2023-2024 AUDIT REPORT

AN INVESTIGATION OF RACE DISCRIMINATION IN RENTAL HOUSING AND THE USE OF CRIMINAL RECORDS IN TENANT SCREENING

IN MARIN, SONOMA, & SOLANO COUNTIES

FAIR HOUSING ADVOCATES OF NORTHERN CALIFORNIA

851 Irwin Street, Suite 218

San Rafael, CA 94901

www.fairhousingnorcal.org

FOREWORD

For more than 150 years, since the passage of the Civil Rights Act of 1866, Black Americans have had the right to enter into lease agreements and purchase and hold property in the United States.[i] In 1923, the Supreme Court recognized the right to "establish a home" as one of the fundamental liberties protected by the U.S. Constitution.[ii] And in 1968, Congress passed the Fair Housing Act to prohibit discrimination in housing on the basis of race, color, national origin, and other protected classes.[iii] However, despite legislative progress, housing discrimination is still a reality for many Black individuals, particularly where the intersection of race and criminal conviction histories creates significant barriers to securing stable housing.

Decades of "tough on crime" policies, including the War on Drugs, have resulted in a significant increase in the prison population and nearly one-third of the U.S. population has a criminal record.[iv] With 95% of current inmates eventually returning to society, access to safe, secure, and affordable housing is crucial for their successful reentry.[v] However, many formerly incarcerated individuals, as well as those with convictions who were not incarcerated, face significant barriers to securing housing. People with criminal records are routinely denied when applying to rent housing, particularly given the explosive increase in algorithmic tenant screening products now commonly used by housing providers, most of which screen for criminal conviction histories.[vi]

The burden of criminal legal system involvement disproportionately impacts Black people.[vii] Due to the over policing of communities of color, Black individuals are stopped by police, arrested, prosecuted, convicted, and incarcerated at rates disproportionate to their share of the general population.[viii] Black people represent about 13% of the total U.S. population but account for roughly 27% of all arrests.[ix] Black men are six times more likely to be incarcerated than white men.[x] In 2021, California law enforcement was more than twice as likely to use force against Black people during vehicle and pedestrian stops compared to white people;[xi] and the share of Black people seriously injured or killed during police encounters is about three times their share of the state population.[xii] Black Californians make up 19.5% of felony defendants but only 5.7% percent of the total state population.[xiii] As a result, a disproportionate number of Black people are affected by criminal background checks when applying for housing. And because people with criminal records face significant barriers to finding housing, they disproportionately end up homeless. Lack of housing leads to limited economic opportunity, thereby increasing the chance of recidivism, and the cycle continues.[xiv]

HUD has issued guidance for landlords in an attempt to minimize these disparities and avoid fair housing violations; however, it is unclear to what extent landlords actually comply with these guidelines. As such, FHANC conducted 120 investigations at 30 rental properties in Marin, Sonoma, and Solano Counties and by analyzing the experiences of Black and white testers posing as prospective renters, this investigation sought to shed light on whether tenants with criminal conviction histories are being discriminated against on the basis of race and/or disproportionately excluded from housing because of their criminal records.

EXECUTIVE SUMMARY

This report details the results and subsequent recommendations following FHANC's investigation of discrimination against Black home seekers with criminal conviction records. Between November 2023 through February 2024, FHANC conducted 120 tests of 30 landlords in Marin, Sonoma and Solano Counties. While federal and state fair housing laws have prohibited housing discrimination on the basis of race for decades, the results of this audit show that Black individuals with criminal legal system involvement continue to experience discrimination and overly broad criminal history screening policies as barriers to housing choice.

FHANC's investigation revealed the following key findings:

- Differential Treatment Based on Race: 47% of investigations revealed evidence of differential treatment, where Black testers were treated less favorably or received less information, follow-up, or encouragement compared to white testers. For example, at one property, a white tester was told that a felony conviction would be overlooked if she applied with a co-signer while a Black tester with the exact same record was told the conviction would result in an automatic denial and was advised not to apply.

- Use of Criminal Background Screening Policies: 83% of the properties investigated screen for criminal records, despite HUD recommendations discouraging this practice because criminal history is not a reliable predictor of tenant success.

- Disparate Impact: None of the landlords investigated that screen for criminal records follow all of HUD's guidelines on how to avoid fair housing violations, and the vast majority fail to conduct individualized assessments or consider mitigating factors like the recency or severity of the alleged conduct. All housing providers that screen for criminal records use third-party tenant screening services, which utilize algorithms that may contain racial or other prohibited bias in their design and/or have not been shown to reliably predict risk. This investigation found that most of the landlords that use third-party screeners rely on them to make eligibility decisions and testers were told there is no opportunity to appeal a denial or provide mitigating information.

- Deterrent Effect of Vague Policies: While most criminal record screening policies would likely deter anyone with a more serious record from applying, 18 of the 25 policies described to testers were so vague that even people with less serious records, like someone with a very old conviction or a recent misdemeanor, would likely be deterred from applying because the only way to know whether the conviction would in approval or denial is to pay a non-refundable application fee (all of which are $20 to $60 per adult household member).

- **Widespread Implications:** In Marin, Sonoma, and Solano counties there are approximately 697 large multi-family rental properties (buildings with 30 or more units), with a total of 110,839 rental apartments. If 83% have criminal record screening policies that violate fair housing laws (as the results of this investigation suggest), there are more than 92,000 units in the tri-county area that exclude home seekers based on their criminal history in a discriminatory manner.

- **Similar Rates of Discrimination in Each County:** While housing providers in Solano County were revealed to be the most discriminatory, with 50% treating Black testers less favorably than white testers and 90% having criminal background screening policies that disproportionately exclude Black applicants, the rate of discrimination was similarly and alarmingly high in all three counties.

Based on these results, FHANC has proposed a number of recommendations for the housing industry and community at large to help increase housing opportunity for people with criminal legal system involvement, particularly Black tenants in Marin, Sonoma, and Solano Counties. Recommendations include funding future audits and fair housing education and passing local ordinances to prohibit landlords from considering criminal histories in tenant screening.

Those responsible for this report hope the results and recommendations contained herein will heighten awareness and encourage a cooperative effort by all segments of our communities to eliminate discrimination based on race, to increase opportunities for people with criminal legal system involvement, and to educate housing providers on their obligation to comply with fair housing laws.

ACKNOWLEDGMENTS

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This audit was carried out by FHANC's Investigations Coordinators, Ursula Lindsey, Maria Callahan, and Quinn McFeeters, under the supervision of Supervising Attorney, Julia Howard-Gibbon, and Executive Director, Caroline Peattie. Ms. Howard-Gibbon analyzed the investigations with the assistance of Ms. Callahan and prepared this audit report with the assistance of FHANC's Housing and Policy Attorney, Savannah Wheeler. Many thanks to all involved.

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AUDIT REPORT

INTRODUCTION

This report presents results of an audit investigation of race discrimination against Black tenants with criminal conviction histories in Marin, Sonoma, and Solano counties in California. This audit was conducted by Fair Housing Advocates of Northern (FHANC) between November 2023 and February 2024.

A. FAIR HOUSING ADVOCATES OF NORTHERN CALIFORNIA (FHANC)

FHANC is a private nonprofit organization dedicated to assisting individuals experiencing housing discrimination and educating the community, including tenants, housing providers, and government employees, as to their rights and responsibilities under federal and state fair housing laws. FHANC's mission is to ensure equal housing opportunity and to educate the community on the value of diversity in neighborhoods.

FHANC provides free comprehensive fair housing counseling services to individuals alleging housing discrimination in Marin County, Sonoma County (except in the City of Petaluma), and Solano County. FHANC also provides other services, such as foreclosure prevention counseling and trainings for housing providers, in other California counties.

In addition to counseling and education services, FHANC recruits, trains, and employs fair housing testers in order to investigate claims of housing discrimination and to assist in conducting systemic investigations, such as the one described in this report.

B. LEGAL BACKGROUND

1. Federal and State Fair Housing Laws

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act (FHA), prohibits discrimination in housing on the basis of race, national origin, color, religion, sex/gender, disability, and familial status.[xv] Under FHA, it is illegal to engage in the following activities because of a person's membership in a protected class:

a. Refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling;

b. Discriminate in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities;

c. Make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates discrimination, preference, or limitation;

d. Represent that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact available;

e. Induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, disability, familial status, or race;

f. Limit, influence or attempt to influence a person's choice of neighborhood or location of dwelling unit within a particular property or community; and/or

g. Refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.[xvi]

The two primary state fair housing laws in California are the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act.[xvii] These laws incorporate the same protected classes of persons as the Fair Housing Act, and also prohibit discrimination based on marital status, sexual orientation, source of income, ancestry, immigration status, citizenship, primary language and arbitrary factors such as age or occupation.[xviii]

2. Criminal Background Screening Policies and Housing Discrimination

While having a criminal record is not a protected characteristic under FHA or FEHA, using criminal history to screen, deny lease renewal, evict, or otherwise exclude individuals from housing may constitute illegal discrimination under fair housing laws. Such discrimination includes when a housing provider intentionally discriminates in using criminal history information (known as "disparate treatment" liability), or when a housing provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate (known as "discriminatory effects" liability). [xix]

a. Disparate Treatment Liability

Federal and state fair housing law prohibit housing discrimination based on race, national origin, and other protected characteristics. [xx] It is unlawful to refuse to rent, sell, negotiate, or to otherwise make housing unavailable to someone based on these characteristics. [xxi]

Therefore, a housing provider's use of criminal history information as a pretext for unequal treatment of individuals based on their race, national origin, or other protected characteristic would constitute a violation of fair housing law. This is referred to as the "disparate treatment" theory of liability. This can include, for example, rejecting a Black applicant based on his criminal record but admitting a white applicant with a comparable criminal record, or having a policy of not renting to applicants with certain convictions, while making exceptions for white applicants, but not for Black applicants. It could also include actions prior to an individual applying for housing, such as a housing provider telling a Black applicant that their criminal history would likely disqualify them before they apply for housing, while not similarly discouraging a white applicant with a comparable criminal record from applying.[xxii]

b. Discriminatory Effects Liability

Because of the over-policing of communities of color, across the U.S., Black people are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. Therefore, criminal records-based barriers to housing are likely to have a disproportionate impact on Black people. [xxiii]

