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Office of General Counsel, Rules Docket Clerk  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 10276  
Washington, DC 20410-0500

**Re: HUD Docket No. FR-6124-P-01, RIN 2501-AD89 Comments in Response to Proposed Rulemaking: Housing and Community Development Act of 1980: Verification of Eligible Status**

To Whom it May Concern:

These comments are submitted on behalf of the Western Center on Law and Poverty in response to the Department of Housing and Urban Development's (HUD) proposed rule to express our strong opposition to Proposed Rule, *Housing and Community Development Act of 1980: Verification of Eligible Status*, 84 Fed. Reg. 20,589 (May 10, 2019) (to be codified at 24 C.F.R. pt. 5). As California's oldest and largest legal services support center, we have over 50 years' experience fighting to reduce poverty in our state through the courts, the legislature, and by working with state and local agencies to ensure our laws are fair and justly implemented. We can speak directly to which federal and state policies serve to reduce poverty in our communities and benefit our state and country as a whole and which policies worsen poverty, penalize families struggling to make ends meet, and hurt us all. HUD's proposed rule threatens to exacerbate poverty by evicting over 25,000 families with mixed immigration status, betraying this country's promise of opportunity in favor of an unreasoned, unworkable policy. Almost ten thousand of those families are in California. The rule should be withdrawn.

HUD claims that it seeks to promulgate the proposed rule in order to "adopt policies to ensure that only eligible persons receive benefits and enforce all relevant laws providing that aliens who are not otherwise qualified and eligible may not receive benefits" and to "to reduce unnecessary regulatory burdens, enhance the effectiveness of those regulations that are necessary, and promote principles underlying the rule of law."<sup>1</sup> In reality, the proposed rule flouts the rule of law, increases regulatory burdens, and ensures that eligible persons will lose housing, in favor of advancing the current administration's anti-immigrant agenda.<sup>2</sup>

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<sup>1</sup> Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20589 (proposed May 10, 2019) (to be codified at 24 C.F.R. pt. 5).

<sup>2</sup> See, e.g., Yeganeh Torbati, *Exclusive: Trump Administration Proposal Would Make It Easier to Deport Immigrants Who Use Public Benefits*, REUTERS (May 3, 2019), <https://www.reuters.com/article/us-usa-immigration-benefits-exclusive/exclusive-trump-administration-proposal-would-make-it-easier-to-deport-immigrants-who-use-public-benefits-idUSKCN1S91UR>; Sarah Pierce, *Immigration Related Policy Changes in the First Two Years of the Trump*



This proposed rule has three main components. First, the rule mandates that all members of a household receiving HUD assistance verify their eligible status. “A family shall not be eligible for assistance unless every member of the family residing in the unit is determined to have eligible status.”<sup>3</sup> Currently, ineligible family members can choose to not contest their immigration status, and the family’s assistance is pro-rated and reduced so as to only provide assistance to eligible members.<sup>4</sup> The composition of mixed-immigration status families varies.<sup>5</sup> While some may have both documented and undocumented members, many documented immigrants are lawfully present in the United States and yet ineligible for HUD assistance (such as U-Visa holders and those studying at American universities on student visas). And the majority of the family members are in fact eligible for assistance. This change will result in evictions to mixed-status families, something HUD freely admits: “HUD assumes that most mixed households will leave HUD’s assisted housing as a result of this rule.”<sup>6</sup>

Second, this proposed rule prohibits ongoing pro-rated support to mixed status families. “A family shall not be eligible for assistance unless every member of the family residing in the unit is determined to have eligible status.”<sup>7</sup> HUD fully expects this will lead to terror in these families, terror that will lead them to vacate their homes. “HUD expects that fear of the family being separated would lead to prompt evacuation by most mixed households, whether that fear is justified.”<sup>8</sup> Because all family members would have to verify their eligibility in order to continue receiving aid under the proposed rule, mixed-status families would no longer be eligible for long-term, pro-rated assistance, and would be displaced.

Third, leaseholders would be required to be eligible for HUD assistance. The proposed rule will “specify that individuals who are not verified to have an eligible immigration status cannot serve as the head of household or spouse (i.e., the holder of the lease).”<sup>9</sup> Previously, eligible children could receive HUD assistance, while their ineligible parents served as the leaseholders. According to HUD’s own analysis, “a larg[e] fraction (70 percent) of households consist of eligible children and

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*Administration, Migration Policy Institute*, (Washington, DC: Migration Policy Institute, 2016), <https://www.migrationpolicy.org/research/immigration-policy-changes-two-years-trump-administration>; NAT’L IMMIGRATION L. CTR., *Understanding Trump’s Muslim Bans* (updated Mar. 8, 2019), <https://www.nilc.org/issues/immigration-enforcement/understanding-the-muslim-bans/>.

<sup>3</sup> Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20592 (proposed May 10, 2019) (proposed May 10, 2019) (to be codified at 24 C.F.R. pt. 5).

<sup>4</sup> 24 C.F.R. § 5.508 (2019).

<sup>5</sup> *Id.*

<sup>6</sup> HUD, *Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No: FR-6124-P-01, at 7 (Apr. 15, 2019).

<sup>7</sup> Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20592 (proposed May 10, 2019) (to be codified at 24 C.F.R. pt. 5).

<sup>8</sup> HUD, *Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No: FR-6124-P-01, at 7 (Apr. 15, 2019).

<sup>9</sup> Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20591 (proposed May 10, 2019) (proposed May 10, 2019) (to be codified at 24 C.F.R. pt. 5).



ineligible parents.”<sup>10</sup> This new requirement will affect the vast majority of mixed-status families, preventing citizen children with noncitizen parents from receiving any aid from HUD whatsoever. This rule will do nothing but sow fear, disrupt lives, and tear immigrant families apart yet again. By prohibiting mixed-status families from receiving assistance, HUD will force these families to choose between staying together, or abandoning perhaps the only affordable, stable home they can find. This is an impossible choice.

Our state of California will be profoundly impacted by this proposed rule; 936,830 individuals receiving housing assistance from HUD would be affected by the proposed rule.<sup>11</sup> While this rule directly targets mixed-status families, it also will harm the most vulnerable people in California. Twenty-four percent of those receiving HUD assistance from programs affected by this rule have disabilities, while 43% are over the age of 62. With a critical housing shortage and an intensifying homelessness crisis across the state, this rule is destined to destabilize communities, separate families, and harm Californians across a range of marginalized groups.

Not only does this rule put tens of thousands at risk of eviction and homelessness, HUD has no legal authority to promulgate such a rule. This proposed rule contravenes the underlying statute, which specifically establishes mixed status families’ eligibility for assistance. Additionally, HUD’s own rationale behind this rule does not stand up under even mild scrutiny. Instead, the analysis below demonstrates that the rule will result in HUD helping fewer people and an overall reduction in the quality of public housing. HUD has failed to take numerous costs into account, and has failed to follow appropriate procedures in promulgating this rule. Finally, this rule violates HUD’s obligation to affirmatively further fair housing, to ensure equal protection, to uphold the right to due process, and to comply with numerous other federal statutes.

Immigrant families have come to this country for a better life – to make a home here. As a nation, we welcome that. The proposed rule will devastate communities and deteriorate housing instead of promoting HUD’s mission to “to create strong, sustainable, inclusive communities and quality affordable homes for all.” HUD should withdraw this rule and instead focus its resources on improving the quality and quantity of affordable housing.

