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Office of the General Counsel
Regulations Division
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union Foundation (“ACLU”) and the New York Civil Liberties Union (“NYCLU”) in response to the U.S. Department of Housing and Urban Development’s (“HUD’s”) Proposed Rulemaking: Reducing Barriers to HUD-Assisted Housing (hereinafter the “Proposed Rule”), which was published in the Federal Register on April 10, 2024 (HUD Docket No. FR–6362–P–01; RIN 2501–AE08).

For over 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in the country. With more than three million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the right of every individual to access housing free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, national origin, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. These comments are also joined by the NYCLU, the New York affiliate of the ACLU, which contributed its insights from experiences with addressing barriers to fair and affordable housing in New York state.¹

For the last several years, the ACLU has engaged in a range of advocacy to end discriminatory tenant practices, particularly related to overbroad criminal and eviction record screening policies and discriminatory criminal activity nuisance ordinances and crime-free housing programs. The ACLU Racial Justice Program has challenged criminal record screening policies, which disproportionately lock people of color out of housing.² The ACLU Women’s Rights Project has

¹ The NYCLU, founded in 1951 as the New York affiliate of the ACLU, is a not-for-profit, nonpartisan organization with eight chapters and regional offices, and more than 160,000 members across New York State. Its mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, and the right to privacy, equality, and due process of law, with particular attention to the pervasive and persistent harms of racism.

² See, e.g., *Jones v. City of Faribault*, No. 18-1643, 2021 WL 1192466, at *24 (D. Minn. Feb. 18, 2021) (denying the city’s motion for summary judgment on all claims save for one theory in an action challenging the city’s rental licensing ordinance including its crime-free housing program); *ACLU Wins Settlement to End Housing Discrimination Case*, ACLU (June 15, 2022), <https://www.aclu.org/press-releases/aclu-wins-settlement-end-housing-discrimination-case>; Rachel Goodman, *Savannah Police Suspend Its Discriminatory ‘Crime Free Housing Program’*, ACLU (Feb. 1, 2018), <https://www.aclu.org/news/racial-justice/savannah-police-suspend-its-discriminatory-crime-free>; *HOME Settles Race Discrimination Lawsuit Against Sterling Glen Apartments*, ACLU OF VIRGINIA & ACLU (Aug. 6, 2019), <https://www.acluva.org/en/press-releases/home-settles-race-discrimination-lawsuit-against-sterling-glen-apartments-settlement>.

engaged in litigation and policy advocacy to combat overbroad and unjust eviction record screening policies because of their disparate impact on Black women and their families.³ This comment draws from this experience.

The ACLU strongly supports the adoption of HUD’s Proposed Rule, which is a critical step to ensuring that all people have access to safe and affordable housing regardless of their criminal or eviction history, and regardless of alleged criminal activity. We applaud HUD for clarifying what counts as relevant criminal activity, effectively establishing presumptive limitations on a lookback period, specifying procedural requirements before denials, requiring a fact-specific and individualized assessment, requiring revision and visibility of updated policies, expanding confidentiality and consent requirements for criminal records checks, and specifying the standard of proof in exclusions, among other changes.

We urge HUD to finalize the Proposed Rule expeditiously to ensure that public housing authorities (“PHAs”) and assisted housing owners reduce barriers to HUD-assisted housing by minimizing unnecessary and discriminatory exclusions while ensuring the health and safety of residents, staff, and communities. We further recommend that HUD consider and implement the following:

1. Provide further limits and clarity regarding what criminal records PHAs and owners may consider, *see infra* [Section II\(a\)](#);
2. Further limit and clarify relevant lookback periods, *see infra* [Section II\(b\)](#);
3. Require PHAs and owners to impose additional procedural requirements before and after any potential denial, *see infra* [Section II\(c\)](#);
4. Modify and more fully explain the factors relevant to an individualized assessment that PHAs and owners must consider, *see infra* [Section II\(d\)](#);
5. Clarify the preponderance of evidence standard, *see infra* [Section II\(e\)](#); and
6. Strengthen tenant engagement requirements, *see infra* [Section II\(f\)](#).

I. The Proposed Rule is a Necessary Step to Remove Arbitrary Barriers that Lock Historically Marginalized and Vulnerable Groups Out of Housing.

Adopting this Proposed Rule on reducing barriers to HUD-assisted housing is a critical step forward in ensuring that all people in our communities have access to safe and affordable housing, and that no one is denied housing or evicted because of arbitrary and unnecessary policies.

³ *Smith v. Wasatch*, No. 2:17-cv-00501 (W.D. Wash. Oct. 30, 2017), <https://www.aclu.org/cases/nikita-smith-v-wasatch-property-management-inc-et-al?document=smith-v-wasatch-property-management-complaint>; *Promoting Housing Opportunity and Mobility Through Eviction Sealing (HOMES): Hearing on H. 1690 & S. 956 Before the Joint Comm. on the Judiciary*, 2023 Leg., 193rd Sess. (Mass. May 9, 2023) (statement of the ACLU and the ACLU of Massachusetts), https://www.aclum.org/sites/default/files/aclu_aclum_joint_testimony_-_ma_homes_act_-_5.9.23-3.pdf; *Submission of Sandra Park, Senior Staff Att’y of the ACLU’s Women’s Rights Project, to the New York Advisory Comm. to the U.S. Comm’n on Civil Rights*, ACLU (July 23, 2021), <https://www.aclu.org/how-evictions-result-intersectional-racial-and-gender-discrimination-testimony-sandra-s-park-senior>.

a. Criminal and Eviction Record Screening and Overly Broad Eviction Policies Disproportionately Harm Protected Groups.

In enacting the FHA in 1968, just one week after the assassination of Martin Luther King, Jr., Congress expressed its intent to root out the various forms of discrimination in housing and to provide for fair housing throughout the United States.⁴ For decades, the FHA has been instrumental in protecting renters across the country from discriminatory policies and practices.⁵ However, historically marginalized and vulnerable communities continue to encounter significant barriers to equal housing opportunities, such as overly restrictive tenant screening policies that categorically deny housing to individuals with any prior criminal or eviction history, and overbroad policies that evict tenants and families based on alleged criminal activity.⁶

Such policies disproportionately and unfairly harm Black, Latine, and Native American individuals because of the stark racial disparities that exist in the United States criminal legal system due to over-policing and systemic bias. For example, “Black people represent roughly 13 percent of the [U.S.] population but account for roughly 27 percent of arrests.”⁷ Black people are arrested more often than white people for the same conduct, including for low level offenses like trespassing, disorderly conduct, consuming in public, lurking, and marijuana use.⁸ Moreover, Black, Latine, and Native American people are among those who are more likely to experience incarceration.⁹ In 2021, Black people were incarcerated at a rate 5 times that of white people, whereas Native American and Latine people were incarcerated at 4.2 times and 2.4 times the rate of white people, respectively.¹⁰ Housing policies and practices that exclude applicants with a history of involvement with the criminal legal system thus disproportionately deny housing opportunities to renters of color.

