July 9, 2019

ATTORNEY GENERAL RAOUL OPPOSES RULE TO DENY CRITICAL HOUSING ASSISTANCE TO IMMIGRANTS

Proposed Rule Could Leave More Than 55,000 Children Homeless Nationwide

Chicago — Attorney General Kwame Raoul, along with a coalition of 21 attorneys general, today submitted a comment letter to the U.S. Department of Housing and Urban Development (HUD) opposing a new proposal that would deny housing assistance to mixed-status families that include any undocumented immigrants.

In the letter, Raoul and the coalition argue that the new proposal would result in the eviction of thousands of families, including many children and lawful residents and citizens, who rely on federal housing assistance. If enacted, the Proposed Rule will harm the states, their residents, their local economies, and the public health.

"For years, HUD's rules and laws governing public housing have facilitated the preservation of the family unit," Raoul said. "This proposed rule cruelly abandons family unity as a priority and eliminates housing assistance for hundreds of thousands of people, including children. I urge HUD to abandon this unlawful and harmful proposal."

The law has for decades allowed families with mixed immigration status to receive public housing subsidies, provided that ineligible family members did not themselves receive any financial subsidies. The new proposal, announced in April, would prohibit family members who are undocumented from residing in a home where another resident receives federal housing assistance. In many cases, the eligible family members are children, and these minors would not be able to live without their parents, resulting in the effective eviction of entire families.

As the department's own analysis concludes, the Proposed Rule would eliminate housing assistance for more than 108,000 people, including at least 55,000 children, many of whom are U.S. citizens or otherwise eligible for housing assistance.

Raoul and the coalition argue that this substantial loss of housing benefits will cause significant economic and social harms to the states, including increased homelessness, reduced productivity, and a higher incidence of significant health problems.

States will have to bear significant administrative and social benefit costs if the rule goes into effect. Private housing providers will be far less likely to participate in subsidized housing programs, leaving states to find additional affordable housing options and plan for increased rates of evictions and homelessness.

Joining Raoul in submitting the comment letter are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

Attorneys General of New York, the District of Columbia, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington

July 9, 2019

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Re: Notice of Proposed Rulemaking, *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), RIN 2501-AD89.

Dear Secretary Carson,

We, the Attorneys General of New York, the District of Columbia, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington (the "States") appreciate the opportunity to provide comments on the Department of Housing and Urban Development's ("the Department") 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) ("Proposed Rule"). As the chief legal officers for our respective States, the undersigned Attorneys General share a commitment to serving the public interest and promoting the rule of law. With those interests in mind, we are concerned that the Proposed Rule, if finalized, would violate federal law, displace tens of thousands of eligible children and families from their homes without basis, and cause extensive harm that is not detailed in the Proposed Rule or the accompanying Regulatory Impact Analysis ("RIA").

The Proposed Rule will harm the States, their residents, their local economies, and the public health. As the Department's own analysis concludes, the Proposed Rule would eliminate housing assistance for more than 100,000 people, including at least 55,000 children, many of whom are U.S. citizens or otherwise eligible for housing assistance. This substantial loss of housing benefits will cause significant economic and social harms to the States, including greater homelessness, reduced productivity, and a higher incidence of significant health problems. In addition, if finalized, the Proposed Rule would likely violate the Administrative Procedure Act. The proposal reverses decades of consistent agency practice without reasoned explanation; fails to adequately consider its impacts on states, cities, and private housing providers; is inconsistent with the text and purpose of the Housing and Community Development Act of 1980; falls far short of the Secretary's statutory obligation to administer all HUD programs in a manner that affirmatively furthers fair housing; and, according to Secretary Carson's own testimony, is a stalking horse to pressure Congress into enacting statutory program reforms—an entirely improper purpose for agency rulemaking. Moreover, the Proposed Rule runs afoul of the Paperwork Reduction Act and

multiple executive orders. We therefore urge the Department to abandon this cruel and unlawful proposal.

I. Background.

Section 214 of the Housing and Community Development Act of 1980, as amended ("the Act"), prohibits the Department from providing specified forms of federal housing assistance to ineligible noncitizens. 42 U.S.C. § 1436a; *see* 84 Fed. Reg. at 20,589. As implemented through subsequent statutory amendments and agency rules, this restriction has consistently been applied for more than thirty years to preserve families with mixed immigration status and ensure that housing assistance is provided to families with at least one eligible family member.

