



For economic and racial justice

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Before the Diversity and Inclusion Subcommittee
of the Committee on Financial Services of the U.S. House of Representatives

*Hearing on
Access Denied: Eliminating Barriers and Increasing Opportunities for Justice-Involved
Individuals*

September 28, 2021

Good morning, Chairwoman Beatty, Ranking Member Ann Wagner, and distinguished members of the Committee. On behalf of the Shriver Center on Poverty Law, I would like to thank the subcommittee for holding this important hearing on eliminating barriers and increasing opportunities for justice-involved individuals.

The Shriver Center on Poverty Law is a national nonprofit organization that fights for economic and racial justice. Over our 50-year history, we have secured hundreds of victories with and for people living in poverty across the country. Today, we litigate, shape policy, and train and convene multi-state networks of lawyers, community leaders, and activists nationwide. Together, we are building a future where all people have equal dignity, respect, and power under the law.

The Shriver Center has long understood how a person's involvement with the criminal legal system can significantly impact their subsequent attempts to access housing. In 2015, we published a report entitled *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*. In that report, we reviewed the admissions policies of over 300 public housing authorities (PHAs) and other federally subsidized housing providers and identified ways in which those policies kept people with criminal records from accessing affordable housing. Later that year, the U.S. Department of Housing and Urban Development cited our report as a resource for PHAs to review to better understand the scope of these issues.¹ This report also inspired similar efforts at the local level, such as Ohio and Texas.²

In this testimony, we will start by discussing the critical role that housing plays in helping people re-join their communities after leaving the criminal legal system. We will then describe the barriers that they face in federally subsidized housing and how proposed federal legislation could address those barriers. Next, we will give an overview of the need to regulate tenant screening companies. Finally, we will end with additional recommendations for Congress to take to increase housing opportunities for people with criminal records.

I. The Importance of Housing for People with Criminal Records

Every year, more than 640,000 people leave state and federal prisons, while local jails process more than 11 million people.³ Securing safe, decent and affordable housing often presents challenges for individuals immediately after release as well as years after exiting the criminal legal system. In a 2015 survey of formerly incarcerated individuals, nearly four out of

¹ OFFICE OF PUBLIC & INDIAN HOUS., U.S. DEP'T. OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015) [hereinafter HUD NOTICE PIH 2015-19], <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>

² See e.g., AUSTIN/TRAVIS COUNTY REENTRY ROUNDTABLE, LOCKED OUT: CRIMINAL HISTORY BARRIERS TO AFFORDABLE RENTAL HOUSING IN AUSTIN & TRAVIS COUNTY, TEXAS 4 (2016), http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf; A NEVER-ENDING SENTENCE: THE IMPACT OF CRIMINAL CONVICTION IN PROJECT-BASED SECTION 8 HOUSING TENANT SELECTION PLANS IN CUYAHOGA COUNTY (2020), <https://www.thehousingcenter.org/wp-content/uploads/2019/12/A-Never-Ending-Sentence-2020.pdf>.

³ Press Release, Peter Wagner & Bernadette Dauby, Mass Incarceration: The Whole Pie 2017 (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

five reported that, because of their criminal history, they were denied admission or deemed ineligible for housing.⁴

Incarceration and homelessness are deeply connected. Formerly incarcerated individuals experience homelessness at ten times the rate of the general public.⁵ These increased odds arise in part because of the limited employment prospects for people with criminal records and its impact on a person's ability to afford housing. Even assuming equal annual earnings, however, formerly incarcerated men remain more likely to experience housing instability than men who have never been incarcerated.⁶ The burden of homelessness for formerly incarcerated individuals is especially acute for Black women, who are four times as likely as white men and twice as likely as Black men to experience sheltered homelessness following incarceration.⁷

In the same way that incarceration is a risk factor for homelessness,⁸ a history of homelessness increases the risk of incarceration. Individuals in jails are seven to eleven times more likely to have recently experienced homelessness than the general population.⁹ And in a Georgia study, a person on parole increased his chances of arrest by 25% each time he changed his address.¹⁰

Housing barriers for justice-involved individuals can also severely restrain their ability to reintegrate back into their communities by exacerbating other collateral consequences. Sustained employment and improved relationships with family, for example, are difficult to achieve in the absence of safe, decent and affordable housing, especially for people who have been formerly incarcerated.¹¹

⁴ SANETA DE VUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 27 (Sept. 2015), <http://whopaysreport.org/who-pays-full-report/>

⁵ LUCIUS COULOUTE, NOWHERE TO GO: HOMELESSNESS AMONG FORMERLY INCARCERATED PEOPLE (2018), <https://www.prisonpolicy.org/reports/housing.html>.