## **I. HUD’s process for promulgating the proposed rule is tainted.**

As an initial matter, we have deep concerns about the rulemaking process. Media reports assert that the rule was written by a White House official, Stephen Miller,<sup>12</sup> “along with White

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<sup>10</sup> HUD, *Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No: FR-6124-P-01, at 8 (Apr. 15, 2019).

<sup>11</sup> *Mixed Citizenship HUD Households*, KEEPING FAMILIES TOGETHER, [https://docs.wixstatic.com/ugd/d97bc4\\_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf](https://docs.wixstatic.com/ugd/d97bc4_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf) (last visited June 26, 2019).

<sup>12</sup> That Stephen Miller drafted the rule is particularly alarming. He has misleadingly claimed that America’s current immigration system “cost[s] taxpayers enormously because roughly half of immigrant head of households in the United States receive some type of welfare benefit,” and that “a recent study said that as much as \$300 billion a year may be lost



House aides, [who] sent the new regulations to HUD officials this year; Mr. Carson was not pleased with the changes, and he questioned how they would be enforced but did not object, according to two people familiar with the situation who spoke on the condition of anonymity.”<sup>13</sup> Federal agencies are entrusted to promulgate rules because of their subject matter expertise. But this proposed rule does not appear to have benefited from the agency’s expertise. Indeed, the media reports elaborated that members of the department that oversees the affected programs did not have access to the language of the rule for weeks, despite having major concerns about it.<sup>14</sup>

Not only does it appear that HUD staff had no input into the rule, Secretary Carson has compromised the public comment process by making statements about the purpose of the rule that do not comport with federal law or practical realities. For example, Secretary Carson has floated the idea that this rule will reduce waitlists for HUD assistance, a reason that is not stated in the proposed rule and that is unsupported by HUD’s own regulatory impact assessment. HUD has provided no data or evidence supporting this assertion. We, as members of the public, cannot accurately address the impact of the rule when the process has been tainted and the reasoning for the rule conflicts with the Secretary’s public comments.

Moreover, because the proposed rule represents such a drastic departure from decades of housing policy and the administration of HUD’s most significant housing programs, the 60-day comment period is too short to adequately address all concerns regarding the rule. HUD’s existing regulations understand that such significant rules require more time for input, mandating that “[a]n ANPR [Advanced Notice of Public Rulemaking] will be used to solicit public comment early in the rulemaking process for significant rules . . .”<sup>15</sup> For this rule, no ANPR was issued. Additionally, in accordance with Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” HUD should have provided translated versions of the proposed rule, which will disproportionately impact persons with limited English proficiency. HUD should withdraw this proposed rule and engage stakeholders.

## **II. HUD fails to account for the costs of family displacement; amid California’s housing crisis, they will have nowhere to go.**

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as a result of our current immigration system in terms of folks drawing more public benefits than they’re paying in.” Press Briefing by Press Secretary Sarah Sanders and Senior Policy Advisor Stephen Miller, The White House (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-senior-policy-advisor-stephen-miller-080217/>. When Miller discovered that an agency had drafted a report describing the benefits of refugees to the economy, he “swiftly intervened,” and the report was “shelved in favor of a three-page list of all the federal assistance programs that refugees used.” Michael D. Shear & Julie Hirschfeld Davis, “Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda” THE NEW YORK TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

<sup>13</sup> Zolan Kanno-Youngs and Glenn Thrush, “HUD Says Its Proposed Limit on Public Housing Aid Could Displace 55,000 Children,” THE NEW YORK TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/us/politics/hud-public-housing-immigrants.html>.

<sup>14</sup> *Id.*

<sup>15</sup> 24 C.F.R. § 10.1 (2019).



The purpose of federally subsidized housing programs is to “to promote the general welfare of the Nation . . . to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families. . . and [t]o address the shortage of housing affordable to low-income families.”<sup>16</sup> California’s housing market is one of the most expensive in the nation, both for homebuyers and for renters. Because of this, HUD’s proposed rule – in conflict with the purpose of assisted housing – would cast tens of thousands of Californians into the streets, and give them a nearly impossible task: finding affordable housing in California.

For many low-income families receiving HUD assistance, that assistance is the difference between stability and homelessness. Low-income families in California are completely shut out of the housing market—buying a home is not an option. The median price of a home in California is \$546,100, the highest figure for any state, and nearly twice as high as the median price nationwide.<sup>17</sup> In three Bay Area counties, median home values are greater than 1.3 million dollars.<sup>18</sup> Housing prices have risen in California every year since 2012, and are not predicted to stop increasing anytime soon.<sup>19</sup> Unsurprisingly, homeownership is at its lowest rate in California since the 1940s.<sup>20</sup> No one can afford to buy a home here, much less California’s poorest residents.

Renters are no better off. According to HUD, affordable housing is housing for which a person pays no more than 30% of their income.<sup>21</sup> Of California’s approximately 6 million renters, 3 million pay more than 30% of their income to rent.<sup>22</sup> By HUD’s own definition, 3 million Californians are living in unaffordable housing. Even worse, 1.7 million California renters spend more than 50% of their total income for rent.<sup>23</sup> Rents in California are exorbitant; renters in California pay 43% more than the nationwide median rent.<sup>24</sup> Incomes have failed to make up for these sky-high rental rates, as incomes in the state are only 19% higher than the national median.<sup>25</sup> Additionally, rents rose by 27% between 2001 and 2017.<sup>26</sup> Median household incomes, however,

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<sup>16</sup> 42 U.S.C. §1437(a)(1)(A)-(B).

<sup>17</sup> Hans Johnson & Marisol Cuellar Mejia, *California’s Future: Housing*, PUB. POL’Y INST. OF CAL. (2019), <https://www.ppic.org/wp-content/uploads/californias-future-housing-january-2019.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *California’s Housing Future: Challenges and Opportunities*, CAL. DEP’T OF HOUS. AND CMTY. DEV., 1, (2018), <http://www.hcd.ca.gov/policy-research/plans-reports/docs/California's-Housing-Future-Main-Draft.pdf>.

<sup>21</sup> *Affordable Housing*, US DEPT. OF URBAN DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/affordablehousing/](https://www.hud.gov/program_offices/comm_planning/affordablehousing/) (last visited June 26, 2019).

<sup>22</sup> *Id.*

<sup>23</sup> *California’s Housing Future: Challenges and Opportunities*, CAL. DEP’T OF HOUS. AND CMTY. DEV., 1, (2018), <http://www.hcd.ca.gov/policy-research/plans-reports/docs/California's-Housing-Future-Main-Draft.pdf>.

<sup>24</sup> Hans Johnson & Marisol Cuellar Mejia, *California’s Future: Housing*, PUB. POL’Y INST. OF CAL. (2019), <https://www.ppic.org/wp-content/uploads/californias-future-housing-january-2019.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *California Federal Rental Assistance Fact Sheet*, CTR. ON BUDGET AND POL’Y PRIORITIES (2019), <https://www.cbpp.org/research/housing/federal-rental-assistance-fact-sheets#CA>.



only increased by 10%.<sup>27</sup> Finally, there simply aren't enough affordable units in California: for every 100 extremely-low-income renter households, there are only 22 units that are both affordable and available to them.<sup>28</sup>

In Los Angeles County, the unaffordability of rental homes is especially pronounced: 92% of Deeply Low income (0-15% of Area Median Income) households spent more than 50% of their income on housing, 72% of Extremely Low Income (15-30% of AMI) households spent more than 50% of their income on housing, and 45% of Very Low Income (30-50% of AMI) households spent the same exorbitant percentage on housing.<sup>29</sup> Such egregiously high housing costs are simply unsustainable, and shows that the housing supply in California cannot support thousands of new renters.