The Proposed Rule misstates the legislative and regulatory history of this requirement by mischaracterizing the history of proration of benefits for families with mixed immigration status, "preservation assistance," the effective dates of the requirements of Section 214 and its implementing regulations, and the documentation requirements. *Id*. at 20,590. It also glosses over the Department's history of trying to implement a similar rule in 1986—a rule that was repeatedly delayed by Congress, enjoined by a federal court, and later withdrawn by the Department. The more accurate history of Section 214 and its implementing regulations described below demonstrates that the Proposed Rule does not simply "bring HUD's regulations into greater alignment with the requirements of Section 214," *id*., but instead marks an unprecedented departure from both past practice and legislative intent. Indeed, Section 214 has an extensive history, which illustrates the centrality of proration as a legislative and regulatory solution that both Congress and the Department have recognized for decades.

A. Prior to 1987, Congress and the Courts Voided Efforts to Deem Mixed-Status Families Ineligible for Housing Assistance.

The Housing and Community Development Act of 1980 added Section 214—a provision entitled "RESTRICTION ON USE OF ASSISTED HOUSING"—to the Housing and Community Development Act of 1974. In the beginning, Section 214 prohibited the provision of federal financial assistance for housing to "nonimmigrant student-alien[s]" (who resided in a foreign country and were admitted to the United States solely to pursue a temporary course of study) and their nonimmigrant spouses and minor children. 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.). In 1981, Congress expanded the restrictions on the use of assisted housing under Section 214 to limit the provision of federal financial assistance for housing to "lawful residents exclusively." *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.). But as detailed below, the 1980 Act and its amendments never ultimately removed financial assistance to mixed-status families; to the contrary, the Act was implemented so as to avoid undermining family unity.

To implement the 1981 changes, the Department published a final rule on October 4, 1982, which stated that its effective date would be published in the future in the Federal Register. Restriction on Use of Assisted Housing, 47 Fed. Reg. 43,674 (Oct. 4, 1982). But before that rule became effective, Congress barred the Department from implementing the 1981 amendments to Section 214 for one year. *See* Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-

181, 97 Stat. 1153 (1983). After the one-year period expired, instead of implementing its 1982 rule, the Department published a revised final rule to implement Section 214. Restriction on Use of Assisted Housing, 51 Fed. Reg. 11,198 (Apr. 1, 1986).[1] But the effective date of that rule was deferred multiple times, delaying its implementation for at least 15 months, through the end of October 1987.[2]

At the same time, the April 1986 rule was challenged by the City of New York, *City of New York v. Pierce*, No. 86-CIV-6068 (LLS) (S.D.N.Y.), and a nationwide class of U.S. citizens and "eligible aliens" who would be eligible for subsidized housing but for the presence in their families of an adult who was not eligible for housing assistance, *Yolano-Donnelly Tenants' Ass'n v. Pierce*, Case No. CIV S-86-846-MLS (E.D. Cal.). In December 1986, the court in *Yolano-Donnelly Tenants' Association* certified the class and entered a preliminary injunction in their favor. *Id.*, Case No. CIV S-86-846-MLS (E.D. Cal. Dec. 18, 1986). The court found that the plaintiffs had raised serious questions on the merits of their claim that the rule violated their Fifth Amendment right to due process because it denied them the right to cohabit with their families, and the hardships caused by losing or being denied housing assistance or being forced to separate from a family member were considerably greater than any hardship the government might suffer from having to delay implementation of a regulation that had already been delayed for years.

After the court's ruling in *Yolano-Donnelly Tenants' Association*, the Department removed the restrictions on housing assistance, and made clear that there were "no HUD restrictions against the use of assisted housing" by ineligible immigrants "until a subsequent final rule is issued." Aliens; Withdrawal of Restrictions on the Use of Assisted Housing, 53 Fed. Reg. 842 (Jan. 13, 1988). In other words, the broader restrictions on the use of assisted housing in Section 214 of the Act were never implemented before Congress again amended the Act in 1987.

B. The 1987 Act and its Implementing Regulations Ensured Continued Assistance for Mixed-Status Families.

Section 214 of the Act was substantially revised again in 1987 but continued to allow mixed-status families to receive housing assistance. Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815 (1988). Congress made clear that one of the purposes of the amendments was "to provide needed housing assistance for homeless people and for persons of low and moderate income who lack affordable, decent, safe, and sanitary housing." *Id.* § 2(b)(3), 101 Stat. at 1819. Both the House and the Senate recognized that many U.S. citizens and otherwise eligible immigrants resided with family members who were undocumented or who had not yet gone through the process of becoming lawful permanent residents. While the Conference Report

[1] Corrections and amendments to that rule were published multiple times in 1986. *See*, *e.g.*, Restriction on Use of Assisted Housing, 51 Fed. Reg. 15,611 (Apr. 25, 1986); Restriction on Use of Assisted Housing; Correction, 51 Fed. Reg. 25,687 (July 16, 1986).