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even if there was no intent to discriminate. [xxiv] A facially neutral policy (meaning that it does not reference race, national origin, or any other protected class) that has a discriminatory effect is in violation of fair housing law if it does not have a legally sufficient justification. 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 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. [xxv]

The interest proffered by the housing provider may not be hypothetical or speculative; the housing provider must be able to prove thorough reliable evidence that its policy or practice of making housing decisions based on criminal history serves a substantial and legitimate interest. Courts have found that screening for convictions that indicate a demonstrable risk to resident safety and/or property may meet that standard. However, even if the asserted interest is substantial and legitimate, the criminal record policy may still be unlawful if there is an alternative policy or practice that will serve the same interest with a less discriminatory effect. [xxvi] An individualized assessment of relevant mitigating information beyond what is contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions of certain convictions or criminal histories that do not take such additional information into account. [xxvii]

c. HUD Recommendations and Best Practices

In 2022, HUD's Office of Fair & Equal Housing Opportunity issued guidance on the use of

criminal records in tenant screening.[xxviii] According to HUD, housing providers should consider the following best practices in order to avoid violating fair housing laws:

1) **Consider not using criminal history to screen tenants for housing**. Criminal history is not a good predictor of housing success, and housing providers should rely on screening criteria that more closely relate to whether an applicant or resident would be a good tenant, such as ability to pay rent, prior rental history, or personal references.

2) **Evict based on criminal conduct only as a last resort** after an individualized assessment of whether eviction is necessary, and never evict a tenant because they have been the victim of criminal activity.

3) **Do not ban a tenant's invited guest from visiting that tenant based on the guest's criminal involvement**, as this can constitute a fair housing violation under the same principles that apply to screening tenants based on criminal history.

4) **If a housing provider chooses to use criminal background screening policies or practices, consider taking the following steps** to avoid potential fair housing violations:

    a) Have a written criminal background screening policy that is made available to all applicants.

    b) Ensure that any policy considers the nature, severity, and recency of criminal conduct.

    c) Avoid the use of third-party screening companies that utilize algorithms that may contain racial or other prohibited bias in their design, have not been shown to reliably predict risk, may produce inaccurate information about the applicant, or make the decision for the housing provider (rather than providing information to the housing provider to make its own determination).

    d) Before making an adverse decision related to an applicant's or tenant's criminal involvement, provide the applicant or tenant with the criminal record, indicate which specific part of the record may form the basis of an adverse decision, and give the applicant or tenant the opportunity to correct inaccurate information or explain extenuating circumstances related to that record.

    e) Comply with any state or local law that limits the landlord's ability to run criminal background checks during the screening process or use criminal background information when making rental determinations.

    f) Delay consideration of criminal history until after an individual's financial and other qualifications are verified and a conditional offer is made.

g) Conduct an individualized assessment that considers relevant mitigating information beyond that contained in an individual's criminal record, as this 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; how long ago the criminal conduct occurred, evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. [xxix]

d. Individualized Assessments

While HUD encourages housing providers to conduct individualized assessments if they choose to screen for criminal records, HUD's guidelines note that housing providers must ensure that that they are not engaging in disparate treatment in any individualized review process. [xxx]

One study found that when housing providers used discretionary criminal record screening policies – or policies that evaluated prospective tenants on a "case by case" basis – they favored white applicants over similarly situated Black applicants 55% of the time. [xxxi] Therefore, these individualized reviews should be utilized only in clearly delineated circumstances when the individual would otherwise be excluded because of current, reliable evidence that the specific crime at issue would threaten safety and/or property.

Identifying and training or hiring individuals who are aware of potential bias issues and qualified to perform individualized assessments can also help mitigate bias that may arise during these assessments. HUD notes that individuals involved in applicant and tenant screening also need to understand and know how to apply FHA's reasonable accommodation requirements. [xxxii]

C. AUDIT BACKGROUND

For more than 20 years, FHANC has conducted multiple telephone, in-person, and email audits in Bay Area counties designed to measure the extent of discrimination in housing against members of protected classes, particularly ethnic and racial minorities. Since 1993, FHANC has conducted multiple race discrimination audits in Marin, Sonoma, and/or Solano Counties with results indicating high rates of discrimination against Black renters.

1. Previous Race Discrimination Investigations

In 2019 and 2022, FHANC conducted testing investigations in all three counties to determine the extent to which landlords were discriminating against Black tenants with Section 8 vouchers. In 2022, FHANC found that Black testers were treated less favorably than white testers 41.51% of the time and that housing providers had policies that were discriminatory toward voucher

holders, which disproportionately exclude Black renters, 61.82% of the time. Similarly, in 2019, 67% of the tests conducted showed at least some level of discrimination based on race and/or source of income (voucher status).

In 2017, FHANC conducted a race discrimination audit where testers met with housing providers in person at properties in Marin and Sonoma counties. 68% of tests conducted in Marin County and 38% of tests conducted in Solano County indicated less favorable treatment toward Black testers than white testers.

In 2008, 2010 and 2011, FHANC conducted voice ID audits using Black and white testers with racially identifiable voices to conduct testing over the phone. In 2008, FHANC found differential treatment disfavoring Black renters in Marin County 32% of the time. Yet a few years later, evidence of differential treatment practically doubled, with 68% of Black testers experiencing less favorable treatment than white testers in Sonoma County in 2010, and 60% experiencing race discrimination in Solano County in 2011.

FHANC also conducted in-person race discrimination testing in Marin County in 1993, 1997 and 2001. In those audits, FHANC found that Black testers encountered less favorable treatment than white testers 33% to 47% of the time.

AUDIT GOALS AND METHODOLOGY

A. WHAT IS A FAIR HOUSING AUDIT?

A fair housing audit is a way to assess compliance or non-compliance with federal and state fair housing laws. It is a controlled measurement of the difference in quality, quantity, and content of information and services afforded to home seekers (testers) by housing providers. An audit differs from complaint-based testing in that it gives a broad overview of housing provider behavior in a given market during a certain time period. Fair housing organizations routinely conduct audits as an educational and enforcement tool.

B. DEFINITIONS

1. ***Testing*** – an investigative tool used to gather evidence of potential housing discrimination that involves one or more testers and is generally covert in nature.

2. ***Test*** – an investigation of a particular property, involving one or more testers/ test parts.

3. ***Investigation*** (multiple meanings) – one test targeting a single housing provider (with one or more test parts); a series of tests targeting a single housing provider; OR an audit of multiple housing providers in a target geographic region.

4. *Test Part* – a contact or series of contacts via phone, email, and/or in person by a single tester or profile with a target housing provider (e.g., a matched paired test consists of two test parts).

5. *Complaint Test* – a test conducted to corroborate (or refute) existing evidence of discriminatory practices.

6. *Audit* – a controlled and systematic way to assess compliance or non-compliance with fair housing laws by housing providers in a particular housing market by using testers to determine how people with protected characteristics are treated in the rental or homebuying process.

7. *Single-Part Test* – a test that involves only one tester; usually used to determine whether a discriminatory policy exists.

8. *Matched Paired Test* – a two-part test that involves two similarly matched testers – one control and one protected – posing as comparably qualified home seekers, on personal, financial, and other characteristics; used to detect differences in service, information, or treatment.

9. *Control Tester* – a tester whose profile does not include the protected characteristic(s) tested.

10. *Protected Tester* – a tester whose profile includes one or more protected characteristic tested.

11. *Tester Profile* – the characteristics and backstory assigned to a tester prior to conducting a test, which may include an alias, financial characteristics (such as income and credit information), an address, employment, a spouse, and/or one or more protected characteristic.

C. AUDIT GOALS

1. To identify instances of differential treatment/discrimination at multi-family rental complexes, indicating the extent to which Black renters with criminal records face difficulty in securing rental housing in Marin, Sonoma, and Solano counties due to race discrimination and criminal background screening policies that disproportionately exclude Black renters.

2. To identify discriminatory tenant screening policies at multi-family rental complexes, indicating the extent to which Black renters with criminal records face difficulty in securing rental housing in Marin, Sonoma, and Solano counties due to criminal background screening policies that disproportionately exclude Black renters.

3. **To conduct additional tests** where results indicate potential discrimination, and to conduct additional investigations at sites where results suggest that further investigation could yield stronger evidence of discrimination.

4. **To bring minor violations to the attention of housing providers** to increase awareness of the potential consequences of engaging in discriminatory practices and prevent future transgressions.

5. **To file enforcement actions** (lawsuits or administrative complaints) in cases with strong evidence of discrimination in order to change discriminatory policies and practices.

6. **To increase housing providers' awareness** of the difficulties Black renters and people with criminal records experience in securing rental housing.

7. **To make Black renters and people with criminal records aware of discriminatory practices** they may experience, and the services provided by FHANC to assist people in asserting their fair housing rights.

8. **To offer training and education to housing providers** on fair housing laws to forestall future discrimination.

D. GEOGRAPHIC SCOPE OF AUDIT

All investigations took place in the geographic areas of Marin County, Sonoma County, and Solano County, with ten tests in each county. Because FHANC only tested properties with 30 or more units, the majority of investigations were conducted in more densely populated cities, where larger multi-family apartment complexes tend to be located.

City / Region	County	# of Tests in City	% of all Tests
San Rafael	Marin	4	13.3%
Vallejo	Solano	4	13.3%
Santa Rosa	Sonoma	4	13.3%
Fairfield	Solano	3	10.0%
Vacaville	Solano	3	10.0%
Petaluma	Sonoma	3	10.0%
Novato	Marin	2	6.7%
Rohnert Park	Sonoma	2	6.7%
Corte Madera	Marin	1	3.3%
Larkspur	Marin	1	3.3%
Sausalito	Marin	1	3.3%

Tiburon	Marin	1	3.3%
Windsor	Sonoma	1	3.3%
Totals		**30**	**100%**

E. AUDIT METHODOLOGY

1. Types of Investigations

Investigations coordinators conducted a total of 30 phone investigations within the target geographic area, totaling 120 test parts. All investigations were four-part tests.