To illustrate just how inaccessible affordable rental housing is, consider this: if one were to rent a two-bedroom house at the state's fair market rate using less than 30% of their income, one would have to earn \$34.69/hour.<sup>30</sup> A minimum wage worker would have to work 116 hours a week – that's three full-time jobs – to earn this amount of money.<sup>31</sup> That means working 17 hours a day, every day of the week. We cannot condemn families to that fate.

One consequence of displacement and eviction is families doubling and tripling up, piling into crowded apartments in order to make ends meet. Immigrants are already more likely to live in overly-crowded housing, both in Los Angeles and across the nation.<sup>32</sup> California also suffers from disproportionately high rates of overcrowded renters; 30% of the *nation's* overcrowded renter households are located in California.<sup>33</sup> This unsafe and unsanitary – the exact types of conditions Congress created the affected housing programs to avoid.

Because of the lack of affordable housing, displaced families thrust into the housing market will almost certainly find nothing that fits their needs. Due to the unique housing conditions present in California, this rule would have a particularly devastating effect on the thousands of mixed-status families in the state. Faced with no choice but to leave their existing affordable homes, these families will either be forced into overcrowded living quarters, or worse, onto the street. This is directly at

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<sup>27</sup> *Id.*

<sup>28</sup> Andrew Aurand, et al., *The Gap: A Shortage of Affordable Homes*, NATIONAL LOW INCOME HOUSING COALITION 7 (March 2019), [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2019.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf).

<sup>29</sup> *Los Angeles County Annual Affordable Housing Outcomes Report*, CAL. HOUSING PARTNERSHIP (2019), [https://1p08d91kd0c03rlxhmhtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/LA-County-Affordable-Housing-Outcome-Report-V3\\_with-appendix.pdf](https://1p08d91kd0c03rlxhmhtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/LA-County-Affordable-Housing-Outcome-Report-V3_with-appendix.pdf).

<sup>30</sup> *Out of Reach*, NAT'L LOW INCOME HOUSING COALITION, 36 (2019), [https://reports.nlihc.org/sites/default/files/oor/OOR\\_2019.pdf](https://reports.nlihc.org/sites/default/files/oor/OOR_2019.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> Claudia D. Solari, *Housing Crowding Effects on Children's Welfare*, 41 SOC. SCI. RES. 2, 7-8 March 2012).

<sup>33</sup> *How Housing Vouchers Can Help Address California's Rental Crisis*, CTR. ON BUDGET AND POL'Y PRIORITIES (last updated Feb. 12, 2016), <https://www.cbpp.org/research/housing/how-housing-vouchers-can-help-address-californias-rental-crisis>.



odds with the purpose of 42 U.S.C. §1437 *et seq.* and HUD must analyze these substantial costs.

### **III. California's homelessness crisis puts mixed-status families at additional risk.**

California's lack of affordable housing has led to a growing homelessness crisis across the state. California's homelessness epidemic is worse than almost any other state.<sup>34</sup> There are 33 homeless individuals per 10,000 residents in California.<sup>35</sup> As of January 2018, 129,972 people experienced homelessness on any given day in California, including 10,836 veterans, and 12,396 unaccompanied young adults.<sup>36</sup> Nearly 250,000 public school children in California experienced homelessness at some time between 2016-2017.<sup>37</sup> Additionally, California has a disproportionately large number of homeless individuals, as the state's homeless population represents 23.6% of those experiencing homelessness in America, yet only 12% of the total US population resides in California.

Not only is California's homeless population large, but it is also much more at-risk than other states. People here who lose their homes do not even have a bed to sleep in – 66% of those experiencing homelessness in California are unsheltered.<sup>38</sup> This is approximately twice as many as the national rate.<sup>39</sup> California also has a disproportionate number of chronically homeless individuals, with 25% of the homeless population chronically homeless, compared to the national rate of 16%.<sup>40</sup> In Los Angeles County, which would bear the brunt of HUD's proposed rule, the problem of chronic homelessness is particularly pronounced; the county saw a 17% rise in chronic homelessness in 2018,<sup>41</sup> while the nation overall saw just a slight increase.<sup>42</sup>

HUD should be advancing policies that will reduce the number of Americans living on the streets, in tents, and under bridges. Yet HUD's mixed-status rule will lead to widespread displacement. The result will be more people evicted, and more people on the streets, especially in

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<sup>34</sup> *California Homelessness Statistics*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, <https://www.usich.gov/homelessness-statistics/ca/> (last visited June 26, 2019).

<sup>35</sup> Marisol Cuellar Mejia & Vicki Hsieh, *A Snapshot of Homelessness in California*, PUB. POL'Y INST. OF CAL. (2019), <https://www.ppic.org/blog/a-snapshot-of-homelessness-in-california/>.

<sup>36</sup> *California Homelessness Statistics*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, <https://www.usich.gov/homelessness-statistics/ca/> (last visited June 26, 2019).

<sup>37</sup> *Id.*

<sup>38</sup> Those experiencing homelessness without shelter are especially susceptible to deteriorating health.

<sup>39</sup> *State of Homelessness*, NATIONAL ALLIANCE TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/> (last visited June 26, 2019).

<sup>40</sup> *The 2018 Annual Homeless Assessment Report to Congress*, HUD (Dec. 2018) <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

<sup>41</sup> *Greater Los Angeles Homeless Count Shows 12% Rise in Homelessness*, LOS ANGELES HOMELESS SERVICES AUTHORITY (June 4, 2019), <https://www.lahsa.org/news?article=558-greater-los-angeles-homeless-count-shows-12-rise-in-homelessness>.

<sup>42</sup> *The 2018 Annual Homeless Assessment Report to Congress*, HUD 64 (Dec. 2018) <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.



California. HUD admits this: “[O]ut of 25,000 households, HUD estimates that at most 25% will have to be formally evicted.”<sup>43</sup> That is 6,250 households forced out, many of whom will face homelessness. Despite this, HUD offers no recourse, no solutions, and no help.

**IV. The proposed rule fails to affirmatively further fair housing, is based on racial animus, and has a disparate impact on families based on national origin, race, disability, age, and familial status.**

The Fair Housing Act (FHA) requires the HUD Secretary to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of” the FHA.<sup>44</sup> This proposed rule does nothing to further fair housing, or advance the civil rights goals of the Fair Housing Act. Asserting pretextual reasons of complying with the statute and reducing waitlists, HUD instead is discriminating against immigrants by denying them access to vital housing programs. Additionally, since most of the eligible persons in mixed status families are children, this rule will have a horrific impact on families with children. Overall, this rule is discriminatory, and does nothing to affirmatively further the goals of the Fair Housing Act, in direct contradiction of the HUD Secretary’s statutorily imposed duties.<sup>45</sup> This discriminatory intent and impact also violates the Fifth Amendment rights to equal protection and due process.

