Nuisance Ordinances and Crime-Free Housing Policies: Impacts on Survivors of Domestic Violence

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Information and Resource Packet

Contents

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U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
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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

I. Introduction

The Fair Housing Act (or the Act) prohibits discrimination in the sale, rental or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.[1] The Department of Housing and Urban Development's (HUD's) Office of General Counsel issues this guidance to explain how the Fair Housing Act applies to ensure that the growing number of local nuisance ordinances and crime-free housing ordinances do not lead to discrimination in violation of the Act.[2]

This guidance primarily focuses on the impact these ordinances may have on domestic violence victims, but the Act and the standards described herein apply equally to victims of domestic violence and other crimes and to those in need of emergency services who may be subjected to discrimination prohibited by the Act due to the operation of these ordinances. This guidance therefore addresses both the discriminatory effects and disparate treatment methods of proof under the Act, and briefly describes the obligation of HUD fund recipients to consider the impacts of these ordinances in assessing how they will fulfill their affirmative obligation to further fair housing.[3] HUD will issue subsequent guidance addressing more specifically how the Fair Housing Act applies to ensure that local nuisance or crime-free housing ordinances do not lead to housing discrimination because of disability.[4]

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[1] 42 U.S.C. §§ 3601-19.

[2] State and local governments use a variety of terms, including "nuisance," "chronic nuisance," "crime-free," or "disorderly behavior" to describe the types of ordinances addressed by this guidance.

[3] Local governments and landlords who receive federal funding may also violate the Violence Against Women Act, which, among other things, prohibits them from denying "assistance, tenancy, or occupancy" to any person because of domestic violence-related activity committed by a household member, guest or "other person in control" of the tenant if the tenant or an "affiliated individual" is the victim. 42 U.S.C. § 14043e-11(b)(3)(A).

[4] Discrimination prohibited by the Fair Housing Act includes "a refusal to make a reasonable accommodation in rules, policies, practices, and services, when such accommodation may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

II. Background

A. Nuisance Ordinances

A growing number of local governments are enacting a variety of nuisance ordinances that can affect housing in potentially discriminatory ways. For example, in Illinois alone, more than 100 such ordinances have been adopted.[5] These ordinances often label various types of conduct associated with a property—whether the conduct is by a resident, guest or other person—a "nuisance" and require the landlord or homeowner to abate the nuisance under the threat of a variety of penalties.[6] The conduct defined as a nuisance varies by ordinance and has ranged from conduct affecting the appearance of the property – such as littering,[7] failing to tend to one's lawn[8] or abandoning a vehicle,[9] to general prohibitions related to the conduct of a tenant or guest – such as disorderly or disruptive conduct,[10] disrupting the quiet use and enjoyment of neighboring properties,[11] or any criminal conduct occurring on or near the property.[12] Nuisance conduct often

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[5] The Sargent Shriver National Center on Poverty Law noted that in August 2013, "more than 100 municipalities in the state of Illinois alone ha[d] adopted some kind of [nuisance or crime-free] ordinance," with the number continuing to increase. Emily Werth, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* 1 (2013), http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf. Other research has identified 37 nuisance ordinances in Pennsylvania. News Release, Pennsylvania Coalition Against Domestic Violence, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction* (Oct. 16, 2014) [hereinafter News Release], http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf. Additionally, 59 nuisance ordinances have been identified across every region of the country, including in large metropolitan cities and small towns, 39 of which define domestic violence, assault, sexual abuse, or battery as nuisance activities. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women* (online supplement), 78 AM. SOCIOLOGICAL REV. 2–3, 4–18 (2013) [hereinafter Desmond & Valdez (online supplement)], http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf.

[6] Although nuisance ordinances have been enacted that apply to both owner-occupied and rental housing, this guidance focuses on the application of the Fair Housing Act to a local government's enactment and enforcement of nuisance and crime-free ordinances against persons who reside in rental housing. Much of the legal analysis in this guidance applies equally to owner-occupied housing as well.

[7] *See, e.g.*, PORTLAND, OR., CODE § 14.B.60.010(D)(9) (2013), https://www.portlandoregon.gov/citycode/?c=28531; CARSON CITY, NEV., CODE § 8.08.70 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!.

[8] *See, e.g.*, JEFFERSON, WIS., CODE § 197-6(F) (2002), http://ecode360.com/9781229.

[9] *See, e.g.*, ADAIR VILLAGE, OR. CODE § 40.610(5) (2012), http://www.adairvillage.org/wordpress/wp-content/uploads/2012/06/Chapter-40-Public-Nuisance-2012.pdf; CARSON CITY, NEV., CODE § 8.08.110 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!; *see also* Werth, *supra* note 5, at 17.

[10] *See, e.g.*, WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf; WEST CHICAGO, ILL., CODE § 10-53 (2008), https://www.municode.com/library/il/west_chicago/codes/code_of_ordinances?nodeId=COOR_CH10NU_ARTVIICHNUPRAB_S10-52VI.

[11] *See, e.g.*, ARIZ. REV. STAT. § 13-2917 (2006).

[12] *See* SPOKANE, WASH., CODE § 10.08A.20(H) (2016), https://my.spokanecity.org/smc/?Section=10.08A.020; *see also* ACLU WOMEN'S RIGHTS PROJECT & THE SOC. SCI. RESEARCH COUNCIL, *Silenced: How Nuisance Ordinances Punish Crime Victims in New York* 8 (2015) [hereinafter *Silenced*], https://www.aclu.org/report/silenced-how-nuisance-ordinances-punish-crime-victims-new-york (citing as examples of harmful nuisance ordinances PATTERSON, N.Y., CODE § 72-2(K) (2009),

includes what is characterized by the ordinance as an "excessive" number of calls for emergency police or ambulance services, typically defined as just a few calls within a specified period of time by a tenant, neighbor, or other third party, whether or not directly associated with the property.[13]

In some jurisdictions, an incident of domestic violence is defined as a nuisance without regard to whether the resident is the victim or the perpetrator of the domestic violence.[14] In other jurisdictions, incidents of domestic violence are not specifically defined as nuisances, but may still be categorized as such because the ordinance broadly defines nuisance activity as the violation of any federal, state or local law, or includes conduct such as disturbing the peace, excessive noise, disorderly conduct, or calls for emergency services that exceed a specified number within a given timeframe.[15] Some ordinances specifically define "excessive" calls for police or emergency services as nuisances, even when the person in need of services is a victim of domestic violence or another crime or otherwise in need of police, medical or other emergency assistance.[16] Even where ordinances expressly exclude victims of domestic violence or other crimes, victims are still frequently deemed to have committed nuisance conduct because police and other emergency service providers may not log the call as domestic violence, instead categorizing it incorrectly as property damage, disturbing the peace or another type of nuisance conduct.[17] Some victims also are hesitant or afraid to identify themselves as victims of abuse.[18]

The ordinances generally require housing providers either to abate the alleged nuisance or risk penalties, such as fines, loss of their rental permits, condemnation of their properties and, in some extreme instances, incarceration.[19] Some ordinances may require the housing provider to evict the resident and his or her household after a specified number of alleged nuisance

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http://www.pattersonny.org/PDFs/Codes/Chapter72-Chronic_Public_Nuisance_Abatement.pdf; SCOTIA, N.Y., CODE § 196-12 (2009), http://ecode360.com/13862484; GLENS FALLS, N.Y., CODE § 146-2(C)(7) (2000), http://ecode360.com/14410432; AUBURN, N.Y., CODE § 213-3(D)(1) (1997), http://ecode360.com/8969396; ROCHESTER, N.Y., CHARTER § 3-15(B)(1)(W) (1984), http://ecode360.com/28971339); News Release, *supra* note 5.

[13] *See* Werth, *supra* note 5, at 4, 18 n.70.

[14] *See, e.g.*, SPOKANE, WASH., CODE § 10.08A.20(H)(2)(q) (2016), *https://my.spokanecity.org/smc/?Section=10.08A.020*; *see also Silenced*, *supra* note 12, at 12; Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1058 (2015); News Release, *supra* note 5.

[15] *See* Kastner, *supra* note 14, at 1058 ("Similarly, the ordinance could cause survivors to be evicted either because the 911 call was not coded as 'domestic violence' or because the landlord was not aware that domestic violence was occurring and could not create a plan to remediate the issue properly.").

[16] *See* Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, L. & SOC. INQ. 15-17 (2015), http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf.

[17] *See, e.g.*, BEACON, N.Y., CODE § 159-3(A)(20) (2011) (exempting domestic violence victims from being penalized under nuisance ordinance where a police officer properly "observes evidence that a domestic dispute occurred").

[18] *See, e.g.*, Arnold & Slusser, *supra* note 16, at 15–16.

[19] *See, e.g.*, Desmond & Valdez (online supplement), *supra* note 5, at 4-18; Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1189 (2008).

violations—often quite low—within a specific timeframe.[20] For example, in at least one jurisdiction, three calls for emergency police or medical help within a 30-day period is considered to be a nuisance,[21] and in another jurisdiction, two calls for such services within one year qualify as a nuisance.[22] Even when nuisance ordinances do not explicitly require evictions, a number of landlords resort to evicting the household to avoid penalties.[23]

In many jurisdictions, domestic-violence-related calls are the largest category of calls received by police.[24] "Intimate partner violence, sexual violence, and stalking are widespread" and impact millions of Americans each year.[25] "On average, 24 people per minute are victims of rape, physical violence, or stalking by an intimate partner in the United States" – more than 12 million individuals over the course of a year.[26] From 1994 to 2010, approximately 80 percent of the victims of intimate partner violence in the nation were women.[27] Women with disabilities are more likely to be subjected to domestic violence than women without disabilities.[28]

Studies have found that victims of domestic violence often do not report their initial incident of domestic violence and instead suffer multiple assaults before contacting the police or seeking a protective order or other assistance.[29] Victims of domestic violence often are reluctant to

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[20] *See* Werth, *supra* note 5 at 4 n.9.

[21] *See, e.g.*, CINCINNATI, OH. CODE § 761-3(a) (2013), http://www.municode.com/resources/gateway.asp?pid=19996&sid=35.

[22] *See* ST. LOUIS, MO., CODE § 15.42.020(G) (2014), https://www.municode.com/library/mo/st._louis/codes/code_of_ordinances?nodeId=TIT15PUPEMOWE_DIVIVOFAGPUPE_CH15.42PUNU#!.

