



**WASHINGTON LAWYERS' COMMITTEE**  
**FOR CIVIL RIGHTS AND URBAN AFFAIRS**

July 9, 2019

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

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

Dear Sir/Madam:

The Washington Lawyers' Committee for Civil Rights and Urban Affairs,<sup>1</sup> the  
Lawyers' Committee for Civil Rights Under Law,<sup>2</sup> the Public Interest Law Center,<sup>3</sup> and  
the Chicago Lawyers' Committee for Civil Rights<sup>4</sup> strongly oppose the above-referenced

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<sup>1</sup> The Committee brings extensive civil rights experience and housing and immigration justice expertise to these comments. Since its founding in 1968, the mission of the Committee was, and continues to be, to fight civil rights violations, racial injustice, and poverty in our community through litigation and advocacy, enlisting the *pro bono* resources of the private bar. For decades, the Committee has fought for fair and equal housing opportunity for its clients. It has also represented countless immigrants facing discrimination in housing, employment, public accommodations, medical care and government services, sexual assault and/or abuse by employers, and loan mortgage modification scams. Based on our historical perspective, current knowledge, and the experience of the Committee and of our clients, we strongly oppose HUD's proposed rule on behalf of our clients and the individuals and communities who rely on the promise of fair and equitable housing long embodied in federal law.

<sup>2</sup> The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity.

<sup>3</sup> The Public Interest Law Center, part of the national consortium of affiliates of the Lawyers' Committee for Civil Rights Under Law, uses high-impact legal strategies to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. The Law Center works to secure access to fundamental resources and services including employment, environmental justice, healthcare, voting, education, and housing. For the last 50 years, the Law Center has been using litigation, community education, advocacy, and organizing to stop housing discrimination against low-income people and to promote healthy, affordable housing for people in the neighborhoods of their choice. The Law Center's experience working with communities to secure their right to fair housing compels them to strongly oppose this proposed rule. In addition to signing on to these comments, the Law Center is submitting an additional set of comments that include a focus on the Philadelphia region and the particular experiences and perspectives of the Law Center and its clients.

<sup>4</sup> For 50 years, the Chicago Lawyers' Committee for Civil Rights has fought against discriminatory policies and practices in an effort to achieve equitable outcomes for all individuals. Our mission is to secure racial equity and economic opportunity for all by providing legal representation through partnerships with the private bar and collaborating with grassroots organizations and other advocacy groups. Chicago Lawyers' Committee has decades of experience with systemic litigation and advocacy combatting housing discrimination and barriers to opportunity under the Fair Housing Act, including investigation of complaints of discrimination, educating people about fair housing rights and obligations and providing

proposed rulemaking (hereinafter “proposed rule”) to oust families with mixed immigration status from public and federally-subsidized housing. The proposed rule claims to more effectively implement Section 214 of the Housing and Community Development Act of 1980 (“Section 214” or “HCDA”), codified at 42 U.S.C. § 1436a, where Congress restricted certain noncitizens’ access to housing benefits.<sup>5</sup> With this proposed rule, the U.S. Department of Housing and Urban Development (“HUD”) will impose two changes that will adversely impact thousands of individuals, especially families with mixed immigration status.

First, the proposed change will contravene Congress’s decision, codified in current law, to preserve families that include ineligible members by permitting mixed-status families to remain together in public or subsidized housing but prorating such families’ housing subsidies so that only eligible individuals, including minor children, receive the assistance. HUD’s proposed rule prevents ineligible household members from remaining in subsidized or public housing with eligible members, thereby forcing vulnerable families to either separate from ineligible relatives or face eviction and the risk of homelessness.

The proposed rule would also require all household members, regardless of age, to submit to verification of their immigration status with the Department of Homeland Security. This change in law will require relatives who are ineligible due to their immigration status and currently do not receive any housing benefits under 42 U.S.C. § 1436a(b)(2), to submit their status for verification rather than simply not assert an eligible immigration status.<sup>6</sup> This proposed change will have a chilling effect on families with household members who are statutorily eligible to receive benefits. It will also displace citizens and noncitizens who cannot comply with HUD’s compulsory verification system because of their status or their inability to access and submit such documentation.

HUD’s proposed rule does not withstand legal scrutiny and does not serve a legitimate policy objective. As a legal matter, it violates the Administrative Procedure Act (“APA”) in two respects: it both contravenes the plain text of its governing statute and lacks a reasoned basis. The discriminatory impacts of the proposed rule on families and on the basis of national origin, particularly in light of its underlying anti-immigrant animus, will result in violations of HUD’s duty to affirmatively further fair housing and draw its constitutionality into question. If implemented, the proposed rule will separate families, cost HUD money, and expose non-citizens and citizens alike, including children and low-income seniors, to sub-standard housing conditions and homelessness.

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representation to individuals and groups to challenge discriminatory policies and practices based on race, national origin and other protected classes.

<sup>5</sup> These include public housing, Housing Choice Vouchers, Section 8 project-based rental assistance housing, Section 236 housing, Section 235 homeownership housing, housing development grants, and Section 23 Leased Housing Assistance Program.

<sup>6</sup> 24 C.F.R. §§ 5.508 (a) & (e); *see also* Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20,589, 20,590-20,591 (proposed May 10, 2019) (to be codified at 24 C.F.R. part 5) (hereinafter “Proposed 24 CFR Part 5”).

## **EXECUTIVE SUMMARY**

Through Section 214 and successive amendments thereto, Congress has made clear and specific policy determinations regarding the categories of noncitizens who are eligible to receive housing subsidies. Its repeated enactments, which ultimately permit “mixed” families to remain in subsidized or public housing but only subsidize “eligible” household members, strike a deliberate balance between withholding benefits from persons with ineligible immigration status and devising a humane framework to avoid disruption to family units. Congress reached this accommodation after finding that alternatives such as HUD’s current proposal, which would lead to the separation or eviction of families, were likely unconstitutional and unnecessarily costly. This proposed rule plainly contradicts the text of the HCDA and Congress’s intent to keep families together and therefore violates the APA.

The proposed rule also flies in the face of HUD’s statutory obligation to affirmatively further fair housing under the Fair Housing Act (“FHA”). The rule will both create barriers to fair housing choice for immigrant families and have an adverse impact on individuals on the basis of their national origin and/or their familial status – outcomes squarely at odds with HUD’s statutory mandate.