For each investigation, the investigations coordinator selected four testers – two white female testers and two Black female testers – to carry out each test part. Each tester was assigned a profile that included an alias, as well as financial and personal information. Each tester was instructed to call the target property posing as a prospective renter searching for housing for her and her boyfriend who either had a misdemeanor DUI or a felony assault conviction on his record. Testers were supposed to ask if the property conducted criminal background checks and, if so, whether their boyfriend's criminal record would result in a denial of housing.

2. Sampling Techniques

Investigations coordinators used property records to identify large rental buildings in the target geographic area by searching for properties with 30 or more rental units. They then searched each property's websites to look for available listings and chose properties with multiple availabilities to target for testing. Investigations coordinators tried to avoid investigating the same property management company more than once. FHANC chose to target larger properties to ensure there would be enough available listings at each property to carry out four-part tests spread out over the course of approximately two to three weeks.

3. Recruitment, Screening, and Training of Testers

a. Tester Training

All testers received fair housing tester training and training in investigative procedures. Testers also received supplemental training on testing for criminal background screening polices.

b. Tester Selection

Only testers with voices clearly identifiable as Black were selected as Black testers and only testers with voices clearly identifiable as white were selected as white testers. All testers selected are female.

4. Investigation Procedures

a. Property Selection

For each investigation, the investigations coordinator identified a rental property in the target geographic area, pursuant to the sampling techniques set forth above.

b. Tester Selection

For each investigation, the investigations coordinator assigned four testers – two Black testers and two white testers. Each tester was matched to their counterparts as closely as possible in age, gender, and temperament. None of the testers selected had other protected characteristics that were identifiable over the phone (such as disabilities or foreign accents) so as not to introduce additional protected variables.

c. Profiles

For each investigation, the investigations coordinator created and assigned each tester a profile with an alias, financial information, family information, and other personal background information. Black testers were assigned Black-sounding names as aliases and white testers were assigned white-sounding names as aliases. Each profile included an email address for testers to provide to the housing provider, if requested, which were created and managed by the investigations coordinators. The email address assigned to each tester corresponded with the tester's alias.

Matched profiles were designed to avoid any indication of difference in protected class characteristics other than race, therefore, no profile included additional protected characteristics (such as children, disabilities, rental subsidies, etc.). Matched profiles included roughly equivalent rental credentials, including similar household incomes and similar rental histories.

Each profile included a boyfriend of the same race who the tester intended to live with and who also had either a misdemeanor DUI or a felony assault on his record. All convictions were fairly recent, occurring within three to four years prior to the test. FHANC deliberately chose one offense that could indicate a demonstrable risk to resident safety and/or property (felony assault) and one offense that could not arguably indicate such a risk (misdemeanor DUI) in order to determine whether housing providers were considering "substantial and legitimate" business interests in their screening policies.

For each investigation, one white tester was assigned a profile that included a white-sounding alias and a boyfriend who was also white with a white-sounding name and a misdemeanor DUI conviction on his record. The other white tester was assigned a profile with a white sounding alias that included a white boyfriend with a white-sounding name and a felony assault conviction

on his record. One Black tester was assigned a profile with a Black-sounding alias that included a Black boyfriend with a Black-sounding name and a misdemeanor DUI conviction on his record. And the other Black tester was assigned a profile with a Black sounding alias that included a Black boyfriend with a Black-sounding name and a felony assault conviction on his record.

d. Test Assignments

For each investigation, the investigations coordinator created a test assignment for each tester based on the information collected from the rental listing. The test assignments included information about the listing (i.e., the phone number of the agent and the address of the property), instructions for conducting the test, and the tester's profile.

Prior to starting the test, the investigations coordinator briefed each tester via phone and/or email and sent each tester their test assignment. Testers were instructed to review their test assignments, acknowledge receipt and understanding of the test instructions, and discuss any questions or concerns about their assignments with the investigations coordinator prior to starting the test.

e. Tests

For each phone investigation, each tester began the test by calling the listed rental agent. The first tester, usually the Black tester whose boyfriend had an assault conviction, was instructed to start the test as soon as possible after reviewing the assignment. The next tester was generally instructed to start their test a few days after the first test. The third tester was instructed to start their test approximately two weeks later and the fourth tester was instructed to start their test a few days after that. Tests were deliberately conducted over a longer period of time to avoid detection by the housing provider, given that the profiles were so similar.

If the tester reached an answering machine, the tester was instructed to leave a message stating their name (alias), phone number, and their interest in renting at the property. Testers were instructed not to include any other information about their profile in the message other than their name and phone number.

If the tester reached a person associated with the listed property (e.g., the property manager or listing agent), the tester introduced themselves and stated that they were calling about the advertised unit. Testers were instructed to seek information from the rental agent about the rental unit and the rental process.

After asking some initial questions about the listing, testers were instructed to ask if the housing provider's tenant screening process included a criminal background check. Testers were then supposed to explain that they were looking for a place to rent with their boyfriend who had either a DUI or assault conviction on his record and that they wanted to know whether their application would likely be denied. If the agent stated that the housing provider did consider

criminal records in determining eligibility, testers were instructed to ask follow-up questions about the process, including whether a third-party screening company was involved, what criteria was used to approve or deny applications, who made the final decision, and whether it was possible to appeal or provide additional information in the event of a denial. Testers were also instructed to ask the agent to email them a copy of the criminal background screening policy if one was available.

f. Debriefs

After each test, the investigations coordinator debriefed the tester, during which the tester gave a description of what happened during the test and discussed any issues or concerns that may have arisen.

g. Post-Test Follow-up

Where the investigations coordinator determined during the debriefing that additional information was needed, testers were instructed to call the agent back with additional questions. In some instances, investigations coordinators also sent emails to the agent to ask follow-up or clarifying questions. Investigations coordinators also monitored the email account for each profile to see if agents reached back out to testers following their phone conversation to encourage the tester to apply or to provide a copy of the written criminal background policy.

h. Test Reports

After each test, the tester completed a report form in which they documented information gathered during the test, including the agent's name/title, the address of the unit, the number of bedrooms, the monthly rent amount, the security deposit amount, any lease options, the date of availability, and any other information that the agent may have provided or sought from the tester (e.g., the tester's income, employment, family size, etc.). In addition to the Report Form, each tester wrote and submitted a narrative description of what happened during the test, including all interactions with the housing provider, plus any follow-up calls or texts.

AUDIT ANALYSIS

A. ANALYSIS PROCESS

FHANC compared the report forms and narratives of all four test parts for each investigation to assess whether Black and white testers received similar or different treatment from each other and to determine whether the housing provider made any discriminatory statements related to race or any other protected class. FHANC also reviewed the narratives to determine whether there was evidence that the housing provider had a criminal background screening policy that would likely have a disparate impact on Black applicants (i.e. a discriminatory effect).

1. Differential Treatment

When analyzing tests for differential treatment based on race, FHANC considered multiple factors, including but not limited to the following:

1. The housing provider's willingness to rent to each tester;

2. Whether the housing provider offered superior rental terms and/or conditions (such as a waiver of the application fee, and/or special offers) to the white tester(s) versus the Black tester(s);

3. Whether the housing provider followed up with any of the testers after the investigation was complete;

4. How the housing provider responded (or failed to respond) to initial contact or subsequent contacts by the testers;

5. Information provided to the testers regarding applicant qualifications, eligibility, or rental criteria; and

6. The housing provider's comments and/or general treatment of testers indicating encouragement, discouragement, and/or steering.

2. Disparate Impact

When analyzing tests to determine whether a housing provider's criminal background screening policy has a disparate impact based on race, FHANC considered multiple factors, including but not limited to the following:

1. Whether the housing provider takes criminal history into account when screening applicants;

2. Whether the landlord has a written criminal background screening policy that is made available to all who inquire;

3. Whether the policy considers the nature and/or severity of the alleged criminal conduct;

4. Whether the policy considers the recency of all alleged criminal conduct or convictions that will result in a denial;

5. Whether the landlord uses a third-party screening company to screen for criminal records;

6. Whether the third-party screening company makes eligibility determinations for the housing provider or whether the screening company provides criminal history information to the housing provider for the housing provider to make their own determinations;

7. Whether the policy allows for applicants to correct any inaccurate information in the record that may serve as the basis for a denial;

8. Whether the policy allows for applicants to explain any extenuating circumstances related to the conduct or conviction that may serve as the basis for a denial;

9. Whether the housing provider delays in considering the applicant's criminal history until after their financial and other qualifications are verified and a conditional offer is made;

10. Whether the policy includes an individualized assessment of each applicant's record that considers relevant mitigating information beyond their record; such as the age of the individual at the time of the conduct, how long ago the criminal conduct occurred, evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct, and evidence of rehabilitation efforts;

11. Whether the policy is designed to achieve a legitimate business interest in that it only relies on offenses that indicate a demonstrable risk to resident safety and/or property as the basis for a denial;

12. Whether the policy is vague and/or so unclear that someone with a criminal record would likely be deterred from applying regardless of the recency or severity of their criminal conduct;

13. Whether the housing provider charges a non-refundable application fee or criminal background check fee that would likely deter someone with a criminal record from applying unless they were sure their application would be approved.

B. CLASSIFICATIONS BASED ON STRENGTH OF EVIDENCE

FHANC analyzed each test for race discrimination by comparing the experiences of Black and white testers at each property to determine whether the housing provider's policies or practices violated fair housing laws under either a differential treatment or disparate impact theory of liability. Tests were classified as showing either: 1) clear evidence of discrimination, 2) some or potential evidence of discrimination, or 3) no/ insufficient evidence of discrimination.