[23] *See* Arnold & Slusser, *supra* note 16, at 13–15 (2015), http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf. While local governments might not explicitly require eviction as the primary nuisance abatement method in their ordinances, in practice, governments may indicate to landlords that eviction is the only acceptable nuisance abatement method. *See, e.g.*, Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 135 (2013), http://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr__0.pdf ("[T]he [Milwaukee Police Department] cleared landlords who evicted domestic violence victims—'Plan Accepted!'—but pressured those who refused to do so.").

[24] Andrew R. Klein, NATIONAL INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, *Practical Implications of Current Domestic Violence Research* 1 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf.

[25] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERV., *Injury Prevention & Control* (last updated Sep. 8, 2014), http://www.cdc.gov/violenceprevention/nisvs/infographic.html.

[26] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERV., UNDERSTANDING INTIMATE PARTNER VIOLENCE (2014), https://www.cdc.gov/violenceprevention/pdf/ipv-factsheet.pdf.

[27] *See* SUSAN CASTALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, *Intimate Partner Violence, 1993–2010* 1 (2015), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf. *See also* NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *There's No Place Like Home: State Laws that Protect Housing Rights for Survivors of Domestic and Sexual Violence* 5 (2012) [hereinafter *No Place Like Home*], https://www.nlchp.org/Theres_No_Place_Like_Home ("In some areas of the country 1 in 4 homeless adults reported that domestic violence was a cause of their homelessness, and between 50% and 100% of homeless women have experienced domestic or sexual violence at some point in their lives.").

[28] OFFICE ON WOMEN'S HEALTH, U.S. DEP'T. OF HEALTH AND HUMAN SERV., *Violence Against Women With Disabilities* (last updated Sep. 4, 2015) [hereinafter WOMEN'S HEALTH], http://www.womenshealth.gov/violence-against-women/types-of-violence/violence-against-women-with-disabilities.html.

[29] KLEIN, *supra* note 24, at 6.

seek assistance because of, among other things, fear of reprisal from their attackers.[30] Nuisance ordinances (and crime-free housing ordinances) are becoming an additional factor that operates to discourage victims from reporting domestic violence and obtaining the emergency police and medical assistance they need.[31]

For example, a woman in Norristown, Pennsylvania who had been subjected to domestic violence by her ex-boyfriend was warned by police that if she made one more 911 call, she and her young daughter would be evicted from their home pursuant to the local nuisance ordinance.[32] The ordinance operated under a "three strike" policy, allowing her no more than two calls to 911 for help. As a result, the woman was too afraid to call the police when her ex-boyfriend returned to her home and stabbed her. Rather than call for an ambulance, she ran out of her house in the hope she would not lose her housing.[33] A neighbor called the police and, due to the serious nature of her injuries, the woman was airlifted to the hospital. A few days after she returned home from the hospital, she was served with eviction papers pursuant to the local nuisance ordinance.[34]

B. Crime-Free Lease Ordinances and Crime-Free Housing Programs

A number of local governments enforce crime-free lease ordinances or promote crime-free housing programs that incorporate the use of crime-free lease addenda.[35] Some of these ordinances operate like nuisance ordinances and penalize housing providers who fail to evict tenants when a tenant, resident or other person has allegedly engaged in a violation of a federal, state and/or local law, regardless of whether the tenant or resident was the victim of the crime at issue.[36] Others mandate or strongly encourage housing providers to include lease provisions that require or permit housing providers to evict tenants where a tenant or resident has allegedly engaged in a single incident of criminal activity, regardless of whether the activity occurred on or off the property.[37]

These provisions often allow housing providers to evict tenants when a guest or other person allowed onto the property by the tenant or resident allegedly engages in criminal activity on

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[30] *See* Arnold & Slusser, *supra* note 16, at 15.
[31] *Id.* at 22; Fais, *supra* note 19, at 1202; Werth, *supra* note 5, at 8.
[32] Complaint at 9–17, *Briggs v. Borough of Norristown et al.*, No. 2013 C 2191 (E.D. Pa. Apr. 24, 2013) [hereinafter Complaint], http://www.aclu.org/files/assets/norristown_complaint.pdf.
[33] *Id.*; Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN, (Sep. 11, 2015), https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911.
[34] *Id. See also* Press Release, U.S. Department of Housing and Urban Development, HUD and Philadelphia Area Borough Settle Allegations of Housing Discrimination Against Victims of Domestic Violence (Oct. 2, 2014), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2014/HUDNo_14-121.
[35] *See, e.g.*, HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR.
[36] *See* Werth, *supra* note 5, at 3 n.8.
[37] *See, e.g.*, SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233; City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259 ("A single violation of any of the provisions of this added addendum shall be deemed a serious violation and a material and irreparable non-compliance. It is understood that a single violation shall be good cause for termination of the lease.").

or near the property, regardless of whether the resident was a victim of the criminal activity or a party to it.[38] The criminal activity that constitutes a lease violation is frequently broadly and ambiguously defined and may include any violation of federal, state or local laws, however minor.[39] Thus, disorderly conduct, excessive noise and similar activity may constitute a crime resulting in eviction.[40] Crime-free lease addenda often do not provide exceptions for cases where a resident or tenant is the victim of domestic violence or another crime.[41] And, as previously noted, even where exceptions do exist, victims of domestic violence and other crimes may be mistakenly categorized and face eviction despite the exception.[42] For example, police often arrest both the victim and the perpetrator under "dual arrest" policies when a victim has defended herself or himself from the perpetrator.[43]

Furthermore, some crime-free housing ordinances mandate or strongly encourage housing providers to implement lease provisions that require eviction based on an arrest alone, or do not require an arrest or conviction to evict a tenant, but rather allow housing providers to rely on a preponderance of the evidence standard while remaining silent on who is responsible for determining that this standard has been met.[44] The principles discussed in HUD's "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"[45] are instructive in

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[38] *See, e.g.*, HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (mandating that all landlords include the Hesperia Crime-Free Lease Addendum, which requires that a single violation of the addendum, whether committed by resident, guest, or other person, provides good cause for termination of tenancy); Hesperia Crime-Free Lease Addendum, http://www.cityofhesperia.us/DocumentCenter/View/13394.

[39] *See* Werth, *supra* note 5, at 17.

[40] *See, e.g.*, WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf.

[41] *See* Werth, *supra* note 5, at 8.

[42] *See, e.g.*, OPEN COMMUNITIES & SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *Reducing the Cost of Being Crime Free: Alternative Strategies to Crime Free/Nuisance Property Ordinances in Illinois* 3 (2015) http://povertylaw.org/sites/default/files/images/advocacy/housing/reducing-the-cost-of-crime-free.pdf.

[43] *See, e.g.*, Kastner, *supra* note 14, at 1065; *see* Werth, *supra* note 5, at 21.

[44] *See, e.g.*, Werth, *supra* note 5, at 12 (noting that some ordinances allow evictions based on arrests or citations alone); LAS VEGAS, NEV., CODE § 6.09.20 (2012) (requiring landlords to complete training encouraging use of Crime-Free Addendum, which permits eviction based on single alleged violation, as shown by preponderance of evidence, rather than criminal conviction; Las Vegas Crime Free Multi-Housing Program Crime-Free Addendum (2014), http://www.lvmpd.com/Portals/0/pdf/prevention/English_CFAddendum01_2014.pdf); SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233 (requiring landlords to use Crime-Free Lease Addendum, which permits eviction based on single alleged violation of addendum as shown by preponderance of evidence, rather than criminal conviction); City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259); Hesperia, Cal., Health and Safety Code § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (providing chief of police discretion as to whether or not to notify the landlord of the evidence or documents, if any, used to determine that a resident engaged in criminal activity); *see also* Werth, *supra* note 5, at 4.

[45] *See* HELEN R. KANOVSKY, GENERAL COUNSEL, U.S. DEP'T OF HOUS. & URBAN DEV., *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.

evaluating the fair housing implications of crime-free lease ordinances and crime-free lease addenda mandated or encouraged by localities and enforced by housing providers.[46]

III. Discriminatory Effects Liability and Enforcement of Nuisance Ordinances and Crime-Free Housing Ordinances

A local government's policies and practices to address nuisances, including enactment or enforcement of a nuisance or crime-free housing ordinance, violate the Fair Housing Act when they have an unjustified discriminatory effect, even when the local government had no intent to discriminate.[47] Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.[48] Thus, where a policy or practice that restricts the availability of housing on the basis of nuisance conduct has a disparate impact on individuals of a particular protected class, the policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the local government, or if such interest could be served by another practice that has a less discriminatory effect.[49]

Discriminatory effects liability is assessed under a three-step, burden-shifting standard requiring a fact-specific analysis.[50] The following sections discuss the three steps used to analyze whether a local government's enforcement of a nuisance or crime-free housing ordinance results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

A. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative enforcement action) has the burden to prove that a local government's enforcement of its nuisance or crime-free housing ordinance has a discriminatory effect, that is, that the local government's nuisance or crime-free housing ordinance policy or practice results or predictably will result in a disparate impact on a group of persons because of a protected characteristic.[51] This is also true for a local

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[46] In addition to being liable for their own discriminatory conduct, housing providers may have a cause of action under the Fair Housing Act against a locality if a locality's ordinance requires housing providers to discriminate based on a protected characteristic. *See, e.g., Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, *1, 13–15 (N.D. Cal. 2011) (concluding that "forcing the owners of a mobile-home park to discriminate on the basis of familial status through a series of city ordinances . . . violates the federal Fair Housing Act.").

[47] 24 C.F.R. § 100.500; *accord Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2511 (2015).

[48] For purposes of this guidance, the term "policy or practice" encompasses governments' nuisance and crime-free ordinances as well as their enforcement of the ordinances. It also includes government activities related to crime-free housing programs that may not be specified by ordinance.

[49] 24 C.F.R. § 100.500; *see also Inclusive Cmtys. Project*, 135 S. Ct. at 2514–15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500).

[50] *See* 24 C.F.R. § 100.500.

[51] 24 C.F.R. § 100.500(c)(1). A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

government's policy or practice encouraging or incentivizing housing providers to adopt crime-free lease addenda (and the discussion throughout the guidance applies equally to such actions). This burden is satisfied by presenting evidence proving that the challenged policy or practice actually or predictably results in a disparate impact.

Different data sources may be available and useful to demonstrate that a government's ordinance actually or predictably results in a disparate impact, which is ultimately a fact-specific and case-specific inquiry. While state or local statistics typically are presented where available and appropriate based on the local government's jurisdiction or other facts particular to a given case, national statistics may be relevant and appropriate, depending on the specific case and the nature of the claim.