⁶ Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 SOC. SCI. RES. 1196, 1206 (2011).

⁷ See COULOUTE, *supra* note 5.

⁸ See generally Stephen Metraux et al., *Incarceration and Homelessness*, 2007 NAT'L SYMP. ON HOMELESSNESS RES. 9-8 to 9-11, <https://www.huduser.gov/publications/pdf/p9.pdf> (2007); see also U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, REDUCING CRIMINAL JUSTICE INVOLVEMENT AMONG PEOPLE EXPERIENCING HOMELESSNESS 1 (August 2016), https://www.usich.gov/resources/uploads/asset_library/Criminal_Justice_Involvement_08_2016.pdf.

⁹ Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness and Mental Health: A National Study*, 59 PSYCHIATRIC SERVS. 170, 175 (2008), <http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2008.59.2.170>.

¹⁰ Faith E. Lutze et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 CRIM. JUST. & BEHAV. 471, 474 (2014), <https://wsicj.wsu.edu/wp-content/uploads/sites/436/2014/11/Criminal-Justice-and-Behavior-2014-Lutze-471-91.pdf>.

¹¹ JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 8 (2012), <http://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF>.

Living with family is one of the most affordable and stable housing options available to justice-involved individuals.¹² It is also one of the most commonly-used options.¹³

Restrictions on where people with criminal records can live, however, mean that many are living in the shadows rather than out in the open, especially in federally subsidized housing. These illicit living arrangements pose a threat to the entire family's housing because of the risk of eviction or subsidy termination, straining the family dynamic. A young father described his experience in this way: "I was living like I was on the run. The feeling that if I get caught there, my wife will lose her apartment, that she's taking that risk for me – that weighed so heavy on my heart."¹⁴ Rather than dampen the strong family bonds that can help people leave the criminal legal system for good, it is time to find ways to reinforce those bonds by reducing unreasonable criminal records barriers to housing.

II. Barriers to Federally Subsidized Housing for Justice-Involved Individuals

The shortage of affordable housing, especially in cities where many formerly incarcerated individuals return to, is a significant barrier for a population whose prior interaction with the criminal justice system often limits their employment prospects.¹⁵ Given this shortage, the need for federally subsidized housing is especially acute for people with criminal records.

A. Federal Law Governing Criminal Records Screening

The three major HUD-assisted programs are public housing, the Housing Choice Voucher program, and project-based Section 8. These programs are administered by public housing authorities (PHAs) and project owners. Contrary to popular belief, PHAs and project owners are required by federal law to exclude applicants who fall within only two narrow categories: (1) applicants who have been convicted of manufacturing methamphetamine on federally assisted property,¹⁶ and (2) applicants who are subject to a lifetime registration requirement because of a prior sex offense.¹⁷

¹² CLAIRE HERBERT ET. AL, NAT'L POVERTY CNTR., RESIDENTIAL INSTABILITY AMONG THE FORMERLY INCARCERATED 2-3 (2016), http://www.npc.umich.edu/publications/policy_briefs/brief42/policybrief42.pdf.

¹³ URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 8 (2006) (showing that the majority of respondents from studies in Illinois, Maryland, Ohio, and Texas reported living with families or intimate partners upon release from the criminal justice system), <http://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>.

¹⁴ Casey Tolan, *NYCHA Stops Discriminating Against New Yorkers with Criminal Records*, VILLAGE VOICE (Dec. 13, 2016), <http://www.villagevoice.com/news/nycha-stops-discriminating-against-new-yorkers-with-criminal-records-9453843>.

¹⁵ See FONTAINE & BIESS, *supra* note 11, at 6.

¹⁶ 42 U.S.C. § 1437n(f)(1) (2016). Federal law also requires PHAs and project owners to deny admission if, within the past three years, a person has been evicted from federally assisted housing for drug-related activity unless either (1) that person has successfully completed drug rehabilitation or (2) the circumstances that led to the prior eviction no longer exist (e.g., the death or incarceration of the person who committed the drug-related criminal activity). 42 U.S.C. § 13661(a) (2016). Also prohibited are applicants who currently use illegal drugs or abuse alcohol. *Id.* at § 13661(b)(1).