Finally, the proposed rule is bad public policy. First, if implemented, it will greatly harm vulnerable members of our communities as it strips away shelter from over 108,000 individuals, including over 55,000 children who are U.S. citizens or otherwise eligible for housing subsidies. Immigrant families will incur health, educational, and financial injuries, and potentially end up homeless, should they be unable to find other adequate and affordable housing. Second, HUD’s inclusion in the proposed rule of expanded compulsory verification requirements for all subsidy recipients will affect up to 9.5 million persons and impose significant burdens on individuals with disabilities, low-income individuals, most of whom are people of color, and seniors. Notably, Congress considered, but ultimately rejected imposition of such burdensome verification requirements. Third, the proposal will cost HUD money and siphon resources from critical housing programs.

When pressed, HUD Secretary Carson could only justify these sweeping harms by invoking the Administration’s anti-immigrant rhetoric. The failure to provide programmatic justification for such a range of harmful consequences underscores the absence of a reasoned decision-making process which must underpin agency rulemaking, and virtually ensures that it will not withstand inevitable judicial scrutiny under the APA.

## **I. THIS PROPOSED RULE CONTRAVENES SECTION 214 OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1980.**

In Section 214, Congress grappled with the rights of mixed-status families, where one or more individuals are eligible<sup>7</sup> for housing benefits while others are not. Specifically, Congress struck a deliberate policy choice: it determined that (1) only household members who are U.S. citizens or of eligible status should receive housing benefits, and (2) related household members of ineligible immigration status could remain with their families without submitting to burdensome verification requirements and without receiving a housing subsidy.<sup>8</sup> Congress adopted this “prorated” approach to keep families together by providing a subsidy only to those household members with eligible immigration status. Despite its claims to bring regulations “into greater alignment with the wording and purpose of Section 214,” HUD violates the intent and contradicts the language of Section 214 with this proposed rule. The proposed rule contravenes Congress’s repeated decision to strike a balance which protects family integrity while saving housing assistance for eligible members of the family and is accordingly contrary to law, in violation of the APA.

### **A. Congress adopted proration because legislators were aware that evicting mixed-status families raises serious constitutional concerns.**

The first iteration of the HCDA did not include proration, resulting in a proposed a rule in 1986 that called for the exclusion of mixed-status families. These efforts ran squarely into judicial roadblocks.<sup>9</sup> In *Yolano-Donnelly Tenant Association v. Pierce*, a

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<sup>7</sup> The initial class of eligible for housing benefits under Section 214 only included U.S. citizens and lawful permanent residents. Throughout different iterations of the HCDA, Congress has consistently expanded the pool of individuals eligible for housing benefits. Importantly, ineligibility for benefits is not equivalent to undocumented status. Currently, ineligible persons who have legal status include survivors of violent crimes (“U Visa” recipients); “dreamers” receiving Deferred Action for Childhood Arrival (“DACA”); nationals from countries devastated by armed conflict or natural disasters receiving Temporary Protected Status (“TPS”); and laborers who are lawfully present under employment visas. In other words, many “ineligible” individuals have legal immigration status. Some are on the path to U.S. citizenship, but simply are not within the discrete class of “eligible” housing benefits recipients in Section 214. This is an important consideration because it further supports the Congressional intent to keep intact families who would otherwise remain together, while withholding benefits from members ineligible for the housing subsidy.

<sup>8</sup> Congress only requires individuals who claim eligibility to submit to verification requirements of their immigration status. *See* 42 U.S.C. § 1436a(i)(1) (“No individual or family applying for financial assistance may receive such financial assistance prior to the affirmative establishment and verification of eligibility of at least the individual or one family member under subsection (d) by the applicable Secretary or other appropriate entity.”). Consequently, ineligible relatives may choose not to verify they have eligible immigration status; in the event such individuals elect this option, all they are currently required to do is notify HUD of this election for purposes of proration. 24 C.F.R. §§ 5.508 (a) & (e).

<sup>9</sup> *See* Bill Piatt, “Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents,” 63 NOTRE DAME L. REV. 35, 37 n.39 (1988) (“The [“alien”] rule requires citizens to decide whether to forego governmental assistance or to separate themselves from those family members who are undocumented. In virtually all cases, the decision to remain together as a family would compel participants in the housing subsidy program to move.”).

federal court enjoined HUD from implementing the proposed regulation.<sup>10</sup> The Court recognized that the right to live with one's family is a fundamental liberty interest protected under the U.S. Constitution.<sup>11</sup> It therefore found that plaintiffs' claim that the "alien rule" violated their rights to substantive due process and equal protection under the Fifth Amendment stated a claim upon which relief could be granted.<sup>12</sup> In another suit, New York City alleged that the proposed regulation would exacerbate homelessness and create an onerous administrative burden for the city.<sup>13</sup> New York City further claimed that requiring the eviction of families with ineligible members would violate both federal law and the U.S. Constitution. Following these challenges, HUD suspended implementation of the proposed regulation and Congress returned to the drawing board.<sup>14</sup>

In 1987, Congress addressed the issue of mixed-status households by adding paragraph (c)(1) to Section 214 to allow for the preservation of families.<sup>15</sup> Congress recognized that the earlier proposed "alien rule" would "produce extraordinary hardships, excessive paperwork, and unnecessary financial difficulties for the individuals, the owners, and, in some cases, the Federal Government."<sup>16</sup> Congress further found that implementation of that rule would be an "injustice" that would cause a multiplicity of harms, including:

...the mandatory eviction of thousands of families now residing in federally-subsidized housing; the eviction of individuals who are citizens or who are properly documented aliens because other members of their household cannot meet the documentation requirements; the denial of admission to families which include citizens and properly documented aliens because not all family members can be properly documented; and the imposition of documentation and verification requirements upon citizens and aliens alike which are not only unduly burdensome, but also impossible even for some citizens to meet.<sup>17</sup>

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<sup>10</sup> *Yolano-Donnelly Tenant Association v. Pierce*, Civ. No. S-86-0846 MLS (E.D. Cal. Dec. 18, 1986) (national injunction issued on November 14, 1986).

<sup>11</sup> *See id.* at \*12-13 ("[T]here is substantial authority for the proposition that due process places a limit on the [government's] ability to interfere with certain extant relationships among family members.") (citations omitted).