These harms exist despite the fact that criminal history is not a predictor of housing success, and there is no empirical evidence that justifies broad exclusions of people with criminal histories from housing.¹¹ For example, a study including data from more than 10,500 households found that, at minimum, 11 of 15 criminal offense categories have no significant effect on housing outcomes

⁴ 42 U.S.C. § 3601 *et seq.*; Sandra Park, *Why Fair Housing is Key to Systemic Equality*, ACLU (May 5, 2023), <https://www.aclu.org/news/racial-justice/why-fair-housing-is-key-to-systemic-equality>.

⁵ See Park, *supra* note 4.

⁶ See *id.*

⁷ Susan Nembhard & Lily Robin, *Racial and Ethnic Disparities Throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, URB. INST. 4 (Aug. 2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf>.

⁸ See, e.g., *Picking Up the Pieces: A Minneapolis Case Study*, ACLU, <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces> (last visited June 7, 2024); Ezekiel Edwards, et al., *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (2020), https://www.aclu.org/wp-content/uploads/publications/marijuanareport_03232021.pdf.

⁹ Nazgol Ghandnoosh, *One in Five: Ending Inequity in Incarceration*, THE SENTENCING PROJECT 3 (Oct. 11, 2023), <https://www.sentencingproject.org/reports/one-in-five-ending-racial-inequity-in-incarceration>.

¹⁰ *Id.* at 6.

¹¹ OFF. OF POL’Y DEV. AND RSCH, U.S. DEP’T OF HOUS. AND URB. DEV., *TENANT SCREENING WITH CRIMINAL BACKGROUND CHECKS: PREDICTIONS AND PERCEPTIONS ARE NOT CAUSALITY* (May 17, 2022), <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html> [hereinafter *Predictions and Perceptions are not Causality*].

(i.e., on the resident's reason for move-out), and any effect of a prior criminal offense on a resident's housing outcome declines over time and becomes insignificant.¹²

Screening out housing applicants based on their criminal records or otherwise punishing them for alleged criminal activity is also inextricably linked to the crisis of homelessness across the country. Criminal legal system involvement and homelessness are part of a vicious cycle. Unhoused people are at an elevated risk of arrest and incarceration, often due to laws that criminalize homelessness.¹³ From 2017 to 2020, 50% of arrests in Portland, Oregon, 42% of arrests in Sacramento, California, and 24% of arrests in Los Angeles, California, were of unhoused people.¹⁴ Yet, arrests and incarceration often result in homelessness—at least 50,000 people enter shelters directly from correctional facilities each year.¹⁵ Moreover, people who have been to prison just once experience homelessness at a rate nearly seven times higher than the general public, while those who have been incarcerated more than once experience rates nearly thirteen times higher.¹⁶ Thus, substantial harms continue to stem from the consideration of criminal records in housing decisions, particularly in unhoused communities and communities of color.

Evicting tenants and their families based on criminal activity at or near the home or screening applicants out based on eviction records also targets and disproportionately harms survivors of gender-based violence. Because these policies frequently penalize households for criminal activity allegedly occurring in the home, they have been used to punish and cause the eviction of survivors of domestic violence.¹⁷ The harmful effects of housing instability are compounded for Black women, Native American women, and other women of color, who face both increased barriers to housing and disproportionate rates of violence.¹⁸ HUD has repeatedly named housing

¹² Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, WILDER RESEARCH (Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

¹³ See *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY 71 (Dec. 2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> ("Unhoused people are arrested at disproportionate rates across the country, and they are as much as 11 times more likely than housed people to be jailed.").

¹⁴ Melissa Lewis, *Police Know Arrest Won't Fix Homelessness. They Keep Making Them Anyway*, REVEAL (June 23, 2022), <https://revealnews.org/article/homeless-unhoused-police-arrests-west-coast-cities>.

¹⁵ See U.S. DEP'T OF HOUS. AND URBAN DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 2: ESTIMATES OF HOMELESSNESS IN THE UNITED STATES 1-14 (Oct. 2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2017-ahar-part-2.pdf>.

¹⁶ Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>.

¹⁷ See, e.g., Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117 (2012),

https://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr__0.pdf; Gretchen W. Arnold, *From Victim to Offender: How Nuisance Property Laws Affect Battered Women*, 34 J. OF INTERPERSONAL VIOLENCE 1103 (May 2016), <https://journals.sagepub.com/doi/10.1177/0886260516647512>; *Silenced: How Nuisance Ordinances Punish Crime Victims in New York*, ACLU WOMEN'S RIGHTS PROJECT & SOC. SCIENCE RSCH. COUNCIL (June 2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf; Joseph Mead et al., *Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio*, CLEVELAND STATE UNIV. (Nov. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067028.

¹⁸ See Monica McLaughlin & Debbie Fox, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking*, NAT'L NETWORK TO END DOMESTIC VIOLENCE 6-6 (2019), https://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf; see also Carolyn M.

discrimination against domestic violence survivors, and specifically the use of programs with policies that punish and threaten their housing, to be a significant fair housing issue,¹⁹ as women account for the vast majority of domestic violence survivors.²⁰ Indeed, HUD previously identified repeal of laws that contain these harmful policies as a step jurisdictions may take to affirmatively further fair housing.²¹

Furthermore, eviction record screening policies contribute to growing racial and gender disparities in housing opportunities. Given the stark racial and gender disparities among evicted Americans, overbroad eviction record screening policies disproportionately harm tenants of color, and particularly Black women.²² HUD has acknowledged that “non-white households may be more likely to face eviction actions, even for the same housing history as white counterparts.”²³ In fact, Black and Latine renters are consistently over-represented among households facing eviction despite their relative share of the renter population.²⁴ These disparities are even starker for women renters, specifically Black and Latine women, who face higher eviction rates than men.²⁵ For instance, an analysis of eviction data conducted by the ACLU Data Analytics Team found that Black women experience eviction at double the rate of

West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, NAT’L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (Mar. 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf; NAT’L CTR. FOR INJ. PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010-2012 STATE REPORT (Apr. 2017), <https://stacks.cdc.gov/view/cdc/46305>.

¹⁹ See, e.g., OFF. OF GEN. COUNS., U.S. DEP’T OF HOUS. AND URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES (Sept. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGNCE.PDF> [hereinafter HUD Local Nuisance Guidance]; OFF. OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. AND URBAN DEV., MEM. FROM SARA K. PRATT, DEPUTY ASSISTANT SEC’Y FOR ENF’T AND PROGRAMS, ON ASSESSING CLAIMS OF HOUSING DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE UNDER THE FAIR HOUSING ACT (FHA) AND THE VIOLENCE AGAINST WOMEN ACT (VAWA) (Feb. 9, 2011), <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>.

²⁰ NAT’L CTR. FOR INJ. PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 7–9 (Nov. 2018), <https://stacks.cdc.gov/view/cdc/60893>; see also Melissa Jeltsen & Alissa Scheller, *At Least a Third of All Women Murdered in the U.S. Are Killed by Male Partners*, HUFFPOST (OCT. 9, 2014), https://www.huffpost.com/entry/men-killing-women-domesti_n_5927140 (last updated Dec. 6, 2017).

²¹ See HUD Local Nuisance Guidance, *supra* note 19, at 12–13.

²² Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCIENCE 649 (Dec. 16, 2020), https://sociologicalscience.com/download/vol-7/december/SocSci_v7_649to662.pdf; see also Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, EVICTION LAB (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction>.

²³ OFF. OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY (FHEO) GUIDANCE ON COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT IN MARKETING AND APPLICATION PROCESSING AT SUBSIDIZED MULTIFAMILY PROPERTIES 7 (Apr. 21, 2022), <https://archives.hud.gov/news/2022/HUD-Title-VI-Guidance-Multifamily-Marketing-and-Application-Processing.pdf> [hereinafter HUD Multifamily Guidance].

²⁴ Hepburn et al., *supra* note 22, at 657–59 (“One in every five adult renters in our sample was black, yet one in every three eviction filings were served to a black renter.”).

²⁵ *Id.* at 659.

white renters.²⁶ As a result, women renters of color are also disproportionately likely to suffer from the negative consequences that can stem from an eviction, including job loss, material hardship, mental and physical health issues, and homelessness.²⁷ Thus, housing providers' reliance on eviction histories to deny potential tenants housing opportunities continues to pose a significant barrier to Black and Latine renters, and women in particular, in securing safe and stable housing and the life opportunities that come with it.

b. The Proposed Rule is a Necessary Step to Ensure that HUD-Assisted Housing Providers Comply with the Law.

The Proposed Rule's changes to exclusions in HUD-assisted housing is consistent with HUD's mandate to affirmatively further fair housing under the FHA²⁸ and HUD's long-standing recognition that overly restrictive tenant screening policies have been and continue to be a formidable barrier to housing, particularly for Black tenants and other tenants of color.²⁹ In 2022, for example, HUD explained that tenant screening practices "may create unnecessary barriers to housing opportunity or be inconsistently applied in practice, in a way that disproportionately excludes individuals based on their race, color or national origin."³⁰ In particular, "[s]creening criteria, such as those related to criminal records, credit, and rental history may operate unjustifiably to exclude individuals based on their race, color, or national origin."³¹ More recently, HUD's Office of Fair Housing and Equal Opportunity reiterated these principles, noting that tenant screening policies based on imprecise or overbroad criteria "may unjustifiably exclude people from housing opportunities in discriminatory ways."³²

With respect to criminal records specifically, HUD has informed housing providers that the use of criminal history-based restrictions to "screen, deny lease renewal, evict or otherwise exclude

²⁶ Sophie Beiers et al., *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU (Jan. 10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color>.

²⁷ See Matthew Desmond et al., *Evicting Children*, 92 SOC. FORCES 303, 303–04 (Sept. 2013), https://scholar.harvard.edu/files/mdesmond/files/social_forces-2013-desmond-303-27.pdf; see also *Why Eviction Matters*, EVICTION LAB, <https://evictionlab.org/why-eviction-matters> (last visited June 7, 2024).

²⁸ 42 U.S.C. § 3608(e)(5).

²⁹ See, e.g., OFF. OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URB. DEV., MEM. FROM DEMETRIA L. MCCAIN, PRINCIPAL DEPUTY ASSISTANT SEC'Y FOR FAIR HOUS. AND EQUAL OPPORTUNITY, ON THE IMPLEMENTATION OF GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 2 (June 10, 2022), <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf> [hereinafter HUD June 10, 2022 Memo]; OFF. OF GEN. COUNS., U.S. DEP'T OF HOUS. AND 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 3–4, 10 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [hereinafter HUD Guidance on Use of Criminal Records].

³⁰ HUD Multifamily Guidance, *supra* note 23, at 6.

³¹ *Id.*

³² OFF. OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., GUIDANCE ON APPLICATION OF THE FAIR HOUSING ACT TO THE SCREENING OF APPLICANTS FOR RENTAL HOUSING 1 (Apr. 29, 2024), https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf [hereinafter HUD Guidance on Screening Applicants for Rental Housing].

individuals from housing” may violate the FHA.³³ Specifically, “a policy or practice that restricts access to housing on the basis of criminal history” may violate the FHA if the policy or practice “has a disparate impact on individuals of a particular race, national origin, or other protected class” and “is not necessary to serve a substantial, legitimate, nondiscriminatory interest.”³⁴ Notably, a “blanket prohibition on any person with any conviction record” cannot meet this burden, irrespective of the date or nature of the conviction.³⁵

Likewise, due to the racial and gender disparities in eviction, “overbroad screenings for eviction history may have an unjustified discriminatory effect . . .” based on race or other protected characteristics, so “housing providers should not rely on eviction records that are old, incomplete irrelevant, or where a better measure of an applicant’s behavior is available.”³⁶ Indeed, such eviction records offer little insight into the most relevant inquiry for housing providers in considering rental applications—i.e., whether an applicant has the present ability to pay the required monthly rent.

II. The Proposed Rule Should be Strengthened to Ensure that People are Not Discriminatorily Excluded from HUD-Assisted Housing.

The Proposed Rule takes important steps in removing barriers to HUD-assisted housing by (1) clarifying that an individualized assessment and consideration of explicit mitigating factors is always required in admissions and termination decisions; (2) further clarifying that arrest records alone may never serve as the basis for an exclusion; (3) creating presumptive limitations on a lookback period for criminal activity; (4) clarifying that the rule applies to criminal records obtained by third party screening companies; (5) instituting clear procedures prior to denial; (6) identifying factors that must be considered in an individualized assessment; (7) limiting the categories of criminal history that may be considered in admissions decisions; and (8) providing a standard of proof for exclusions, among other changes. In addition, we recommend the following changes.

a. HUD Should Limit and Clarify What Criminal Records PHAs and Owners May Consider (Question for Comment #5).

Although criminal history is not a predictor of housing success, and there is no empirical evidence that justifies broad exclusions of people with criminal histories from housing, as discussed above,³⁷ housing providers often obtain and use criminal records in a variety of ways to unfairly screen out potential tenants. The data they rely on may contain records that are outdated and often include arrest records, juvenile records, and sealed and expunged records that should not serve as a basis to disqualify tenants.

For example, in Faribault, Minnesota, as part of its so called “crime-free” housing ordinance, the Faribault Police Department encouraged landlords to screen tenants by using information from

³³ HUD June 10, 2022 Memo, *supra* note 29, at 3; HUD Guidance on Use of Criminal Records, *supra* note 29, at 1.

³⁴ HUD Guidance on Use of Criminal Records, *supra* note 29, at 2.

³⁵ *Id.* at 6.

³⁶ HUD Guidance on Screening Applicants for Rental Housing, *supra* note 32, at 20.

³⁷ *See, e.g.,* Predictions and Perceptions are not Causality, *supra* note 11; Warren, *supra* note 12, at 15.

Minnesota’s Bureau of Criminal Apprehension (“MBCA”), which contained data on criminal convictions for 15 years following completion of a sentence, and did not allow sorting for recent criminal history.³⁸ A “full” criminal history report from MBCA included not only public information regarding convictions but also all arrest records and juvenile records.³⁹ Furthermore, Faribault instructed landlords to ask potential tenants about whether they had ever been convicted of a crime regardless of the age or nature of the offense.⁴⁰ Accordingly, Faribault’s crime-free housing ordinance resulted in the unjust denial of housing to numerous potential tenants, including by encouraging landlords to deny housing based on alleged conduct that had no connection whatsoever to housing success (i.e., the ability to maintain housing stability and achieve positive housing outcomes⁴¹), conduct that occurred many years ago, and/or conduct that never resulted in a conviction.