1. Clear Discrimination

For the purposes of this report, "clear evidence of discrimination" refers to clear violations of FHA and/or FEHA, including but not limited to:

a. Having a criminal record screening policy that has a clear disparate impact on Black applicants in that it is not designed to achieve a substantial and legitimate business interest and/or is not the least discriminatory way of achieving such interest;

b. Enforcing policies inconsistently based on race and/or willingness to make an exception to a stated policy for a white tester but not a Black tester;

c. Refusing to rent to or negotiate with a person because of their race;

d. Making a false representation about rental availability to a person because of their race (as evidenced by representations to other testers);

e. Offering inferior terms, conditions, privileges, or services to a tester because of their race;

f. Suggesting another neighborhood or property would be more suitable because of the tester's race (steering);

g. Making discriminatory statements regarding a tester's race or the demographics of the neighborhood where the property is located;

h. Responding to an inquiry from one or more white testers after failing to respond to multiple inquiries from one or more Black testers;

i. Stating or indicating a preference for certain applicants based on race and/or or implying that a person's application would likely be denied because of their race; and/or

j. Discouraging one or more Black testers from applying while encouraging one or more white testers to apply.

2. Some/ Potential Discrimination

For the purposes of this report, "some/ potential evidence of discrimination" refers to some, but not clear, evidence of a discriminatory policy and/or other evidence that indicates a likelihood of discrimination, including but not limited to:

k. Having a criminal record screening policy that likely, but not clearly, has a disparate impact on Black applicants in that it follows some of HUD's recommendations but fails to follow others and/or is so vague that it is unclear whether it follows HUD's recommendations;

a. Communicating potentially discriminatory eligibility criteria to some testers and non-discriminatory criteria to others, where different testers speak to different agents;

b. Failing or refusing to provide testers with any meaningful information beyond the fact that the housing provider screens for criminal records thus the only way for applicants to know whether their criminal record would result in a denial is to pay a non-refundable application fee;

c. Causing delays in the application process by failing or refusing to answer questions about criminal record policies;

d. Communicating minor differences in rental terms or eligibility criteria to Black testers versus white testers;

e. Making comments that *could*, but not conclusively, indicate a preference based on race; and/or

f. Making negative comments about a housing provider's legal obligation to comply with fair housing laws (despite being willing to rent to a tester with protected characteristics).

3. No/ Insufficient Evidence of Discrimination

For the purposes of this report, "no/ insufficient evidence of discrimination" refers to tests where:

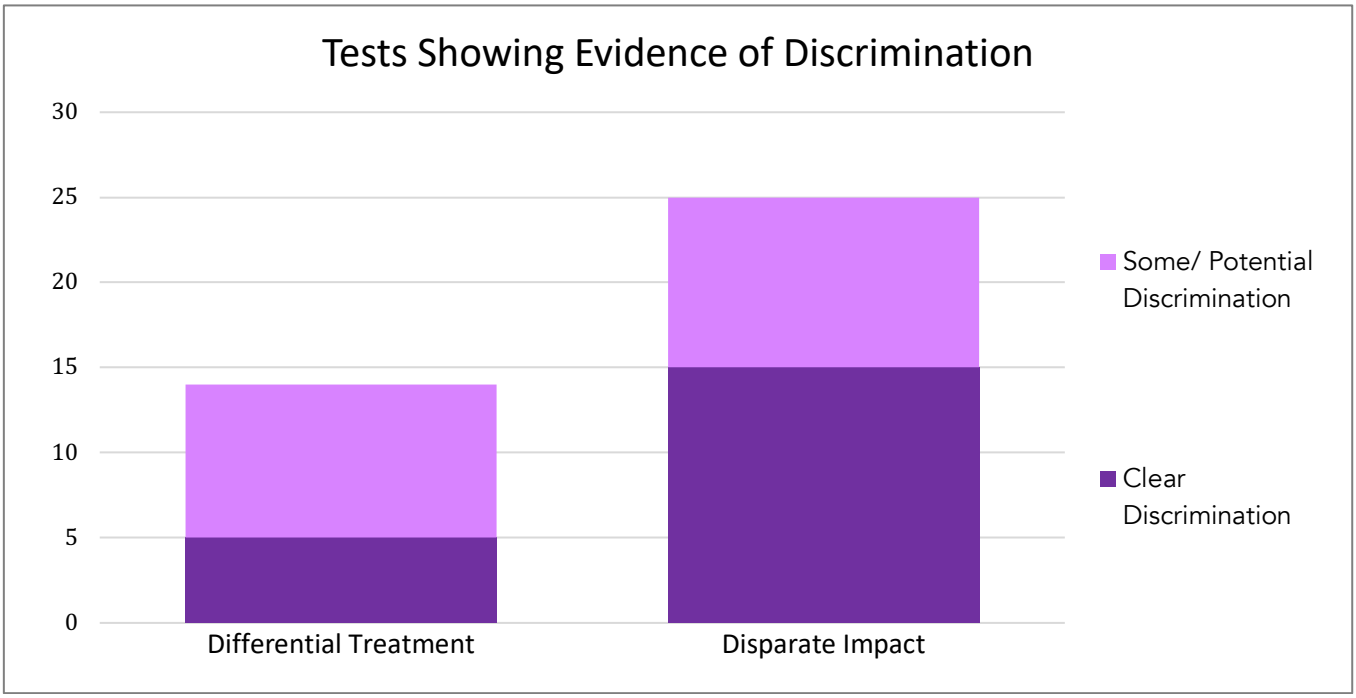
a. Black and white testers received substantially similar information and/or treatment by the housing provider;

b. The housing provider did not make any statements that could be interpreted as discriminatory on the basis of race; AND

c. The housing provider does not screen for criminal records or has a screening policy that meets all of HUD's recommendations to avoid violating fair housing laws, including: having a screening policy that is clear and readily available to all prospective applicants; not relying on a third-party screener to make eligibility decisions; delaying background checks until after financial eligibility is verified; only considering offenses that indicate a demonstrable risk to resident safety and/or property; allowing applicants to provide additional information or explain any extenuating circumstances related to the conduct or conviction before and after denial; AND conducting individualized assessments of the circumstances related to applicants' criminal conduct or convictions.

AUDIT RESULTS

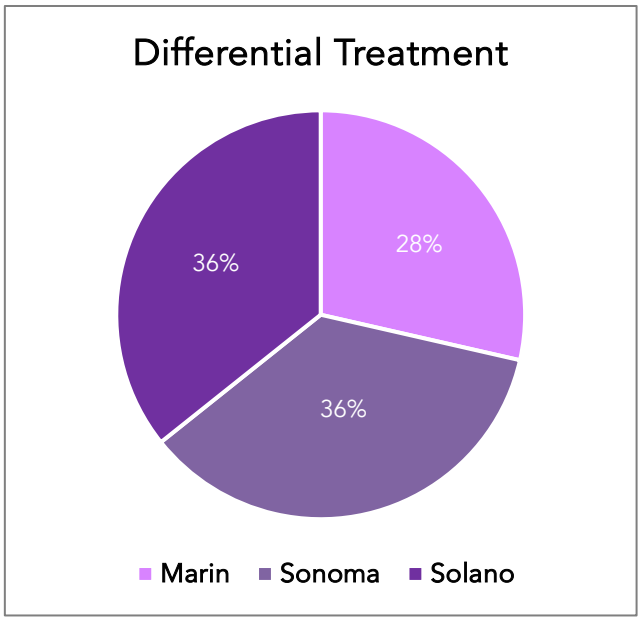
A. OVERALL RESULTS

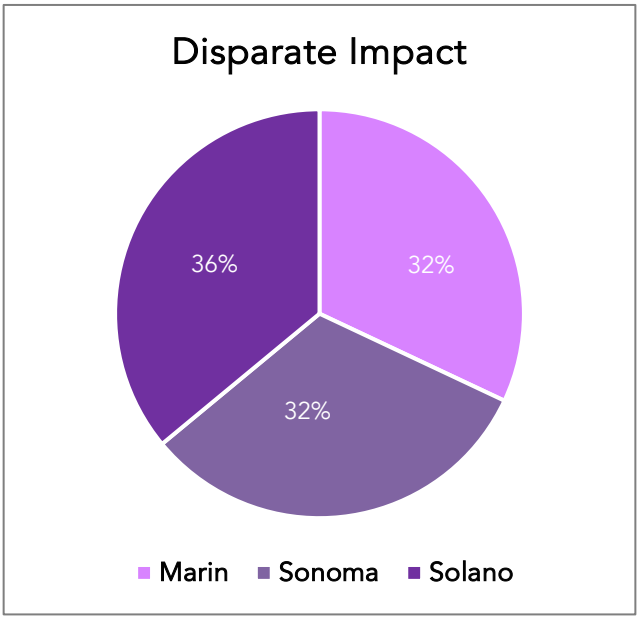


Of the 30 investigations conducted (120 test parts), 46.7% revealed at least some evidence of differential treatment based on race, with 16.7% showing clear evidence of discrimination and 30% showing some/ potential evidence of discrimination. 25 investigations revealed evidence of a criminal background screening policy that had a disparate impact on Black applicants, with 50% showing clear evidence of discrimination and 33.3% showing some or potential evidence of discrimination. Only five investigations revealed no or insufficient evidence of race discrimination under either theory of liability. Every housing provider that treated Black testers less favorably than white testers also had a discriminatory screening policy.