Local statistics are likely to be available for use in establishing whether a local government's enforcement of its nuisance or crime-free ordinance has a disparate impact. Other evidence – for example, resident data and files, demographic data, city and police records including data on enforcement of nuisance or crime-free ordinances, citations and correspondence between housing providers and city officials and court records regarding nuisance abatement – may also be relevant in determining whether a challenged nuisance or crime-free housing ordinance policy or practice causes a disparate impact.

Evidence of nationwide disparities in the enforcement of nuisance or crime-free ordinances based on protected characteristics may be relevant to consider, depending on the specific case and the nature of the claim.[52] Also, in some cases, national statistics may provide grounds for HUD to investigate complaints challenging the enforcement of nuisance ordinances. For example, nationally, women comprise approximately 80 percent of all individuals subjected to domestic violence each year,[53] which may provide grounds for HUD to investigate under the Fair Housing Act allegations that the adverse effects of a nuisance ordinance fall more heavily on victims of domestic violence.

Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a local government will have the opportunity to offer evidence to refute the claim that its nuisance ordinance causes a disparate impact on one or more protected classes.

B. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the local government to prove that the challenged nuisance or crime-free housing ordinance is necessary

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

[53] *See* CASTALANO, *supra* note 27, at 1.

to achieve a substantial, legitimate, nondiscriminatory interest of the local government.[54] The interest of the local government may not be hypothetical or speculative, meaning the local government must be able to prove with evidence what the government interest is, that its interest is legitimate, substantial and nondiscriminatory, and that the challenged practice is necessary to achieve that interest.[55] Assertions based on generalizations or stereotypes about persons deemed to engage in nuisance or criminal conduct are not sufficient to prove that an ordinance or its enforcement is necessary to achieve the local government's substantial, legitimate, nondiscriminatory interest.

As explained in the preamble to HUD's 2013 Discriminatory Effects Final Rule, a "substantial" interest is a core interest of the organization that has a direct relationship to the function of that organization.[56] The requirement that an interest be "legitimate" means that the local government's justification must be genuine and not false or fabricated.[57] A number of local governments have nuisance or crime-free ordinances that encourage, require or are likely to result in housing providers evicting or taking other adverse housing actions against residents, including victims of domestic violence and other crimes, because the residents requested police, medical or other emergency assistance, without regard to whether the calls were reasonable under the circumstances.[58] Where such a practice is challenged and proven to have a disparate impact, the local government would have the difficult burden to prove that cutting off access to emergency services for those in grave need of such services, including victims of domestic violence or other crimes, thereby potentially endangering their lives, safety and security,[59] in fact achieves a core interest of the local government and was not undertaken for discriminatory reasons or in a discriminatory manner. Similarly, if the local government's policy or practice requires or encourages housing providers to evict victims of domestic violence or other crimes or others in need of emergency services, the local government would have the burden to prove that such a policy or practice in fact is necessary to achieve the local government's substantial, legitimate, nondiscriminatory interest.

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a local government successfully proves that its nuisance or crime-free housing ordinance, policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. If the analysis reaches the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another policy or practice that has a less discriminatory effect.[60]

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[54] 24 C.F.R. § 100.500(c)(2).
[55] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013) (preamble to final rule codified at 24 C.F.R. pt. 100).
[56] 78 Fed. Reg. at 11470.
[57] *Id.*
[58] *See* Werth, *supra* note 5, at 8.
[59] When domestic violence victims are evicted on the basis of a nuisance citation, they may often lack alternative housing and experience homelessness. *See, e.g.*, Amanda Gavin, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities*, 119 PENN ST. L. REV. 257, 260 ("on any given day, over 3000 people face homelessness because they are unable to find shelter away from their abusers . . . making domestic violence a leading cause of homelessness in the United States").
[60] 24 C.F.R. § 100.500(c)(3); *accord Inclusive Cmtys. Project*, 135 S. Ct. at 2515.

The identification of a less discriminatory alternative will depend on the particulars of the policy or practice at issue, as well as the specific nature of the underlying problem the ordinance seeks to address.

IV. Intentional Discrimination and Enforcement of Nuisance Ordinances or Crime-Free Housing Ordinances

A local government may also violate the Fair Housing Act if it intentionally discriminates in its adoption or enforcement of a nuisance or crime-free housing ordinance. This occurs when the local government treats a resident differently because of sex, race or another protected characteristic. The analysis is the same as is used to analyze whether any housing ordinance was enacted or enforced for intentionally discriminatory reasons.

Generally, two types of claims of intentional discrimination may arise. One type of intentional discrimination claim arises where a local government enacts a nuisance ordinance or crime-free housing ordinance for discriminatory reasons. Another type is where a government selectively enforces a nuisance or crime-free housing ordinance in a discriminatory manner. For the first type of claim, in determining whether a facially neutral ordinance was enacted for discriminatory reasons, courts generally look to certain factors. The factors, all of which need not be satisfied, include, but are not limited to: (1) the *impact* of the ordinance at issue, such as whether the ordinance disproportionately impacts women compared to men, minority residents compared to white residents, or residents with disabilities or a certain type of disability compared to residents without disabilities; (2) the *historical background* of the ordinance, such as whether there is a history of discriminatory conduct by the local government; (3) the *specific sequence of events*, such as whether the locality adopted the ordinance only after significant community opposition motivated by race or another protected characteristic; (4) *departures from the normal procedural sequence*, such as whether the locality deviated from normal procedures for enacting a nuisance ordinance; (5) *substantive departures*, such as whether the factors usually considered important suggest that a local government should have reached a different result; and (6) the *legislative or administrative record*, such as any statements by members of the local decision-making body.[61]

For the second type of intentional discrimination claim, selective enforcement, where there is no "smoking gun" proving that a local government is selectively enforcing a nuisance or crime-free housing ordinance in a discriminatory way, courts look for evidence from which such an inference can be drawn. The evidence might be direct or circumstantial. For example, courts have noted that an inference of intentional sex discrimination could arise directly from evidence

[61] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). *See also Hidden Vill., LLC v. City of Lakewood*, 867 F. Supp. 2d 920, 942 (N.D. Ohio 2012) (utilizing *Arlington Heights* factors to analyze whether municipal action was motivated by discriminatory intent); *see, e.g., Valdez v. Town of Brookhaven*, 2005 U.S. Dist. LEXIS 36713, *47 (E.D.N.Y 2005) (explaining factors probative of discriminatory intent in case involving town's alleged disproportionate enforcement of zoning and housing codes against Latinos).

that a housing providers seeks to evict female residents shortly after incidents of domestic violence.[62]

A common method of establishing intentional discrimination indirectly, through circumstantial evidence, is through the familiar burden-shifting method of proving intentional discrimination originally established by the Supreme Court in the employment context.[63] In the standard complaint alleging selective enforcement of a nuisance or crime-free ordinance for discriminatory reasons, the plaintiff first must produce evidence to establish a prima facie case of disparate treatment. This may be shown, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) a local government official (or housing provider, depending on the circumstances) took action to enforce the nuisance or crime-free ordinance or lease addendum against the plaintiff or complainant because the plaintiff or complainant allegedly engaged in nuisance or criminal conduct; (3) the local government official or housing provider did not take action to enforce the nuisance or crime-free ordinance or lease addendum against a similarly-situated resident not of the plaintiff or complainant's protected class who engaged in comparable conduct; and (4) the local government or housing provider subjected the plaintiff or complainant to an adverse housing action as a result of the enforcement of the nuisance or crime-free ordinance or lease addendum. It is then the burden of the local government and/or housing provider, depending on the circumstances, to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing action.[64] The proffered nondiscriminatory reason for the challenged decision must be clear, reasonably specific and supported by admissible evidence.[65] Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.[66]

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[62] *See Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) (explaining that landlord's attempt to evict victim 72 hours after domestic violence incident could give rise to inference of discrimination on the basis of gender). *See, e.g.*, *Dickinson v Zanesville Metro. Hous. Auth.*, 975 F. Supp. 2d 863, 872 (S.D. Ohio 2013) (articulating that a housing provider's failure to comply with the Violence Against Women Act and assignment of blame to the victim for the results of domestic violence could give rise to an inference of sex discrimination); *Meister v. Kansas City*, 2011 U.S. Dist. LEXIS 19166, *19–20 (D. Kan. 2011) ("[E]vidence that defendant knew that domestic violence caused damage to plaintiff's housing unit would help support a claim that she was evicted under circumstances giving rise to an inference of sex discrimination.").

[63] *See, generally*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating burden-shifting standard of proving intentional discrimination under Title VII).

[64] *See, e.g.*, *Lindsay v. Yates*, 578 F.3d at 415 (articulating that if plaintiff presents evidence from which a reasonable jury could conclude that there exists a prima facie case of housing discrimination, then the burden shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing decision); *Bouley*, 394 F. Supp. 2d at 678 (explaining that once a plaintiff has established a prima facie case of discrimination, the burden then shifts to the defendant to assert a legitimate, nondiscriminatory rationale for the challenged decision).

[65] *See, e.g.*, *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1040 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

[66] *See, e.g.*, *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups. Our reasoning, in part, is that 'clever men may easily conceal their [discriminatory] motivations.'" (*quoting United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974))).

If the defendant (or respondent in a HUD administrative enforcement action) establishes a legitimate, nondiscriminatory reason for the adverse housing action, a plaintiff or HUD may still prevail by showing that the proffered reason was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination.[67] For example, the fact that the defendant (or respondent) acted upon comparable nuisance or criminal conduct differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that the defendant (or respondent) was not considering such conduct uniformly. Additionally, shifting or inconsistent explanations offered by the defendant (or respondent) for the adverse housing action may provide evidence of pretext. Similarly, a local government's claim that its nuisance citations would not cause tenant evictions because the citations were issued to the housing provider and not the residents could be evidence of pretext.[68] Ultimately, the evidence that may be offered to show that defendant's or respondent's stated justification is pretext for intentional discrimination will depend on the facts of a particular case.