¹⁷ 42 U.S.C. § 13663(a) (2016).

Other than these two narrow categories, PHAs and project owners have discretion over their screening policies. Currently, federal law allows PHAs and project owners to deny admission to applicants who have engaged in any of the following activities within a reasonable time before applying:

1. Drug-related criminal activity,¹⁸
2. Violent criminal activity,¹⁹
3. Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing employees.²⁰

For the last category, HUD has advised that “there are a wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare of the PHA’s residents;”²¹ therefore, it should not be regarded as a catch-all provision.

It is important to note that there are two significant limits to this discretion. The first limit is time: according to federal law, criminal activity is relevant only if it occurred within a “reasonable time” before the screening process take place.²² The second limit comes from civil rights laws. In other words, a PHA or project owner’s criminal records screening policy must comply with federal civil rights laws, including the Fair Housing Act.

B. Four Types of Barriers in Federally Subsidized Housing

For the past decade, HUD has encouraged PHAs and project owners to use their discretion to give “second chances” to justice-involved individuals and to help them “gain access to one of the most fundamental building blocks of a stable life – a place of live.”²³ This encouragement has led some PHAs to adopt more inclusive policies. Agency encouragement in the absence of legislative action, however, will have a limited impact on removing housing barriers because PHAs and project owners do not consistently use their discretion to admit people with records. Indeed, some continue to engage in one of four problematic practices.

The first problematic practice is **arrest record screening**. Some housing providers use prior arrests as a basis for denying housing, even if those arrests never resulted in a conviction. Arrests, however, prove only that a person has been suspected of criminal activity, not that they

¹⁸ 42 U.S.C. § 13661(c) (2016). “Drug-related criminal activity” is defined as the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute, or use the drug. 24 C.F.R. § 5.100 (2016).

¹⁹ 42 U.S.C. § 13661(c) (2016). “Violent criminal activity” is defined as any criminal activity that has as one of its elements the use, attempted use or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage. 24 C.F.R. § 5.100 (2016).

²⁰ 42 U.S.C. § 13661(c) (2016).

²¹ U.S. DEP’T. OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 96-97 (2003).

²² 42 U.S.C. § 13661(c)(2) (2016)

have committed any crime.²⁴ Arrest records are also notoriously inaccurate.²⁵ Given their limited probative value, arrest records should not form the basis of a denial of housing.

The second problematic practice is the **failure to place reasonable time limits** on the use of criminal history, despite a federal requirement to do so.²⁶ Some subsidized housing providers, for example, do not indicate when a criminal record will be too old to factor into the admissions analysis, thus leaving the impression that criminal history is an insurmountable barrier.

The third major barrier facing people with criminal records is the use of **overbroad categories of criminal activity**. Some housing providers bar anyone with a past criminal conviction without regard to whether the underlying activity was minor or irrelevant to a person's ability to be a good tenant. Even where a screening policy offers a more limited universe of prohibited criminal activity, the end result can still be overbroad. Many housing providers, for example, only screen for felony convictions, but given how state legislatures have increasingly been ratcheting up the punishments for crimes, the "felony" label does not necessarily indicate the level of seriousness that would justify denying a person housing. Additionally, some housing providers use vague categories of criminal activity, such as activity that indicates a person will be a "negative influence on other residents."

The fourth and last practice of concern was the **underuse of mitigating evidence** in the criminal records screening process. In public housing, PHAs must consider the time, nature and extent of the applicant's conduct. In addition, PHAs may consider evidence of rehabilitation, such as substance abuse treatment, education, and employment, in order to mitigate the effects of a criminal record in the admissions process.²⁷ Instead, some housing providers either neglect to inform applicants of this right or refused to give due consideration to the evidence presented by the applicants, thus depriving the applicant of a meaningful opportunity to show how they were more than the four corners of their criminal background check.²⁸

C. The Fair Chance at Housing Act.

If passed, the Fair Chance at Housing Act would help curtail these problematic practices in several ways.

First, to address the problem of arrest record screening, the proposed legislation would prevent PHAs and project owners from denying housing on the basis of arrests that did not result in a conviction, as well as juvenile records and sealed/expunged records.