We applaud HUD for clarifying that admission may be denied only if a household member is currently engaged in or has engaged in specific categories of criminal activity,⁴² and that arrest records alone can never serve as a basis for exclusion.⁴³ HUD should, however, explicitly prohibit HUD-assisted housing providers from considering certain types of criminal records in addition to arrest records that do not reliably constitute evidence of criminal activity. The Proposed Rule’s definition of “criminal record” currently includes “warrants, arrests . . . dismissals or deferrals of prosecution, acquittals or mistrials pertaining to an individual . . . and fines and fees.”⁴⁴ These records are not reliable evidence of past criminal activity⁴⁵ and should not be a part of an applicant’s reviewable criminal history.

HUD should also prohibit denials of admission that are based in whole or in part on juvenile records, participation in or completion of diversion or deferred judgment programs, any conviction that has been expunged, sealed, the subject of an executive pardon, the subject of a certificate of relief from disabilities, the subject of a certificate of good conduct, or records that have otherwise been legally nullified, vacated, or protected from disclosure.⁴⁶

³⁸ Decl. of Alejandro Ortiz, No. 216, *Faribault*, No. 18-1643; *id.* at Ex. BH, ¶¶ 7–8, ECF No. 219-7, *Faribault*, No. 18-1643.

³⁹ *Id.* at Ex. BJ, at 4, ECF No. 219-9, *Faribault*, No. 18-1643.

⁴⁰ *Id.* at Ex. BK, at 2, ECF No. 219-10, *Faribault*, No. 18-1643.

⁴¹ Warren, *supra* note 12, at 10.

⁴² Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25363 (§ 5.855(a)); *id.* at 25366 (§ 882.518(b)); *id.* at 25368 (§ 882.519(e)); *id.* at 25369 (§ 960.204(b)); *id.* at 25372 (§ 982.307(a)(3)(iv)); *id.* at 25374 (§ 982.553(a)(4)(ii)).

⁴³ *Id.* at 25362 (§ 5.852(b)); *id.* at 25363 (§ 5.855(d)); *id.* at 25367 (§§ 882.518(c)(ii)(B)(3); 882.518(d)); *id.* at 25368 (§§ 882.519(c); 882.519(e)(4)); *id.* at 25369 (§ 960.203(b)(3)(ii)); *id.* at 25370–71 (§§ 966.4(l)(5)(iii)(A); 966.4(l)(5)(vii)(B)); *id.* at 25372 (§§ 982.310(c)(3); 982.310(h)(3)); *id.* at 25375 (§ 982.553(c)).

⁴⁴ *See, e.g., id.* at 25361 (§ 5.100).

⁴⁵ *See infra*, Section II(e).

⁴⁶ *See, e.g.,* N.Y. State Homes and Cmty. Renewal Fair and Equitable Hous. Off., *Guide for Assessing an Applicant’s History of Criminal Legal System Involvement for State-Funded Housing* 1 (Mar. 19, 2024) (applicant may not be denied housing if they have a permanent certificate of relief from disabilities or good conduct that covers housing), <https://hcr.ny.gov/system/files/documents/2024/04/doc-y-guidance-for-assessing-applicants-with-a-history-of-criminal-legal-system-involvement-20241903-final.pdf> [hereinafter NYS Guidance]; NEW YORK, N.Y., LOCAL LAW 24 (Dec. 20, 2023) (prohibiting consideration of convictions that are sealed, expunged, pardoned, the subject of a certificate of relief from disabilities or otherwise legally nullified or vacated); N.Y. EXEC. LAW § 296(16) (making it an unlawful discriminatory practice to inquire about or act adversely towards someone because of arrests that did not

Further, within the categories HUD has identified as potentially relevant to admissions, HUD should provide more guidance to limit discretion in applying these categories. Too much discretion can lead to broad exclusions that operate as blanket bans on a wide range of criminal convictions as housing providers are left to interpret for themselves which crimes are violent or threaten health and safety. We urge HUD to limit discretion by being as specific as possible on the types of crimes that these categories entail.

For instance, “violent criminal activity” could be interpreted to include a variety of misdemeanors which, when identified by name, are difficult to understand whether they include an element of violence or not. As one example, in some states, misdemeanor simple assault requires physical injury but in other states does not even require physical contact.⁴⁷ Further, the category of “other criminal activity” that threatens health or safety is incredibly broad and could sweep in wide swaths of alleged criminal or other activity that is left to the discretion of housing providers to interpret. Decisionmakers often use such unfettered discretion to target and disproportionately harm people of color.⁴⁸ The ACLU has challenged similarly broad provisions, such as those prohibiting “disorderly conduct” or “nuisances,” across the country.⁴⁹

Instead of leaving discretion to PHAs, HUD should, at minimum, provide a definition or further explanation of “criminal activity that would threaten the health, safety, or right to peaceful

result in convictions, youthful offender adjudications, or sealed convictions); DETROIT, MI., ORDINANCE 01-19 (Sept. 1, 2019) (prohibiting rejection based on consideration of arrests that did not result in convictions, participation in diversion or deferral of judgment programs, judicially dismissed, expunged, voided, invalidated, or inoperative conviction, or juvenile convictions); PORTLAND, OR., ORDINANCE 30.01.086 (July 29, 2022) (prohibiting rejection based on consideration of arrests that did not result in conviction, participation in diversion or deferral programs, dismissed, expunged, voided, or invalidated convictions, or juvenile convictions).

⁴⁷ Compare N.Y. PENAL LAW § 120.00 (2014) (requiring causing physical injury to another person) with FLA. STAT. ANN. § 784.011 (2023) (requiring only a threat to do violence).

⁴⁸ See, e.g., Jamila Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. REV. 1637 (2020), <https://static1.squarespace.com/static/640d6616cc8bbb354ff6ba65/t/64484928bb9266461d310dfb/1682458921110/1+Morgan+35+postEIC.pdf>; see also Sam Davis et al., *The Consequences of Cops in North Carolina Schools*, ACLU OF NORTH CAROLINA 7 (2023), <https://static1.squarespace.com/static/64d3ad6abbf62a6134c8401a/t/65313ce2edb0aa4fde389edd/1697725667593/2023.10.18-nc-discipline-final.pdf> (explaining that in South Carolina, Black school students were charged with the vague crime of “disorderly conduct” at nearly seven times the rate of their white peers due to the “unbridled discretion” the laws grant police officers (quoting *Carolina Youth Action Project; D.S. by & through Ford v. Wilson*, 60 F.4th 770, 784 (4th Cir. 2023))).