V. Assessment of Nuisance Ordinances and Crime-Free Housing Ordinances as Part of the Duty to Affirmatively Further Fair Housing

In addition to prohibiting discrimination, the Fair Housing Act requires HUD to administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the policies of the Act.[69] The purpose of the Act's affirmatively furthering fair housing (AFFH) mandate is to ensure that recipients of Federal housing and urban development funds do more than simply not discriminate: recipients also must take meaningful action to overcome fair housing issues and related barriers to fair housing choice and disparities in access to opportunity based on sex, race, national origin, disability, and other characteristics protected by the Act. Congress has repeatedly reaffirmed the AFFH mandate by requiring HUD program participants to certify that they will affirmatively further fair housing as a condition of receiving Federal funds.[70]

In 2015, HUD issued a rule on affirmatively furthering fair housing which requires grantees who receive Community Development Block Grant, HOME, Housing Opportunities for Persons with AIDS, or Emergency Solutions Grant funding to conduct an assessment of fair housing for purposes of setting goals to affirmatively further fair housing. In conducting their assessments of fair housing, state and local governments should assess their nuisance ordinances, crime-free housing ordinances and related policies or practices, including the processes by which nuisance ordinance and crime-free housing ordinances are enforced, and consider how these ordinances, policies or practices may affect access to housing and access to police, medical and other governmental services based on sex, race, national origin, disability, and other characteristics protected by the Act. One step a local government may take toward meeting its duty to affirmatively further fair housing is to eliminate disparities by repealing a nuisance or

[67] *See, e.g.*, *Bouley*, 394 F. Supp. 2d at 678.
[68] *See Hidden Vill.*, 867 F. Supp. 2d at 952 (noting that "[d]efendants appear blind to the possibility that repeatedly issuing citations to a landlord, based upon the actions of its tenants, would logically create an incentive for the landlord to evict his problem tenant . . . produc[ing] the same result—the eviction of [predominantly African American youth] but by different means.").
[69] 42 U.S.C. § 3608(d), (e)(5).
[70] 42 U.S.C. §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16).

crime-free ordinance that requires or encourages evictions for use of emergency services, including 911 calls, by domestic violence or other crime victims.

VI. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing ordinances, policies or practices that have an unjustified discriminatory effect because of protected characteristics. While the Act does not prohibit local governments from appropriately considering nuisance or criminal conduct when enacting laws related to housing, governments should ensure that such ordinances and related policies or practices do not discriminate in violation of the Fair Housing Act.

Eighty percent of domestic violence victims are women, and in some communities, racial or ethnic minorities are disproportionately victimized by crime. Where the enforcement of a nuisance or crime-free ordinance penalizes individuals for use of emergency services or for being a victim of domestic violence or other crime, a local government bears the burden of proving that any discriminatory effect caused by such policy or practice is supported by a legally sufficient justification. Such a determination cannot be based on generalizations or stereotypes.

Selective use of nuisance or criminal conduct as a pretext for unequal treatment of individuals based on protected characteristics violates the Act. Repealing ordinances that deny access to housing by requiring or encouraging evictions or that create disparities in access to emergency services because of a protected characteristic is one step local governments can take to avoid Fair Housing Act violations and as part of a strategy to affirmatively further fair housing.

Helen R. Kanovsky, General Counsel

HUD Guidance on Local Nuisance Ordinances and Crime-Free Housing Ordinances: A Summary

In September 2016, HUD issued guidance that examines how the enforcement of nuisance ordinances and crime-free housing ordinances could violate the Fair Housing Act, under certain circumstances. Since the overwhelming majority of domestic violence survivors are women, for example, any policies or practices that affect survivors may constitute sex discrimination under the Fair Housing Act. This HUD guidance focuses on the effect that the enforcement of nuisance and crime-free housing ordinances may have on survivors of domestic violence.

The guidance first discusses how nuisance and crime-free ordinances can have a disproportionate effect on certain groups, which may violate the Fair Housing Act, even when there was no intent to discriminate. The guidance notes that various data sources (including police records or resident data) can be used to show that such ordinances disproportionately affect groups protected by the Fair Housing Act, such as women. The guidance also states that local governments cannot rely upon stereotypes about persons who have been described as engaging in nuisance or criminal activities to defend such ordinances. The guidance also notes that it is not likely that a legitimate, core governmental interest can be served by preventing access to essential emergency services for those who have a significant need for such services, such as domestic violence survivors or other crime victims.

The guidance also discusses how jurisdictions can violate the Fair Housing Act by intentionally using the adoption or enforcement of a nuisance or crime-free ordinance to discriminate. For instance, jurisdictions can have discriminatory motives for adopting a nuisance ordinance. Factors that may indicate an intent to adopt a discriminatory ordinance include considerations such as historical context, the sequence of events leading up to the adoption of the ordinance, the administrative or legislative record, and the ordinance's impact. Another way a jurisdiction can use nuisance and crime-free ordinances is in selective enforcement. Selective enforcement has been shown by, for example, providing evidence that a housing provider sought eviction of female tenants shortly following domestic violence incidents. The guidance concludes by suggesting that local governments can further fair housing objectives by repealing nuisance or crime-free ordinances that penalize survivors or other crime victims for calling 911 or other emergency services.

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U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

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

I. Introduction

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

II. Background

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

[1] 42 U.S.C. § 3601 *et seq.*
[2] Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2012*, 3 (Jan. 2014), *available at* https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf.
[3] Nat'l Acad. Sci., Nat'l Res. Couns., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 2 (Jeremy Travis, et al. eds., 2014), *available at:* http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes.
[4] *Id.*
[5] E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at 29, appendix tbls. 1 and 2, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387.
[6] Bureau of Justice Statistics, U.S. Dep't of Justice, *Reentry Trends in the United States*, *available at* http://www.bjs.gov/content/pub/pdf/reentry.pdf.
[7] *See, e.g.*, S. Metraux, et al. "Incarceration and Homelessness," in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research, #9* (D. Dennis, et al. eds., 2007), *available at:* https://www.huduser.gov/portal//publications/pdf/p9.pdf (explaining "how the increasing numbers of people leaving carceral institutions face an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.").

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

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

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

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

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

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

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

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

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

[12] *See* 24 C.F.R. § 100.500.

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

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

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

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

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

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

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

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

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

general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.[18] In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.[19] Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.[20]

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

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

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

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

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

[18] *See id.*
[19] *See id.*
[20] E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at table 10, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387.
[21] 24 C.F.R. § 100.500(c)(2); *see also Inclusive Cmtys. Project*, 135 S. Ct. at 2523.
[22] *See* 24 C.F.R. § 100.500(b)(2); *see also* 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).
[23] *See, e.g.*, Answer to Amended Complaint at 58, *The Fortune Society, Inc. v. Sandcastle Towers Hsg. Dev. Fund Corp.*, No. 1:14-CV-6410 (E.D.N.Y. May 21, 2015), ECF No. 37 ("The use of criminal records searches as part of the overall tenant screening process used at Sand Castle serves valid business and security functions of protecting tenants and the property from former convicted criminals."); *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009) (noting, based on affidavit of property owner, that "[t]he policy [against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds … [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property."); *see also* J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, Washington, 61 Fed. Probation 12, 20 (1997) (finding in a survey of 196

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

1. Exclusions Because of Prior Arrest

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

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

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

[25] HUD recently clarified that arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing. *See* Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD PIH Notice 2015-19, (November 2, 2015), available at: http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf.

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

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

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

2. Exclusions Because of Prior Conviction

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

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

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

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

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

[31] *Id.*

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

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

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

C. Evaluating Whether There Is a Less Discriminatory Alternative

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

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

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

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

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

[36] 24 C.F.R. § 100.500(c)(3); *accord Inclusive Cmtys. Project*, 135 S. Ct. 2507.

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

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

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

IV. Intentional Discrimination and Use of Criminal History

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

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

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[37] 42 U.S.C. § 3607(b)(4).

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

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

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

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

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

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

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

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

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

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

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

V. Conclusion

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

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

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

Helen R. Kanovsky, General Counsel

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

February 9, 2011

MEMORANDUM FOR: FHEO Office Directors
FHEO Regional Directors

FROM: Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs

SUBJECT: Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA)

I. Purpose

This memorandum provides guidance to Fair Housing and Equal Opportunity (FHEO) headquarters and field staff on assessing claims by domestic violence victims of housing discrimination under the Fair Housing Act (FHAct). Such claims are generally based on sex, but may also involve other protected classes, in particular race or national origin. This memorandum discusses the legal theories behind such claims and provides examples of recent cases involving allegations of housing discrimination against domestic violence victims. This memorandum also explains how the Violence Against Women Act (VAWA)[1] protects some domestic violence victims from eviction, denial of housing, or termination of assistance on the basis of the violence perpetrated by their abusers.

II. Background

Survivors of domestic violence often face housing discrimination because of their history or the acts of their abusers. Congress has acknowledged that "women and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence."[2] Housing authorities and landlords evict victims under zero-tolerance crime policies, citing the violence of a household member, guest, or other person under the victim's "control."[3] Victims are often evicted after repeated calls to the police for domestic violence incidents because of allegations of disturbance to other tenants. Victims are also evicted because of property damage caused by their abusers. In many of these

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[1] This guidance refers to the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), which included provisions in Title VI ("Housing Opportunities and Safety for Battered Women and Children") that are applicable to HUD programs. The original version of VAWA, enacted in 1994, did not apply to HUD programs. Note also that HUD recently published its VAWA Final Rule. *See* HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66246 (October 27, 2010).

[2] 42 U.S.C. § 14043e(3) (findings published in the Violence Against Women Act). Note that VAWA also protects male victims of domestic violence. *See* HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66246, 66251 ("VAWA 2005 does protect men. Although the name of the statute references only women, the substance of the statute makes it clear that its protections are not exclusively applicable to women.").

[3] *See* 24 CFR § 5.100.

cases, adverse housing action punishes victims for the violence inflicted upon them. This "double victimization"[4] is unfair and, as explained in this guidance, may be illegal.

Statistics show that women are overwhelmingly the victims of domestic violence.[5] An estimated 1.3 million women are the victims of assault by an intimate partner each year, and about 1 in 4 women will experience intimate partner violence in their lifetimes.[6] The U.S. Bureau of Justice Statistics found that 85% of victims of domestic violence are women.[7] In 2009, women were about five times as likely as men to experience domestic violence.[8] These statistics show that discrimination against victims of domestic violence is almost always discrimination against women. Thus, domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may have a cause of action for sex discrimination under the Fair Housing Act.[9]

In addition, certain other protected classes experience disproportionately high rates of domestic violence. For example, African-American and Native American women experience higher rates of domestic violence than white women. Black women experience intimate partner violence at a rate 35% higher than that of white females, and about 2.5 times the rate of women of other races.[10] Native American women are victims of violent crime, including rape and sexual assault, at more than double the rate of other racial groups.[11] Women of certain national origins and immigrant women also experience domestic violence at disproportionate rates.[12] This means that victims of domestic violence may also have a cause of action for race or national origin discrimination under the Fair Housing Act.