Evidence of Discrimination	# of Tests	% of Tests
Evidence of differential treatment	14	46.7%
Evidence of disparate impact	25	83.3%
Evidence of differential treatment and/or disparate impact	**25**	83.3%
No/ insufficient evidence of discrimination	**5**	16.7%
Total	**30**	100%

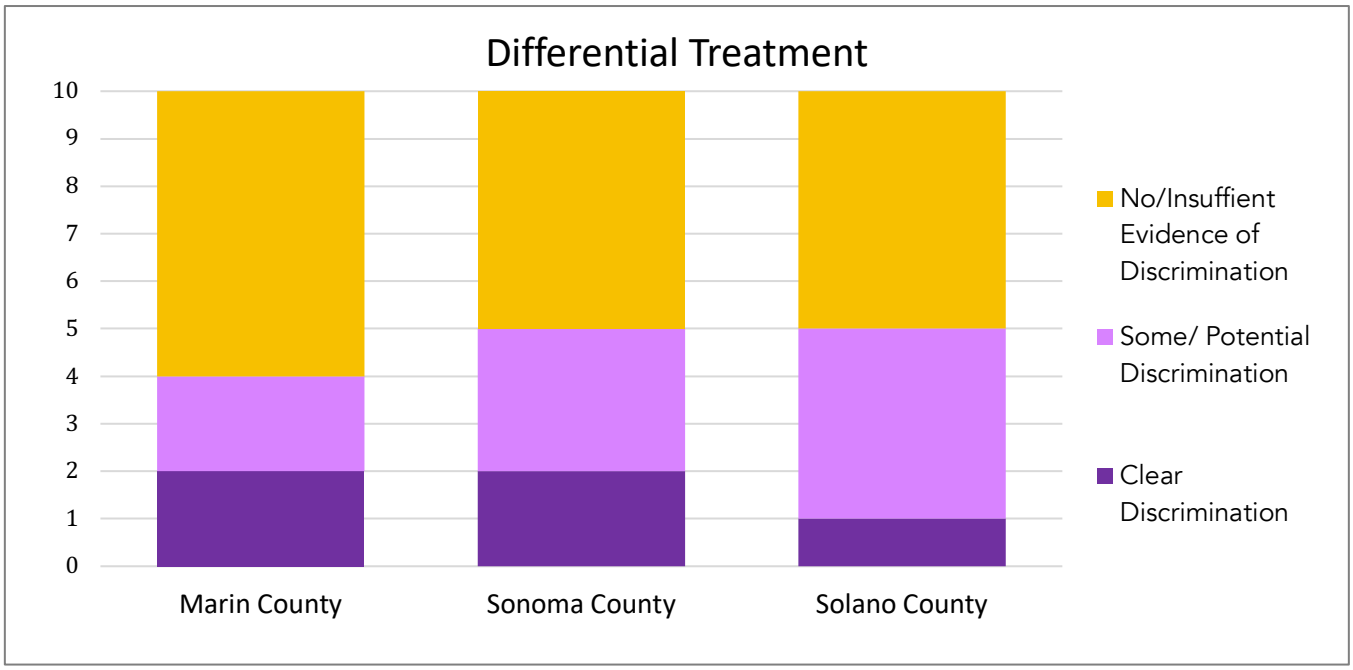
B. RESULTS BY GEOGRAPHIC AREA





Of the 14 investigations that showed evidence of differential treatment, four (28%) were in Marin County, five (36%) were in Sonoma County, and five (36%) were in Solano County. Of the 25 investigations that showed evidence of disparate impact, eight (32%) were in Marin County, eight (32%) were in Sonoma County, and nine (36%) were in Solano County.

1. Evidence of Differential Treatment by County



a. Marin County

Of the 10 investigations conducted in Marin County, 40% revealed at least some evidence of

differential treatment based on race, with 20% showing clear evidence of discrimination and 20% showing some or potential evidence of discrimination.

Evidence of Differential Treatment	# of Tests	% of Tests
Total tests showing discrimination	**4**	**40%**
Clear discrimination	2	20%
Some/ potential discrimination	2	20%
Tests with no/ insufficient evidence of differential treatment	**6**	**60%**
Total	**10**	**100%**

b. Sonoma County

Of the 10 investigations conducted in Sonoma County, 50% revealed at least some evidence of differential treatment based on race, with 20% showing clear evidence of discrimination and 30% showing some or potential evidence of discrimination.

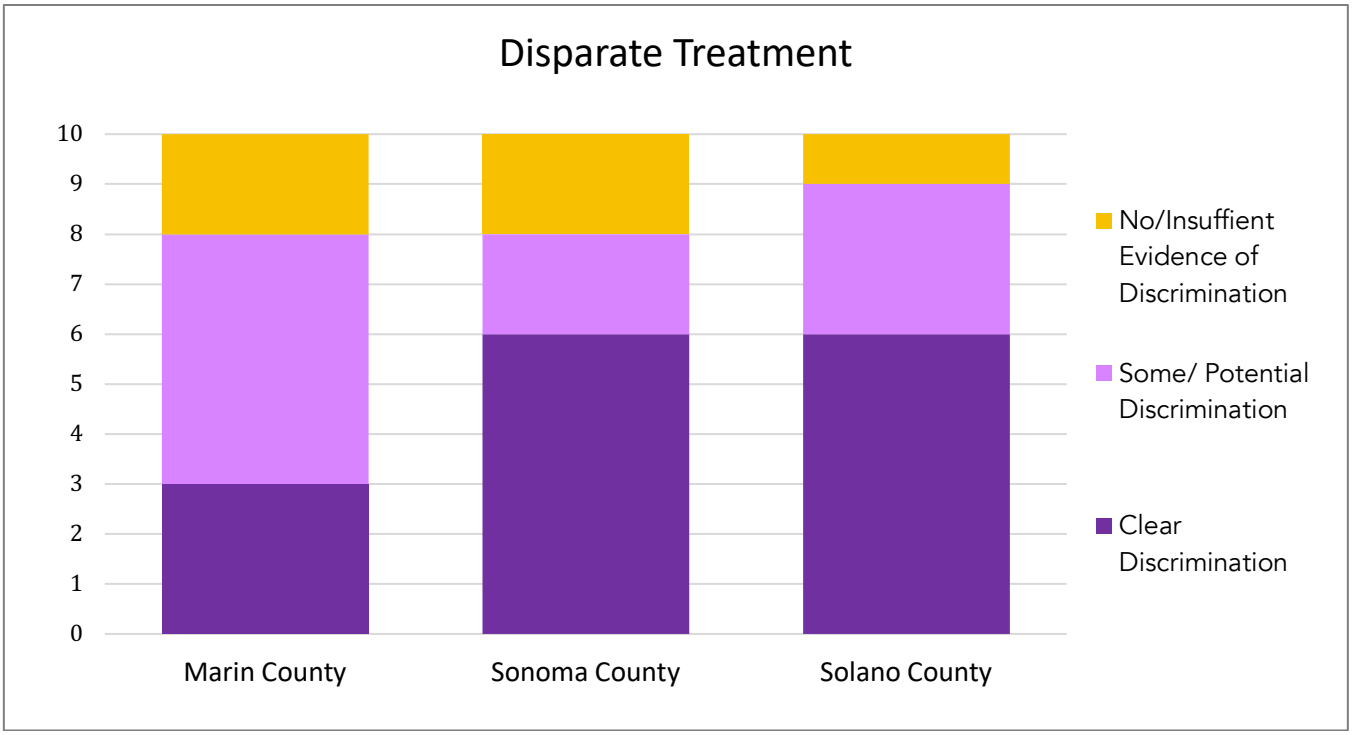
Evidence of Differential Treatment	# of Tests	% of Tests
Total tests showing discrimination	**5**	**50%**
Clear discrimination	2	20%
Some/ potential discrimination	3	30%
Tests with no/ insufficient evidence of differential treatment	**5**	50%
Total	10	100%

c. Solano County

Of the 10 investigations conducted in Solano County, 50% revealed at least some evidence of differential treatment based on race, with 10% showing clear evidence of discrimination and 40% showing some or potential evidence of discrimination.

Evidence of Differential Treatment	# of Tests	% of Tests
Total tests showing discrimination	**5**	**50%**
Clear discrimination	1	10%
Some/ potential discrimination	4	40%
Tests with no/ insufficient evidence of differential treatment	**5**	50%
Total	**10**	100%

2. Evidence of Disparate Impact by County



a. Marin County

Of the 10 investigations conducted in Marin County, 80% revealed at least some evidence of disparate impact based on race, with 30% showing clear evidence of discrimination and 50% showing some or potential evidence of discrimination.

Evidence of Disparate Impact	# of Tests	% of Tests
Total tests showing discrimination	**8**	**80%**
Clear discrimination	3	30%
Some/ potential discrimination	5	50%
Test with no or insufficient evidence of disparate impact	**2**	**20%**
Total	**10**	**100%**

b. Sonoma County

Of the 10 investigations conducted in Sonoma County, 80% revealed at least some evidence of disparate impact based on race, with 60% showing clear evidence of discrimination and 20% showing some or potential evidence of discrimination.

Evidence of Disparate Impact	# of Tests	% of Tests
Total tests showing discrimination	**8**	**80%**
Clear discrimination	6	60%
Some/ potential discrimination	2	20%
Test with no or insufficient evidence of disparate impact	**2**	**20%**
Total	**10**	**100%**

c. Solano County

Of the 10 investigations conducted in Solano County, 90% revealed at least some evidence of disparate impact based on race, with 60% showing clear evidence of discrimination and 30% showing some or potential evidence of discrimination.