⁴⁹ See, e.g., *Faribault*, 2021 WL 1192466, at *24 (denying in part defendants’ motion for summary judgment in an action challenging the city’s crime-free ordinance); *ACLU Wins Settlement to End Housing Discrimination Case*, ACLU (June 15, 2022), <https://www.aclu.org/press-releases/aclu-wins-settlement-end-housing-discrimination-case>; *Somai v. City of Bedford*, No. 1:19-cv-00373 (N.D. Ohio 2020), <https://www.aclu.org/cases/somai-v-city-bedford-oh> (repealing the city’s criminal activity nuisance ordinance and preventing reenactment); *Briggs v. Borough of Norristown*, No. 2:13-cv-02191 (E.D. Pa. 2013), <https://www.aclu.org/cases/briggs-v-borough-norristown-et-al#legal-documents> (repealing the city’s nuisance ordinance and preventing reenactment); *Markham v. City of Surprise*, No. 2:15-cv-01696 (D. Ariz. 2015), <https://www.aclu.org/cases/nancy-markham-v-city-surprise> (repealing the city’s nuisance ordinance and preventing reenactment); *Watson v. City of Maplewood, Missouri*, No. 4:17-cv-01268, 2017 WL 4758960 (E.D. Mo. Oct. 20, 2017), <https://www.aclu.org/cases/rosetta-watson-v-maplewood> (denying in part Maplewood’s motion to dismiss an action challenging the city’s nuisance policy, which authorized officials to revoke residents’ occupancy permits for criminal activity and police calls); Rachel Goodman, *Savannah Police Suspend Its Discriminatory ‘Crime Free Housing Program’*, ACLU (Feb. 1, 2018), <https://www.aclu.org/news/racial-justice/savannah-police-suspend-its-discriminatory-crime-free>.

enjoyment.” Similarly, HUD should consider identifying specific types of crimes that may satisfy these requirements, as well as types of crimes that do not.⁵⁰ A starting point for doing so would be to prohibit consideration of misdemeanor convictions entirely, since a misdemeanor conviction indicates that the jurisdiction has already made a determination that the offense is not severe. In any event, HUD should make clearer to PHAs and owners that even for crimes that may satisfy the categories HUD has identified, the FHA prohibits the use of policies that would exclude applicants based on criminal histories that do not constitute a substantial, legitimate, non-discriminatory reason for denial.⁵¹ Thus, identifying reviewable criminal history (i.e., criminal history that may be included in one of the specific categories) is the beginning of the inquiry, not the end. PHAs and owners still have an obligation to demonstrate that exclusion based on a particular criminal conviction satisfies a substantial, legitimate, non-discriminatory need, and they must support any such determination with empirical evidence.

b. HUD Should Further Limit and Clarify Relevant Lookback Periods (Question for Comment #2).

We applaud HUD for establishing that a lookback period that considers convictions that occurred more than three years prior to an application is presumptively unreasonable.⁵² This is essential to removing barriers to housing. As HUD has rightly recognized,⁵³ research shows that many categories of criminal convictions have no effect on housing outcomes, and where there is any effect, that limited risk decreases significantly over time.⁵⁴ And most individuals with convictions have not had a conviction in many years.⁵⁵ If limitations to lookback periods are not in place, all individuals with a conviction could be excluded from housing regardless of the time

⁵⁰ See, e.g., NEW YORK, N.Y. LOCAL LAW 24 (Dec. 20, 2023); SEATTLE, WA., MUN. CODE 14.09 *et seq.* (Aug. 14, 2017); S.F., CAL., POLICE CODE, art. 49 § 4906; RICHMOND, CAL., MUN. CODE, art. 6 § 7.110.

⁵¹ See HUD Guidance on Use of Criminal Records, *supra* note 29; HUD June 10, 2022 Memo, *supra* note 29, at 2, 7.

⁵² Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25363 (§ 5.855(b)); *id.* at 25366 (§ 882.518(b)(2)); *id.* at 25368 (§ 882.519(e)(2)); *id.* at 25370 (§ 960.204(c)(2)); *id.* at 25374 (§ 982.553(a)(4)(ii)(B)).

⁵³ *Id.* at 25342–43 (citing Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVS. 224 (Feb. 2009); Tejani N et al., *Incarceration Histories of Homeless Veterans and Progression Through a National Supported Housing Program*, 50 COMM. MENTAL HEALTH J. 514-9 (July 2014); Warren, *supra* note 12, at 15; Douglas N. Evans et al., *Examining Housing Discrimination Across Race, Gender and Felony History*, 34 HOUS. STUDIES 761 (Sept. 14, 2017); Douglas Evans & Jeremy Porter, *Criminal History and Landlord Rental Decisions: A New York Quasi-Experimental Study*, 11 J. OF EXPERIMENTAL CRIMINOLOGY 21 (Sept. 20, 2014)); see also HUD Guidance on the Use of Criminal Records, *supra* note 29, at 6–7).

⁵⁴ See Warren, *supra* note 12, at 20; Valerie Schneider, *Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing*, 53 U. RICH. L. REV. 923, 933 (2019) (“There is little empirical evidence that excluding individuals from housing opportunities solely because of a criminal record increases public safety.”); Predictions And Perceptions are not Causality, *supra* note 11; Ava Pittman, *Housing for All: Reducing Barriers to Housing for People with Criminal Records*, TACOMA HOUS. AUTH. 21 (May 14, 2021), https://www.tacomahousing.org/wp-content/uploads/2022/10/housing_for_all_-_reducing_barriers_to_housing_for_people_with_criminal_records_-_tacoma_housing_authority_2021-5-14.pdf (finding no meaningful relationship between criminal record history and negative housing outcomes).

⁵⁵ See, e.g., Becca Cadoff et al., *Criminal Conviction Records in New York City (1980-2019)*, JOHN JAY COLL. OF CRIM. JUST. 28 (Apr. 2021), https://datacollaborativeforjustice.org/wp-content/uploads/2021/04/2021_04_07_Conviction_Record_Report.pdf (showing that in New York City, 63.9% of individuals with a criminal conviction have not had a new conviction in over 10 years, 36% have not had a conviction in over 20 years, and 20.3% have not have a conviction in the last five years).

since a conviction, despite the fact that studies show there is no difference whatsoever in tenant outcomes between those with convictions and those without after a period of time.

The Proposed Rule's presumption that it is unreasonable to consider criminal activity that occurred more than three years prior to application is an important floor, but HUD should shorten this presumptive lookback period for certain convictions, including for misdemeanor convictions to the extent such convictions are considered at all. One research study found that misdemeanor convictions had no effect on housing outcomes after two years.⁵⁶ We thus encourage HUD to shorten the lookback period for misdemeanors to at least two years to align with this research and remove barriers that disproportionately exclude Black and Indigenous People of Color ("BIPOC") based on factors that are not relevant to housing.⁵⁷

The Proposed Rule also permits a longer lookback period "after a determination, based on empirical evidence, that such longer prohibition is necessary to ensuring the health, safety, and peaceful enjoyment of other tenants or property employees."⁵⁸ As explained above, HUD should make clear that the FHA's requirements regarding the need to have a substantial, legitimate, non-discriminatory reason with no less discriminatory alternative to exclusions still apply, so a rigorous showing of the purported need for a longer lookback period as well as use of the individualized assessment is still required.