III. HUD's "One Strike" Rule and The Violence Against Women Act (VAWA)

In 2001, the Department issued a rule allowing housing authorities and landlords to evict tenants for criminal activity committed by any household member or guest, commonly known as the "one strike" rule.[13] The rule allows owners of public and Section 8 assisted housing to terminate a tenant's lease because of criminal activity by "a tenant, any member of the tenant's household, a

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[4] *See* Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 J. GENDER, SOC. POL'Y & L. 377 (2003).

[5] We recognize that men also experience domestic violence. However, because of the wide disparity in victimization, and because many FHAct claims will be based on the disparate impact of domestic violence on women, we use feminine pronouns throughout this guidance.

[6] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States* (2003).

[7] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Crime Data Brief, *Intimate Partner Violence, 1993-2001* (2003).

[8] Jennifer R. Truman & Michael R. Rand, U.S. Department of Justice, *Criminal Victimization, 2009* (2010).

[9] Domestic violence by same-sex partners would be analyzed in the same manner and would be based on sex and any other applicable protected classes.

[10] *Id., (Repeat of reference above)*

[11] Steven W. Perry, U.S. Dep't of Justice, NCJ 203097, *A Bureau of Justice Statistics Statistical Profile, 1992-2002: American Indians and Crime* (2004).

[12] For statistics on specific groups, *see* American Bar Association Commission on Domestic Violence, Survey of Recent Statistics, http://new.abanet.org/domesticviolence/Pages/Statistics.aspx.

[13] Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776 (May 24, 2001) (amending 24 CFR pts. 5, 200, 247, 880, 884, 891, 960, 966, and 982) (often referred to as the "one strike" rule).

guest or another person under the tenant's control"[14] that "threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or… threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises."[15] This policy would seem to allow evictions of women for the violent acts of their spouses, cohabiting partners, or visitors. However, the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA)[16] prohibits such evictions in public housing, voucher, and Section 8 project-based programs. VAWA protects victims of domestic violence, dating violence, sexual assault, and stalking.[17]

VAWA provides that being a victim of domestic violence, dating violence, or stalking is not a basis for denial of assistance or admission to public or Section 8 tenant-based and project-based assisted housing. Further, incidents or threats of abuse will not be construed as serious or repeated violations of the lease or as other "good cause" for termination of the assistance, tenancy, or occupancy rights of a victim of abuse. Moreover, VAWA prohibits the termination of assistance, tenancy, or occupancy rights based on criminal activity directly relating to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control if the tenant or immediate member of the tenant's family is a victim of that domestic violence, dating violence, or stalking.[18]

VAWA also allows owners and management agents to request certification from a tenant that she is a victim of domestic violence, dating violence, or stalking and that the incidence(s) of threatened or actual abuse are bona fide in determining whether the protections afforded under VAWA are applicable.[19] The Department has issued forms for housing authorities and landlords to use for such certification requests,[20] but tenants may also present third-party documentation of the

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[14] 24 CFR § 5.100.

[15] 24 CFR § 5.859.

[16] Pub. L. 109-162, 119 Stat. 2960 (2006). For the Department's final rule on VAWA, see HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66246 (Oct. 27, 2010) (amending 24 CFR pts. 5, 91, 880, 882, 883, 884, 886, 891, 903, 960, 966, 982, and 983).

[17] Each of these terms is defined in VAWA and HUD's corresponding regulations. *See* HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66246, 66258.

[18] Note the exception to these provisions at 24 C.F.R. § 5.2005(d)(2), which states that VAWA does not limit the authority of a public housing agency (PHA), owner, or management agent to evict or terminate a tenant's assistance if they can demonstrate an actual and imminent threat to other tenants or those employed or providing services at the property if that tenant is not terminated. However, this exception is limited by §5.2005(d)(3), which states that a PHA, owner, or management agent can terminate assistance only when there are no other actions that could reduce or eliminate the threat. Other actions include transferring the victim to different unit, barring the perpetrator from the property, contacting law enforcement to increase police presence or developing other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat.

[19] 42 U.S.C. §1437d(u)(1)(A) (public housing program), 42 U.S.C. §1437f(ee)(1) (voucher programs).

[20] HUD Housing Notice 09-15 transmits Form HUD-91066, Certification of Domestic Violence, Dating Violence or Stalking for use by owners and management agents administering one of Multifamily Housing's project-based Section 8 programs and Form HUD-91067, the HUD-approved Lease Addendum, for use with the applicable HUD model lease for the covered project-based Section 8 program. HUD Public and Indian Housing Notice 2006-42 transmits form HUD-50066, Certification of Domestic Violence, Dating Violence or Stalking, for use in the Public Housing Program, Housing Choice Voucher Program (including project-based vouchers), Section 8 Project-Based Certification Program, and Section 8 Moderate Rehabilitation Program. See also PIH Notice 2006-23, Implementation of the Violence Against Women and Justice Department Reauthorization Act of 2005.

abuse, including court records, police reports, or documentation signed by an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional from whom the victim has sought assistance in addressing the abuse or the effects of the abuse.[21] Finally, VAWA allows housing authorities and landlords to bifurcate a lease in a domestic violence situation in order to evict the abuser and allow the victim to keep her housing.[22]

While VAWA provides important protections for victims of domestic violence, it is limited in scope. For example, it does not provide for damages.[23] In addition, VAWA does not provide an explicit private cause of action to women who are illegally evicted. Moreover, VAWA only protects women in public housing, voucher, and Section 8 project-based programs, so domestic violence victims in private housing have no similar protection from actions taken against them based on that violence. VAWA also may not protect a woman who does not provide the requisite documentation of violence,[24] while a claim of discrimination under the Fair Housing Act is not dependent on compliance with the VAWA requirements. In short, when a victim is denied housing, evicted, or has her assistance terminated because she has been a victim of domestic violence, the FHAct might be implicated and we may need to investigate whether that denial is based on, for example, race or sex.

IV. Legal Theories under the Fair Housing Act: Direct Evidence, Unequal Treatment, and Disparate Impact

Direct evidence. In some cases, landlords enforce facially discriminatory policies. These policies explicitly treat women differently from men. Such policies are often based on gender stereotypes about abused women. For example, if a landlord tells a female domestic violence victim that he does not accept women with a history of domestic violence as tenants because they always go back to the men who abuse them, his statement is direct evidence of discrimination based on sex. Investigations in direct evidence cases should focus on finding evidence about whether or not the discriminatory statement was made, whether the statement was applied to others to identify other potential victims, and whether it reflects a policy or practice by the landlord. The usual questions that address jurisdiction also apply.

Unequal treatment. In some cases, a landlord engages in unequal treatment of victims of domestic violence in comparison to victims of other crimes. Or a landlord's seemingly gender-neutral policy may be unequally applied, resulting in different treatment based on sex. For example, a policy of evicting households for criminal activity may be applied selectively against women who have been abused by their partners and not against the male perpetrators of the domestic violence. If there is evidence that women are being treated differently because of their status as victims of domestic violence, an unequal treatment theory applies. If an investigator finds evidence of unequal treatment, the investigation shifts to discovering the respondent's reasons for the differences and

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[21] 42 U.S.C. §1437d(u)(1)(C); 42 U.S.C. § 1437f(ee)(1)(c).
[22] 42 U.S.C. §1437d(l)(6)(B); 42 U.S.C. § 1437f(c)(9)(C) .
[23] Remedies available under VAWA include, for example, the traditional PIH grievance process. *See* HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66246, 66255.
[24] While VAWA 2005 allows owners and PHAs to request certification of domestic violence from victims, the law also provides that owners and PHAs "[a]t their discretion . . . may provide benefits to an individual based solely on the individual's statement or other corroborating evidence." 42 U.S.C.A. § 1437d(u)(1)(D); 42 U.S.C.A. § 1437(f)(ee)(1)(D).

investigating each reason to determine whether the evidence supports or refutes each reason. If a nondiscriminatory reason(s) is articulated, the investigation shifts again to examining the evidence to determine whether or not the reason(s) given is supported by the evidence or is a pretext for discrimination.[25]

Disparate impact. In some cases, there is no direct evidence of unequal treatment, but a facially neutral housing policy, procedure, or practice disproportionately affects domestic violence victims. In these cases, a disparate impact analysis is appropriate. Disparate impact cases often arise in the context of "zero-tolerance" policies, under which the entire household is evicted for the criminal activity of one household member. The theory is that, even when consistently applied, women may be disproportionately affected by these policies because, as the overwhelming majority of domestic violence victims, women are often evicted as a result of the violence of their abusers.

There are four steps to a disparate impact analysis. First, the investigator must identify the specific policy, procedure, or practice of the landlord's that is allegedly discriminatory. This process means both the identification of the policy, procedure, or practice and the examination of what types of crimes trigger the application of the policy. Second, the investigator must determine whether or not that policy, procedure, or practice was consistently applied. This step is important because it reveals the correct framework for the investigation. If the policy is applied unequally, then the proper analysis is unequal treatment, not disparate impact. If, however, the policy was applied consistently to all tenants, then a disparate impact analysis applies, and the investigation proceeds to the next step.

Third, the investigation must determine whether or not the particular policy, procedure, or practice has a significant adverse impact on domestic violence victims and if so, how many of those victims were women (or members of a certain race or national origin). Statistical evidence is generally used to identify the scope of the impact on a group protected against discrimination. These statistics should be as particularized as possible; they could demonstrate the impact of the policy as to applicants for a specific building or property, or the impact on applicants or residents for all of the landlord's operations. For example, in a sex discrimination case, the investigation may uncover evidence that women in one apartment complex were evicted more often than men under a zero-tolerance crime policy. It would not matter that the landlord did not intend to discriminate against women, or that the policy was applied consistently. Proof of disparate impact claims is not an exact science. Courts have not agreed on any precise percentage or ratio that conclusively establishes a prima facie case. Rather, what constitutes a sufficiently disparate impact will depend on the particular facts and circumstances of each case.

If the investigation reveals a disparate impact based on sex, race, or national origin, the investigation then shifts to eliciting the respondent's reasons for enforcing the policy. It is critical to thoroughly investigate these reasons. Why was the policy enacted? What specific outcome was it meant to achieve or prevent? Were there any triggering events? Were any alternatives considered, and if so, why were they rejected? Is there any evidence that the policy has been effective? What constitutes a sufficient justification will vary according to the circumstances. In general, the investigation will examine whether or not the offered justification is real and supported by a substantial business justification. For the purposes of this memorandum, it is important to

[25] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for an explanation of the burden-shifting formula.

understand that an investigation must identify and evaluate the evidence supporting and refuting the justification.