Second, the proposed legislation would place more parameters on the type of criminal conduct that could form the basis of denying admission. Whereas federal law refers to broad categories of criminal activity, the proposed legislation is more specific and restricts the universe of criminal conduct that PHAs and project owners can consider. Specifically, PHAs and project

²⁴ *Schwabe v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957).

²⁵ NAT'L EMP'T LAW PROJECT, *FAULTY FBI BACKGROUND CHECKS FOR EMPLOYMENT: CORRECTING FBI RECORDS IS KEY TO CRIMINAL JUSTICE REFORM 1-3* (2015), <http://www.nelp.org/content/uploads/NELP-Policy-Brief-Faulty-FBI-Background-Checks-for-Employment.pdf>.

²⁶ 42 U.S.C. § 13661(c) (2016).

²⁷ 24 C.F.R. § 960.203(d)(1) (2016).

²⁸ See MARIE CLAIRE TRAN-LEUNG, *WHEN DISCRETION MEANS DENIAL* 29 (2015), <https://www.povertylaw.org/article/when-discretion-means-denial/>.

owners would only be able to consider felony convictions if the underlying conduct would threaten the health or safety of other tenants, employees, or the PHA or project owner. The proposed legislation also specifically excludes drug convictions where the sentence was less than 10 years.

Third, the proposed legislation would require PHAs and project owners to conduct an individualized review before denying an applicant based on their conviction record. Whereas many PHAs and project owners currently have a policy of denying applicants first and then giving them an informal review later, the proposed legislation turns this timeline around to put applicants in a better position to access housing. The process takes place along the following timeline: (1) applicant submits application, (2) panel review of application, (3) decision by PHA to admit or deny, (4) if denial, applicant appeals, (5) applicant receives informal hearing. By adopting this timeline, applicants with conviction records are more likely to be able to present their mitigating evidence and less likely to fall through the cracks.

Finally, the proposed legislation establishes a review panel for conducting the individualized review, which must include at least one resident representative.

Because the Fair Chance at Housing Act would significantly improve the housing opportunities for people with criminal records and set the stage for additional protections in other federally-assisted programs and the private rental market, we strongly urge Congress to pass this proposed legislation.

III. The Need For Increased Regulation of Tenant Screening Companies

When it comes to housing barriers for people with criminal records, it is not enough to regulate housing providers, such as PHAs and project owners. Tenant screening companies play an increasingly larger role in the application process both in federally subsidized housing and the private rental market. While some companies simply provide landlords with criminal record information, other companies have taken a more active role in the screening process by offering algorithmic assessments of candidates and offering to improve fair housing compliance for landlords.²⁹ Over the last decade, the tenant screening industry has flourished, and yet, it continues to be largely underregulated, especially compared to employment screening companies providing similar criminal record information to employers.

Currently, FCRA provides two additional consumer protections for the use of criminal records in the employment context. First, the applicant is entitled to notice that the criminal record will be used for employment purposes. Second, the consumer reporting agency is required to use “strict procedures” (as opposed to the general FCRA standard of “reasonable procedures”) to ensure maximum possible accuracy of the reports.³⁰ Such protections do not exist for housing applicants, even though the criminal record information is the same. Congress should amend

²⁹ Colin Lecher, *Automated Background Checks are Deciding Who's Fit for a Home*, THE VERGE (Feb. 1, 2019), <https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic>; see *Connecticut Fair Housing Center v. Corelogic Rental Prop.*, 369 F.Supp.3d 362 (2019) (holding that the defendant consumer reporting agency had a duty under the Fair Housing Act not to discriminate when carrying out its tenant screening activities that went beyond simply reporting criminal record information).

³⁰ 15 U.S.C. § 1681k.

FCRA to extend these protections from the employment context to the tenant screening context and thus put employment applicants and housing applicants on the same footing.³¹

Congress should also amend FCRA to limit the types of criminal records that can appear in consumer reports for non-law enforcement purposes. These limits would reflect the notion that a person's prior arrests and convictions has diminishing predictive value over time, especially outside of the context of the criminal legal system. Currently, FCRA places no time limits on how far back a consumer reporting agency can report a conviction, even though blanket bans likely violate civil rights laws governing employment and housing. At a minimum, Congress should limit the dissemination of conviction records to seven years, which is the standard time limit for most other records under FCRA. In addition, Congress should clarify that consumer reporting agencies must not report sealed and expunged records. In addition to helping people with these records access housing and employment, this clarification would help preserve the public policy of states that took affirmative steps to protect their residents against the stigma of a criminal record after a certain period of time. Although more reform is needed, these recommendations are long overdue and are good steps toward full regulation of the tenant screening industry and more robust protections of housing and employment applicants.

