

February 5, 2013

Housing Authority of New Orleans
c/o Senior Advisor to the Administrative Receiver
4100 Touro Street
New Orleans, LA 70122

Re: *Housing Authority of New Orleans' Draft Criminal Background Policy Statement*

Dear Mr. Gilmore:

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) writes to offer its comments on the draft Criminal Background Policy Statement (“Draft Policy Statement”) proposed by the Housing Authority of New Orleans (“HANO”) on January 5, 2013. As the nation’s oldest civil rights firm, LDF has long worked to eliminate racial barriers from all aspects of American life and to create a more just and fair democracy. LDF also strongly supports re-entry policies that help people with prior convictions, who are disproportionately African-American, to successfully reintegrate into society.

In the preamble to the Draft Policy Statement, HANO acknowledges that “whether explicit or implicit, its practices have served to perpetuate” the problems faced by people with criminal records as they attempt to reintegrate into society. While the Draft Policy Statement is an important step in rectifying those practices, if it is adopted as it is currently drafted, it would unfairly exclude a large number of New Orleanians from employment and housing opportunities provided by HANO and its contractors. In this comment letter, we briefly contextualize the obstacles people with criminal records face and the importance of sensible criminal records policies by employers and landlords. Next, we discuss how the Draft Policy Statement undermines opportunities for people with criminal records in both the employment and housing contexts. Lastly, we offer specific amendments to the Draft Policy Statement to address these concerns and ensure that it complies with federal guidelines concerning the use of criminal background information.¹

I. Given the Large Number of Americans with Criminal Records, It is Crucial for Employers and Landlords to Develop Sensible and Fair Criminal Records Policies.

¹ It is our understanding that HANO, throughout the process of developing the Draft Policy Statement, has engaged community groups, such as Stand With Dignity, whose members who will be directly affected by the new policy. We applaud HANO for engaging these vital stakeholders; their lived experiences provide important context, and demonstrate the real-world impacts of policy decisions.

In recent decades the number of Americans who have some sort of criminal record has increased significantly. Incarceration rates in the United States have more than tripled since the 1980s.² As a result of this increase, the United States imprisons more people than any other country in the world.³ Louisiana imprisons more people than any other state in the country, and has one of the highest per capita incarceration rates in the world.⁴

Racial minorities have been hit hardest by this national trend. The prevalence of arrest rates and criminal convictions are far higher among African Americans and Latinos than for whites. Recent statistics from the FBI show that African Americans accounted for more than 3 million arrests in 2009 (28.3% of total arrests), even though they represented just 12.9% of the general population; whites, who formed 75.6% of the general population, accounted for fewer than 7.4 million arrests (69.1% of total arrests).⁵ Among persons arrested on felony charges in 2006, 29% were white, while 45% were black and 24% were Latino.⁶ Similar disparities are seen in conviction rates as well. One recent estimate found that nearly one-fourth of the black adult male population (23.3%) has at least one felony conviction but is not currently under any form of criminal justice supervision, while that figure is only 9.2% for the adult male population as a whole.⁷ The share of adult males that has ever been imprisoned is 16.6% for blacks, 7.7% for Latinos, and 2.6% for whites.⁸ These racial disparities are not explained by disproportionate rates of criminal activity: one study found that in 2005, African Americans represented 14% of current drug users, yet they constituted 33.9% of persons arrested for drug offenses.⁹ Scholars have also highlighted the roles that racial profiling and discriminatory criminal justice policies have played in creating these stark racial disparities.¹⁰

² U.S. Dep't of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1998* (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus98.pdf>; Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2003* (2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p03.pdf>.

³ Marc Mauer, *Race to Incarcerate*, 15-41 (1999).

⁴ Cindy Chang, *Louisiana is the World's Prison Capital*, THE TIMES-PICAYUNE (May 13, 2012), available at http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html (last visited Feb. 5, 2013).