Even if there is sufficient justification for the policy, there may be a less discriminatory alternative available to the respondent. A disparate impact investigation must consider possible alternative policies and analyze whether each policy would achieve the same objective with less discriminatory impact. For example, in a case of discriminatory eviction under a zero-tolerance policy, a landlord could adopt a policy of evicting only the wrongdoer and not innocent victims. This policy would protect tenants without unfairly penalizing victims of violence.

In summary, an investigation of a disparate impact case must seek evidence that a specific policy of the landlord's caused a substantial, disproportionate, adverse impact on a protected class of persons. Proving a disparate impact claim will generally depend on statistical data demonstrating the disparity and a causal link between the policy and the disparity; discriminatory intent is irrelevant.

V. Fair Housing Cases Involving Domestic Violence

Eviction Cases. Victims are often served with eviction notices following domestic violence incidents. Landlords cite the danger posed to other tenants by the abuser, property damage caused by the abuser, or other reasons for eviction. Several cases have challenged these evictions as violations of VAWA or the Fair Housing Act.

Alvera v. CBM Group, Case No. 01-857 (D. Or. 2001).[26] The victim was assaulted by her husband in their apartment. She obtained a restraining order against her husband, and he was subsequently arrested and jailed for the assault. She provided a copy of the restraining order to the property manager. The property manager then served her with a 24-hour eviction notice based on the incident of domestic violence. The notice specified: "You, someone in your control, or your pet, has seriously threatened to immediately inflict personal injury, or has inflicted personal injury upon the landlord or other tenants." The victim then submitted an application for a one-bedroom apartment in the same building. Management denied the application and refused to accept her rent. After a second application, management finally approved her for a one-bedroom apartment, but warned her that "any type of recurrence" of domestic violence would lead to her eviction.

The victim filed a complaint with HUD, which investigated her case and issued a charge of discrimination against the apartment management group. She elected to pursue the case in federal court. The parties later agreed to settle the lawsuit. The consent decree, approved by the Oregon district court in 2001, requires that the management group agree not to "evict, or otherwise discriminate against tenants because they have been victims of violence, including domestic violence" and change its policies accordingly. Employees of the management group must participate in education about discrimination and fair housing law. The management group also agreed to pay compensatory damages to the victim.

Warren v. Ypsilanti Housing Authority, Case No. 4:02-cv-40034 (E.D. Mich. 2003). The victim's ex-boyfriend broke into her house and physically abused her. She called the police to

[26] A copy of the determination is attached to this memo.

report the attack. When the Ypsilanti Housing Authority (YHA) learned of the attack, it attempted to evict the victim and her son under its zero-tolerance crime policy. The ACLU sued the YHA for discrimination, arguing that because victims of domestic violence are almost always women, the policy of evicting domestic violence victims based on the violence perpetrated against them had a disparate impact based on sex in violation of the federal Fair Housing Act and state law. The parties reached a settlement, under which the YHA agreed to cease evicting domestic violence victims under its "one-strike" policy and pay money damages to the victim.

Bouley v. Young-Sabourin 394 F. Supp. 2d 675 (D. Vt. 2005). The victim called the police after her husband attacked her in their home. She obtained a restraining order against her husband and informed her landlord. The landlord spoke to the victim about the incident, encouraging her to resolve the dispute and seek help through religion. The victim told her landlord that she would not let her husband return to the apartment and was not interested in religious help. The landlord then served her with a notice of eviction, stating that it was "clear that the violence would continue." In a ruling on the parties' cross-motions for summary judgment, the court held that the victim had presented a prima facie case of sex discrimination under the Fair Housing Act. The case later settled.

T.J. v. St. Louis Housing Authority (2005). The victim endured ongoing threats and harassment after ending her relationship with her abusive boyfriend. He repeatedly broke the windows of her apartment when she refused to let him enter. She obtained a restraining order and notified her landlord, who issued her a notice of lease violation for the property damage caused by the ex-boyfriend and required her to pay for the damage, saying she was responsible for her domestic situation. Her boyfriend finally broke into her apartment and, after she escaped, vandalized it. The housing authority attempted to evict her based on this incident. The victim filed a complaint with HUD, which conciliated the case. The conciliation agreement requires the housing authority to relocate her to another apartment, refund the money she paid for the broken windows, ban her ex-boyfriend from the property where she lived, and send its employees to domestic violence awareness training.

Lewis v. North End Village, Case No. 2:07-cv-10757 (E.D.Mich. 2007). The victim obtained a personal protection order against her abusive ex-boyfriend. Months later, the ex-boyfriend attempted to break into the apartment, breaking the windows and front door. The management company that owned her apartment evicted the victim and her children based on the property damage caused by the ex-boyfriend. With the help of the ACLU of Michigan, she filed a complaint against the management company in federal court, alleging sex discrimination under the FHAct. The case ultimately settled, with the management company agreeing to new, nondiscriminatory domestic violence policies and money damages for the victim.

Brooklyn Landlord v. R.F. (Civil Court of Kings County 2007). The victim's ex-boyfriend continued to harass, stalk, and threaten her after she ended their relationship. In late April 2006, he came to her apartment in the middle of the night, banging on the door and yelling. The building security guard called by the victim was unable to reason with her abuser, who left before the police arrived. One week later, the abuser came back to the building, confronted the same security guard, and shot at him. The victim was served an eviction notice from her Section 8 landlord based on this incident. The victim filed a motion for summary judgment which asserted defenses to eviction

under VAWA and argued that the eviction constituted sex discrimination prohibited by the FHAct. The parties reached a settlement under which the landlord agreed to take measures to prevent the ex-boyfriend from entering the property.

Jones v. Housing Authority of Salt Lake County (D. Utah, filed 2007). The victim applied for and received a Section 8 voucher in 2006. She and her children moved into a house in Kearns, Utah later that year. She allowed her ex-husband, who had previously been abusive, to move into the house. Shortly after he moved in, the victim discovered that he had begun drinking again. After he punched a hole in the wall, the victim asked him to move out. When he refused, she told the Housing Authority that she planned to leave the home with her children to escape the abuse. The Housing Authority required her to sign a notice of termination of her housing assistance. The victim requested a hearing to protest the termination, and the Housing Authority decided that termination of her assistance was appropriate, noting that she had never called the police to report her husband's violent behavior. With the help of Utah Legal Services, she filed a complaint in federal court against the Housing Authority, alleging that the termination of her benefits violated VAWA and the FHAct.

Cleaves-Milan v. AIMCO Elm Creek LP, 1:09-cv-06143 (N.D. Ill., filed October 1, 2009). In 2007, the victim moved into an Elmhurst, Illinois apartment complex with her fiancé and her daughter. Her fiancé soon became abusive, and she ended the relationship. He became upset, produced a gun, and threatened to shoot himself and her. She called police to remove him, obtained an order of protection, and removed him from the lease with the consent of building management. When she attempted to pay her rent, however, building management told her that she was being evicted because "anytime there is a crime in an apartment the household must be evicted." With the help of the Sargent Shriver National Center on Poverty Law, she filed a complaint against the management company for sex discrimination under the Fair Housing Act.

Transfer Cases. Victims will also sometimes request transfers within a housing authority in order to escape an abuser. Two recent cases have challenged the denial of these transfers as sex discrimination under the Fair Housing Act, with mixed results.

Blackwell v. H.A. Housing LP, Civil Action No. 05-cv-01225-LTB-CBS (D. Colo. 2005). The victim's ex-boyfriend broke into her apartment and, over the course of several hours, raped, beat, and stabbed her. She requested a transfer to another complex. Building management refused to grant her the transfer, forcing her and her children into hiding while police pursued her ex-boyfriend. With the help of Colorado Legal Services, the victim filed a complaint in federal court, alleging that the failure to grant her transfer request constituted impermissible discrimination on the basis of sex based on a disparate impact theory. The case eventually settled. The landlord agreed to institute a new domestic violence policy, prohibiting discrimination against domestic violence victims and allowing victims who are in imminent physical danger to request an emergency transfer to another Section 8 property.

Robinson v. Cincinnati Metropolitan Housing Authority, Case No. 1:08-CV-238 (S.D. Ohio 2008). The victim moved into a Cincinnati public housing unit with her children in 2006. She began dating a neighbor, who physically abused her repeatedly. When she tried to end the relationship, he beat her severely and threatened to kill her if she ever returned to the apartment.

She obtained a protection order and applied to the Cincinnati Metropolitan Housing Authority (CMHA) for an emergency transfer, but was denied. The victim was paying rent on the apartment but lived with friends and family for safety reasons. With the help of the Legal Aid Society of Southwest Ohio, the victim filed a complaint against CMHA in federal court, alleging that by refusing to grant her occupancy rights granted to other tenants based on the acts of her abuser, CMHA intentionally discriminated against her on the basis of sex. The court denied her motion for a temporary restraining order and preliminary injunction, finding that CMHA policy allows emergency transfers only for victims of federal hate crimes, not for victims of domestic violence. The court also distinguished cases of domestic violence-based eviction from the victim's case,[27] saying that CMHA did not violate her rights under the FHAct by denying her a transfer.

VI. Practical Considerations When Working with a Victim of Domestic Violence

When working with a victim of domestic violence, an investigator must be sensitive to the victim's unique circumstances. She is not only a potential victim of housing discrimination, she is also a victim of abuse. Often, a victim who is facing eviction or other adverse action based on domestic violence also faces urgent safety concerns. She may fear that the abuser will return to harm her or her children. An investigator should be aware of resources available to domestic violence victims and may refer a victim to an advocacy organization or to the police.[28] Investigators should also understand that a victim may be hesitant to discuss her history. Victims are often distrustful of "the system" after negative experiences with housing authorities, police, or courts. In order to conduct an effective investigation, investigators should be patient and understanding with victims and try not to appear judgmental or defensive.[29]

VII. Conclusion

The Violence Against Women Act provides protection to some victims of domestic violence who experience housing discrimination but it does not protect them from discrimination based on sex or another protected class. Thus, when a victim is denied housing, evicted, or has her assistance terminated because she has experienced domestic violence, we should investigate whether that denial or other activity violates the Fair Housing Act. Victims may allege sex discrimination, but may also allege discrimination based on other protected classes, such as race or national origin.

Questions regarding this memorandum should be directed to Allison Beach, Office of the Deputy Assistant Secretary for Enforcement and Programs, at (202) 619-8046, extension 5830.

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[27] In its order denying Robinson's request for a temporary restraining order and a preliminary injunction, the court cites *Bouley*, *Lewis*, *Warren*, and *Alvera* as cases that "recognized that to evict the women in these situations had the effect of victimizing them twice: first they are subject to abuse and then they are evicted." Order, page 6.