IV. Additional Recommendations for Congress

If passed, the Fair Chance at Housing will significantly expand housing opportunities for people with criminal records and their families. Until this legislation passes, there are legislative steps that Congress can take in the interim that would help increase housing opportunities for people with criminal records.

A. Create vouchers that give HUD the ability to waive criminal records screening requirements.

Through the American Rescue Plan (ARP), HUD created Emergency Housing Vouchers to help house individuals currently experiencing or at risk of homelessness. ARP gave HUD the authority to issue waivers necessary to expedite or facilitate the use of amounts available, and HUD used this authority to modify a PHA's ability to screen voucher applicants for criminal records.³²

Generally, PHAs have discretion to deny admission on the basis of drug-related criminal activity, violent criminal activity, and other criminal activity that threaten the health and safety of other residents. For emergency housing vouchers, however, HUD eliminated the PHA's ability to deny assistance to applicants on the basis of drug-related criminal activity, reasoning that drug addiction may often be the root cause of homelessness, among other reasons. In addition, HUD imposed a 12-month lookback period for violent criminal activity and other criminal activity that threatens the health and safety of other residents.³³ By giving HUD this type of authority, Congress puts HUD in a place to show that eliminating these types of permissive prohibitions

³¹ For a full discussion of these issues, see National Consumer Law Center, Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing (2019), <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf>.

³² HUD, PIH Notice 2021-15 (HA), Emergency Housing Vouchers – Operating Requirements (May 5, 2021), <https://www.hud.gov/sites/dfiles/PIH/documents/PIH2021-15.pdf>.

³³ *Id.* at 29-31.

can help get housing assistance to people in need efficiently and without compromising public safety. As similar opportunities arise as Congress continues to address the impact of the pandemic on communities, we urge Congress to seize these moments to reduce criminal records barriers for federally subsidized housing.

B. Increase oversight of federally assisted properties under the Low Income Housing Tax Credit program.

In addition to increasing protections in HUD-assisted and USDA-assisted housing programs, Congress should increase its oversight of the Low Income Housing Tax Credit program to encourage state finance housing agencies and property owners to use their significant discretion toward increasing housing opportunities for people with criminal records. The LIHTC program is important for creating more housing opportunities for people with criminal records for two reasons. First, LIHTC provides the largest source of affordable housing financing in the country, making people with arrest and conviction records highly likely to seek housing at LIHTC properties. Second, LIHTC properties often have such more draconian criminal records policies than PHAs, in part because the policies of LIHTC properties are subject to far less public scrutiny than those of PHAs. Increased oversight will help ensure that these properties refine their criminal records policies in a way that aligns with HUD and its administration of HUD-assisted programs.

C. Strengthen fair housing protections for people with criminal records.

One final area where congressional attention is needed is around fair housing. In 2016, HUD issued guidance explaining that housing providers who use criminal records as a basis for denying or terminating housing could violate the Fair Housing Act under the disparate impact theory.³⁴ The Fair Housing Act, however, has a significant exception: there is currently no fair housing protection under the disparate impact theory if the person was convicted of manufacturing or distributing controlled substances.³⁵ In other words, a housing provider could deny housing to this person based on this conviction without violating the Fair Housing Act, even if such a denial would have an unjustified disparate racial impact. This exception is a relic of the War on Drugs and should be eliminated since it creates a significant housing barrier for individuals with these convictions on their record.

In summary, to address the significant housing barriers that people with criminal records face, Congress can take the following actions:

1. Pass the Fair Chance at Housing Act
2. Amend the Fair Credit Reporting Act to increase regulation of tenant screening companies
3. Create vouchers that give HUD the ability to waive criminal records screening requirements
4. Increase oversight of federally assisted properties under the Low Income Housing Tax Credit program

³⁴ 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 (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf.

³⁵ *Id.* at 8 (citing § 807(b)(4) of the Fair Housing Act).

5. Strengthen fair housing protections for people with criminal records