Evidence of Disparate Impact	# of Tests	% of Tests
Total tests showing discrimination	**9**	**90%**
Clear discrimination	6	60%
Some/ potential discrimination	3	30%
Test with no or insufficient evidence of disparate impact	**1**	**10%**
Total	**10**	**100%**

3. Evidence of Discrimination by City

City / Region	County	# of Tests in City	Discrimination
San Rafael	Marin	4	4
Vallejo	Solano	4	3
Santa Rosa	Sonoma	4	4
Fairfield	Solano	3	3
Vacaville	Solano	3	3
Petaluma	Sonoma	3	2
Novato	Marin	2	1
Rohnert Park	Sonoma	2	2
Corte Madera	Marin	1	1
Larkspur	Marin	1	1
Sausalito	Marin	1	1
Tiburon	Marin	1	0
Windsor	Sonoma	1	0
Totals		**30**	**25**

C. DIFFERENTIAL TREATMENT

Of the 30 investigations conducted, 14 (46.7%) revealed at least some evidence of differential treatment based on race, with five (16.7%) showing clear evidence of discrimination and 9 (30%) showing some or potential evidence of discrimination.

a. Tests Showing Evidence of Differential Treatment

Test #	Strength of Evidence	Evidence of Differential Treatment
T-00109	Clear Discrimination	• Black testers on average called many more times than white testers before their calls were returned
T-00110	Some/ Potential Discrimination	• White testers received more info and encouragement (e.g.: "you can come today") • White tester with DUI told "I don't see that being a problem"
T-00119	Some/ Potential Discrimination	• Agent assumed Black tester had bad credit when she asked about a minimum credit score, but no similar statement made to white testers • Black testers given less information when they asked about criminal background screening policies and were told all they could do was apply and find out • White testers told they would get their holding deposit back if application denied, which was not told to Black testers • Agent told white tester with DUI it would probably be fine if she had to guess while Black tester with DUI was told it could go either way
T-00125	Clear Discrimination	• White tester with a felony was advised to apply with a cosigner in order to get approved while Black tester with a felony was told it would be an automatic denial and was advised not to apply
T-00126	Some/ Potential Discrimination	• Criminal background policy was only disclosed to one (white) tester
T-00130	Some/ Potential Discrimination	• Testers were told relatively the same thing but the Black tester with an assault was told there's no way to appeal and that criminal records are taken "very seriously" while the white tester with an assault was told there are many ways to appeal (although this could be attributed to the fact that they spoke to different agents)
T-00135	Some/ Potential Discrimination	• Both black testers were told there is a criminal background check while one white tester was told there isn't (but testers spoke with different agents) • One Black tester never received responses to multiple follow-up emails/questions she sent
T-00138	Some/ Potential Discrimination	• Both testers with DUI spoke to the same agent who told the Black tester she couldn't tell her if the application would be

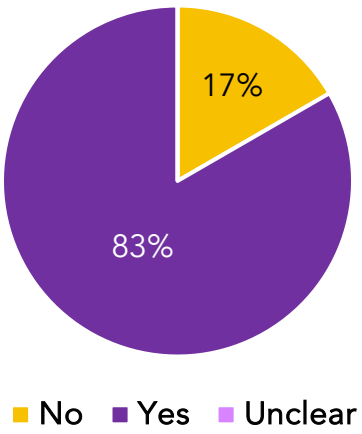
		denied but told the white tester it would be considered a conditional approval (meaning she would have to pay a higher security deposit) • Black testers tried multiple times to follow up but never received responses
T-00142	Some/ Potential Discrimination	• Agent told Black tester she could reapply if her application was denied but told the white tester they would try to work it out
T-00151	Some/ Potential Discrimination	• Agent repeatedly told the Black tester she did not want to provide any information about the criminal background policy because she might provide the wrong information and said she probably couldn't get any information unless an application was submitted • When the same agent spoke to a white tester, she said she had minimal information about the criminal background policy but that she could look it up and did
T-00158	Clear Discrimination	• When a Black tester asked about the criminal background check, she was told "it's an online website and I don't have anything to do with that" but when a white tester asked the same agent she was given much more information about the criminal background check policy • Agent also gave the white tester her manager's email address so the tester could request more information
T-00159	Some/ Potential Discrimination	• One Black tester never received a response after leaving three voicemails and making eight calls over the course of five days while all other testers received a call back after leaving 1-2 voicemails
T-00161	Clear Discrimination	• A white tester and a Black tester both gave their email address to the same agent and requested that more information be provided after the call but the agent only followed up with the white tester and the Black tester never received a follow-up
T-00168	Clear Discrimination	• Both Black testers were told any conviction would result in an automatic denial • Both white testers were told that denials were based on the type of conviction

D. DISPARATE IMPACT

a. Analysis of HUD Guidelines

In order to determine whether a housing provider's criminal record screening policy may have a disparate impact on Black applicants, FHANC analyzed each policy (as described to testers, emailed to testers, and/or posted on the property's website) to determine which if any of HUD's guidelines the housing provider complied with. 83.3% of tests revealed evidence of criminal history screening policies that have a disparate impact on Black applicants.

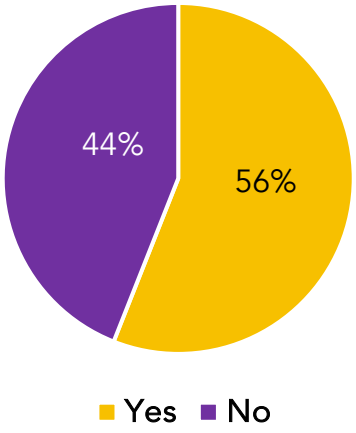
1. Does the housing provider **screen for criminal records**?



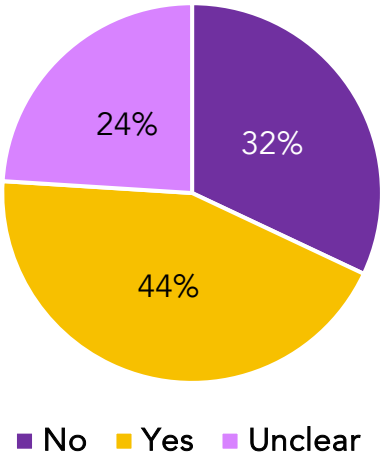
HUD recommends that housing providers consider not using criminal records to screen tenants for housing because research shows that criminal history is not a good predictor of housing success. HUD advises instead that housing providers rely on screening criteria that more closely relates to whether an applicant or resident would be a good tenant, such as ability to pay rent, prior rental history, or personal references. Despite this recommendation, of the 30 housing providers investigated, 25 told testers that they screen applicants for criminal histories.

2. Does the housing provider have a **written criminal background screening policy** that is made **readily available** to all who inquire?

HUD recommends that if housing providers choose to screen for criminal records that they have a written policy that is available to all applicants. FHANC found that of the 25 landlords that told testers they run background checks, only 11 had written policies that were accessible to testers either via email from the agent or listed on the housing providers' website. Some testers reported that when describing their criminal record screening policy, some agents were clearly reading from a written document but when the tester requested that the agent send them a copy of the written policy the agent refused to do so.



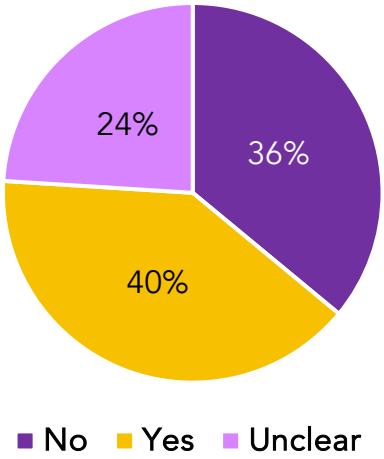
3. Does the policy **consider the nature and/or severity of criminal conduct** or convictions that will result in a denial?



HUD recommends that if housing providers choose to screen for criminal records that they consider the nature and severity of the criminal conduct that may serve as the basis for a denial. Despite this recommendation, FHANC found that of the 25 housing providers that conduct background checks, only 11 described policies to testers or had available written policies that clearly consider the nature and severity of a crime, such as whether the conviction was for a felony or misdemeanor. Additionally, in eight of the investigations conducted, testers were not given sufficient information to determine whether the policy took the nature and/or severity of the offense into account.

4. Does the policy **consider the recency of the criminal conduct** or convictions that will result in a denial?

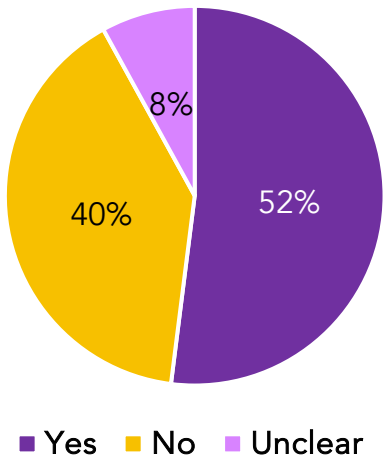
HUD recommends that if housing providers choose to screen for criminal records that they consider the recency of the criminal conduct that may serve as the basis for a denial. However, FHANC found that of the 25 housing providers that screen for criminal records, only 10 described policies to testers or had available written policies that clearly consider the recency of the conviction. For example, some policies stated that a particular type of felony and/or misdemeanor could result in a denial if the conviction occurred within a specified number of years. However, in six of the investigations, testers were not given sufficient information to determine whether the policy took the recency of the conviction into account (i.e.: there was no mention of a timeframe or cutoff date for any type of conviction).



5. Does the housing provider use a **third-party screening company** to screen for criminal records?

HUD recommends that housing providers avoid the use of third-party screening companies because they use algorithms that may contain racial or other prohibited bias in their design, they have not been shown to reliably predict risk, and their reports may produce inaccurate information about the applicant. Despite this recommendation, however, all 25 of the housing providers that consider criminal histories use third-party products to screen tenants. Examples of these companies include Yardi (a.k.a. RentGrow), RealPage, ResidentVerify, TransUnion, OnSite, and CoreLogic, which recently settled a $2.275 million class action lawsuit for having an algorithmic tenant screening program that disproportionately harmed Black and Latinx applicants.[xxxiii]

6. Does the **third-party screener make eligibility decisions** for the housing provider rather than providing the criminal history information to the housing provider to make their own determination?

