations set out in the 2016 HUD Guidance and emphasized that improper use of criminal history can give rise to FHA liability under both disparate impact and discriminatory intent claims.[134]

The 2022 memorandum operationalizes the 2016 HUD Guidance by instructing Fair Housing and Equal Opportunity (FHEO) investigators, Fair Housing Initiatives Program grantees (FHIPs), and Fair Housing Assistance Program agencies (FHAPs) on how to assess both facially neutral policies and discriminatory enforcement. It urges investigators to scrutinize not only the written policy but also how it is applied in practice, and provides concrete examples of evidence that may support a finding of intentional discrimination.[135]

To strengthen its legal authority and improve enforcement outcomes, HUD should consider promulgating this Guidance through notice-and-comment rulemaking. Formalizing the Guidance as a legislative rule would give it binding legal effect, reduce ambiguity for housing providers, and enhance its value in both agency investigations and judicial proceedings. This would also allow HUD to clarify key evidentiary issues—such as the appropriate use of national versus local incarceration data and the need for individualized review—in ways that carry greater weight with courts. In turn, codification could promote more consistent application of the FHA's disparate impact standard and reduce the need for plaintiffs to reestablish foundational principles through costly and uncertain litigation.

131. Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362, 371 (D. Conn. 2019).

132. Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 292–99, 304 (D. Conn. 2020).

133. 2022 HUD MEMORANDUM, *supra* note 114 at 1.

134. *Id.* at 3.

135. *Id.* at 4.

2. The *Fortune Society* Case

While the 2016 HUD Guidance and the 2022 memorandum offer valuable frameworks for addressing criminal history-based discrimination, their non-binding nature limits their enforceability. Because private landlords who do not receive federal funds are generally exempt from HUD regulations, litigation under the FHA remains one of the few viable tools for challenging exclusionary screening policies. One recent case that illustrates the potential of litigation in this area is *Fortune Society v. Sandcastle Towers Housing Development Fund*.[136] This case demonstrates how advocates can use FHA disparate impact claims to challenge blanket bans on renting to individuals with criminal records and suggests strategies for future litigation to enhance housing access for people with past convictions.

The plaintiff, The Fortune Society ("Fortune"), is a non-profit organization that provides housing to formerly incarcerated individuals in New York City.[137] Fortune attempted to rent apartments for its clients at the Sandcastle Towers, a scattered-site apartment complex in Queens, New York. When Sandcastle Towers learned that Fortune was seeking the apartments for formerly incarcerated individuals, they refused to rent the apartments, citing their policy against renting to people with criminal convictions.[138] Fortune filed suit, arguing that the blanket ban was unlawfully discriminatory in that it disproportionately impacted African Americans and Hispanics in New York City relative to whites.[139]

In July 2019, the court issued an opinion denying the defendant's motion for summary judgment and allowing the case to proceed to trial.[140] Importantly, the opinion rejected the defendant's argument that Fortune itself was not harmed by the policy and therefore lacked standing to sue.[141] The court clarified that, under the FHA, a nonprofit organization does not need to be a direct tenant or applicant to bring claims; rather, the key inquiry is whether the organization suffered a "perceptible impairment" in its operations due to the alleged discrimination.[142] The court found that Fortune had suffered a concrete and particularized injury because the organization had to divert significant time and financial resources to secure alternative housing for its clients.[143]

For example, Fortune demonstrated that one of its employees dedicated nearly fifty hours per month over the course of one year to finding housing for clients who would have otherwise been placed at Sandcastle Towers.[144] Additionally, the organization had to hire an extra staff member solely to assist in housing placements for

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136. Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp., 388 F. Supp. 3d 145 (E.D.N.Y. 2019).
137. *Id.* at 159.
138. *Id.* at 159–160.
139. *Id.* at 152.
140. *Id.* at 179.
141. *Id.* at 163–66.
142. *Id.* at 163–64.
143. *Id.* at 164.
144. *Id.* at 161.

rejected clients.[145] Fortune also provided documentation showing that securing alternative housing for these clients led to $65,000 in costs due to higher rents.[146]

This aspect of the ruling paves the way for other advocacy organizations that focus on criminal justice in housing to challenge blanket bans on people with convictions in their communities. Nonprofits, unlike individual tenants, often have the institutional knowledge, legal expertise, and financial resources necessary to effectively challenge these practices. By affirming that organizations can establish standing based on operational impairment, the court's decision encourages nonprofits to systematically document the tangible costs and resource diversions caused by exclusionary policies. This decision shows that, by collecting detailed evidence of the burdens imposed by discriminatory practices, including staff time, financial expenditures, and client displacement, nonprofits can make the threshold showing necessary to bring an FHA claim.