**A. Thousands of Immigrants and Children Will Be Evicted.**

Family integrity is deeply ingrained in the history of United States. Indeed, “the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests. . . .”<sup>46</sup> Overall, 436,340 households made up of 936,830 individuals in California receive housing assistance from programs which would be affected by this rule.<sup>47</sup> This includes 63,390 households with a non-citizen, and nearly 10,000 households with an ineligible non-citizen.<sup>48</sup> California also happens to be home to the most immigrants of any state.<sup>49</sup> So California has the highest number of mixed-status families—9,320 such families, or 36.5% of the total nationwide—meaning our state would be particularly harmed by this rule.<sup>50</sup>

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<sup>43</sup> HUD, *Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No: FR-6124-P-01, at 15 (Apr. 15, 2019).

<sup>44</sup> 42 U.S.C. § 3608(e)(5)(2019).

<sup>45</sup> See also *Reyes v. Waples Mobile Home Park Ltd. P’ship*, 903 F.3d 415, 419 (4th Cir. 2018), cert. denied sub nom. *Waples Mobile Home Park Ltd. P’ship v. de Reyes*, 139 S. Ct. 2026 (2019) (holding that district court erred in granting summary judgment under the Fair Housing Act for mobilehome park owner who began instituting verification of legal status requirement on entire households).

<sup>46</sup> *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

<sup>47</sup> *Mixed Citizenship HUD Households*, KEEPING FAMILIES TOGETHER, [https://docs.wixstatic.com/ugd/d97bc4\\_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf](https://docs.wixstatic.com/ugd/d97bc4_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf) (last visited June 26, 2019).

<sup>48</sup> *Id.*

<sup>49</sup> Hans Johnson, et al., *Immigrants in California*, PUB. POL’Y INST. OF CAL. (2019) <https://www.pplic.org/publication/immigrants-in-california/>.

<sup>50</sup> *Mixed Citizenship HUD Households*, KEEPING FAMILIES TOGETHER, [https://docs.wixstatic.com/ugd/d97bc4\\_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf](https://docs.wixstatic.com/ugd/d97bc4_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf) (last visited June 26, 2019).



Forty-eight percent of children in California have immigrant parents.<sup>51</sup> As of 2016, nearly 1.5 million children in California live in homes with at least one undocumented parent.<sup>52</sup> While not all of these families will be immediately affected by this rule, they are among those who could be impacted in the future and those impacts were not considered in HUD's proposed rule.

Family separations undermine family stability and lead to toxic stress, trauma, and attachment issues in children. Even a temporary separation has an enormous negative impact on the health and educational attainment of these children later in life, and many parents struggle to restore the parent-child bond once it has been disrupted by a separation. HUD's own Regulatory Impact Assessment finds that nationally, over 55,000 children who are eligible for federal assistance will be harmed by this rule because someone in their family is not eligible.<sup>53</sup> These children will be harmed—either an ineligible family member will move out of affordable housing, or the entire family will be displaced and forced to move, either to overcrowded housing or to the street.

And in the long run, the proposed rule's impact on those children will cause a cascading series of harmful effects. Those children who end up in overcrowded housing will face long-term impacts like decreased test scores, increased behavioral problems, and negative health effects.<sup>54</sup> Also, families displaced by this rule will face higher housing costs, which will lead to greater housing instability. Such instability will beget additional long-lasting detrimental effects for children affected by HUD's proposed rule. When families are housing-burdened, they have far less money to spend on other basic needs, such as food and healthcare. This leads these families to be much more susceptible to homelessness,<sup>55</sup> which will only compound their problems. Children of families who are behind on rent have increased odds of lifetime hospitalization, increased odds of poor health, and increased food insecurity.<sup>56</sup> The higher the rent, the higher the chance of falling behind.

The havoc this rule will wreak on families in California will not only displace and disrupt these families in the short-term; it will harm their children for years to come. This shocks the conscience. It also impinges on the state's traditional role in preserving family integrity, creating

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<sup>51</sup> Part of Us: A Data-Driven Look at Children of Immigrants, URBAN INSTITUTE (March 14, 2019), <https://www.urban.org/features/part-us-data-driven-look-children-immigrants>.

<sup>52</sup> Randy Capps, et al., *A Profile of U.S. Children with Unauthorized Parents*, MIGRATION POLICY INSTITUTE 9 (Jan. 2016), <https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf>.

<sup>53</sup> HUD, *Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No: FR-6124-P-01 at 6-8 (Apr. 15, 2019) (73% of eligible family members are children and there are a total of 76,141 eligible individuals in the covered programs, for a total of 55,582 eligible children; 70% of households are composed of eligible children with ineligible parents, for a total of 38,907 eligible children in households with ineligible parents).

<sup>54</sup> Claudia D. Solari, *Housing Crowding Effects on Children's Welfare*, 41 SOC. SCI. RES. 2, 13 March 2012).

<sup>55</sup> Sarah Bohn, et al., *Reducing Child Poverty in California*, PUB. POL'Y INST. OF CAL. (2017) [https://www.ppic.org/wp-content/uploads/r\\_1117sbr.pdf](https://www.ppic.org/wp-content/uploads/r_1117sbr.pdf).

<sup>56</sup> Megan Sandel, et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS 2 (2018) <https://nlihc.org/sites/default/files/Unstable-Housing-Caregiver-Child-Health-Renter-Families.pdf>.



Tenth Amendment concerns.<sup>57</sup> The proposed rule fails to account for how we will pay for the devastating effects on children over the coming years – including the higher healthcare costs and the diminished educational potential of the impacted children. The proposed rule must be withdrawn.

### B. The Proposed Rule Targets Latinx Communities.

The rule targets immigrant families generally, but also particularly harms Latinx communities. Over a quarter of those receiving HUD assistance in California are Latinx individuals, which amounts to more than a quarter of a million individuals.<sup>58</sup> This proposed rule is nothing more than a new front in the Trump Administration’s perpetual assault on immigrant and Latinx communities. Lest we forget, President Trump announced his campaign by denigrating Mexican immigrants, saying, “They’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>59</sup> Since his inauguration, President Trump has stated that he must protect the “West” against those from “the South or the East.” Since the proposal of this rule, a White House source has been quoted saying, “As illegal aliens attempt to swarm our borders, we’re sending the message that you can’t live off of American welfare on the taxpayers’ dime.”<sup>60</sup> Additionally, in testimony supporting the rule, HUD Secretary Ben Carson stated that this rule “is common sense. You take care of *your own* first.” Clearly, he doesn’t see Latinx immigrants as “his own,” and this rule is an attempt to target and terrorize these communities.

Additionally, there will be a significant chilling effect if this regulation goes into place, whereby fewer and fewer immigrants, including Latinx immigrants, will sign up for needed public assistance. In a recent study of the Latinx homeless population in LA, surveyors “noted that a lack of information has led many immigrants to view all public services as presenting a potential risk to their immigration status in the U.S.”<sup>61</sup> This coincides with the chilling effect on immigrant and Latinx use of public services due to the broadened definition of “public charge,” which has been

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<sup>57</sup> “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” *Hisquierdo v. Hisquierdo* 439 U.S. 572, 581 (1979).

<sup>58</sup> *Picture of Subsidized Households*, US DEPT. OF HOUSING AND URBAN DEV., 2018 (note – These figures are approximations. HUD’s data includes the total number of people, but only includes demographic data for households – not individuals. We have determined the number of individuals by multiplying relevant household demographic figures with the total number of individuals provided by HUD. Since the demographic figures are percentages of households, not of individuals, these results will be estimates of the total number of individuals). Available at: <https://www.huduser.gov/portal/datasets/assths.html>.

<sup>59</sup> Full text: *Donald Trump announces a presidential bid*, WASH. POST (JUNE 16, 2015) ([https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm\\_term=.a307e322e729](https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.a307e322e729)).