⁵ U.S. Dep't of Justice, Federal Bureau of Investigation, *Crime in the United States 2009*, tbl. 43 (2010), available at <http://www2.fbi.gov/ucr/cius2009/arrests/index.html> (last visited Feb. 5, 2013).

⁶ Thomas H. Cohen & Tracey Kyckelhahn, U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006*, app. tbl. 2 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>.

⁷ Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy and the Civic Reintegration of Criminal Offenders*, 605 *Annals Am. Acad. Pol. & Soc. Sci.* 281, 288 & tbl. 2 (2006).

⁸ Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

⁹ Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, Am. Bar Ass'n (2010).

¹⁰ See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *Invisible Punishment* (Marc Mauer & Meda Chesney-Lind eds., 2002).

The racial disparities in the criminal justice system are particularly evident in New Orleans. Recently, the United States Department of Justice (“DOJ”) conducted an investigation of the New Orleans Police Department (“NOPD”).¹¹ DOJ found that in 2009, NOPD arrested 500 African-American males (compared to eight white males) under the age of 17 for serious offenses such as homicide and larceny; they also arrested 65 African-American females under the age of 17 (compared to one white female) for such offenses during the same time frame.¹² At the end of its investigation, DOJ concluded that there is “reasonable cause to believe that NOPD engages in a pattern or practice of discriminatory policing in violation of constitutional and statutory law.”¹³

People with criminal records face tremendous barriers in their attempts to reintegrate into society. Having a criminal record often serves as a scarlet letter in the job market, as many employers rely on sweeping criminal background policies when screening applicants, and exclude applicants who have any record at all.¹⁴ Similarly, many public housing authorities have promulgated overly broad criminal records policies that result in the exclusion of individuals with only minor criminal records.¹⁵ When individuals with criminal records are denied stable employment and housing options, the likelihood that they will recidivate increases significantly.¹⁶ Thus, dismantling these barriers will not only substantially improve the lives of the significant portion of the population that now has a criminal record, but it will also lead to a society that is safer and more productive.

There is now also growing consensus among elected officials and policymakers that greater attention needs to be devoted to the challenges faced by individuals with criminal records, so that this growing segment of the population can successfully reintegrate into civic life and society.¹⁷ As former President George W. Bush has observed:

¹¹ U.S. Dep’t of Justice, Investigation of the New Orleans Police Department (March 16, 2011), http://www.justice.gov/crt/about/spl/nopd_report.pdf.

¹² *Id.*

¹³ *Id.*

¹⁴ National Employment Law Project, *65 Million “Need Not Apply:” The Case for Reforming Criminal Background Checks for Employment* (2011), available at http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf.

¹⁵ Corrinne Carey, *No Second Chance: People With Criminal Records Denied Access to Public Housing*, HUMAN RIGHTS WATCH (2004), available at <http://hrw.org/reports/2004/usa1104/>.

¹⁶ See, e.g., Berkeley Center for Criminal Justice, *Reaching for Higher Ground: Increasing Employment Opportunities for People with Previous Convictions* (2010), available at http://www.law.berkeley.edu/files/Final_EO_Master_Complete.pdf; Marta Nelson, Perry Deess, & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City* (1999), available at <http://www.vera.org/content/first-month-out-post-incarceration-experiences-new-york-city>.

¹⁷ See, e.g., Press Release, Department of Justice, Attorney General Eric Holder Convenes Inaugural Cabinet-Level Reentry Council (Jan. 5, 2011), available at <http://www.justice.gov/opa/pr/2011/January/11-ag-010.html> (last visited Feb. 5, 2013).

We know from experience that if [former prisoners] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life.¹⁸

II. The Employment Barriers in the Draft Policy Statement Are Overly Broad and Will Unfairly Reduce Employment Opportunities for People with Criminal Records.