<sup>12</sup> *Id.*

<sup>13</sup> *City of New York v. Pierce*, 86-CIV-6068, (S.D.N.Y. 1986) (stayed following nationwide class certification in *Yolano-Donnelly Tenant Association*).

<sup>14</sup> 53 Fed. Reg. 842-48 (Jan. 13, 1988), reported on and reproduced in 65 Interpreter Releases 50-51, 65-71 (Jan. 15, 1988); *see also* 65 Interpreter Releases 274 (Mar. 21, 1988).

<sup>15</sup> Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815, reported on and reproduced in 65 Interpreter Releases 50-51, 63-64 (Jan. 15, 1988).

<sup>16</sup> H.R. Rep. No. 100-122(I), 100th Cong., 1st Sess. 3317, 3365-66 (1987).

<sup>17</sup> *Id.*

The deliberate addition of paragraph (c)(1) was “intended to clarify the original intent of Congress that families in which at least one person is eligible are not disqualified,” contrary to HUD’s 1986 proposed rule.<sup>18</sup>

Continuing its commitment to balance family preservation with limits on the eligibility for assistance, Congress amended the HCDA again in 1996 to add the proration rule, stating that “[f]inancial assistance . . . for a family may be provided only on a prorated basis, under which the amount of financial assistance is based on the percentage of the total number of members of the family that are eligible for that assistance under the program of financial assistance and under this section.”<sup>19</sup> HUD’s new proposed rule seeks to resurrect the “alien rule,” despite the plain text of Section 214, well-documented contrary legislative intent, and judicial recognition that forcing the eviction or separation of families raises serious constitutional concerns.

**B. The proposed rule contradicts the plain words of Section 214, and if implemented, would violate the Administrative Procedure Act.**

The APA requires that regulations that purport to implement a statute but are inconsistent with that statute will not withstand judicial scrutiny.<sup>20</sup> Because its proposed rule conflicts with the plain text of Section 214 in at least two ways, HUD cannot implement this rule without violating the APA as a matter of law.

First, Section 214 explicitly provides for proration. For families that include individuals who are ineligible for housing subsidies, Congress provided that the benefits received “*shall* be prorated” on an indefinite basis.<sup>21</sup> In contrast, the proposed rule would prohibit mixed-status families from living in subsidized housing, including public housing, Section 8 project-based units, or private apartments through the use of a Housing Choice Voucher.<sup>22</sup> There is no basis for this rule under Section 214, which mandates prorated

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

<sup>19</sup> 42 U.S.C. § 1436a(a) (1986).

<sup>20</sup> Courts will “set aside” agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right or otherwise “not in accordance with law.” 5 U.S.C. § 706(2)(A), (C); *see also Chevron U.S.A., One v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (Courts must enforce the “unambiguously expressed intent of Congress.”); *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (invalidating Department of Veterans Affairs regulation for violating clear meaning of statute).

<sup>21</sup> *See* 42 U.S.C. § 1436a(b)(2) (“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 explicitly permits housing authorities to choose not to affirmatively establish ineligibility.

<sup>22</sup> The rule contemplates limited circumstances for proration, such as during the time period when the eligibility of all household members is being ascertained. However, it leaves no question that every member of the household must be eligible in order for the household to receive assistance, and that proration should be “rar[e]” and of “short duration”; rather than indefinite. *See* Proposed 24 CFR Part 5, at 20591.

assistance in its plain text. Congress's imperative was to preserve families—not break them apart.<sup>23</sup>

Second, the proposed rule also imposes burdensome and costly verification requirements for seniors in violation of Section 214. The proposed rule requires compulsory verification for every member of the household—from infants to seniors—regardless of whether they contend that they are eligible for benefits. This requirement adversely impacts two of the most vulnerable segments of mixed-status families: seniors and ineligible relatives. Since the passage of the HCDA, Congress cautioned against invasive verification methods.<sup>24</sup> Section 214 embodies Congress's concern by protecting vulnerable seniors from the often insuperable burden of eligibility verification. 42 U.S.C. § 1436a(d)(2). HUD's own impact analysis recognizes that the proposed rule exceeds the scope of the statute by making verification of eligibility compulsory for individuals 62 years of age and older.<sup>25</sup> As explained in Section III, *infra*, imposing this burden on seniors is likely to have a devastating impact on many families—including those with U.S. citizen members who are unable to secure the documentation required by HUD. Additionally, the proposed rule requires ineligible relatives, who make no claim to housing benefits under Section 214, to submit to verification requirements—a change that is unnecessary under the current statutory and regulatory scheme in which such individuals are prohibited from receiving housing subsidies.<sup>26</sup> This imposes a new cost and burden on housing authorities and further ensures HUD's goal to eject mixed-status families from public and federally subsidized housing.

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<sup>23</sup> See 42 U.S.C. § 1436a(c).

<sup>24</sup> Congress made clear that “the bill [does not] authorize the Secretary of Housing and Urban Development or any other public official to invade the privacy of occupants of assisted housing in an effort to identify illegal aliens and to secure their removal. However, the Secretary is required to take reasonable steps to identify such persons by methods which may include a request for documentation of an occupant's legal status, and which will protect the rights of all those being assisted.” See H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 1010, 1056 (1981). Congress was concerned that housing programs treat future applicants “fairly and humanely” and “protect applicants from embarrassment or humiliation.” *Id.*

<sup>25</sup> See 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 2 n.3 (Apr. 15, 2019) (“Individuals 62 years of age or older, who claim eligible immigration status, are exempted from the immigration status verification requirements [42 U.S.C. 1436a(d)(2)]. However, aside from proof of age, this proposed rule will require them to submit one of the documents approved by the Department of Homeland Security (DHS) as acceptable evidence of immigration status.”); see also, proposed regulation 24 CFR § 5.508(b)(2).

<sup>26</sup> HUD accomplishes this by erasing a provision of the current regulations (at 24 CFR § 5.508(e)) that complies with Congress' directive to only verify the eligibility of individuals who seek housing benefits. See *supra* n. 5; 24 CFR § 5.508(e). HUD wrongly claims that this segment of the current regulations only refer to temporary prorated assistance. See Proposed 24 CFR Part 5, at 20591 (noting HUD's interpretation that “do not contend” provision of current regulations is contrary to Section 214). Contrary to HUD's interpretation, Congress clearly provides that only eligible individuals who submit to verification can obtain benefits, and it does not require any further (ineligible) relatives to come forward unless they can comply with verification. See 42 USC § 1436a(i)(1) (requiring the verification of eligibility of at least one member of families that seek financial assistance) and 42 U.S.C. § 1436a(b)(2).