Finally, the Proposed Rule rightly ties the lookback period to the underlying criminal activity.⁵⁹ Clarifying the triggering event for a lookback period in admissions decisions is important because laws in this area vary. Tying the lookback period to a sentencing or release date would be inappropriate, as these are too far beyond the dates of the underlying criminal conduct and are often not readily available on background reports. To dispel any confusion, HUD should make the triggering event for the lookback period clear.

c. HUD Should Impose Additional Procedural Requirements Before and After Any Potential Denial (Question for Comment #3).

We applaud HUD for proposing a requirement that PHAs and owners provide a copy of any relevant criminal record to the applicant 15 days prior to any denial, and for proposing that PHAs and owners must inform applicants of their ability to dispute the accuracy and relevancy of criminal records and provide mitigating information prior to denials.⁶⁰ It is essential that tenants have the information necessary to dispute the basis for any potential exclusion and provide mitigating information. Moreover, it is critical to establish accountability mechanisms to ensure

⁵⁶ Warren, *supra* note 12, at 20.

⁵⁷ This approach also aligns with the fair housing law enacted in Richmond, California, which provides a two-year lookback period for all convictions, including felonies. MUN. CODE, ART. 6, § 7.110 (Dec. 20, 2016). In New York state-funded housing, the lookback period is only one year for misdemeanors. *See* NYS Guidance, *supra* note 46, at 5.

⁵⁸ Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25363 (§ 5.855(b)); *id.* at 25366 (§ 882.518(b)(2)); *id.* at 25368 (§ 882.519(e)(2)); *id.* at 25370 (§ 960.204(c)(2)); *id.* at 25374 (§ 982.553(a)(4)(ii)(B)).

⁵⁹ *Id.* at 25363 (§ 5.855(b)); *id.* at 25366 (§ 882.518(b)(2)); *id.* at 25368 (§ 882.519(e)(2)); *id.* at 25370 (§ 960.204(c)(2)); *id.* at 25374 (§ 982.553(a)(4)(ii)(B)).

⁶⁰ *See id.* at 25363 (§ 5.855(c)); *id.* at 25366 (§ 882.518); *id.* at 25370 (§ 960.204); *id.* at 25375 (§ 982.553).

that PHAs and owners engage in meaningful individualized review of an applicant that accounts for specific factors and mitigating information.

These considerations are especially critical because increasingly, landlords, owners, and other housing providers obtain criminal records data from tenant screening services.⁶¹ These screening companies generally rely on databases of aggregated criminal record data, which are often plagued with various errors. For instance, reports may mistakenly retrieve criminal records from people with similar names, improperly include sealed or expunged records, omit critical information about how a case was disposed of or resolved, contain misleading or inaccurate information, and misclassify the offense reported.⁶² These errors are often impossible to correct, including because some screening companies fail to provide the underlying records to landlords, and some only produce a “risk” score, or overall recommendation.⁶³ Moreover, rather than making individualized assessments on an applicant’s criminal history and considering any mitigating circumstances, as a commitment to fair housing requires, landlords often use criminal record information to deny housing to potential tenants based on *any* criminal history, including arrests, old convictions, and low-level crimes.⁶⁴

Accordingly, additional procedural requirements are important to ensure that housing providers—including those who use tenant screening companies—are engaging in an individualized review of underlying criminal records and providing that information to tenants, and that tenants have a meaningful opportunity to challenge the accuracy and relevancy of any criminal history prior to and after denial.

With these issues in mind, HUD should require that, while review of any criminal record is pending, PHAs and owners hold the applied-for housing open, or at minimum provide the next available comparable unit to the applicant once approved.⁶⁵ And while the Proposed Rule as a whole makes clear that an individualized assessment that includes all relevant information submitted by the applicant is required prior to any denial, *see infra*, HUD should make this explicit in Section 5.855(d) discussing denials as well.

⁶¹ See Abby Boshart, *How Tenant Screening Services Disproportionately Exclude Renters of Color from Housing*, HOUS. MATTERS: URB. INST. (Dec. 21, 2022), <https://housingmatters.urban.org/articles/how-tenant-screening-services-disproportionately-exclude-renters-color-housing>.

⁶² Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, NAT’L CONSUMER L. CTR. 3 (Dec. 2019), <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>; see also Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters*, THE MARKUP (May 28, 2020), <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters>.

⁶³ Kirchner & Goldstein, *supra* note 62.

⁶⁴ Decl. of Alejandro Ortiz, Ex. BK, *supra* note 40, ECF No. 219-10 (suggesting landlords deny applicants who have a criminal history).

⁶⁵ See, e.g., State Attorneys General, Comment Letter on the Adverse Impacts of Tenant Screening Reports and Algorithmic Determinations of Tenant “Worthiness” (May 30, 2023), <https://oag.ca.gov/system/files/attachments/press-docs/Multi%20State%20Attorneys%20General%20Comment%20Letter%20to%20the%20FTC%20CFPB%20on%20Tenant%20Screening%20%281%29.pdf> (citing PHILA., PA., CODE §§ 9-1008 (3), (4), 9-810 (2021) (granting prospective tenants the right to submit mitigating and corrective evidence within 7 business days of an adverse decision and requiring the landlord to offer a comparable next available unit if the information would prove to a reasonable person that the applicant could meet the requirements of the tenancy)).

If a PHA or owner does deny an applicant based, in part or in whole, on a criminal record following an individualized assessment, HUD should require the PHA or owner to provide a copy of all materials considered, as well as a written statement of the reason for the denial explaining (i) how the individual's criminal record is relevant to a substantial, legitimate, non-discriminatory PHA or owner interest, and (ii) how any submitted mitigating information was taken into account in the required individualized assessment.⁶⁶ Further, HUD should require PHAs and owners to provide information regarding available avenues for redress in the denial notification, including information about HUD's administrative complaint process.⁶⁷

d. HUD Should Modify and Further Clarify the Factors Relevant to an Individualized Assessment (Question for Comment #4).

We also applaud that the Proposed Rule provides a definition of individualized assessment and identifies a non-exhaustive list of factors to consider when conducting an individualized assessment of criminal history and criminal activity and relevant mitigating circumstances.⁶⁸ Such individualized assessment is a less discriminatory alternative to overbroad exclusions, as HUD has recognized,⁶⁹ and therefore is required under the FHA. However, without further guidance on how to apply the factors HUD has deemed relevant, PHAs and owners are again left with too much discretion, which can further perpetuate and entrench discrimination.

With respect to admissions, HUD currently proposes requiring consideration of the facts or circumstances surrounding the criminal conduct, the age of the individual at the time of the conduct, evidence of good tenant history before or after the conduct, and evidence of rehabilitation efforts. These factors are important to consider, but they should be modified and clarified to further limit the potential for discrimination.