The Draft Policy Statement states that job applicants will be barred from working at HANO or any entity that does business with HANO as a contractor, consultant, or landlord if: “(1) they pose a clear and present danger to the workplace . . . , (2) [their] criminal history includes acts of child abuse or sexual predation, or (3) [they have] a history of domestic violence.” The Draft Policy Statement provides that Category One applicants—those who “pose a clear and present danger to the workplace”—will be permitted to provide additional information to a reviewing panel demonstrating that they will be productive members of the workforce. The reviewing panel will be empowered, after considering that information, to allow offers of employment to be extended to certain Category One applicants. The Draft Policy Statement does not permit the reviewing panel to consider such information for Category Two and Three applicants.

While criminal background screens can be a useful tool for employers, the employment barriers in the Draft Policy Statement are far too broad and will only result in unnecessarily excluding otherwise qualified workers. As discussed in greater detail below, the Draft Policy Statement not only conflicts with guidance by the United States Equal Employment Opportunity Commission (“EEOC”) on the proper use of criminal records in employment decisions, but the vague definitions contained in the Draft Policy Statement are likely to deter large numbers of applicants from even seeking employment with HANO and its contractors.

A. The Draft Policy Statement Is Not Consistent With, and In Some Places, Directly Contradicts the EEOC’s Guidance on Employers’ Consideration of Criminal Records.

In April 2012, the EEOC issued enforcement guidance on employers’ consideration of arrest and conviction records when making employment decisions (“EEOC Guidance” or “Guidance”),¹⁹ which was designed to consolidate and update its guidelines for employers’ use of criminal history information.²⁰ In the Guidance, the EEOC discusses how employers’ use of

¹⁸ President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.americanrhetoric.com/speeches/stateoftheunion2004.htm> (last visited Feb. 5, 2013).

¹⁹ Equal Employment Opportunity Comm’n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e et seq. (April 25, 2012).

²⁰ The EEOC previously issued guidance on these matters in 1987 and 1990. See Equal Employment Opportunity Comm’n, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964* (Feb. 4, 1987); Equal Employment Opportunity Comm’n, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987); Equal Employment

criminal history information can violate Title VII of the Civil Rights Act. Specifically, the EEOC explains that policies that are facially race-neutral can result in disparate impact liability under Title VII²¹ if they disproportionately impact racial minorities (or other protected groups) and are not job related and consistent with business necessity. In order to avoid liability, the EEOC Guidance recommends employers consider three factors when developing criminal records policies: (i) the nature and gravity of the prior criminal conduct, (ii) the time that has elapsed since the prior criminal conduct, and (iii) the nature of the job held or sought (the “*Green* factors”).²² The EEOC Guidance urges employers to consider these factors to ensure that criminal records exclusions are not overly broad, but are related to the positions at issue and fulfill a business necessity.

The Guidance also recommends employers use “individualized assessments,” to provide applicants who are likely to be excluded due to past criminal conduct an opportunity to present additional information to demonstrate that they should not be excluded because of their criminal history.²³ Factors that employers can consider during an individualized assessment includes efforts at rehabilitation, employment/character references, the applicant’s prior employment history, and whether the individual is bonded under a federal, state, or local bonding program.²⁴

In the Guidance, the EEOC also notes that employers who deny applicants employment opportunities based on arrest records may violate Title VII.²⁵ The Guidance explains that since arrests are not proof that criminal conduct occurred—in fact, many arrests do not result in criminal convictions—they are not job related or consistent with business necessity for an employer to deny positions based solely on arrest records.²⁶ The EEOC also recommends

Opportunity Comm’n, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Sept. 7, 1990).

²¹ The United State Supreme Court, in its landmark decision, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), recognized that Title VII not only prohibits overt racial discrimination, but also “practices, procedures, or tests neutral on their face, and even neutral in terms of intent” that “operate to ‘freeze’ the status quo of prior discriminatory employment practices.” Thus, employers can be held liable under Title VII for employment practices that have a disparate impact on protected groups (such as racial minorities), unless they can demonstrate that the practice is related to job performance (job-related and consistent with business necessity). *Id.* at 431. Congress codified disparate impact liability under Title VII in the 1991 Civil Rights Act. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166.

²² EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records*, at 15-16. The *Green* factors are based on a 1975 decision by the United States Court of Appeals for the Eighth Circuit. *See Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). In that decision, the court concluded that an employer’s policy that disqualified applicants for employment for any criminal conviction other than a minor traffic offense violated Title VII’s disparate impact protections.

²³ EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records*, at 18.

²⁴ *Id.* at 18.

²⁵ *Id.* at 12.

²⁶ The Guidance does make clear that employers can make employment decisions based on the conduct underlying the arrest if the conduct makes the person unfit for the position at issue. *Id.*

against employers' use of criminal records information during the initial screening process;²⁷ instead as a best practice, the EEOC recommends that employers wait until late in the selection process, such as during an interview or after a provisional offer has been made, to inquire about applicants' criminal backgrounds. "The policy rationale [for waiting] is that an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience."²⁸

The Draft Policy Statement deviates from the EEOC Guidance in a number of significant ways. First, and perhaps most importantly, the Draft Policy Statement fails to comply with the *Green* factors. The Draft Policy Statement excludes applicants who fall into Categories One, Two, or Three for *all* employment opportunities; it does not, as the EEOC Guidance recommends, "focus on the dangers of particular crimes and the risks in particular positions."²⁹ In fact, the Draft Policy Statement does not even clarify precisely what criminal conduct falls into Categories One, Two, and Three, much less identify how that conduct disqualifies applicants from performing *every* job at HANO and any of its contractors. Moreover, the Draft Policy Statement does not include any consideration of the time that has elapsed since the criminal conduct occurred, which is one of the *Green* factors. As such, applicants who fall into Categories One-Three would be excluded from employment even if their criminal conduct occurred decades in the past. The EEOC Guidance does not endorse exclusions on criminal conduct that are indefinite; rather, it recommends that the duration be "sufficiently tailored" so that it only lasts as long as necessary for the position in question.³⁰

Second, while the Draft Policy Statement permits a process akin to an "individualized assessment" for Category One applicants, it does not provide such a process for applicants in Categories Two and Three. Those applicants are thus denied an opportunity to present information of rehabilitation or that they have previously performed the job without incident. Under the Draft Policy Statement, for example, an applicant with a "history of domestic violence" would be permanently ineligible from working on a HANO-affiliated construction site even if he has performed the job satisfactorily in the past and his convictions are decades old. The Draft Policy Statement also fails to articulate why Category One applicants are able to benefit from an individualized assessment process, while the other classes of applicants are not.

Third, the Draft Policy Statement does not distinguish between arrests and convictions. By not specifying whether arrest records will be treated any differently than convictions records, the Draft Policy Statement is inconsistent with the EEOC Guidance, which makes clear that

²⁷ A growing number of municipalities have adopted such practices, which are colloquially known as "ban the box." National Employment Law Project, *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records* (2012), available at <http://www.nelp.org/page/-/SCLP/2011/CityandCountyHiringInitiatives.pdf?nocdn=1>.

²⁸ EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records*, at 13.

²⁹ *Id.* at 16.

³⁰ *Id.* at 15.

employer policies that treat arrest and conviction records identically are likely to run afoul of Title VII's disparate impact protections.³¹

B. The Draft Policy Statement Is Overly Vague and Is Likely to Have A Significant Deterrent Effect.

Aside from conflicting with the EEOC Guidance, the Draft Policy Statement's failure to clearly articulate what criminal conduct will lead to employment exclusions is likely to discourage qualified applicants from applying for positions at HANO and its contractors.