## **II. THE PROPOSED RULE WILL VIOLATE THE AGENCY'S DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING AND ITS MISSION TO PROVIDE FAIR AND EQUAL HOUSING.**

The proposed rule also violates HUD's obligation to affirmatively further fair housing under the Fair Housing Act ("FHA")—an obligation that arises from the agency's core mission to provide fair and equal housing. As written, this rule creates barriers to fair housing choice for immigrant families and will adversely impact individuals on the basis of their national origin and/or their familial status.

HUD has a statutory duty to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of" the FHA. *See* 42 U.S.C. § 3608(e)(5). All of the programs implicated by the proposed rule are administered by HUD<sup>27</sup> and accordingly encompassed under the agency's statutory duty. HUD itself has defined affirmatively furthering fair housing to mean "taking meaningful actions, in addition to combating discrimination, that . . . foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics," including national origin. *Id.*; 24 C.F.R. § 5.152 (defining "affirmatively furthering fair housing").

The obligation to affirmatively furthering fair housing thus requires HUD to do more than simply combat discrimination; it requires HUD to take actions that will meaningfully address identified barriers to housing choice on the basis of national origin or any other protected characteristic. In this case, the proposed rule will do precisely the opposite. It will deprive thousands of mixed-status families of access to subsidized housing, creating barriers to, rather than promoting, these immigrant families' housing choice. Moreover, the individuals who will be impacted by the proposed rule share a common protected characteristic—their national origin, either because they originate from another country or, in the case of U.S. citizen children, share a cultural tie to another country. Despite HUD's affirmative obligation to protect such individuals, its proposed rule will force mixed-status households out of their current homes and require them to find other affordable, non-subsidized housing, likely in a limited range of neighborhoods far from their communities and support systems.

Alternatively, for those households who break up their families to ensure eligible members retain access to subsidized housing, the family member who is forced to move out of the household will similarly have his or her housing choice limited by the proposed rule. Put plainly, whether the family stays together and loses its subsidy or the ineligible member moves out rather than compromise the affordable housing of the family, it is the household as a unit that will be harmed, even if the injuries sustained affect individual family members in different ways, *see infra* at Section III.

There is a straightforward way for HUD to comply with its statutory obligation to affirmatively further fair housing. It would simply ensure compliance with Section 214—

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<sup>27</sup> *See* Proposed 24 CFR Part 5, at 20589.



in this case, adherence to the current proration rule that permits mixed-status families to stay together. Doing so would fulfill HUD's obligation to undertake "meaningful action" to address an identified barrier to housing choice—the separation of mixed-status families and/or their ouster from subsidized housing of their choice.

HUD's proposed rule will fail to affirmatively further fair housing in one other key respect. Because 70% of the households impacted by HUD's rule are families with eligible minor children, the rule will have an adverse and disproportionate impact based on a household's familial status.<sup>28</sup> The FHA prohibits discrimination based on familial status. *See, e.g.*, 42 U.S.C. §§ 3604 (a)-(d); 3605; 3617. A rule that creates a disparate impact on the basis of familial status would cause HUD to violate the FHA—the very law it is entrusted to enforce—and as a result, also contravene its statutory obligation to further affirmatively the policies of the FHA.

### **III. HUD'S PROPOSED RULE WILL LEAD TO DISPLACEMENT AND NEGATIVE HEALTH OUTCOMES FOR ECONOMICALLY VULNERABLE IMMIGRANT FAMILIES AND GENERATE HARM TO OTHER SUBSIDY RECIPIENTS.**

The serious flaws of the proposed rule are far from technicalities. HUD's own analysis confirms that its implementation would create far-reaching housing insecurity, including the displacement of tens of thousands of individuals from their current subsidized housing, or homelessness, accompanied by long-term health, educational, and developmental harm to children, including those with U.S. citizenship.

Beyond the impact to mixed-status households, the millions of individuals who are, and had previously certified themselves to HUD to be U.S. citizens, will be burdened by and, in many cases, unable to meet the proposed rule's more stringent citizenship verification requirements. Individuals with disabilities, low-income citizens, who are disproportionately citizens of color, and seniors are especially likely to encounter difficulties in meeting the proposed rule's verification of status requirement because many of these citizens do not have citizenship documentation readily available or encounter barriers to accessing such information. These subgroups of HUD subsidized housing beneficiaries for whom housing subsidies are intended accordingly risk losing their homes. Such consequences are far from speculative: the same consequences followed implementation of an earlier Medicaid citizenship verification requirement and resulted in a sharp decline in enrollment and losses of benefits to eligible persons. *See infra* at Section III.B. And, as HUD admits, the proposed rule will cost the agency hundreds of millions of dollars because it will have to pay out larger subsidies to households comprised entirely of individuals of eligible status. To cover these costs, HUD will likely have to reduce the quantity of its affordable housing and reduce maintenance needed to preserve the quality

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<sup>28</sup> Section 3602(k) of the FHA defines familial status as one or more individuals under the age of 18 being domiciled with (1) a parent, legal custodian, or (2) the designee of such parent or legal custodian, with the written permission of such parent or legal custodian.

of its federally assisted housing, at the expense and well-being of current subsidized housing residents.

**A. Thousands of immigrant families will face negative outcomes due to the proposed rule, including children whose health and educational opportunities would be compromised.**

Based on HUD's own data, 25,000 households—or up to 108,000 individuals—could be left without subsidized housing should they choose to forego assistance rather than break up their families.<sup>29</sup> Among these household members, over 55,000 are children who are U.S. citizens or of eligible status.<sup>30</sup> Because these children live with parents or other adults who are not of eligible status, these children will be forced to relinquish their access to housing subsidies.<sup>31</sup> This is the case mainly for three reasons: (1) the proposed rule will eliminate proration that currently allows mixed-status families to receive subsidies even where the only eligible household member is a child;<sup>32</sup> (2) an ineligible parent or other ineligible adult who previously served as a leaseholder will no longer be able to reside in subsidized housing because of his or her ineligible status; and (3) the eligible child does not have the legal capacity to sign a lease, thus depriving that child of his or her *rightful* subsidy.