<sup>60</sup> Amber Athey, *Scoop: HUD Planning Crackdown on Illegal Immigrants Taking Advantage of Public Housing*, DAILY CALLER (Apr. 17, 2019) <https://dailycaller.com/2019/04/17/housing-urban-development-illegal-immigrants-public-assistance/>.

<sup>61</sup> Melissa Chinchilla, *Stemming the Rise of Latino Homelessness: Lessons from Los Angeles County*, LATINO POLICY & POLITICS INITIATIVE 13 <https://socialinnovation.usc.edu/wp-content/uploads/2019/02/Melissa-Chinchilla-Stemming-the-Rise-of-Homelessness.pdf> (Last visited June 26, 2019).



predicted to lead to millions of immigrants forgoing desperately needed health, nutrition, and social services.<sup>62</sup>

C. The proposed rule disproportionately impacts California's Asian Pacific American communities.

California has, by far, the largest population of Asian and Pacific Islanders of any state in the U.S.<sup>63</sup> Nearly one-third (31%) of Asian Americans in the U.S. live in California.<sup>64</sup> Additionally, a significant number of those assisted by the programs which will be affected by HUD's proposed rule are Asian-Americans or Pacific Islanders: 14% of California's HUD recipients in the affected HUD programs are Asian Americans or Pacific Islanders, and in certain cities, that number is substantially larger.<sup>65</sup> Twenty-six percent of HUD-assisted individuals in Oakland are Asian American or Pacific Islander, and this figure is 31% in San Francisco.<sup>66</sup>

This population is already quite vulnerable in California. Eighteen percent of California's Asian Americans live in poverty,<sup>67</sup> and 13% of those who are housing-burdened in California are Asian immigrants.<sup>68</sup> There are signs that this group is struggling more now than ever before. Asian Americans experienced the highest growth in homelessness among all racial groups from 2016-2017, a 44% jump.<sup>69</sup> This is not a community that can withstand destabilization and displacement; nonetheless, that is what HUD proposes to inflict upon them.

D. Individuals with disabilities will be harmed by HUD's proposed rule.

Individuals with disabilities – both those in mixed-status families and those in families where all members are eligible for assistance – will be harmed by this regulation. Individuals with disabilities already face huge housing challenges, as very few rental units can accommodate those

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<sup>62</sup> Jeanne Batalova, et al., *The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

<sup>63</sup> *Population Distribution by Race/Ethnicity*, KAISER FAMILY FOUNDATION, <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?dataView=1&currentTimeframe=0&selectedDistributions=asian--native-hawaiianother-pacific-islander&sortModel=%7B%22colId%22:%22Asian%22,%22sort%22:%22desc%22%7D> (last visited June 26, 2019).

<sup>64</sup> Gustavo Lopez, et al., *Key facts about Asian Americans, a diverse and growing population*, PEW RESEARCH CENTER (Sept. 8, 2017) <https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

<sup>65</sup> *Picture of Subsidized Households*, US DEPT. OF HOUSING AND URBAN DEV., 2018.

<sup>66</sup> *Id.*

<sup>67</sup> Sarah Bohn, et al., *Poverty in California*, PUB. POL'Y INST. OF CAL. (2018) <https://www.ppic.org/publication/poverty-in-california/>.

<sup>68</sup> Sara Kimberlin, *Poverty and Housing Costs in California: Data and Policy Solutions*, CAL. BUDGET AND POL'Y CTR. (Sept. 22, 2017) [https://calbudgetcenter.org/wp-content/uploads/SCANPH\\_Sara-Kimberlin\\_9.22.2017.pdf](https://calbudgetcenter.org/wp-content/uploads/SCANPH_Sara-Kimberlin_9.22.2017.pdf).

<sup>69</sup> Agnes Constante, *Advocates worry housing issues may lead to an Asian-American census undercount*, NBC NEWS (AUG. 21, 2018), <https://www.nbcnews.com/news/asian-america/advocates-worry-housing-issues-may-lead-asian-american-census-undercount-n900381>.



with disabilities.<sup>70</sup> For those living with disabilities, this means an already insufficient housing market is even more difficult to navigate – and more impossible to afford. California has the largest population of individuals living with disabilities of any state,<sup>71</sup> and many receive HUD assistance. Twenty-four percent of those that receive such assistance in California currently live with a disability, a higher portion than the national average.<sup>72</sup>

California's population of people living with disabilities is particularly at-risk. Our state has the highest percentage of individuals living with a self-care disability of any state; this group comprises 23% of the national population of people living with disabilities.<sup>73</sup> Additionally, approximately 23% of California's residents that live with disabilities live in poverty.<sup>74</sup> By harming those living with disabilities that are part of mixed-income families, HUD is directly targeting the most vulnerable among us.

Even individuals with disabilities who are not part of mixed-status families will be harmed by this rule. The onerous identification requirements for all HUD-assisted individuals will disproportionately affect people living with disabilities. More than seven percent of people with disabilities do not have a valid ID; this is higher than the 5% of people without disabilities that don't have an ID.<sup>75</sup> Individuals with disabilities are less likely to have a driver's license because they are less likely to drive, and the process to get the needed documents in order to have a valid ID issued can be a significant barrier.<sup>76</sup> Therefore, HUD's proposed rule will harm citizens and eligible non-citizens with disabilities because they are unable to obtain identification documents.

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<sup>70</sup> Gillian B. White, *Nowhere to Go: The Housing Crisis Facing Americans With Disabilities*, THE ATLANTIC, Dec. 15, 2015, <https://www.theatlantic.com/business/archive/2015/12/renting-with-a-disability/420555/> (noting that only 1% of all US rental housing has all 5 basic accessibility features, which include step-free entry, a single floor layout, and wide doors and hallways).

<sup>71</sup> *2018 Annual Disability Statistics Compendium*, DISABILITY STATISTICS & DEMOGRAPHICS (2019) [https://disabilitycompendium.org/sites/default/files/user-uploads/2018 Compendium Accessible AdobeReaderFriendly.pdf](https://disabilitycompendium.org/sites/default/files/user-uploads/2018%20Compendium%20Accessible%20AdobeReaderFriendly.pdf).

<sup>72</sup> *Picture of Subsidized Households*, US DEPT. OF HOUSING AND URBAN DEV., 2018

<sup>73</sup> *2018 Annual Disability Statistics Compendium*, DISABILITY STATISTICS & DEMOGRAPHICS (2019) [https://disabilitycompendium.org/sites/default/files/user-uploads/2018 Compendium Accessible AdobeReaderFriendly.pdf](https://disabilitycompendium.org/sites/default/files/user-uploads/2018%20Compendium%20Accessible%20AdobeReaderFriendly.pdf) (Note: A self-care disability is defined in the American Community Survey as someone who reports they have trouble bathing or dressing).

<sup>74</sup> *Picture of Subsidized Households*, US DEPT. OF HOUSING AND URBAN DEV., 2018.

<sup>75</sup> S.E. Smith, *Voting is already hard for people with disabilities. Voter ID laws make it even harder.*, VOX (Apr. 1, 2016), <https://www.vox.com/2016/4/1/11346714/voter-id-laws-disabilities>.