As noted above, people with criminal records face tremendous obstacles when seeking to reenter the workforce. When employers have overly broad criminal record policies, like HANO's proposed policy, or refuse to hire anyone with a criminal record, such policies are widely communicated, whether by explicit notice from the employer, obvious hiring patterns, or word-of-mouth. People with criminal records learn about the policies and avoid wasting their time applying. The Draft Policy Statement is likely to further contribute to this problem. Individuals with criminal records are likely to learn about its broad categories, and assume they are ineligible for employment, even though that may not be the case. The Draft Policy Statement's deterrent effect is further magnified by the fact that it does not indicate, as discussed above, whether arrests (as opposed to convictions) are considered when placing applicants into Categories One-Three. Given the high unemployment rate—especially for African Americans and other racial minorities—the impact of hiring policies that deter qualified individuals from applying for positions cannot be overstated. A criminal records policy that clearly identifies the prohibited criminal conduct provides greater clarity to the potential workforce and minimizes any deterrent effect.

III. The Draft Policy Statement Unfairly Denies Housing Opportunities for People with Criminal Records.

The restrictions imposed in the Draft Policy Statement concerning housing are essentially identical to those concerning employment.³² As such, many of the same concerns discussed above also apply to the housing restrictions.

³¹ The Draft Policy Statement also departs from the EEOC Guidance by not requiring that questions about criminal conduct be removed from the early stages of the application process. Inquiring about criminal records on the application or soon thereafter makes it much more likely that applicants will be prejudged based on their background and not evaluated based on their ability to effectively perform the job at issue.

³² Specifically, the Draft Policy Statement states that, in regards to housing, applicants will be barred from residing in HANO-affiliated property if: "(1) they pose a clear and present danger to . . . the community in which they might live, (2) [their] criminal history includes acts of child abuse or sexual predation, or (3) [they have] a history of domestic violence."

A. The Draft Policy Statement Goes Far Beyond the Restrictions Imposed By the U.S. Department of Housing and Urban Development in Terms of Excluding People Based on Criminal Records.

In a letter to executive directors of public housing authorities (“PHAs”) dated June 17, 2011, Shaun Donovan, Secretary of the United States Department of Housing and Urban Development (“HUD”) reaffirmed the importance of ensuring that people with criminal records are not unnecessarily denied access to public housing.³³ In his letter, Secretary Donovan wrote:

[T]his is an Administration that believes in the importance of second chances—that people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future. Part of that means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life—a place to live.³⁴

Secretary Donovan used his letter to remind PHAs that HUD regulations only specify two categories of offenses that subject an individual to a lifetime ban in public housing and Housing Choice Voucher programs: (i) being convicted of manufacturing or producing methamphetamine on the premise of federally assisted housing or (ii) being a sex offender who is subject to a lifetime registration requirement under a State sex offender registration program.³⁵ Additionally, HUD has promulgated a number of regulations that permit a PHA to deny admission if it is determined that a household member is engaged in certain drug-related criminal activity or has been previously evicted from federally assisted housing for drug-related criminal activity.³⁶ Besides for these restrictions, Secretary Donovan noted that PHAs have broad discretion in crafting criminal records policies; however, but he “encourage[d PHAs] to allow ex-offenders to rejoin their families.”

The Draft Policy Statement conflicts with Secretary Donovan’s request. By preventing overly broad—and as noted above in the employment context, vaguely defined—categories of applicants from being eligible to reside in HANO-affiliated properties, the Draft Policy Statement will only create additional hurdles for people with criminal records who are striving to reunite with their families and fully reenter civil society. Furthermore, the Draft Policy Statement is inconsistent with two principles laid out in HUD regulations concerning criminal records.

³³ Letter from Shaun Donovan, Secretary of the U.S. Dep’t of Housing and Urban Development and Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing to Public Housing Authorities Executive Directors (June 17, 2011), available at http://www.nationalreentryresourcecenter.org/documents/0000/1126/HUD_letter_6.23.11.pdf (last visited Feb. 5, 2013).

³⁴ *Id.*

³⁵ HUD Program Requirements, 24 C.F.R. § 960.204 (2013).