[28] Nationwide resources include the National Domestic Violence Hotline, at 1-800-799-SAFE (7233) or www.thehotline.org, and www.womenslaw.org. Either resource can refer victims to local advocates and shelters and provide safety planning advice.

[29] For more advice on working with domestic violence survivors, see Loretta M. Frederick, *Effective Advocacy on Behalf of Battered Women*, The Battered Women's Justice Project, available at http://www.bwjp.org/files/bwjp/articles/Effective_Advocacy_Battered_Women.pdf.

DETERMINATION OF REASONABLE CAUSE

CASE NAME: Alvera v Creekside Village Apartments
CASE NUMBER: 10-99-0538-8

I. JURISDICTION

A complaint was filed with the Department on October 22, 1999, alleging that Ms. Tiffani Ann Alvera, the complainant, was injured by a discriminatory act by the respondents, Creekside Village Apartments, a California Limited Partnership; General Partners Edward and Dorian Mackay; The CBM Group, Inc.; and CBM Group employees Karen Mock, Resident Manager of Creekside Village Apartments, and Inez Corenevsky, Supervising Property Manager. It is alleged that the respondents were responsible for a discriminatory refusal to rent and discriminatory terms, conditions, privileges, or services and facilities, in violation of Sections 804 (a) and (b) of the Fair Housing Act. The most recent discriminatory act was alleged to have occurred on September 7, 1999. The property is Creekside Village Apartments, 1953 Spruce Drive, Seaside, Oregon. The property is not exempt under the Act.

The respondents receive federal financial assistance from the United States Department of Agriculture, Rural Development.

II. COMPLAINANT'S ALLEGATIONS

Ms. Alvera alleged that on August 2, 1999, her husband physically assaulted her in their home, apartment 21 in Creekside Village Apartments. Her husband was jailed and Ms. Alvera obtained a temporary restraining order against him. On August 4, 1999, Ms. Alvera alleged, she received a 24 hour notice to vacate from management that stated that, pursuant to Oregon law: "You, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted substantial personal injury upon the landlord or other tenants." The notice specified that the incident was the assault on Ms. Alvera by her husband. Ms. Alvera alleged further that after issuing the notice, the managers refused to accept her rent for September. The managers also refused to move her to a one bedroom apartment; since her husband was not to live with her any more, she believed that she no longer qualified for a two bedroom apartment in this USDA subsidized complex. Ms. Alvera alleged that management discriminated against her because of her sex because the way they interpret and enforce Oregon state law toward domestic violence victims has a greater negative impact on women. She also alleged that management would not have treated men the same way as she was treated.

III. RESPONDENTS' DEFENSES

The respondents defended that they gave Ms. Alvera a 24 hour notice to vacate because it is their policy to evict tenants who pose a threat to the safety and well-being of other tenants in the complex. When one person in the household poses a threat, the entire household is evicted.

IV. FINDINGS AND CONCLUSIONS

The investigation revealed that the subject property consists of forty units and is funded by the USDA Rural Development program. The property is intended to serve lower income residents.

The investigation found that Ms. Alvera and her former husband, Mr. Humberto Mota, signed a lease and moved into a two bedroom unit at the complex in November, 1998. Until the incident from which this complaint arises, Ms. Alvera received no warnings or admonitions concerning her tenancy from the respondents. During this period Mr. Mota assaulted Ms. Alvera, who called the police. However, the respondents apparently were not aware of this incident and no action was taken with respect to their tenancy. In March, 1999, respondent Karen Mock became the resident manager of Creekside Village Apartments.

The evidence shows that on August 2, 1999, at approximately 5:30 am, Mr. Mote physically assaulted Ms. Alvera, causing Ms. Alvera to go to the hospital. Her mother, Tamie Alvera, who resided in unit 30 in the complex, at approximately 6:00 am, went to Ms. Mock in order to get a key to her daughter's apartment so that she could see whether Mr. Mota was still in the apartment. At the time, Tamie Alvera told Ms. Mock that Ms. Alvera had been beaten by Mr. Mota. Ms. Mock wrote up an incident report and sent it to respondent Corenevsky. The investigation revealed that immediately after she was released from the hospital, Ms. Alvera obtained a restraining order against her husband, which she showed to Ms. Mock. The restraining order stated that Mr. Mota could not contact Ms. Alvera at her residence, place of business, or within 100 feet of Ms. Alvera and could not contact her by phone or mail. The order also stated that Mr. Mota would move from and not return to their residence. Ms. Alvera discussed with Ms. Mock removing Mr. Mota from the lease.

The investigation revealed further that Ms. Mock was instructed by Ms. Corenevsky to terminate Ms. Alvera's tenancy and issue a 24 hour for cause eviction notice. On August 4, 1999, CBM Group issued a 24 hour notice to Ms. Alvera and Mr. Mota. The notice stated: "You, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted substantial personal injury upon the landlord or other tenants." The notices specified: "On August 2, 1999 at approximately 6 a.m. Humberto Mota reportedly physically attacked Tiffani Alvera in their apartment. Subsequently, Police were called in."

The investigation established that on August 4, 1999, Ms. Alvera made an application for a one bedroom unit at the complex because there was then only one member of the household. The evidence shows that this application was rejected by the respondents because of the incident of domestic violence for which Ms. Alvera received the 24 hour notice. The evidence showed that unit 18, a one bedroom apartment into which Ms. Alvera eventually moved, was available as of August 4, 1999. On October 8, 1999, Ms. Alvera submitted a second application for a one bedroom apartment. On November 2, Ms. Alvera signed a lease for a one bedroom apartment, where she resided until she was later evicted for reasons not directly related to the allegations of this complaint.

The evidence further revealed that on August 6, 1999, Ms. Mock refused to accept Ms. Alvera's rent for the month of August. The respondents communicated to Ms. Alvera up through early September, 1999 that they intended to pursue an FED action against her. On October 26, 1999, an attorney representing the respondents wrote Ms. Alvera "concerning your Rental Agreement of [unit 21]." The letter stated:

> "As you know, there was a recent incident of violence that took place between you and another member of your household. It is our understanding that you have taken steps to ensure that such an incident will not occur again.
>
> This letter is to advise that Creekside is very concerned about the effect of such conduct on other tenants of the premises. Your conduct and the conduct of the other tenant would probably have been grounds for termination of your tenancy. Obviously, Creekside would not desire to take this action.
>
> This letter is to advise that if there is any type of reoccurrence of the past events described above, that Creekside would have no other alternative but to-cause an eviction to take place. We solicit your cooperation in continuing to maintain a restraining order or for you to take whatever action is necessary to make certain that the rules of your tenancy are followed."

There is no dispute that the sole reason for the 24 hour notice was respondents' response to this incident of domestic violence. The evidence shows that none of the other tenants complained to the respondents that their tenancy had been disrupted or that they had been injured or feared injury because of the incident. Ms. Mock stated that after Ms. Alvera vacated the apartment a hole in the wall, which might have been caused by an assault by Mr. Mota, was discovered, but that she learned of this damage long after the 24 hour notice had been issued and that she did not report the hole to her superiors.

The investigation did not establish that Ms. Alvera was treated differently than similarly situated male tenants. There were no similarly situated male tenants. The evidence also revealed that there were at least three incidents of domestic violence at Creekside Village Apartments, all involving female victims, but respondents knew only about the August, 1999 incident involving Ms. Alvera. The evidence showed that the respondents issued three other 24 hour notices. One notice was for criminal activity, one was because the INS took the entire family away, and one was because a tenant threatened other tenants with a baseball bat. The evidence also showed that the resident manager filed six incident reports with upper management during the period June 1, 1999 to January 31, 2000. The only incident report involving violence, domestic or otherwise, was that involving Ms. Alvera.

It is the respondents' policy, expressed by respondent Corenevsky, that where there is any threat or act of violence by a tenant or, their guest, the household is terminated. She stated that the subject property has a "zero tolerance" for violence or threats of violence, and this policy was affirmed by the ADA/504 Coordinator for CBM Group. Ms. Corenevsky stated: "As is often the case in a domestic violence situation the victim does not take steps to prevent a reoccurrence of violent acts, subjecting other tenants to witness the scene play out time and time again. The reasons we take such a hard stance on the issue of violence is to maintain a peaceful living environment for all tenants."

Nationally, each year from 1992 to 1996 about 8 in 1,000 women and 1 in 1,000 men experienced a violent victimization by an intimate—a current or former spouse, girlfriend or boyfriend. National statistics also showed that, although less likely than males to experience violent crime overall, females are 5 to 8 times more likely than males to be victimized by an intimate. Other national studies have found that women are as much as ten times more likely than men to be victimized by an intimate.

National statistics show that 90% to 95% of victims of domestic violence are women. National estimates are that at least one million women a year are victims of domestic violence. A 1998 Oregon Domestic Violence Needs Assessment stated that more than one in eight (13.3 %) women in the state were the victims of physical abuse by an intimate in the prior year. Evidence obtained during the investigation showed that 93% of the victims of domestic violence reported to Clatsop County in 1999 were women. The 1998 Oregon Domestic Violence Needs Assessment compared the Oregon statistics to national statistics on the prevalence of domestic violence and found them to be comparable. National studies using a similar methodology reported that 1 out of every 9 to 1 out of every 12 women had been victims of physical assault by an intimate partner within the previous year. This compares to the Oregon study's finding that 1 of every 10 Oregon women have been victims of physical assault.

These statistics demonstrate that the respondents' policy of evicting all members of a household because of an incident of domestic violence, regardless of whether the household member is a victim or a perpetrator of the domestic violence, has an adverse impact based on sex, because of the disproportionate number of women victims of domestic violence.

The respondents have raised several reasons for their policy. One rationale advanced by the respondents is the need to protect other tenants both from threats of violence or violence and from being disturbed in their tenancy. However, the evidence fails to support this rationale. In the case of Ms. Alvera, no other tenants complained about the incident in question and the evidence shows that the only tenant who was aware of the incident was Ms. Alvera's mother. There were no other records of tenant complaints or incident reports involving domestic violence though the evidence shows that incidents of domestic violence were occurring at the complex. Further, there was no evidence in the investigation to support an assumption that there is a greater probability that persons living in the immediate vicinity of a household that has incidents of domestic violence will themselves become victims of that violence.