HUD is candid that the proposed rule will push mixed-status families, including U.S. citizen children, to forego housing subsidies to which family members are entitled: “[F]ear of the family being separated [will] lead to prompt evacuation by most mixed households.”<sup>33</sup> Once these families give up their housing subsidies, they will be forced to search for new homes, without access to government assistance. Having lost their subsidies, such families will face a limited pool of housing units from which they can afford to rent.

It is well documented that in many metropolitan areas, such as the District of Columbia, housing costs are high, and the supply of affordable housing is rapidly

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<sup>29</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 (Apr. 15, 2019) at 7; see also 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=.86f28c2a0982](https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.86f28c2a0982).

<sup>30</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 6-7 (Apr. 15, 2019); see also Tracy Jan, *HUD says 55,000 children could be displaced under Trump plan to evict undocumented immigrants*, WASH. POST (May 10, 2019), [https://www.washingtonpost.com/business/2019/05/10/hud-says-children-could-be-displaced-under-trump-plan-evict-undocumented-immigrants/?utm\\_term=.a67eb3e03c49](https://www.washingtonpost.com/business/2019/05/10/hud-says-children-could-be-displaced-under-trump-plan-evict-undocumented-immigrants/?utm_term=.a67eb3e03c49).

<sup>31</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 6-7 (Apr. 15, 2019).

<sup>32</sup> 42 U.S.C. § 1436a (b)(2).

<sup>33</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).

shrinking.<sup>34</sup> During the period of 2002 to 2013, the District of Columbia lost half of its low-cost units (apartments renting for less than \$800 a month fell from almost 60,000 in 2002 to 33,000 in 2013).<sup>35</sup> Accordingly, as a result of HUD's proposed rule and current housing market conditions in the District and other metropolitan areas, mixed-status families may be unable to afford housing and end up homeless.<sup>36</sup> A further effect of this rule will thus be to exacerbate homelessness and the affordable housing crises facing many communities.

The harm HUD's proposed rule will generate is not abstract for our clients. In the case of one family who resides in a subsidized Northeast Washington, D.C. property, the U.S. citizen children will potentially end up without the home on which they have come to depend, simply because their mother is not of eligible status, and none of the children are old enough to become the leaseholders despite their status as U.S. citizens. Faced with the impossible choice of separating the U.S. citizen children from their mother, the household will likely relinquish its housing subsidy. Further, the family's home is located near schools, public transportation, and medical centers on which the family has come to rely. Once forced to give up its subsidized housing, the family would additionally be uprooted from its community and lose access to its support structures.

Even the families who are able to find alternate housing after being forced out of their subsidized housing will be required to spend more on rent and suffer economic and health-related costs as a result of the family's increased rental housing spending. Studies show that cost-burdened families tend to spend less on food, healthcare, and transportation, among other essential needs.<sup>37</sup> (HUD considers it a "severe" cost- or rent-burden for a household to pay more than 50 percent of its gross income on rent and utilities.<sup>38</sup>) In addition to the challenges posed by high rents, the housing that will be available to families who are ejected from subsidized housing is likely to be substandard, uninhabitable, overcrowded, or located in neighborhoods with higher crimes and poverty rates.<sup>39</sup>

Children whose households are burdened by the costs of rent or who live in substandard, overcrowded, or unsafe housing suffer significant and detrimental health effects. Studies show that children who live in cost-burdened households often "face

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<sup>34</sup> Wes Rivers, *Going, Going, Gone: DC's Vanishing Affordable Housing*, A DC Fiscal Policy Report (March 12, 2015) at pages 1-4 [hereinafter "*Going, Going, Gone*"].

<sup>35</sup> *Id.* at 1, 4.

<sup>36</sup> *Id.* at 1, 5 (discussing how high costs leave families at risk of homelessness); see also Diane Yentel, "The Affordable Home Crisis Continues, But Bold New Plans May Help," Citylab (Mar. 14, 2019), <https://www.citylab.com/perspective/2019/03/affordable-housing-near-me-data-bold-solutions-funding/584779/>.

<sup>37</sup> Claire Zippel, *A Broken Foundation: Affordable Housing Crisis Threatens DC's Lowest-Income Residents*, A DC Fiscal Policy Report (Dec. 18, 2016) at 1 and 8 [hereinafter "*A Broken Foundation*"].

<sup>38</sup> *Going, Going, Gone* at 6.

<sup>39</sup> *Id.* at 1, 6, and 7; see also Matthew Desmond, Carl Gershenson, et al., *Forced Relocation and Residential Instability Among Urban Renters*, Social Service Review, Volume 89, Number 2, June 2015 (noting how forced displacement causes families to relocate to substandard housing and have a higher likelihood of relocating again).

developmental challenges that make it hard to succeed in school,” while their low-income parents who pay for the unaffordable housing “face high rates of depression and often miss medical appointments.”<sup>40</sup> Put plainly, unstable housing can increase the chances that children will develop behavioral problems, have higher rates of absenteeism, and struggle in school.

Among the most destabilizing circumstances an individual—especially a child—can face is eviction. Data confirms that eviction generates negative health outcomes on the entire family, including depression, anxiety, high blood pressure, and/or psychological distress.<sup>41</sup> Children’s school performance suffers as a result of evictions, and older children often drop out of school, develop substance abuse issues, and/or generally experience lower educational attainment as compared to their peers.<sup>42</sup> Applied here, the high likelihood that children of mixed-status families will end up in unstable and inadequate housing because the proposed rule will either forcibly displace them or lead to their families’ eviction means these children will likely suffer numerous adverse outcomes, some of which may have life-long consequences.<sup>43</sup>

HUD’s response to such predictable consequences is that impacted families will be able to retain their subsidized housing for some period of time through a “temporary deferral of termination of assistance.”<sup>44</sup> Far from a failsafe, such deferrals will not prevent the possibility of homelessness for mixed-status families or the stress and undue harm they will endure; at most, it will buy families six to eighteen months of time to find housing, depending on whether the household qualifies for six-month deferral period renewals.

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<sup>40</sup> *A Broken Foundation* at 1.

<sup>41</sup> Allison Bovell-Ammon & Megan Sandel, *The Hidden Health Crisis of Eviction*, Boston University School of Health, Children’s Health Watch (Oct. 5, 2018); *Losing Home: The Human Cost of Eviction in Seattle*, A Report by the Seattle Women’s Commission and the Housing Justice Project of the King County Bar Association (Sept. 2018) at 6, 59-60 (describing negative health and educational outcomes children experience due to eviction) [hereinafter *The Human Cost of Eviction in Seattle*].