<sup>76</sup> *Id.*



E. California's population is aging – this population will be dramatically harmed by HUD's proposed rule.

California has a rapidly aging population, which will present unique problems for the state in the coming decades. By 2036, California's population of seniors over the age of 65 is projected to increase by 90%.<sup>77</sup> The most elderly group, those who are 80 and over, will double in population size between 2015 and 2035.<sup>78</sup> And this elderly population is extremely poor: the average median income of seniors in California is just \$21,300,<sup>79</sup> and 36% of those 80 and over have incomes below 200% of the federal poverty line.<sup>80</sup> And what age group has seen the steepest rise in homelessness? Older adults. The number of individuals experiencing homelessness that are 62 and older jumped by 22% in 2018.<sup>81</sup>

Forty-three percent of those in California receiving aid from the HUD programs affected by this rule are over 62,<sup>82</sup> and over 30,000 eligible noncitizens are over the age of 62 in California.<sup>83</sup> In Los Angeles, over 60,000 people – 45% of HUD-assistance recipients in affected programs in the city – are elderly.<sup>84</sup> In San Francisco, the number is even higher – 56 % of those that receive assistance from affected HUD programs are over 62.<sup>85</sup> This population will be significantly affected by HUD's new rule, because this population makes up a major part of the group of people that are helped by HUD's programs.

Not only will mixed-income families with an elderly household member be harmed, but elderly citizens will be more likely to be evicted or displaced due to this proposed rule. Eighteen percent of citizens over the age of 65 do not have a photo ID.<sup>86</sup> Eligible noncitizens will similarly face difficulty providing documentation to verify their eligible immigration status under the proposed rule. With California's increasing elderly population, and its significant rates of impoverishment, the state will be unable to meet the increased needs of this community that will be harmed by HUD's proposed rule.

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<sup>77</sup> Department of Finance Releases New State Population Projections, CAL. DEPT. OF FIN. (Mar. 8, 2017), [http://www.dof.ca.gov/Forecasting/Demographics/Projections/documents/P\\_PressRelease.pdf](http://www.dof.ca.gov/Forecasting/Demographics/Projections/documents/P_PressRelease.pdf).

<sup>78</sup> Nina Ebner, *Aging California's Retirement Crisis: State and Local Indicators* 5 (Oct. 2015), <http://laborcenter.berkeley.edu/pdf/2015/aging-californias-retirement-crisis.pdf>.

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> Melanie Mason, *California's senior population is growing faster than any other age group. How the next governor responds is crucial*, L.A. TIMES (Oct. 7, 2018), <https://www.latimes.com/projects/la-pol-ca-next-california-demographics/>.

<sup>82</sup> *Picture of Subsidized Households*, US DEPT. OF HOUSING AND URBAN DEV., 2018.

<sup>83</sup> *Mixed Citizenship HUD Households*, KEEPING FAMILIES TOGETHER, [https://docs.wixstatic.com/ugd/d97bc4\\_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf](https://docs.wixstatic.com/ugd/d97bc4_c0832bfe7d804ec499a2fdcc8fb9de3a.pdf) (last visited June 26, 2019).

<sup>84</sup> *Picture of Subsidized Households*, US DEPT. OF HOUSING AND URBAN DEV., 2018.

<sup>85</sup> *Picture of Subsidized Households*, US DEPT. OF HOUSING AND URBAN DEV., 2018.

<sup>86</sup> *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CENTER FOR JUSTICE (Nov. 2006).



## V. California's economy, particularly its agricultural sector, will be harmed by this attack on immigrants.

Economists consider immigration to be a positive force for the US economy.<sup>87</sup> And so the Administration's attacks on our immigrant communities, including this rule, will negatively affect California's economy, and as a result, America's as well. California is an agricultural powerhouse: 2/3 of America's fruits and nuts are grown in California, along with 1/3 of America's vegetables.<sup>88</sup> Thirteen percent of the nation's total agricultural production comes from California; it is by far the most productive agricultural state.<sup>89</sup>

Immigrants are the driving force behind California's agricultural productivity. Over half of all agricultural workers in California are immigrants.<sup>90</sup> Due to the instability that this community will face if HUD's proposed rule is finalized, California's agricultural industry will be undermined by the Trump Administration. The Administration's anti-immigrant policies have already caused economic harm: a worker shortage and reduced tourism and travel income.<sup>91</sup> Additionally, policies that deny government assistance to immigrant communities like this proposed rule and the administration's proposed change to the definition of "public charge" are forecasted to result in severe economic harm if implemented. The UCLA Center for Health Policy Research estimated that the public charge rule, if implemented, would cost the state of California 17,700 jobs.<sup>92</sup> HUD's Proposed Rule will have a similarly negative effect.

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<sup>87</sup> *The Effects of Immigration on the United States' Economy*, PENN WHARTON, UNIVERSITY OF PENNSYLVANIA, (June 27, 2016), <https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy> ("The available evidence suggests that immigration leads to more innovation, a better educated workforce, greater occupational specialization, better matching of skills with jobs, and higher overall economic productivity).

<sup>88</sup> *California Agricultural Production Statistics*, CAL. DEPT. OF FOOD AND AGRIC., <https://www.cdfa.ca.gov/statistics/> (last visited June 26, 2019).

<sup>89</sup> *Cash receipts by state*, US. DEPT. OF AGRIC. ECON. RES. SERV., [https://data.ers.usda.gov/reports.aspx?ID=17843#P429fc0072a7c4804b0ff5114757cbab5\\_54\\_17iT0R0x5](https://data.ers.usda.gov/reports.aspx?ID=17843#P429fc0072a7c4804b0ff5114757cbab5_54_17iT0R0x5) (last visited June 26, 2019).

<sup>90</sup> Barbara Harvey, *Verify: Are half of California farmworkers undocumented?*, ABC NEWS 10 (Aug. 16, 2017), <https://www.abc10.com/article/news/local/verify/verify-are-half-of-california-farmworkers-undocumented/464768839>.

<sup>91</sup> Ed Coghlan, *California communities taking stock of immigration crackdown's economic impact*, CA FWD (Mar. 28, 2019), <https://cafwd.org/reporting/entry/california-communities-taking-stock-of-immigration-crackdowns-economic-imp> ("The agriculture industry is suffering a farm worker shortage and the travel and tourism industries have been hard hit by the Trump policies").

<sup>92</sup> Ninez A Ponce, et al., *Proposed Changes to Immigration Rules Could Cost California Jobs, Harm Public Health*, UCLA CTR. FOR HEALTH POL'Y RES. (Dec. 2018), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2018/publiccharge-factsheet-dec2018.pdf>.



**VI. The Proposed Rule Does Not Comport with the Statute and Fails to Address Why It Upends Decades of the Agency’s Own Interpretation; HUD’s own rationale also demonstrates the pretextual nature of their proffered explanation for the rule.**

A. A history of Section 214.

Originally, Section 214 of the Housing and Community Development Act of 1980 created restrictions prohibiting “nonimmigrant student-alien” from receiving financial assistance in applicable HUD programs.<sup>93</sup> The statute has been modified several times since. The restrictions were expanded in 1981 to make ineligible any person who did not have certain lawful immigration status.<sup>94</sup> Several years later, in 1986, a court granted a preliminary injunction against implementing Section 214, to a national class of plaintiffs who would have been eligible for HUD-housing but for the presence of an ineligible adult. *Yolano-Donnelly Tenant Ass’n v. Pierce*, No. CIV S-86-0846 MLS (E.D. Cal.). In 1988, Congress passed another significant amendment to Section 214, allowing the Secretary to provide for preservation of mixed-status families – with full subsidy.<sup>95</sup> Proration was not part of the statute at that time.