HUD should consider modifying consideration of age to focus on the age of the applicant at the time of their application for housing. As HUD has recognized, crime commission drops sharply after the mid-twenties, with most people no longer committing crimes by their forties.⁷⁰ This is the case because, again as HUD has recognized, people become more future-oriented, better at managing emotions, and more able to assess consequences once the brain has fully developed, reducing their risk of recidivism.⁷¹ In any event, HUD should make clear that consideration of

⁶⁶ See, e.g., New York, N.Y., Local Law 24 (Dec. 20, 2023); NYS Guidance, *supra* note 46, at 2; PORTLAND, OR., ORDINANCE 30.01.086 (2022) at § F(2)(c); RICHMOND, CAL., MUN. CODE, art. 6 at § 7.110.050(f)(1) (Dec. 20, 2016); SEATTLE, WA., MUN. CODE § 14.09.025(b) (2024); D.C. CODE § 42-3541.02(f) (requiring a written notice with specific reason(s) for denial); BERKELEY, CAL., MUN. CODE § 13.106.040(E) (2020) (requiring written statement with reasons for an adverse action).

⁶⁷ See, e.g., RICHMOND, CAL., MUN. CODE, art. 6 at § 7.110.050(f)(1) (Dec. 20, 2016); D.C. CODE § 42-3541.02(f); BERKELEY, MUN. CODE § 13.106.050(D).

⁶⁸ Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25361 (§ 5.852(a)(1)); *id.* at 25362 (§ 5.852(a)(2)).

⁶⁹ HUD Guidance on Use of Criminal Records, *supra* note 29, at 6–7.

⁷⁰ Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25343 (citing Ashley Nellis, *A New Lease on Life*, THE SENTENCING PROJECT (2021), <https://www.sentencingproject.org/app/uploads/2022/08/A-New-Lease-on-Life.pdf>).

⁷¹ *Id.* (citing Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILD 15 (Fall 2008); U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS (2017)).

the age of the individual at the time of conduct should only help an applicant, not hurt them. If the applicant was young at the time of the conduct, the conduct is less relevant to an adult applicant's current ability to be a responsible tenant. However, many housing providers will count this factor against someone if they were not young at the time of the conduct, which is not how individualized assessment and mitigating factors are intended to function. As previously explained, many categories of criminal convictions have no effect on housing outcomes, so the fact that criminal conduct occurred at an older age has no relevancy to housing and should not be counted against an applicant. We suggest rephrasing this factor as follows: "to the extent that the applicant was under 25 years of age at the time of the conduct, the age at the time of conduct."⁷²

Regarding consideration of evidence of rehabilitation efforts, HUD should clarify either in the Proposed Rule or in subregulatory guidance, the non-exhaustive types of rehabilitation efforts that should be considered. These efforts may include but are not limited to educational and rehabilitative programming completed since the date of the offense, including during incarceration; statements from community members, employers, or service providers; statements from a member of the judiciary or law enforcement, parole, or probation officers; as well as certificate of relief or good conduct or their equivalents across jurisdictions.⁷³

HUD should also consider expanding the list of factors to include positive consideration of community ties and employment status. Indeed, HUD has previously contemplated consideration of these factors in its recent guidance.⁷⁴ For example, the effect of employment on recidivism is well-documented, with one study finding that people stably employed in the year prior to an offense were 12% less likely to recidivate than those who were not.⁷⁵ If an individual has been employed prior to applying, this should count in their favor (but not vice versa). In light of this research, New York guidance on state-funded housing allows positive consideration of the fact that an applicant has sought and maintained employment after a conviction.⁷⁶ New York guidance similarly allows consideration of volunteer or community activities and letters of recommendation from community members.⁷⁷

We also recommend that HUD define and/or clarify what constitutes "good tenant history" to ensure that overbroad or imprecise screening criteria does not unjustly exclude tenants from housing. Across the country, landlords file millions of eviction cases every year.⁷⁸ It is well

⁷² New York State has taken this approach for state-funded housing. See NYS Guidance, *supra* note 46, at 6 ("The reviewer must evaluate offenses committed between the ages of 18 and 25 with the understanding that individuals who exercise poor judgment as youths or young adults very often mature into law abiding productive adults. On the other hand, if a person was convicted as an older person this does not, in itself, present a barrier to tenancy.").

⁷³ See, e.g., NYS Guidance, *supra* note 46, at 6; SEATTLE, WA., MUN. CODE § 14.09.010 (Aug. 14, 2017); RICHMOND, CAL., MUN. CODE, art. 6 at § 7.110.040(i) (Dec. 20, 2016); DETROIT, MI., ORDINANCE 01-19 § 26-5-3 (Sept. 1, 2019).

⁷⁴ HUD Guidance on Screening of Applicants for Rental Housing, *supra* note 36, at 14.

⁷⁵ Nathan Hurst, *Prison Education Programs Reduce Inmate Prison Return Rate, MU Study Shows*, UNIV. OF MO. (Oct. 3, 2011), <https://munewsarchives.missouri.edu/news-releases/2011/1003-prison-education-programs-reduce-inmate-prison-return-rate-mu-study-shows>.

⁷⁶ NYS Guidance, *supra* note 46, at 7.

⁷⁷ *Id.*

⁷⁸ See Hepburn et al., *supra* note 22 (explaining that, in 10 states and 34 cities nationwide, landlords filed over 1 million eviction cases in 2023); Juan Pablo Garnham et al., *New Data Release Shows that 3.6 Million Eviction Cases*

established that Black renters, particularly Black women renters, are disproportionately threatened with eviction and disproportionately evicted from their homes.⁷⁹ While fewer than one in five renters are Black, over half of all eviction filings are against Black renters.⁸⁰ Black women in particular are evicted at nearly twice the rate of white renters.⁸¹ Landlords also often categorically reject prospective tenants with any connection to a prior eviction filing (i.e., “No-Evictions” policies), regardless of whether the court actually ordered the eviction. Black women renters are the group most likely to be harmed by these “No-Evictions” policies, as they are more likely to have an eviction case filed against them that resulted in a dismissal.⁸²

HUD has recognized that, due to these disparities, overly broad eviction record screening policies pose significant fair housing concerns and that eviction records, particularly those that are old, incomplete, or irrelevant, should not be relied upon “where a better measure of an applicant’s behavior is available.”⁸³ The Proposed Rule’s reference to “good tenant history,” without further clarification or guidance, risks amplifying the disproportionate harms that eviction inflicts on low-income tenants of color. Thus, the Proposed Rule should provide further guidance and clarification as to what landlords may consider when evaluating “tenant history” to prevent perpetuating such disparities. Specifically, we recommend clarifying that an applicant’s prior history may not count against them, but, rather, may only count in the applicant’s favor.

Finally, HUD should take steps to ensure that the Proposed Rule recognizes and accounts for the experiences of criminalized survivors of gender-based violence, including by affirmatively recognizing the protections of the Violence Against Women Act (“VAWA”). Critically, survivors of gender-based violence are often criminalized as a result of the violence they have experienced.⁸⁴ For instance, many survivors have faced arrest and/or prosecution for engaging in acts of self-defense or being coerced into criminal conduct by their abuser.⁸⁵ Accordingly, it is critical for housing providers to seek further information about the circumstances underlying a criminal activity or record and to consider other mitigating factors, rather than to assume that a

were Filed in the United State in 2018, EVICTION LAB (July 11, 2022) (explaining that landlords filed 3.6 million eviction cases in 2018), <https://evictionlab.org/new-eviction-data-2022>.