<sup>42</sup> *The Human Cost of Eviction in Seattle* at 59-60.

<sup>43</sup> *Housing Instability is Linked to Adverse Childhood Behavior*, How Housing Matters (May 9, 2019), <https://howhousingmatters.org/articles/housing-instability-linked-adverse-childhood-behavior/>; see also Mary Cunningham & Graham McDonald, *Housing as a Platform for Improving Education Outcomes among Low-Income Children*, Urban Institute (May 2012), <https://www.urban.org/sites/default/files/publication/25331/412554-Housing-as-a-Platform-for-Improving-Education-Outcomes-among-Low-Income-Children.PDF>.

<sup>44</sup> Proposed 24 CFR Part 5, at 20595. HUD’s proposed “continued assistance” to a tenant family fares no better as it presents a narrow exception to the general rule that if any member is ineligible, the family must forego assistance or require that ineligible family member to leave the household. In effect, the exception is much like the general rule. *Id.* at 20595 (permitting assistance only if “(1) The family was receiving assistance under a Section 214 covered program on June 19, 1995; (2) The family’s head of household or spouse has eligible immigration status as described in §5.506; and (3) The family does not include any person who does not have eligible immigration status other than the head of household, any parents of the head of household, any parents of the spouse, or any children of the head of household or spouse”).

**B. HUD's verification requirement and the costs of the proposed rule will inflict harm on U.S. citizens in non-mixed-status households who depend on safe and affordable housing.**

Forced eviction, the loss of valuable housing subsidies, and ensuing negative health outcomes for mixed-status families are not the only negative outcomes generated by this rule. Up to 9.5 million additional households who claim citizenship status will be forced to go through an unduly burdensome verification process.<sup>45</sup> In the District of Columbia alone, more than 57,000 individuals will be required to verify their citizenship status.<sup>46</sup> This process has proven challenging for seniors, citizens of color, citizens with disabilities, and low-income citizens, as evidenced by the impacts generated following the implementation of similar Medicaid verification requirements.<sup>47</sup> As the Government Accountability Office reported in a 2007 survey, Medicaid enrollment suffered a sharp decline in half of the responding 44 states *due to* the citizenship documentation requirement.<sup>48</sup> Given that as many as seven percent of citizens do not have citizenship documentation readily available,<sup>49</sup> and such information can be difficult for these vulnerable citizens to obtain, especially for individuals with disabilities,<sup>50</sup> the impacts to households outside of mixed-status families is likely to be significant. Those who are unable to meet the verification requirements under the proposed rule will lose access to their housing subsidies and potentially face eviction.

**C. The increased costs HUD will bear to implement the proposed rule will hurt currently eligible housing subsidy holders by reducing the quantity and maintenance of existing public and other subsidized housing.**

Even those who are deemed eligible will suffer harm as a result of HUD's proposed rule. First, in replacing mixed-status families with households entirely comprised of

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<sup>45</sup> National Housing Law Project, "Keep Families Together" Comment Template at 6, <https://www.keep-families-together.org/resources>.

<sup>46</sup> See National Housing Law Project, *Keep Families Together*, "Resources/State Data Table," <https://www.keep-families-together.org/resources> (citing to Center on Budget and Policy Priorities analysis of 2017 HUD administrative data).

<sup>47</sup> Donna Cohen Ross, *New Medicaid Citizenship Documentation Requirement is Taking a Toll: States Report Enrollment Is Down and Administrative Costs Are Up*, Center on Budget and Policy Priorities (Mar. 13, 2007), <https://www.cbpp.org/archiveSite/2-2-07health.pdf>.

<sup>48</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *Medicaid: States Reported That Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens* (June 2007), <https://www.gao.gov/new.items/d07889.pdf>.

<sup>49</sup> Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification, Brennan Center for Justice (Nov. 2006), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf).

<sup>50</sup> A number of individuals with disabilities do not drive and are less likely to have state-issued identification. See S.E. Smith & Rebecca Cokley, *Reforming Elections Without Excluding Disabled Voters*, Ctr. for Am. Progress (Mar. 29, 2019), <https://www.americanprogress.org/issues/disability/news/2019/03/28/468019/reforming-elections-without-excluding-disabled-voters/> (comparing the 7.5 percent of people with disabilities who lacked a valid ID to the less than five percent of people without disabilities who lacked an ID).

members who are eligible and whose subsidies will be larger, HUD would be required to spend anywhere from \$372 million to \$437 annually, separate from the additional costs to move and/or evict mixed-status families (anywhere from \$12.8 to 17.4 million).<sup>51</sup> To finance these additional costs, the agency will, by its own admission, reduce the quantity of assisted housing units, including by decreasing the number of Housing Choice Vouchers.<sup>52</sup> Relatedly, HUD acknowledges that the costs of its proposed rule will likely further reduce public housing maintenance, “possibly [leading to] deterioration of the units that could lead to vacancy.”<sup>53</sup> It is no secret that public housing has been in a state of disrepair for years; should HUD implement its proposed rule and disinvest further in public housing repairs, the residents who live in these units will be forced to live in uninhabitable housing or forced to leave their homes, thereby raising public housing vacancy rates. By lowering the quality of housing for public housing residents around the country, many of whom have endured deplorable conditions for years, HUD’s rule will further harm the most vulnerable beneficiaries of its programs—low-income residents, many of whom are people of color and families with minor children.<sup>54</sup>

To further compound these issues, public housing authorities (“PHA”) will have to collect documents to verify the citizenship or other eligible immigration status of subsidy recipients and those applying for assistance. Doing so will require extensive resources, resources that PHAs will also need to establish policies and criteria to determine whether a family qualifies for continued housing assistance or a temporary deferral of termination of assistance. By depleting their already inadequate resources, PHAs will have to divert staff’s time away from the important work of screening families for subsidized housing, assisting PHA beneficiaries in finding housing, and—relevant to DC’s and many other jurisdictions’ experiences—detract valuable time from solving the critical problem of making necessary repairs to public housing.<sup>55</sup>

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<sup>51</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 11 (Apr. 15, 2019).