³⁶ *Id.*

First, HUD regulations concerning exclusions are generally time-limited. For example, if a person has been previously evicted from federally assisted housing due to drug-related criminal activity, she is only prohibited from other federal assisted housing for a maximum period of three years.³⁷ Such a limitation is sensible, as it recognizes that people should be afforded another opportunity after a reasonable period of time has elapsed. Moreover, that is consistent with research by criminologists that the likelihood a person with a criminal record will commit a future criminal offense declines with age,³⁸ time since the arrest or offense,³⁹ and time since release.⁴⁰ The Draft Policy Statement, however, does not include any provision limiting consideration of offenses after a certain time frame. Accordingly, it will result in permanently excluding large categories of people with criminal records from HANO-affiliated properties.

Second, HUD regulations concerning drug-related criminal activities state that evidence of rehabilitation should be considered before denying admission or terminating tenancy. Among the factors that can be considered are participation or completion in a drug or alcohol rehabilitation program and whether the person has presented other evidence of successful rehabilitation.⁴¹ However, the Draft Policy Statement denies Category Two and Three applicants the opportunity to present such evidence. They are automatically barred from HANO-affiliated properties and not are given any opportunity to demonstrate why they will not be a danger to the community in which they are seeking to live.

B. The Draft Policy Statement Is In Danger of Violating the Disparate Impact Protections Embodied Within the Fair Housing Act.

Disparate impact liability is not limited to Title VII; disparate impact liability is also cognizable under Title VIII of the Civil Rights Act, also known as the Fair Housing Act (“FHA”). Thus, housing policies that have a disproportionate effect on racial minorities can result in legal liability.

The FHA provides, in relevant part, that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race.”⁴² HUD has consistently taken

³⁷ *Id.* at § 5.854(a) (2013).

³⁸ *See, e.g.,* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Background Checks*, 47 *Criminology* 327 (2009); Peter B. Hoffman & James L. Beck, *Burnout—Age at Release From Prison and Recidivism*, 12 *J. Crim. Just.* 617, 621 (1984).

³⁹ *See, e.g.,* Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 *Crime & Delinquency* 64, 78 (2007); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Offense Predict Future Offending?*, 5 *Criminology & Pub. Pol’y* 483, 496-99 (2006).

⁴⁰ *See, e.g.,* Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 *Criminology & Pub. Pol’y* 697, 699-700 (2007).

⁴¹ HUD Program Requirements, 24 C.F.R. § 5.852(c) (2013).

⁴² 42 U.S.C. § 3604(b).

the position that a violation of the FHA can be demonstrated either by proof of discriminatory intent or a showing that there is a significant discriminatory effect. Final orders issued by HUD's administrative law judges have repeatedly recognized that the FHA prohibits housing policies that are facially neutral but have a discriminatory effect on racial minorities.⁴³ Moreover, HUD has proposed regulations, for which final approval is pending, codifying its longstanding view that disparate impact claims are cognizable under the FHA.⁴⁴ Federal courts have also recognized that disparate impact claims can be brought under the FHA. For example, the United States Court of Appeals for the Fifth Circuit, whose jurisdiction includes New Orleans, has written: "We agree that a violation of the FHA may be established not only by proof of discriminatory intent, but also be a showing of significant discriminatory effect."⁴⁵ The court went on to explain that such a claim requires a showing that "a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class."⁴⁶

The Draft Policy Statement is in danger of running afoul of the FHA's disparate impact protections. Given the large number of racial minorities with criminal records in New Orleans specifically and Louisiana more generally, the Draft Policy Statement is likely to disproportionately burden racial minorities. Narrowing the exclusions, and making them more consistent with those promulgated by HUD, will not only likely decrease the disparate impact that the Draft Policy Statement has on racial minorities, but it will also provide HANO with a more-defensible rationale for the policy if it is ever legally challenged.

IV. HANO Can--and Should--Amend the Draft Policy Statement So That It Provides Greater Opportunity for People with Criminal Records.

Below we propose several steps that HANO can take to revise the Draft Policy Statement to address the aforementioned concerns. These recommendations will better ensure that people with criminal records are not unfairly and unnecessarily denied employment and housing opportunities.