⁷⁹ Beiers et al., *supra* note 26; HUD Guidance on Screening Applicants for Rental Housing, *supra* note 32, at 19 (“Even though fewer than one in five renters are Black, over half of all eviction cases are filed against Black renters. Black and Hispanic renters have eviction cases filed against them at higher rates than White renters, with women of those groups bearing even higher disparities.”).

⁸⁰ HUD Guidance on Screening Applicants for Rental Housing, *supra* note 32, at 19; Nick Gretz et al., *Who is Evicted in America*, EVICTION LAB (Oct. 3, 2023), <https://evictionlab.org/who-is-evicted-in-america>; see, e.g., Hepburn et al., *supra* note 22, at 658.

⁸¹ Beiers et al., *supra* note 26.

⁸² *Id.*

⁸³ HUD Guidance on Screening Applicants for Rental Housing, *supra* note 32, at 20 (“Because of these disparities, overbroad screenings for eviction history may have an unjustified discriminatory effect. Therefore, tenant screening companies and housing providers should not rely on eviction records that are old, incomplete, irrelevant, or where a better measure of an applicant’s behavior is available.”).

⁸⁴ *Safe Homes, Safe Communities: A Guide for Local Leaders on Domestic Violence and Fair Housing*, ACLU 11 (Apr. 25, 2015), <https://www.aclu.org/publications/safe-homes-safe-communities?redirect=safe-homes> [hereinafter *Safe Homes Safe Communities*]; OFF. OF PUB. AND INDIAN HOUS., U.S. DEP’T OF HOUS. AND URBAN DEV., PIH-2017-08 (HA), VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 GUIDANCE 8 (2013) [hereinafter HUD VAWA Guidance].

⁸⁵ *Safe Homes Safe Communities*, *supra* note 84, at 11.

criminal record or activity disqualifies an applicant or current tenant from rental housing.⁸⁶ Moreover, the criminalization of survivors compounds the factors that already place them at a heightened risk for homelessness and housing insecurity, including housing discrimination (e.g., housing denial or evictions), loss of employment, and economic abuse leading to poor credit history and other financial consequences.⁸⁷ Failing to account for the experiences of survivors would perpetuate ongoing harms and exacerbate the difficulties they encounter securing housing.

As the Proposed Rule recognizes, it is essential that housing providers consider relevant mitigating circumstances prior to any decisions regarding eviction or termination.⁸⁸ Moreover, even where statutes grant HUD-assisted housing providers discretion to terminate or evict based on certain criminal records or criminal activity, such discretion is limited by anti-discrimination statutes, including the FHA.⁸⁹ In our experience, leases that provide for the authority to evict tenants based on broad categories of allegedly criminal or disorderly activity disproportionately harm vulnerable and marginalized groups, including Black, Latine, and Native American renters, survivors of gender-based violence, and individuals with disabilities. Accordingly, it is essential that any finalized rule contain a non-exhaustive list of mitigating factors that housing providers must consider prior to eviction, including but not limited to the effect of termination of assistance or eviction on household members not involved in the conduct. HUD should provide further clarity either in the final rule, or in subsequent guidance regarding how these mitigating factors may apply to survivors of gender-based violence in particular.

e. The Preponderance of Evidence Standard Should be Further Clarified (Question for Comment #7).

We think that it is a critical step to ensure that any adverse determination based on a criminal record must, at minimum, be supported by a preponderance of the evidence, and that an arrest standing alone can never be a basis for exclusion.⁹⁰ Nonetheless, HUD should provide more clarity regarding what evidence would and would not constitute sufficient evidence of criminal activity independent of an arrest so as to better ensure that exclusions are not based on insufficient, inaccurate, and discriminatory information. For example, police reports, in particular, are inherently unreliable and prejudicial.⁹¹ Moreover, PHAs and owners are unlikely to have the expertise to determine what happened at an alleged incident, and, therefore, HUD should clarify that housing providers should not use an arrest to trigger an inquiry as to whether alleged activity occurred.

⁸⁶ *Id.* at 3; *see also* VAWA Guidance, *supra* note 84.

⁸⁷ Safe Homes Safe Communities, *supra* note 84, at iii.

⁸⁸ Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25337.

⁸⁹ *Id.* at 25345.

⁹⁰ *Id.* at 25362 (§ 5.852(b)); *id.* at 25363 (§ 5.855(d)); *id.* at 25367 (§§ 882.518(c)(ii)(B)(3); 882.518(d)); *id.* at 25368 (§§ 882.519(c); 882.519(e)(4)); *id.* at 25369 (§ 960.203(b)(3)(ii)); *id.* at 25370–71 (§§ 966.4(l)(5)(iii)(A); 966.4(l)(5)(vii)(B)); *id.* at 25372 (§§ 982.310(c)(3); 982.310(h)(3)); *id.* at 25375 (§ 982.553(c)).

⁹¹ Nanya Gupta, *Prejudicial and Unreliable: The Role of Police Reports in U.S. Immigration Detention & Deportation Decisions*, NAT'L IMMIGRANT JUST. CTR. (July 2022), <https://immigrantjustice.org/research-items/policy-brief-prejudicial-and-unreliable-role-police-reports-us-immigration-detention>.

f. HUD Should Strengthen Tenant Engagement Requirements (Question for Comment #9).

The Proposed Rule rightly recognizes the importance of ensuring that tenants have a voice in how their homes are managed, and that tenants should have notice of program requirements and housing providers' screening practices.⁹² To this end, the Proposed Rule's provisions that provide that PHAs and owners must promptly amend PHA administrative plans to conform with the new regulation, and make such plans and tenant selection policies more widely available are critical.⁹³ Moreover, the Proposed Rule rightly provides tenants with notification of the changes to the tenant selection plan, the right to inspect and copy changes for at least 30 days, notification of the proposed substantive changes to the tenant selection plan, the right to inspect and copy such changes for at least 30 days, and the right to draft written comments on the proposed changes to the tenant selection plan and submit them to the owner and to the local HUD office.

In ensuring that PHAs and owners are accountable to tenants, and that tenants have a meaningful voice in shaping the policies that affect their homes, HUD should require that owners respond to comments received from tenants within a reasonable time frame before the plans are finalized. Moreover, HUD should provide for additional ways in which tenants can comment on proposals, such as through discussions or meetings to better ensure that all tenants are able to participate.

III. Conclusion

Unfair and discriminatory tenant screening practices and evictions based on criminal activity are pervasive barriers to housing and particularly harm Black, Latine, and Native American families, including those headed by women, survivors of gender-based violence, and other vulnerable and marginalized groups. A final rule that takes important steps to remove such barriers to HUD-assisted housing is essential to addressing these exclusionary policies, and to furthering fair housing.

The ACLU appreciates the opportunity to submit comments for this proposed rule on Reducing Barriers to HUD-Assisted Housing. Please feel free to contact Amanda M. Meyer (amandam@aclu.org), or Alexis Alvarez (alexisa@aclu.org), ACLU Racial Justice Program, or Linda S. Morris (lindam1@aclu.org) or Hannah Warntjes (hwarntjes@aclu.org), ACLU Women's Rights Project with any questions.

⁹² Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25351.

⁹³ *Id.* at 25364 (§ 5.906).