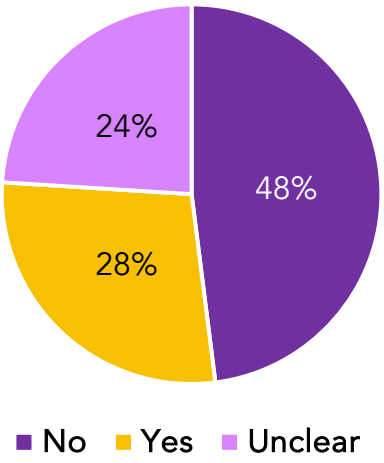


HUD recommends that if housing providers choose to screen for criminal records that they avoid using a third-party screening company that makes eligibility decisions for the housing provider, rather than providing information to the housing provider to make its own determination. FHANC found that of the 25 housing providers that consider criminal records, 13 told testers that applications are either approved or denied by a third-party screening company, and either implied or explicitly stated that the property management company has no input or influence over whether an application gets approved or denied. One tester was told, "We use CoreLogic, a 3rd party vendor, and they let us know if someone is being approved or not." Another tester was told, "Screening is done by On-Site, a third party. They set requirements and no exceptions. Only way to find out is to go through the application process and pay the fee." Another tester was told that the agent couldn't tell them if her application would be denied "because it would just come back through Yardi, the screening service we use. We don't make the decision." Additionally, many agents seemed unaware of whether the criteria used by the screening company was set by the landlord or whether the screening company sets its own guidelines for when to deny applications based on criminal history. In two investigations, agents either did not know or refused to tell testers whether eligibility decisions were made by management or a third-party screener.

7. Does the policy **allow for applicants to correct any inaccurate information** in the record that may serve as the basis for a denial?

HUD recommends that before making an adverse decision related to an applicant's criminal involvement, that the applicant be given an opportunity to correct inaccurate information in the criminal history report. All 25 housing providers that screen for criminal records use third-party screeners, which are required under the Fair Credit Reporting Act (FCRA) to allow applicants rejected based on a screening agency's background check to raise a dispute against any discrepancies, and the screening agency has 30 days to resolve the issue (if necessary). Some testers were told that if denied, they could reach out to the third-party screener to appeal the denial, however, the vast majority of the screening companies mentioned to testers do not make their dispute procedures readily available. In fact, only two screening companies (TransUnion and OnSite) have forms on their website to report errors on a tenant screening report. In some cases, testers also tried to contact the screening companies directly using phone numbers or email addresses provided to them by the rental agent, in order to find out more about the criminal record policy or how to appeal. However, they were usually given no additional information and if the third-party screener even responded at all they usually told the tester that she would have to contact the management company to find out about the screening policy for that particular property.

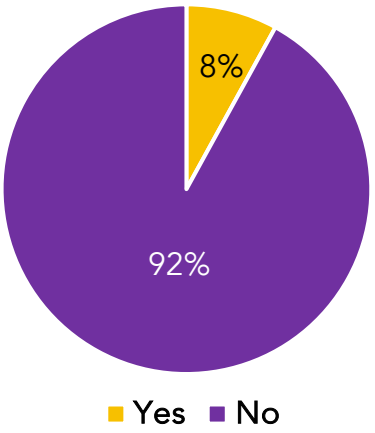
8. Does the policy **allow applicants to explain any extenuating circumstances** related to the conduct or conviction that may serve as the basis for a denial, either before or after the criminal background check is completed?



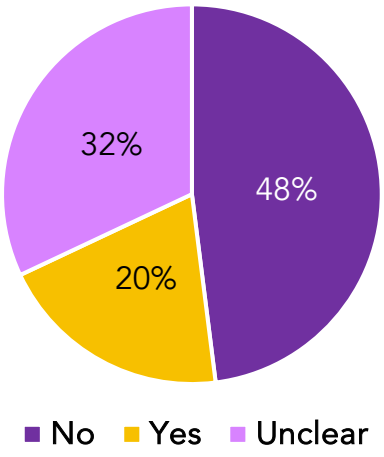
HUD recommends that if a housing provider chooses to screen for criminal records, before making an adverse decision related to an applicant's criminal involvement that they provide the applicant with the criminal record, indicate which specific part of the record may form the basis of an adverse decision, and give the applicant the opportunity to explain extenuating circumstances related to the record or conduct. Despite this recommendation, FHANC found that of the 25 landlords that run background checks, only seven allow applicants to explain extenuating circumstances either before or after the criminal background check is complete. Some testers were told there was no appeals process and management could not make any exceptions to categorical denials because that would "violate fair housing laws." In six of the investigations, testers were not given sufficient information to determine whether an applicant could provide additional information about the criminal conduct because agents either did not know enough about the policy or refused to provide that information to the testers.

9. Does the housing provider **delay in considering an applicant's criminal history** until after their financial and other qualifications are verified?

HUD recommends that if housing providers choose to use criminal records to screen tenants that they delay consideration of criminal history until after an individual's financial and other qualifications are verified and a conditional offer is made. Yet only two of the housing providers that screen for criminal records actually follow this recommendation. FHANC found that 23 of housing providers tested run criminal background checks and credit checks at the same time. Some testers were told that third-party screening companies determine eligibility based on a point system in which an applicant starts with a total number of points and then points are deducted for unfavorable conviction history, eviction history, and/or credit history from the same total score.

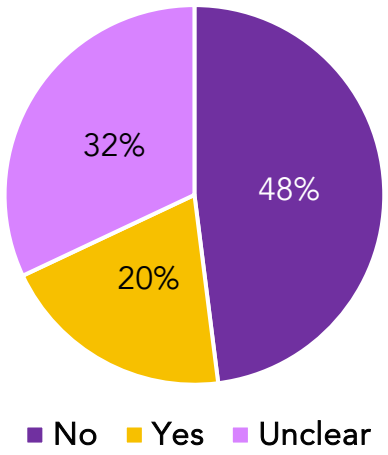


10. Does the policy include an **individualized assessment** of each applicant's record that considers relevant mitigating information?



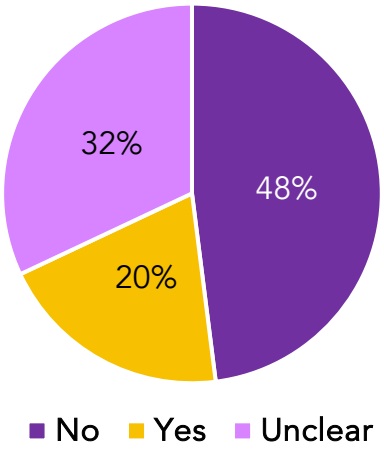
HUD recommends that if a housing provider choses to screen for criminal records that it conduct an individualized assessment of each applicant's record that considers relevant mitigating information, such as the age of the individual at the time of the conduct, how long ago the criminal conduct occurred, evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct, and/or evidence of rehabilitation efforts. This is because individualized assessments are likely to have less of a discriminatory effect than categorical exclusions that do not consider additional information. Of the 25 housing providers that screen for criminal records, FHANC found that only five conduct individual assessments considering mitigating information. In eight of the investigations, testers were not given sufficient information to determine whether housing providers imposed categorical denials based on particular offenses (or severity) or whether they were willing to make case-by-case determinations or exceptions.

11. Is the policy is designed to achieve a **substantial and legitimate business interest** in that only offenses that indicate a demonstrable risk to resident safety and/or property may serve as the basis for a denial?



If a housing provider chooses to consider criminal histories when screening applicants, in order to comply with fair housing laws, the housing provider must design a policy that is necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider. The interest proffered may not be hypothetical or speculative; the housing provider must be able to prove through reliable evidence that its policy serves a substantial and legitimate interest and that such interest could not be served by another practice that has a less discriminatory effect. Since the only interest proffered by housing providers that courts have upheld as substantial and legitimate are protecting the safety of other resident and preventing damage to the property, FHANC looked at whether housing providers' policies are narrowly tailored to achieve those interests. FHANC found that of the housing providers that screen for criminal records, five have policies that are overly broad (i.e.: they do not just prohibit offenses that indicate a demonstrable risk to resident safety and/or property). In eight of the investigations, testers were not given sufficient information to determine whether the housing provider considered resident or property safety in designing its policy.

12. Is the policy **vague** and/or so unclear that someone with a criminal record would likely be **deterred from applying** regardless of recency or severity of the criminal conduct?



FHANC found that the vast majority of the criminal record screening policies revealed by this investigation would likely deter anyone with a more serious criminal record from applying, especially someone with a recent felony. However, 18 of the policies were so vague that even people with less serious records, like someone with a very old conviction or a recent misdemeanor, would likely be deterred from applying because the only way to know whether the applicant would be approved or denied is to pay a non-refundable application fee. Every housing provider tested charges a non-refundable application fee between $20 and $60, except one provider that said the fee would only be charged if the applicant was approved but chose not to move in (note this housing provider also does not screen for criminal records).

CONCLUSIONS

Only five of the 30 investigations conducted revealed no or insufficient evidence of race discrimination under either theory of liability (differential treatment or disparate impact). Every housing provider that treated Black testers less favorably than white testers also had a discriminatory screening policy.

Nearly half of the investigations conducted revealed at least some evidence of differential treatment based on race, with five (16.7%) showing clear evidence of discrimination and nine (30%) showing some or potential evidence of discrimination.

83.3% of investigations revealed evidence of a criminal background screening policy that would likely have a disparate impact on Black applicants. The impact of this number is significant because it shows that Black individuals with criminal legal system involvement have an incredibly high chance of being screened out when searching for housing. The 25 properties that consider criminal histories represent a total of 5,211 units – 5,211 units that people with criminal records would likely be excluded from based on these policies. In Marin, Sonoma, and Solano counties there are approximately 697 large multi-family rental properties (buildings with 30 or more units), with a total of 110,839 rental apartments. If 83% have criminal record screening policies that violate fair housing laws, as the results of this investigation suggest, there are more than 92,000 units in the tri-county area that exclude some or all home seekers based on their criminal history.

FHANC also found that of housing providers that screen for criminal records, all use third-party tenant screening services, which utilize algorithms that may contain racial or other prohibited bias in their design and have not been shown to reliably predict risk. 13 housing providers told testers that applications are either approved or denied by a third-party screening company, implying (or explicitly stating) that the property manager has no input or influence on whether an application gets approved. One tester was told about a third-party screening company that, "They set requirements and no exceptions. Only way to find out is to go through the application process and pay the fee." Only two out of the 25 housing providers that screen for criminal records said they conducted individualized case-by-case assessments of applicants' criminal records, and 48% told testers that there is no way to provide information about extenuating circumstances or to appeal a denial.