- **Develop distinct criminal records policies for employment and housing.** HANO should have two separate policies: one for employment and one for housing. There may be, for example, criminal conduct that renders an individual ineligible to reside in HANO-affiliated property, but is not related to the job opportunities available at HANO or its contractors.

⁴³ See, e.g., *HUD v. Mountain Side Mobile Estate P'ship*, No. 08-92-0010, 1993 WL 307069 (HUD Sec'y July 19, 1993); *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520 (HUD ALJ May 1, 1992).

⁴⁴ See Implementation of the Fair Housing Act's Discriminatory Effects Standards, 76 Fed. Reg. 70,921 (proposed Nov. 16, 2011).

⁴⁵ *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

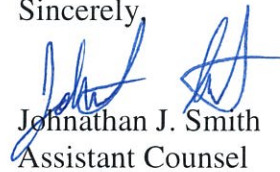
⁴⁶ *Id.* As another court explained, the "fact that more minorities than non-minorities are affected by a given policy . . . alone does not establish disparate impact necessary for discriminatory effect. The disparate impact analysis requires looking beyond the absolute numbers of white and minority victims to analyze the disproportionate burden on minorities." *Bailey v. Lawler-Wood Housing*, No. 05-5193, 2007 WL 101191, at *3 (E.D. La. Jan. 9, 2007).

- **Clearly delineate what criminal conduct will lead to exclusions.** The Draft Policy Statements lists vague, poorly-defined categories of criminal conduct that can result in exclusion (i.e., posing a “clear and present danger” to the workplace or community, having “a history of domestic violence”). The Draft Policy Statement should delineate specific criminal conduct that will result in ineligibility (e.g., list specific offenses, distinguish between different levels of criminal conduct (misdemeanors v. felonies)).
- **Adhere to the EEOC Guidance.** For employment opportunities, the EEOC Guidance provides a clear roadmap for development of criminal records policies that comply with Title VII. HANO should revise its Draft Policy Statement so that it appropriately considers the *Green* factors and provides an opportunity for individualized assessment for all applicants. HANO should also revise the Draft Policy Statement to distinguish between arrests and convictions, as the EEOC recommends.
- **Remove questions about criminal history from employment applications.** Applicants should be judged on their ability to successfully perform the job they are seeking; “banning the box” prevents employers from pre-judging (and unfairly excluding) applicants who have criminal records.
- **Limit offenses that lead to automatic and permanent disqualification for housing applicants to those identified in HUD Regulations.** Federal law requires that individuals that have been convicted of manufacturing or producing methamphetamine on the premise of federally assisted housing or who are sex offenders subject to a lifetime registration requirement under a State sex offender registration program be permanently barred from federally assisted housing. The Draft Policy Statement should make clear that all other persons with criminal records are not permanently barred from obtaining HANO-affiliated housing, and that after a certain period of time (e.g., three years) HANO will not consider a criminal record.
- **Allow housing applicants to present evidence of rehabilitation or any other evidence showing they will not pose a danger to the community.** It is vital for HANO to develop a policy that allows people with criminal records to show that they have made positive changes in their lives and does not impose permanent restrictions on people for mistakes they made and paid for in their pasts.⁴⁷

⁴⁷ The Draft Policy Statement seemingly provides such an opportunity for Category One applicants; it should also be extended to applicants in Categories Two and Three as well. Moreover, any process for reviewing evidence of rehabilitation should not be limited to HANO staff, but should allow for input and involvement from other stakeholders, such as HANO residents.

LDF applauds HANO for taking a proactive step in attempting to address the problems facing New Orleanians with criminal records. However, if the Draft Policy Statement is adopted as currently worded, HANO will only create additional barriers and complications for this vulnerable population. We welcome the opportunity to provide additional information and to work with HANO to amend the Draft Policy Statement to more fully address the admirable goals set out in its preamble. Please direct communications to undersigned at 202.216.5561 or at jsmith@naacplfg.org.

Sincerely,



Johnathan J. Smith
Assistant Counsel