<sup>52</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>53</sup> *Id.*

<sup>54</sup> See John Goering, Ali Kamely, Todd Richardson, Office of Policy Development and Research, U.S. Department of Housing and Urban Development, *An Analysis of the Racial Occupancy and Location of Public Housing Developments*, 2-3, 20-21 (1994) (noting that larger public housing projects has historically been African Americans, similar to the demographics of many family housing developments). In the District of Columbia, one of the largest public housing properties—Barry Farm—has historically and until recently been a primarily African American-community, many members of whom are families with children. See Class Action Compl. for Declaratory and Injunctive Relief and Damages at ¶ 27 and n. 2, *Barry Farm Tenants and Allies Association, Inc., et al., v. District of Columbia Housing Authority, et al.*, No. 17-cv-01762, ECF 1.

<sup>55</sup> National Housing Law Project, “Keep Families Together” Comment Template at 6, <https://www.keep-families-together.org/resources>; see also Matt Quinn, *Public Housing Agencies Oppose HUD’s Plan to Evict Immigrant Families*, GOVERNING (May 21, 2019), <https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>.

#### **IV. HUD’S PROPOSAL TO EVICT IMMIGRANT FAMILIES RAISES SERIOUS CONCERNS IN THE CONTEXT OF THE TRUMP ADMINISTRATION’S ANTI-IMMIGRANT POLICIES.**

Rather than addressing an actual issue with the implementation of the HCDA or a pressing problem like the affordable housing crisis, this proposed rule responds to a pretextual problem—the need to “bring HUD’s regulations into greater alignment with the requirements of Section 214 and make the administrative process for verification uniform.”<sup>56</sup> As discussed in Section I, Congress carefully crafted a balance between the need to prohibit allocation of housing subsidies to individuals of “ineligible” status and the need to keep families together. Now, instead of ensuring the most effective allocation of housing benefits, HUD intends to create greater administrative burdens on under-resourced public housing authorities, *see supra* Section III.C., displace families that Congress intended to remain together, jeopardize housing for currently eligible and U.S. citizen housing beneficiaries due to a burdensome compulsory verification requirement, and reduce the quality and quantity of subsidized housing to the detriment of low-income tenants, *see supra* Section III.B. The fact that the proposed rule will lead to such harmful outcomes despite the availability of an existing, less harmful alternative under Section 214, is further evidence that the rule is not the product of “reasoned decisionmaking” and instead arbitrary and capricious under the APA.<sup>57</sup>

HUD’s own explanation of the proposed rule raises serious questions about the legitimacy of the motivating animus to target mixed status families. As HUD explains in its impact analysis, “HUD expects that fear of the family being separated would lead to prompt evacuation by most mixed households, whether that fear is justified.”<sup>58</sup> It remains a question as to why this agency, dedicated to the provision of fair and equal housing assistance, would draft a rule whose admitted impact will be the denial of such assistance to eligible individuals.<sup>59</sup>

Indeed, HUD does not base the proposed rule on an analysis of housing policy. Instead, it grounds the proposed rule in the March 6, 2017 Presidential Memorandum, which is directed at the Departments of State and Homeland Security and concerns the admissibility of noncitizens seeking entry into the U.S.<sup>60</sup> This Memorandum directs all “relevant” executive departments and agencies to issue new rules related to the screening and vetting of noncitizens for visas or immigration benefits.<sup>61</sup> HUD admits that it does not

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<sup>56</sup> Proposed 24 CFR Part 5, at 20590.

<sup>57</sup> *See ACA Int’l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018).

<sup>58</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>59</sup> The fact that HUD could avoid a multiplicity of harmful consequences by simply adhering to its current rule is further evidence that the rule is not the product of “reasoned decisionmaking” and instead the type of arbitrary and capricious agency action that does not withstand an APA challenge. *See ACA Int’l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018).

<sup>60</sup> *See* n.18 of the proposed rule preamble.

<sup>61</sup> *See* Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry Into the United States, and Increasing

play a “relevant” role in implementing this Presidential Memorandum.<sup>62</sup> Nevertheless, HUD claims that the proposed rule was “prompted” by the Memorandum, signaling HUD’s deviation from its mission to provide housing assistance by adopting a role in enforcement of immigration policy.<sup>63</sup>

This shift in focus continues the Trump Administration’s attacks on immigrant families. This Administration jump-started its presidency with the dramatic expansion of Immigration and Customs Enforcement raids,<sup>64</sup> the ban on immigrants from predominantly Muslim countries,<sup>65</sup> the elimination of TPS designation for many Latin American and African countries,<sup>66</sup> and the termination of DACA.<sup>67</sup> The Executive Branch has repeatedly targeted families, enacting policies that have forced the separation of parents from their children<sup>68</sup> and deporting parents of detained migrant children.<sup>69</sup> A number of federal courts

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Transparency Among Departments and Agencies of the Federal Government and for the American People, 82 FR 16279, at 16280 (April. 3, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-04-03/pdf/2017-06702.pdf>.

<sup>62</sup> See n. 18 of the proposed rule (“the Presidential Memorandum is focused on the admissibility of aliens into the United States rather than programs of assistance”).

<sup>63</sup> HUD’s failure to consider “relevant factors” is probative that its proposed rule “flunked the test” of the APA. See *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (explaining that courts can review whether a decision was based on “a consideration of the relevant factors” and whether “there has been a clear error of judgment”).

<sup>64</sup> See Regina F. Graham & Liam Quinn, *Trump's executive orders dramatically expand power of immigration officers as they will have 'broad latitude' in deciding who is detained or deported*, DAILYMAIL.COM (Jan. 29, 2017), available at <https://www.dailymail.co.uk/news/article-4169294/Power-immigration-officers-expanded-Trump.html>.

<sup>65</sup> See *Intern'l Refugee Assistance Project v. Trump*, Memorandum Opinion, 1:17-cv-02969-TDC (05/02/2019) (permitting constitutional claims to advance following government’s motion to dismiss).