[2] Restriction on Use of Assisted Housing, 51 Fed. Reg. 26,876 (July 28, 1986) (delaying the effective date of the rule for two months in response to a request by several Members of Congress in view of the possible enactment of pending legislation, containing amendments to section 214, during the 1986 Congressional session); Restriction on Use of Assisted Housing; Delay of Effective Date and Related Technical Amendments, 51 Fed. Reg. 34,570 (Sept. 29, 1986) (delaying the effective date an additional three months in response to a second congressional request); Restriction on Use of Assisted Housing, 51 Fed. Reg. 42,088 (Nov. 21, 1986) (delaying the effective date of the rule until at least October 31, 1987).

on the 1987 Act stated that future housing assistance to previously unassisted families would be permitted "only if the head of the household or their spouse is a citizen or national of [sic] legal alien resident," such language was later omitted from the Act. H.R. Rep. No. 100-426 at 184 (1987) (Conf. Rep.). After the issuance of the Conference Report on November 6, 1987, a provision for continued un-prorated assistance to mixed-status families was expressly added to the 1987 Act as a compromise.

This compromise permitted indefinite continued assistance—also known as "preservation assistance"—to mixed-status families where the head of household or spouse had eligible status, but other family members did not. For families whose head of household or spouse did not have eligible status, but other members of the family were eligible, the compromise allowed the Department and local housing authorities to defer termination of benefits for up to 3 years. As Senator Armstrong stated:

> The broad outline of the compromise was this. We are not going to let any more [undocumented immigrants] into subsidized housing. . . . But we are saying that where you have a mixed family . . . we are not going to force them to break up that family. This is a direct, head-on collision, Mr. President, between two very deeply engrained values in our society. One is obeying the law, which is certainly contravened by paying them subsidies. But the other and perhaps in this case an even higher value is the sanctity of the family.
>
> So I think the ultimate outcome of this is probably about as good a compromise as we could make. In fact, I guess I would have to say that in my opinion it is almost a Solomon-like compromise.

100 Cong. Rec. S18615 (daily ed. Dec. 21, 1987) (statement of Sen. Armstrong).

These provisions were not immediately implemented. Rather, to honor congressional intent "to protect 'the sanctity of the family,'" Restriction of Use on Assisted Housing by Aliens, 53 Fed. Reg. 41,038, 41,043 (Oct. 19, 1988), the Department stated that it was necessary to implement the protective provisions of the Act at the same time that the final rule implementing the restrictions in the Act became effective. *Id*. at 41,044. Thus, the effective date of the 1987 Act was never considered the operative date of the new restrictions or of the protection for mixed-status families. Although the Department proposed regulations to implement the new provisions of Section 214 in 1988, that proposed rule did not become final, and was published again with revisions in 1994.

In 1994, the Department published the notice of proposed rulemaking to finally implement Section 214 for the first time since 1982, again emphasizing the importance of maintaining family unity. Restrictions on Assistance to Noncitizens, 59 Fed. Reg. 43,900, 43,901 (Aug. 25, 1994). The Department again emphasized, as it did in 1988, that the congressional intent of Section 214(c)(1) was to protect the sanctity of the family, so the restrictions and protections of the Act could not be deemed self-implementing. *See id*. Otherwise, the Department would thwart congressional intent and render those protections meaningless for families that received subsidized housing after the law was enacted but before the final rule implementing it became effective. *See id*. The 1994 proposed rule did not require U.S. citizens to submit proof of citizenship because the Immigration Reform and Control Act of 1986 only imposed documentation requirements on those

who declared themselves to be noncitizens. *See id*. at 43,905. For the same reasons, the Department did not impose documentation requirements on individual family members who chose not to declare their citizenship status.

The rule proposed in 1994 was finalized in March 1995 and expressly mandated assistance to mixed-status families. Restrictions on Assistance to Noncitizens, 60 Fed. Reg. 14,816, 14,817 (Mar. 20, 1995). Specifically, the 1995 rule permitted proration of housing assistance for the first time. The Department stated that "[p]roration of assistance is consistent with the preservation of Families [sic] provisions of Section 214." *Id*. at 14,822. The 1995 rule made plain that "proration of assistance *must* be offered to eligible mixed families." *Id.* (emphasis added).