In 1995, HUD promulgated, and for the first time implemented, a Final Rule regarding Section 214, which required housing authorities to prorate assistance.<sup>96</sup> On September 12, 1996, the *Yolano-Donnelly Tenant Ass’n* lawsuit was settled, with an agreement that the 1996 rule adequately protected mixed-status families. Only two weeks later, Congress enacted more amendments to Section 214, explicitly providing for proration of housing assistance.<sup>97</sup> To bring the regulations into line with the new statute, HUD promulgated an interim rule and solicited in-person comments from stakeholders as well as public comment for 60-days.<sup>98</sup> The interim rule brought proration provisions into line with the new statute. It also, significantly, included a provision based on the new statute, that a housing authority could ignore Section 214 altogether.<sup>99</sup> Congress made one major change to Section 214 again, after the implementation of the 1996 Interim Rule – it removed the language that HUD had interpreted to allow housing authorities to ignore Section 214 and replaced it with the provision allowing housing authorities to choose not to verify eligibility.<sup>100</sup> The Congressional decision to change one portion of Section 214 that HUD had interpreted and let the rest remain

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<sup>93</sup> Pub. L. No. 96-399, § 214(b)(2), 94 Stat. 1614, 1637-38 (1980); see also H.R. Rep. No. 96-1420 at 112 (1980) (Conf. Rep.).

<sup>94</sup> See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 329, 95 Stat. 408 (1981); H.R. Rep. No. 97-208 at 696-97 (1981) (Conf. Rep.).

<sup>95</sup> Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 164, 101 Stat. 1815.

<sup>96</sup> Restrictions on Assistance to Noncitizens, 60 Fed. Reg. 14816-01 (Mar. 20, 1995).

<sup>97</sup> Use of Assisted Housing by Aliens Act of 1996, Pub. L. No. 104-208, Div. C, Title V, §§ 572 to 576, September 30, 1996, 110 Stat. 3009-684, 3009-685, 3009-687.

<sup>98</sup> Revised Restrictions on Assistance to Noncitizens, 61 Fed. Reg. 60,535, 60,536 (Nov. 29, 1996).

<sup>99</sup> Notably, the current Proposed Rule does not even acknowledge this previous rulemaking process or Interim Rule, making it difficult or impossible for most commenters to understand HUD’s reasoning for changing its position.

<sup>100</sup> PL 105-276, Title V, § 592(a), October 21, 1998, 112 Stat. 2653.



signifies its tacit approval of the agency's *existing* interpretation. HUD promulgated the current final rule in 1999.<sup>101</sup>

B. The proposed rule contradicts Section 214.

In the proposed rule, HUD claims to be revising its regulations “into greater alignment with the wording and purpose of Section 214,” namely by barring mixed-status families from receiving assistance. HUD insists that Section 214 prohibits indefinite receipt of prorated assistance by mixed-status families, but Section 214 does no such thing. Congress clearly intended to provide for this type of assistance precisely to avoid forcing families into the impossible choices between leaving stable housing together, or living apart so that some members could remain in stable housing.

Section 214 establishes that Congress intended that every eligible member of a mixed status family would receive assistance by prorating the amount of financial assistance. For example, 42 U.S.C. § 1436a(b)(2) states, “If the eligibility for financial assistance *of at least one member* of a family has been affirmatively established under this section, and the ineligibility of one or more family members has not been affirmatively established under this section, any financial assistance made available to that family by the applicable Secretary *shall be prorated...*” (emphasis added). The law then explicitly permits housing authorities to choose not to establish eligibility of every family member before providing financial assistance.<sup>102</sup> Congress did not mince words. “Shall be prorated” does not mean “may be prorated for some period of time.”

The proposed rule also attempts to take away discretion to housing authorities that Congress has explicitly given them. Housing authorities are allowed to choose not to establish eligibility of every family member before providing financial assistance.<sup>103</sup> HUD now attempts to require that housing authorities do the very thing that Congress says they may choose not to. That is simply impermissible.

The statute also requires that housing authorities verify eligibility for financial assistance on an individual – not familial – basis. In the subsection entitled “Verification of eligibility,” Congress established a scheme by which a family could receive financial assistance when “eligibility of at least the individual or *one family member*” was established.<sup>104</sup> Section 214 does bar continued assistance for families that *knowingly* permit ineligible family members to reside in an assisted unit, but makes clear that termination “shall not apply to a family if the ineligibility of the ineligible individual at issue was considered in calculating any proration of assistance provided for the

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<sup>101</sup> 64 FR 25726. The current Proposed Rule also fails to acknowledge the existence of this Final Rule, let alone address it.

<sup>102</sup> 42 U.S.C. § 1436a(i)(2)(A).

<sup>103</sup> 42 U.S.C. § 1436a(i)(2)(A).

<sup>104</sup> 42 U.S.C.A. § 1436a(i)(1) (West 2019).



family.”<sup>105</sup> HUD cannot create a regulation that authorizes termination where Congress explicitly stated that the authority for termination shall not apply.

In 1988, Congress included a provision by which mixed status families who had been receiving full, nonprorated, subsidy prior to the statute’s passage could avoid family breakup. Indeed, subsection (c) is entitled “(c) Preservation of families . . .”<sup>106</sup> The provision, as initially passed, allowed certain mixed-status families to receive full assistance and remain in assisted housing indefinitely and allows other families with ineligible immigrants to receive temporary deferrals of termination of assistance.<sup>107</sup> HUD badly misinterprets that provision to conclude that Congress only intended for prorated assistance to be provided for a limited time. In fact, Congress did not add the proration provisions until 1996.<sup>108</sup> HUD’s claim that the language of the 1988 amendments were intended to limit the duration of prorated financial assistance is simply incorrect.

HUD has also failed to point to any provisions of Section 214 that require leaseholders to be U.S. citizens or have an eligible immigration status. In fact, 42 U.S.C. § 1436a(f)(1) makes clear that financial assistance may be provided to a family upon establishing the eligibility of upon “the affirmative establishment and verification of eligibility of *at least ... one* family member” and places no further requirements on the age, capacity, or other characteristic of that family member. Congress knew how to make such distinctions; 42 U.S.C. § 1436a(c)(1)(A) specifically authorizes continued provision of financial assistance to certain families receiving assistance as of February 5, 1988, when either “the head of household or spouse” was a citizen or eligible immigrant.<sup>109</sup> The proposed rule thus makes a distinction that Congress purposefully not to create. HUD must withdraw its rule because it is in direct conflict with Section 214.

### C. The proposed rule arbitrarily upends decades of HUD interpretation.

When changing a long-held agency interpretation, a federal agency must state “good reasons for the new policy” and consider that the rule has “engendered serious reliance interests” to some group. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126, 195 L. Ed. 2d 382 (2016)(holding that a Department of Labor regulation was arbitrary and capricious). In proposing this new rule, HUD does neither, ignoring that the rule has engendered serious reliance interests to both mixed-status families and the housing providers who rely on their higher rents.

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<sup>105</sup> 42 U.S.C.A. § 1436a(d)(6) (West 2019) (noting that the penalty for allowing ineligible household members to reside in assisted units “shall not apply to a family if the ineligibility of the ineligible individual at issue was considered in calculating any proration of assistance provided for the family”).

<sup>106</sup> *Id.* at (c).