The respondents also argued that their policy is consistent with and mandated by rules of Rural Development concerning properties funded by that agency. Rural Development has implemented regulations and procedures providing that: "Action or conduct of the tenant or member which

disrupts the livability of the project by being a direct threat to the health or safety of any person, or the right of any tenant or member to the quiet enjoyment of the premises..." is grounds for termination of tenancy. However, Rural Development's rules and policies also provide: "It is not the intent that this provision of material lease violation apply to innocent members of the tenant's household who are not engaged in the illegal activity, nor are responsible for control of another household member or guest." The Rural Development representative responsible for monitoring Creekside Village Apartments stated that the rule protects innocent parties.

Respondent Corenevsky also stated that a reason that the respondents evict the entire household is because a TRO doesn't stop violence, and many men are not afraid of TROs. The results of national studies on the effectiveness of restraining orders in preventing future incidents of domestic violence are mixed. One study showed that in the six months after a restraining order is issued, 65% of the women who obtained the order reported no further domestic violence problems. Another study showed that future incidents of violence did occur even after a restraining order was obtained. However, the respondents' rationale is based on overbroad generalizations that do not take into account either the individual circumstances of the female victim tenant or all of the actions that she may have taken to prevent a recurrence of the violence. For example, in the case of Ms. Alvera, Mr. Mota was jailed, apparently subsequently left the country, and has had no further contact with Ms. Alvera.

In issuing a 24 hour notice, the respondents apparently also were relying on an Oregon State law, ORS 90.400(3), which permits landlords to issue a notice for a tenant to vacate the property within 24 hours if there is substantial personal injury to the landlord or other tenants. However, that law, and the legislative history behind it, were not intended to apply to innocent victims of violence. During the legislative process witnesses testified that: "There are special concerns about battered women who might be evicted under this provision because of the outrageous conduct of an abusive boyfriend; they would be punished twice; beaten by the boyfriend, then evicted because of the boyfriend's abuse."

The evidence taken as a whole establishes that a policy of evicting innocent victims of domestic violence because of that violence has a disproportionate adverse impact on women and is not supported by a valid business or health or safety reason by the respondents.

V. CONCLUSION

For the foregoing reasons, the Department finds reasonable cause to believe that the complainant has been discriminated against because of her sex in violation of the Fair Housing Act. A copy of the Final Investigative Report is available by requesting the Report in writing addressed to the Fair Housing Hub, Northwest/Alaska Area, U.S. Department of Housing and Urban Development, 909 First Avenue, Suite 205, Seattle, Washington 98104.

4/13/01
Date

Judith A. Keeler
Director, Seattle Fair Housing Hub

nhlp NATIONAL HOUSING LAW PROJECT

Domestic & Sexual Violence and Housing Newsletter: Issue 1 (2018)

Ohio Study Details How Nuisance Ordinances Harm Domestic Violence Survivors

Across the United States, crime-free and nuisance ordinances and policies jeopardize the housing security of survivors of domestic violence, dating violence, sexual assault, and stalking. Such ordinances often penalize property owners for so-called "nuisance" conduct that occurs at a property. If that property is a rental property, oftentimes landlords will, in turn, evict tenants who have allegedly engaged in nuisance activity. Such nuisance activity may include calling the police a certain number of times within a specific timeframe. These nuisance activities have been enforced against survivors of domestic violence who are seeking police assistance due to the actions of their abusers. This has led to survivors having to choose between being evicted and ensuring their safety.

A recent study, entitled ***Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio*****,** explores nuisance ordinances in Ohio and their effects. The authors, including Cleveland State University and the ACLU of Ohio, published the study in November 2017. At the time the report was published, almost 50 cities in Ohio had nuisance ordinances. The report focuses on the more than 20 ordinances in the northwest part of the state. Specifically, the report discusses the (1) adoption of these ordinances, and (2) how they are implemented.

Adoption of Nuisance Ordinances

The first part of the report largely focuses on why nuisance ordinances are adopted. The report notes that nuisance ordinances are often put in place in response to resident complaints. The report offers several reasons why cities adopt nuisance ordinances, such as: (1) giving local police more authority; (2) responding formally to resident complaints concerning neighborhood activities; (3) creating laws that regulate resident conduct in accordance with neighborhood "character"; and (4) making property owners assist with regulating resident activities and conduct. Additionally, the report details how nuisance ordinances can be passed to target certain populations such as communities of color and renters (including Section 8 Voucher households).

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Implementation of Nuisance Ordinances

The second part of the report details how cities implement nuisance ordinances. For example, the authors note that nuisance ordinances are often a way of penalizing activity that would be either difficult to prove, or that is not in fact criminal behavior. Some of the cities examined in the study recommend that owners evict tenants in response to alleged nuisance activity at the property. The study also identifies instances where cities would cross-check nuisance violations with lists of residents served by the local housing authority so that residents with nuisance violations would be terminated from the Voucher program.

The report describes the lack of procedural protections for tenants who are accused of nuisance conduct. Specifically, the report notes that some cities prevent tenants from being able to challenge or appeal the nuisance designation. The report cites several examples of cities that provide appeal rights to owners, but not tenants. Furthermore, in at least one city included in the study, city officials intentionally ensured that notifications concerning nuisance activity would go directly to the owner, not the tenant.

The study also describes how enforcement of nuisance ordinances can negatively impact survivors of domestic violence. At the time the study was published, about half of Ohio cities with nuisance laws considered "domestic violence as a nuisance offense." According to the report, several Ohio cities have amended their nuisance laws to remove domestic violence being considered a nuisance. The study cites "an extreme example" of a city where "almost every nuisance letter [in a particular time frame] was sent to the scene of domestic violence." The study outlines several examples in which cities notified landlords of nuisance activity occurring at their properties as a result of domestic violence incidents. In one example, the landlord evicted the tenant after receiving a nuisance letter from the city. That city has since changed its law such that domestic violence is not considered nuisance conduct.

The report also outlines examples of how Ohio nuisance ordinances have negative impacts upon persons with mental health challenges and persons struggling with drug addiction – including persons who need medical assistance in an emergency (such as suicide attempts or drug overdoses).

(Continued on page 3)

Resource

Cleveland State University and ACLU of Ohio, *Who Is A Nuisance? Criminal Activity Nuisance Ordinances in Ohio* (Nov. 2017), available at:

https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2513&context=urban_facpub

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Conclusion

The report's authors find that nuisance ordinances "disproportionately target and impact residents of color, renters, and residents using housing vouchers." Furthermore, the study also outlines how such ordinances have been enforced against domestic violence survivors, as well as persons experiencing mental health and substance abuse emergencies. Survivors are consistently harmed by the enforcement of these ordinances, and, as the study points out, can contribute to housing instability.

Advocates should review the Ohio study to gain a better understanding of how local nuisance ordinances may be impacting survivors in their communities. ▪

Nuisance Ordinances and Their Impacts on Domestic Violence Survivors

An Introduction for Local Governments

Nuisance ordinances are local laws that often impose penalties (e.g., fines) on property owners for activity on their property that is considered to be "nuisance" activity. While such laws are known for enforcing local rules such as lawn-upkeep, these ordinances may also capture other conduct -- such as making a certain number of calls for police or emergency assistance to a property within a particular time frame. In response to warnings or nuisance citations from a city or town, property owners often evict renters to avoid penalties.

How Can Nuisance Ordinances Negatively Affect Domestic Violence Survivors and Other Populations?

Depending on how specific ordinances are written and enforced, these laws may:

- Count incidents of domestic violence or calls to 911 for assistance as nuisance activity, subject to penalties.
- Miscategorize incidents of domestic violence (e.g., counting incidents as "noise complaints" or "criminal activity") that may count toward a nuisance designation.
- Discourage domestic violence survivors from calling for police or emergency assistance out of fear of eviction or other penalties, forcing a choice between one's housing and personal safety.
- Negatively affect persons with mental health disabilities and communities of color.

Can Enforcement of Nuisance Ordinance Violate Other Laws?

Yes -- again, depending on the specific ordinance or policy at issue, enforcement of nuisance ordinances against domestic violence survivors and other populations may violate laws such as:

- The Fair Housing Act and similar state laws that prohibit sex, race, and disability discrimination;
- The Violence Against Women Act, which protects survivors of domestic violence, dating violence, sexual assault, and stalking in federal housing programs;
- The U.S. Constitution, including one's First Amendment right to seek help from the government; and
- Any state laws prohibiting nuisance ordinances that adversely impact survivors or other populations.

Questions about whether a policy violates the law should be referred to an attorney familiar with the specific facts.

What if a Local Nuisance Law Has an Exception So That Domestic Violence Incidents are Not Counted as "Nuisances"?

An exception for domestic violence incidents does not guarantee that survivors are protected from the negative impacts of nuisance laws. As HUD pointed out in 2016 guidance, even in places where laws specifically exclude domestic violence survivors or other crime victims, these victims may still be considered to have engaged in nuisance conduct because "police and other emergency service providers may not log the call as domestic violence, instead categorizing it incorrectly as property damage, disturbing the peace or another type of nuisance conduct."

Training and Technical Assistance Available for Local Governments

To request training or technical assistance, please contact Renee Williams, rwilliams@nhlp.org.

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Getting Evicted for Calling the Police: Nuisance Ordinances and Their Impacts on Domestic Violence Survivors

Information for Local Advocates

What are Nuisance Ordinances?

Nuisance ordinances are local laws that often impose penalties (e.g., fines) on property owners for activity on their property that is considered to be "nuisance" activity. For example, failure to maintain one's lawn is an example of a "nuisance."

Such ordinances may also define nuisance activity as calling law enforcement or emergency assistance to a property a certain number of times within a certain timeframe. For example, if someone calls the police to their apartment complex too many times within a month or year, making such calls may be considered "nuisance" activity under local law. In response, property owners cited under nuisance ordinances may evict renters to avoid penalties.

How can Nuisance Ordinances Negatively Affect Domestic Violence Survivors and Other Populations?

- Local nuisance ordinances may count incidents of domestic violence or calls to 911 for assistance as nuisance activity, subject to penalties.
- Nuisance ordinances discourage survivors from calling for police or emergency assistance out of fear of eviction or other penalties. This makes survivors choose between their homes and their safety.
- Nuisance ordinances have also been shown to negatively affect persons with disabilities and communities of color.

Are there Possible Protections Under the Law?

Enforcement of nuisance ordinances against domestic violence survivors and other populations may violate laws such as:

- The Fair Housing Act and similar state laws that prohibit sex, race, and disability discrimination;
- The Violence Against Women Act, which protects survivors of domestic violence, dating violence, sexual assault, and stalking in federal housing programs;
- The U.S. Constitution, including one's First Amendment right to seek help from the government; and
- Any state laws prohibiting nuisance ordinances that adversely impact survivors or other populations.

Need More Information?

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