<sup>66</sup> See *NAACP v. DHS*, No. 1:18-cv-00239-MJG (D.Md. filed Jan. 24, 2018) (alleging that termination of TPS for Haiti was racially discriminatory under the Fifth Amendment Due Process clause); *Centro Presente v. Dep't of Homeland Sec'y*, No. 18-cv-10340-DJC (D.Mass. filed Feb. 22, 2018) (alleging Due Process and Equal Protection violation due to intentional discrimination on the basis of race, ethnicity, or national origin for TPS-holders from Haiti, El Salvador, and Honduras); *Ramos v. Nielsen*, No. 18-cv-1554-EMC (N.D.Cal. filed Mar. 12, 2018) (suit on behalf of U.S. citizen children of TPS-holders from Haiti, Sudan, El Salvador, and Nicaragua alleging APA violation); *Saget v. Trump*, No. 18-cv-1599-WFK (E.D.N.Y. filed March 15, 2018) (alleging APA, Due Process, and statutory violation in termination of Haitian TPS and citing discriminatory comments from U.S. president against Haitians); *Casa De Maryland, Inc. v. Trump*, No. 18-cv-845-GJH (D.Md. filed Mar. 23, 2018) (alleging racial and national origin discrimination in violation of Equal Protection and Due Process violations for Salvadoran TPS-holders); and *Bhattarai v. Nielsen*, No. 19-cv-731-EMC (N.D.Cal. filed Feb. 10, 2019) (alleging racial animus and APA violation in termination of TPS for Honduras and Nepal).

<sup>67</sup> See, e.g., *CASA de Maryland v. DHS*, 2019 WL 2147204 at n.14 (4th Cir. 2019), pending cert (holding that termination of DACA violated the APA).

<sup>68</sup> See Katie Shepherd, *Up to 5 Migrant Children Are Still Separated From Their Family Every Day, New Government Data Shows*, American Immigration Council (June 26, 2019), available at <http://immigrationimpact.com/2019/06/26/migrant-children-still-separated/#.XRTqwI97mUk> (“2,726 children were separated from January 2018 through June 2018 amidst the family separation policy. Between the supposed end of the policy in June 2018 through March 2019, almost four hundred more children were separated.”)

<sup>69</sup> Parents and caregivers were also the target of enforcement operations when seeking the release of unaccompanied immigrant children and submitting to background checks. See Tal Kopan, *The simple reason*



have considered the racial animus<sup>70</sup> evidenced behind the administration's policies and have enjoined the conduct of this administration towards immigrants. The Administration has also questioned the status of U.S. citizen children of immigrant parents, criticizing the right to birthright citizenship enshrined in the Fifteenth Amendment of the U.S. Constitution to address centuries of racial injustice in this country.<sup>71</sup>

The Secretary of HUD employed similar anti-immigrant rhetoric when testifying before Congress about the reasoning behind this rule. He explained that the rule is intended to "take care of our own first," echoing the President's view that U.S. citizen children of immigrants are second-class citizens.<sup>72</sup> The Secretary claimed to favor "tax-paying Americans" with this proposed rule, although immigrants contribute more in tax revenue than they seek public benefits<sup>73</sup> and dismissed Congress's careful proration approach, commenting that one cannot "prorate the roof over someone's head."<sup>74</sup> This discriminatory view has not passed constitutional muster with prior anti-immigrant policies of this Administration.<sup>75</sup> The overtly anti-immigrant intention animating the proposed rule, together with its harmful impact on citizen children and other eligible recipients based on their national origin or that of their families, means that it likely violates the Equal Protection Clause of the Fifth Amendment.

## CONCLUSION

With this proposed rule, HUD solves no existing problem. Instead, this rule will produce draconian consequences for thousands of mixed-status families, over 55,000 children, including U.S. citizen children, persons with disabilities, low-income citizens—

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*more immigrant kids are in custody than ever before*, CNN (Sept. 14, 2018), available at <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html> ("In September 2017, then-ICE acting Director Tom Homan said at a public event that his agency would arrest undocumented people who came forward to care for the children, something previous administrations avoided."); *see also* *JECM v. Lloyd*, 18-cv-00903 ¶ 81 (E.D.Va. Aug. 16, 2018), ECF No. 21 (second amended complaint explaining that Office of Refugee Resettlement, which processes the release of unaccompanied migrant children, began sharing with Immigration and Customs Enforcement the information of parents or potential guardians seeking the children's release, leading to the parents' or guardians' detention or deportation).

<sup>70</sup> *See, e.g., supra* at n.52 *Saget*, (citing U.S. President's remarks that Haitians "all have AIDS" and "[w]hy would we want any more Haitians?"); *Ramos* (citing U.S. President's comments calling African and Latin American countries "sh\*thole countries");

<sup>71</sup> *See* Chris Riotta, *Trump wants to use an executive order to override the 14th Amendment. Here's why that won't work*, THE INDEPENDENT (Oct. 30, 2018), available at <https://www.independent.co.uk/news/world/americas/us-politics/birthright-citizenship-14th-amendment-trump-executive-order-immigrants-constitution-a8608836.html>.

<sup>72</sup> *See* Sylvan Lane, *Carson on HUD eviction plan: 'You take care of your own first'*, THE HILL (May 21, 2019), available at <https://thehill.com/policy/finance/444791-dems-rip-carson-for-proposal-to-evict-undocumented-immigrants-from-public>; *see also* HUD Oversight Hearing, C-Span (May 21, 2019) (at 1:57:05-1:57:43).

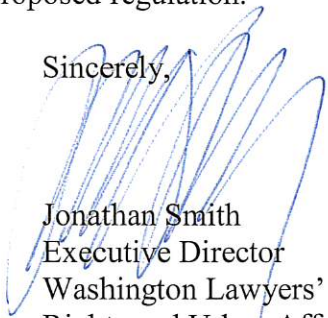
<sup>73</sup> *See* Gretchen Frazee, *4 myths about how immigrants affect the U.S. economy*, PBS NEWS HOUR (Nov. 2, 2018), available at <https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy> ("Immigrants contribute more in tax revenue than they take in government benefits.").

<sup>74</sup> *See* HUD Oversight Hearing, at 1:59:15-2:00:19.

<sup>75</sup> *See supra* n. 65-67.

most of whom are persons of color—and seniors. Untold numbers of persons who will lose their subsidized housing are eligible individuals. Ignoring its own statutory mandate and mission, HUD admits that its proposed rule will cause mixed-status families to forego housing benefits and be more expensive to HUD. It will likely spread more fear within our immigrant community, separate families, increase homelessness, and penalize vulnerable U.S. citizen children of immigrant parents. In light of the lack of any reasonable justification for this rule, its contravention of existing law and Congress's intent, its potential harm to thousands of immigrants, and the inevitability of the protracted litigation that will ensue if adopted, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, the Lawyers' Committee for Civil Rights Under Law, the Public Interest Law Center, and the Chicago Lawyers' Committee for Civil Rights urge HUD not to implement its proposed regulation.

Sincerely,



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