<sup>107</sup> *Id.*

<sup>108</sup> 1987, Pub. L. No. 100-242, 101 Stat. 1815 (1988)

<sup>109</sup> 42 U.S.C. § 1436a (c)(1)(A) (“Permit the continued provision of financial assistance, if necessary to avoid the division of a family in which *the head of household or spouse* is a citizen of the United States, a national of the United States, or an alien resident of the United States described in any of paragraphs (1) through (6) of subsection (a)”) (emphasis added).



D. HUD's proffered rationale for the proposed rule is pretextual and illogical.

HUD has continuously struggled to explain the rationale behind this proposed change. Primarily, HUD Secretary Ben Carson has suggested that long waiting lists to receive assistance are behind this proposition. "We need to make certain our scarce public resources help those who are legally entitled to it," Secretary Carson said in a statement. "Given the overwhelming demand for our programs, fairness requires that we devote ourselves to legal residents who have been waiting, some for many years, for access to affordable housing."<sup>110</sup>

Nonetheless, HUD's own analysis says nothing about the proposed rule potentially reducing wait lists. Instead, HUD admits this rule will reduce the number of people served by their programs, and – in public housing – reduce the quality of units. HUD's own analysis states that the "likeliest scenario" of this change will lead to HUD "reduc[ing] the quantity and quality of assisted housing in response to higher costs." For vouchers, "there could be fewer households served under the housing choice vouchers program," and for public housing programs, this rule "would have an impact on the quality of service, e.g., maintenance of the units and possibly deterioration of the units that could lead to vacancy."<sup>111</sup> In other words, the Proposed Rule would result in public housing units deteriorating until the low-income tenants living there are forced to leave.

Because HUD's own analysis in no way supports the proffered explanation for the proposed rule, one can only conclude that this explanation is merely pretextual. Furthermore, HUD's admission that they are purposefully adopting a policy that will result in the agency helping less people, and helping them in less effective ways, shows that this decision is completely illogical. HUD plans to willfully oversee the degradation of the public housing stock, the antithesis of their mission "to create strong, sustainable, inclusive communities."<sup>112</sup>

**VII. HUD has failed to undertake statutorily mandated analyses of the proposed rule.**

Any time a federal rule is proposed, any agency may be required to undertake analyses under the National Environmental Policy Act,<sup>113</sup> Executive Order 13132, the Unfunded Mandates Reform Act,<sup>114</sup> or the Regulatory Flexibility Act.<sup>115</sup> HUD has erroneously claimed exemptions from each.

The National Environmental Policy Act (NEPA) requires an environmental impact report in

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<sup>110</sup> Tracy Jan, *Trump proposal would evict undocumented immigrants from public housing*, WASH. POST (Apr. 18, 2019), [https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm\\_term=.05aeb732caa6](https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.05aeb732caa6).

<sup>111</sup> HUD, *Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No: FR-6124-P-01, at 3 (Apr. 15, 2019).

<sup>112</sup> *Mission*, HUD, <https://www.hud.gov/about/mission> (last visited June 26, 2019).

<sup>113</sup> 42 U.S.C. § 4332(C)(1).

<sup>114</sup> 2 U.S.C. § 1532.

<sup>115</sup> 5 U.S.C. § 603.



connection with any “major federal actions significantly affecting the quality of the human environment.” HUD’s regulations regarding NEPA provide that approval of policies that do not involve the leasing of real property, among other things.<sup>116</sup> HUD claims the proposed rule that it is exempt from the obligation to conduct an environmental review under because “[t]he proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction[.]”<sup>117</sup> But the rule obviously governs and regulates leasing of real property and relates to the provision of assistance in such real property leasing. This renders the exception inapplicable and requires an environmental impact report.

The Regulatory Flexibility Act provides that “[w]henver an agency is required . . . to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis [describing] the impact of the proposed rule on small entities.”<sup>118</sup> Small entities include small nonprofits and governmental jurisdictions with populations of less than 50,000. 5 U.S.C.A. § 601(6). The proposed rule significantly impacts small entities, including: (i) small PHAs that have or may have mixed families or must carry out additional verification procedures for program participants; (ii) landlords who lease to mixed-status families with housing choice vouchers; (iii) homeless shelters and other programs and services that can be expected to serve the needs of displaced mixed families; (iv) nonprofit owners of housing that receive project-based Section 8 or other funding included in Section 214. The Housing Authority of the City of Los Angeles alone estimates that it would have to evict one of every three households in its public housing – that is a devastating impact that must be assessed.<sup>119</sup>

Section 6 of Executive Order 13132, 64 Fed. Reg. 43255, provides that “no agency shall promulgate any regulation . . . that imposes substantial direct compliance costs on State and local governments, and that is not required by statute” unless either the federal government provides funds for compliance or publishes a “federalism impact statement” that describes “the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and (C) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.” 64 Fed. Reg. 43257-58. The proposed rule would impose direct compliance costs on public housing agencies by requiring them to screen and verify the eligibility of additional non-citizens in HUD-assisted housing, evict residents who become ineligible, and turn over units. HUD states in its regulatory impact analysis that “HUD would bear eviction costs

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<sup>116</sup> 24 C.F.R. § 50.19(c)(1)(i).

<sup>117</sup> 84 Fed. Reg. 20591.

<sup>118</sup> 5 U.S.C. § 603(a).

<sup>119</sup> Zolan Kanno-Youngs and Glenn Thrush, “HUD Says Its Proposed Limit on Public Housing Aid Could Displace 55,000 Children,” THE NEW YORK TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/us/politics/hud-public-housing-immigrants.html>.



between \$3.3 to \$4.4 million,” but those are actually costs to each housing authority. Even that amount is substantial. HUD’s claimed exemption from E.O. 13132<sup>120</sup> is invalid.

The Unfunded Mandates Reform Act requires an agency to perform a cost analysis before promulgating any rule that imposes a federal mandate which “may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year[.]” 2 U.S.C. § 1532(a). A “federal mandate” includes “any provision in a statute or regulation that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.”<sup>121</sup> HUD’s brief analysis shows that compliance with the proposed rule may result in State, local, tribal, and private expenditures well over \$100,000,000. In addition to moving costs (estimated between \$12.8 and \$17.4 million), HUD notes the cost of homelessness will be between \$20,000 and \$50,000 per person per year. A cost analysis is required.

### VIII. Conclusion

For decades, HUD has interpreted Section 214 to strike a balance between ensuring that all people eligible for housing subsidies receive their benefits and keeping mixed-status families together. Congress implicitly approved that interpretation every time it amended the statute without changing HUD’s interpretation. Now, HUD arbitrarily refuses to address why it is changing the interpretation now. And most importantly, HUD fails to assess the enormous costs this proposed rule will have on families, communities, and localities. HUD deprives members of the public of information needed to fully assess the impact of this rule. Instead, it appears that the proposed rule’s justifications are mere pretext, designed to obfuscate this intentional attack on immigrant families.

Finally, we join in supporting the comments submitted by the National Housing Law Project opposing the promulgation of this rule. The proposed rule should be withdrawn. Please contact me at [ngrewal@wclp.org](mailto:ngrewal@wclp.org) if you have any questions.

Sincerely,

Navneet K. Grewal  
Matthew Warren  
Madeline Howard  
WESTERN CENTER ON LAW AND POVERTY\*

\*We thank law clerk Scott Davis for the significant research and drafting assistance he provided.

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<sup>120</sup> 84 Fed. Reg. at 20592.

<sup>121</sup> 2 U.S.C. § 1555.