The *Fortune Society* opinion also found that the plaintiff's expert testimony on statistical disparities in incarceration rates and their impact on access to housing was sufficiently relevant and reliable to be admissible as evidence of disparate impact.[147] The expert's report assessed whether the exclusion of individuals with criminal history disproportionately affected African Americans and Hispanics compared to whites in the New York City housing market.[148] To achieve this, the expert relied on incarceration risk data and examined multiple geographic areas—including Queens, New York, and the broader New York City metro area—across various income levels.[149] Using a "Z test" for statistical significance, the plaintiff's expert demonstrated that the racial disparities in incarceration rates were statistically significant; in other words, they were not due to chance.[150]

Defendants sought to exclude this testimony, arguing that the expert did not use demographic data specific to Sandcastle Towers.[151] However, the court rejected these arguments, emphasizing that statistical analysis of the *potential* applicant pool, rather than just the *actual* applicants, is often appropriate in disparate impact cases.[152] This is particularly true when a discriminatory criminal history-based policy may deter applicants from applying in the first place.[153] By affirming this principle, the court made it easier for future plaintiffs to prove housing discrimination even when landlords claim that the actual applicant pool does not show racial disparities. The ruling recognizes that the absence of disparities among actual applicants does not necessarily mean a policy is nondiscriminatory under the FHA. If the policy deters certain groups

145. *Id.* at 164.
146. *Id.*
147. *Id.* at 170.
148. *Id.* at 169.
149. *Id.*
150. *Id.* at 169–70.
151. *Id.* at 170.
152. *Id.*
153. *Id.*

from applying in the first place, courts may be willing to recognize that its disparate impact is hidden in the broader housing market.

In October 2019, before the case proceeded to trial, the parties in the *Fortune* case reached a landmark settlement.[154] The owners of Sandcastle Towers agreed to pay Fortune $1.1875 million in damages, marking one of the largest settlements in a case challenging a ban on renting to individuals with criminal records.[155] Additionally, the press release announcing the settlement noted that the defendants had sold Sandcastle Towers and no longer owned or managed rental real estate.[156] This settlement not only provided significant financial compensation for the affected organization but also set a powerful precedent, reinforcing the applicability of the FHA to challenges of blanket bans on renting to individuals with criminal histories.

Moreover, the size of the settlement sends a strong message to other landlords and property managers who may seek to impose similar exclusionary policies. The financial and reputational risks associated with such litigation may deter housing providers from categorically denying individuals with criminal records, particularly when those policies are not tied to legitimate concerns about tenant safety or property security. As JoAnne Page, President and CEO of Fortune, noted, this settlement should serve as a warning to landlords who engage in discriminatory housing practices under the assumption that their policies will go unchallenged.[157]

Beyond deterrence, the *Fortune Society* case provides a strategic roadmap for future litigation aimed at dismantling criminal history-based housing discrimination. By leveraging disparate impact claims under the FHA, housing advocates and legal organizations can challenge policies that, while facially neutral, have a disproportionately negative effect on communities of color. The case also highlights the importance of expert testimony and statistical analysis in proving housing discrimination, particularly in contexts where discriminatory policies discourage applications from affected individuals. Future advocacy efforts can build on this precedent by continuing to document the systemic barriers that formerly incarcerated individuals face in securing stable housing and using data-driven litigation strategies to challenge unlawful exclusionary practices.

However, *Fortune Society* also illustrates the burdens associated with relying on litigation to enforce fair housing protections. Although the court's reasoning closely tracked HUD's 2016 Guidance, the plaintiff still had to compile extensive statistical evidence, retain an expert witness, and demonstrate organizational

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154. *Landmark Settlement of Lawsuit Establishing National Precedent That Advocacy Organization Can Challenge Private Landlords' Blanket Ban on Renting Apartments to People with Criminal Records*, THE FORTUNE SOCIETY (Nov. 5, 2019), https://fortunesociety.org/media_center/landmark-settlement-of-lawsuit-establishing-national-precedent-that-advocacy-organization-can-challenge-private-landlords-blanket-ban-on-renting-apartments-to-people-with-criminal-records/[https://perma.cc/HUP7-6EL8] [hereinafter *Fortune Press Release*].

155. *Id.*

156. *Id.*; *Landmark $1,187,500 Settlement Reached in Fair Housing Case Challenging Criminal Record Ban*, RELMAN COLFAX, (Nov. 5, 2019), https://www.relmanlaw.com/news-206 [https://perma.cc/WP6H-DHLE].

157. *Fortune Press Release*, *supra* note 154.

injury to proceed beyond summary judgment. This reflects a broader structural gap in FHA enforcement: while HUD has clearly articulated how criminal history screening may violate the Act and courts have treated it as persuasive authority, its nonbinding nature limits its legal force. Promulgating the guidance through notice-and-comment rulemaking would address this limitation directly, codifying key standards and reducing reliance on case-by-case litigation to clarify FHA obligations. Doing so would formalize the framework under 24 C.F.R. § 100.500, provide regulated parties with greater clarity, and give courts firmer ground to rely on when adjudicating these claims.

Conclusion

The intersection of housing policy and criminal history screening creates significant barriers for individuals with past convictions, perpetuating housing instability and racial disparities. The withdrawal of HUD's proposed rule has left a critical gap in protections, underscoring the urgent need for policies that prevent federally assisted housing providers from imposing unnecessary restrictions on individuals with criminal records. While the rule aimed to address these issues in federally assisted housing, private landlords remain largely unconstrained, often imposing blanket bans that disproportionately impact Black and Hispanic applicants. The Fair Housing Act has emerged as a crucial tool in challenging these discriminatory practices, with legal precedents and HUD guidance affirming that such policies may constitute unlawful disparate impact. Cases like *Fortune Society* demonstrate the power of litigation in holding landlords accountable and securing meaningful change, reinforcing the necessity of individualized assessments over categorical exclusions. Moving forward, reinstating and strengthening reforms like the withdrawn HUD proposed rule, alongside continued advocacy and litigation, is essential to dismantling systemic barriers, ensuring fair access to housing, and fostering more inclusive communities.