Housing providers in Solano County were revealed to be the most discriminatory of the three counties tested: five of the 10 housing providers tested in Solano treated Black testers less favorably than white testers and nine had criminal background screening policies that disproportionately exclude Black applicants. While housing providers in Marin County were the least discriminatory, with 40% of tests revealing evidence of differential treatment and 80% revealing evidence of disparate impact, the rate of discrimination was similarly and alarmingly high in all three counties.

LESSONS LEARNED

A. TAKEAWAYS

As we strive toward a more equitable society, it is imperative to understand the full scope of discrimination faced by vulnerable populations. This investigation serves as a crucial step in that direction, providing insights that can guide future efforts to ensure that tenants are given a fair chance, regardless of their racial background or criminal history. The findings of this investigation are vital in informing policymakers, housing advocates, and the general public about the extent of racial discrimination in the local housing market, particularly as it relates to individuals with criminal records. The implications of this audit extend beyond the confines of the housing sector, touching on broader social justice issues that affect underserved communities.

These findings point to the need for more enforcement actions as well as increased education and outreach to property owners and managers, particularly those in Solano County, where instances of discrimination were the highest.

Past investigations conducted by FHANC have revealed extremely high rates of discrimination at small and medium sized properties, which is unsurprising given that "mom and pop" landlords usually have less access to legal advice and/or fair housing training than employees at large management companies. However, this investigation also revealed high rates of differential treatment (46.7%) and a lack of understanding of fair housing obligations as they apply to criminal background screening, which is incredibly disappointing given that all tests were conducted at large properties comprising 40 to 495 units each (with a median of 185 units). Additionally, the fact that so many housing providers were willing to state their discriminatory criminal record policies in writing, suggests that at least some are likely unaware of HUD's guidelines and how criminal record screening policies may violate fair housing law. These findings underscore the substantial need for increased fair housing training for small and large landlords, in addition to enforcement efforts.

B. AUDIT LIMITATIONS

1. Pre-Application Testing Underestimates the Degree of Discrimination

By virtue of its very design and purpose, this audit does not identify the full scope of discriminatory conduct. This audit sought to measure only the degree of discrimination an individual could encounter at the pre-application stage. Because testers did not submit applications, this audit cannot identify housing providers who dispense information and applications without apparent bias but discriminate later in the tenant selection process. This suggests the need to perform follow-up in addition to the tests conducted to date, especially in those instances where initial tests suggest differential treatment. Completed application tests

could yield evidence of housing providers turning down qualified Black applicants because of their race or using criminal history as pretextual reason for denial when the actual reason is race discrimination. However, full application testing is nearly impossible to conduct given that testers would have to use their real name and credentials which would make it difficult to match them with other testers. Additionally, subjecting testers to repeated credit checks would likely result in a decrease in their credit scores.

2. Lack of Knowledge of Housing Provider Policies by Agents Frustrates FHANC's Ability to Conduct Policy Testing

When an audit is designed to determine whether housing providers have discriminatory housing polices, it is difficult to analyze such polices when testers speak to agents or representatives of the management company that do know enough about screening polices and/or eligibility criteria to provide useful information. In this investigation, several testers were told by rental agents that they could not provide any specific information about the criminal record screening policy, other than that one exists. Many were told that the only way to know if a particular offense might serve as the basis for denial is to pay a non-refundable application fee to find out. Some agents were also unsure as to whether there was a way to challenge a denial or whether management had the authority to override a denial. Because testers do not submit applications, there is no way to know whether a policy is in fact discriminatory (in that it might result in a discriminatory denial) or whether it actually complies with fair housing laws. This is problematic because it not only limits our ability to assess the extent of discrimination it also has the effect of deterring applicants who might otherwise qualify from applying given the non-refundable application fee.

RECOMMENDATIONS

B. **Work to pass fair chance ordinances** in Marin County, Sonoma County and Solano County to prohibit housing providers from considering criminal records when screening tenants. HUD recommends this approach because criminal background checks disproportionately impact Black and Brown applicants and research shows that criminal history is not a good predicter of housing success. Other jurisdictions have passed similar legislation that have significantly reduced barriers for people with criminal legal system involvement in those areas. For example, in 2020 the City of Berkeley passed the Ronald V. Dellums Fair Chance Access to Housing ordinance, which prohibits housing providers from considering criminal history in making rental housing decisions or selecting tenants.[xxxiv] Shortly thereafter, Just Cities conducted an email audit to examine the impact of the ordinance and found that 71% of respondents were operating in compliance, demonstrating that as a result of this policy the majority of housing providers in Berkeley no longer considered criminal history in making rental housing decisions immediately following the passage of the ordinance.[xxxv]

C. **Disseminate audit results** to Marin County, Sonoma County, and Solano County officials, the general public, media, and advocacy groups as an important educational tool. Meet with local governments and partner organizations to inform them of the results of the audit and what steps need to be taken to combat race discrimination and exclusion of tenants with criminal histories. Social media posts and press releases should focus on informing the public about barriers faced by people with criminal legal system involvement, particularly Black individuals.

D. **Monitor sites** where there was an indication of differential treatment or a discriminatory policy and retest and/or take further action when appropriate, including filing lawsuits or administrative complaints in order to prevent future discrimination and deter other bad actors.

E. **Offer fair housing training** to housing providers. The audit points out the need for continuous training in fair housing laws for all owners and managers of rental property, with an emphasis on criminal record screening policies and the subtleties of differential treatment and the need to supply uniform information and treatment to all potential applicants. FHANC has conducted Fair Housing Law and Practice seminars throughout the North Bay for many years. Such educational endeavors should be supported by public officials and aggressively marketed to housing industry providers through housing associations and elected officials. It is important to ensure that all housing providers and their staff receive fair housing information and training.

F. **Work with housing providers** to ensure that they are following fair housing laws and that they understand the laws. Send notices to properties where testing showed evidence of differential treatment and/or discriminatory policies.

G. **Conduct additional audits**. Because discrimination is so often subtle or cloaked as helpful suggestions, it may go undetected. Comparative examinations such as this offer the best approach to bring such practices to light. We recommend that Marin County, Sonoma County, and Solano County consider funding similar projects in the future.

H. **Spread the word to other service providers**. Work with other agencies serving Black renters and/or people with criminal legal system involvement, to inform their clients of their fair housing rights and available services.

ENDNOTES

[i] *See* 42 U.S.C. § 1981.
[ii] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[iii] *See* 42 U.S.C. § 3601 et seq.
[iv] The Sentencing Project, *Poverty and Opportunity Profile: Americans with Criminal Records*, https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf; citing Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2012 (U.S. Department of Justice, 2014), https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf; citing also Analysis of Bureau of Justice Statistics data by The Sentencing Project, "Trends in U.S. Corrections" (2013), available at http://sentencingproject.org/doc/publications/inc_Trends_in_ Corrections_Fact_sheet.pdf.
[v] Bureau of Justice Statistics, U.S. Dep't of Justice, *Reentry Trends in the United States*, http://www.bjs.gov/content/pub/pdf/reentry.pdf.
[vi] *See* U.S. Department of Housing and Urban Development "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," June 10, 2022.
[vii] Analysis of Bureau of Justice Statistics data by The Sentencing Project, "Trends in U.S. Corrections" (2013), available at http://sentencingproject.org/doc/publications/inc_Trends_in_ Corrections_Fact_sheet.pdf.
[viii] *See* U.S. Department of Housing and Urban Development "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," June 10, 2022.
[ix] See Nembhard, Susan and Robin, Lily. Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices. Urban Institute (August 2021).
[x] Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2012 (U.S. Department of Justice, 2014), https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf.
[xi] "California police more likely to use force against Black people," PBS News (January 3, 2023), https://www.pbs.org/newshour/nation/california-police-more-likely-to-use-force-against-black-people-report-says.
[xii] Public Policy Institute of America, Policy Brief: *Police Use of Force and Misconduct in California* (October 2021); https://www.ppic.org/wp-content/uploads/policy-brief-police-use-of-force-and-misconduct-in-california.pdf.
[xiii] *Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant 2019 Report to the California Legislature as Required by Penal Code Section 1170.45* (November 7, 2019), https://www.courts.ca.gov/documents/lr-2019-JC-dispositions-criminal-cases-2019-pc1170_45.pdf).
[xiv] The Effect of Housing Circumstances on Recidivism, Crim Justice Behav. 2020 Sep; 47(9): 1097–1115; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8496894.
[xv] *See* 42 U.S.C. § 3601 et seq.
[xvi] *Id.*
[xvii] *See* Cal. Gov't Code §§ 12927, 12955 et seq.; *see also* Cal. Gov't Code § 51 et seq.
[xviii] *Id.*
[xix] *See* U.S. Department of Housing and Urban Development "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," June 10, 2022.
[xx] *See* 42 U.S.C. §3604(a); Cal. Gov't Code §§ 12955(a).
[xxi] *Id.*
[xxii] *See* U.S. Department of Housing and Urban Development "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," June 10, 2022
[xxiii] *Id.*
[xxiv] *See* U.S. Department of Housing and Urban Development "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," April 4, 2016.

[xxv] *Id.*

[xxvi] *See* U.S. Department of Housing and Urban Development "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," June 10, 2022.

[xxvii] *Id.*

[xxviii] *Id.*

[xxix] *Id.*

[xxx] *Id.*

[xxxi] *Id.*

[xxxii] *Id.*

[xxxiii] "Rental Applicants Using Housing Vouchers Settle Ground-Breaking Discrimination Class Action Against SafeRent Solutions," ABC News (April 29, 2024), https://mlac.org/rental-applicants-settle-discrimination-class-action-abc.

[xxxiv] The Ronald V. Dellums Fair Chance Access to Housing Ordinance, BMC 13.106 (adopted April 14, 2020).

[xxxv] Just Cities Berkeley and Oakland Fair Chance Housing: 2020 and 2021 Housing Provider Email Audit Report (January 13, 2023), https://berkeleyca.gov/sites/default/files/documents/2023-05-09%20Item%2030%20Annual%20Report%20on%20the%20Ronald%20V.%20Dellums.pdf.