C. Since 1995, Congress has Continued to Affirmatively Sanction Prorating Assistance to Mixed-Status Families.

Following publication of the 1995 rule, Congress added language to Section 214 mandating that continued assistance provided to avoid the division of an eligible mixed-status family, i.e., "preservation assistance," may be prorated based on the percentage of family members eligible for assistance. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996); *see also* H.R. Rep. No. 104-863, at 701 (1996) (Conf. Rep.); 42 U.S.C. § 1436a(c). Prior to that statutory amendment, the Department had changed positions on whether proration of housing assistance was permissible under the statute. *See* 59 Fed. Reg. at 43,904 (describing the Department's previous position that proration was not permitted by the statute). Thus, Congress made clear that proration of "preservation assistance" is permissible under the statute.

In 1996, Congress also added the following language regarding proration of benefits that remains in Section 214(b) to this day:

> If the eligibility for financial assistance of *at least one member of a family* has been affirmatively established under the program of financial assistance and 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, based on the number of individuals in the family for whom eligibility has been affirmatively established under the program of financial assistance and under this section, as compared with the total number of individuals who are members of the family.

Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (emphasis added); 42 U.S.C. § 1436a(b)(2); *see also* H.R. Rep. No. 104-863 at 701 (1996) (Conf. Rep.). The 1996 law also added new statutory text specifically exempting individuals aged 62 and older from having their immigration status verified even if they provided a declaration stating that they are not citizens or nationals of the United States. *Id.*

An interim rule published in late November 1996 continued the practice of prorated assistance; it "require[d] that continued financial assistance provided to an eligible mixed family after November 29, 1996 be prorated based on the percentage of family members that are eligible for assistance. An eligible mixed family is a family containing members with eligible immigration status, as well as members without such status, and that meets the criteria for eligibility for

continued assistance as set forth in Section 214." Revised Restrictions on Assistance to Noncitizens, 61 Fed. Reg. 60,535, 60,536 (Nov. 29, 1996).

That same year, Congress passed the Immigration Reform Act of 1996 and offered additional protections to immigrant families. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Section 575 of the Immigration Reform Act added subsection (h)(2) to Section 214 of the Housing and Community Development Act. Section 214(h)(2) permitted a Public Housing Authority (PHA) to opt-out of "this section," referring to Section 214 in its entirety. *Id.*; *see also* 61 Fed. Reg. at 60,537. Under the revised Section 214, the Department was not responsible for verifying the eligibility of recipients of housing assistance if a PHA elected to ''opt-out'' of 24 C.F.R. part 5, subpart E. *Id.* at 60,538. This revision to Section 214 effectively permitted PHAs to provide benefits to families and individuals without verifying that they had an eligible immigration status. Congress did not repeal this provision of Section 214 until 1998, *see* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 105-276, 112 Stat. 2461, 2653 (1998), and the Department did not amend its implementing regulations until May 12, 1999, *see* Revised Restrictions on Assistance to Noncitizens, 64 Fed. Reg. 25,726, 25,727 (May 12, 1999).

Congress has had multiple opportunities since the 1995 rule to change its mandate to the Department, but it has repeatedly chosen not to do so, instead consistently maintaining assistance for mixed-status families. Although Congress amended the Act again in 2000 and 2016, it did not remove the statutory language regarding proration of benefits to mixed-status families or families receiving "preservation assistance" or change the documentation requirements. *See, e.g.*, Organic Act of Guam—Amendments, Pub. L. No. 106-504, § 3(b), 114 Stat. 2312 (2000) (amending 42 U.S.C. § 1436a(a)(7)); Housing Opportunity Through Modernization Act of 2016, Pub. L. No. 114-201, Title I, § 113, 130 Stat. 804 (2016) (same).

Proration represents a compromise that has long been in place to balance Section 214's directive that federal financial assistance be made only on behalf of citizens and qualifying noncitizens with a mandate that Congress deemed more important, which was to protect the family unit. The Proposed Rule at issue here and the description of the history of proration misrepresents Congress's purpose altogether.

II. The Department's Adoption and Implementation of the Proposed Rule Will Cause Harm to the States and Private Housing Providers.

The Proposed Rule would cause great harm to the States and thus should be withdrawn. The Department fails to consider how the Proposed Rule will impact the States in the following ways: (1) the States would be required to subsume the costs associated with implementing the Proposed Rule due in part to the Department's failure to identify a sufficient source of funds for the expected increase in costs; (2) greater administrative burdens to verify a housing applicant's immigration status would deter private housing providers from participating in subsidized housing programs, particularly in areas with higher demands on rental housing markets and low affordable housing stock will only exacerbate the affordable housing crisis; (3) the Proposed Rule will harm State residents who are eligible for housing assistance, including by violating their constitutional

rights; and (4) the Proposed Rule conflicts with many city and state laws that prohibit discrimination and other laws aimed at preserving the family unit.

A. The Increased Cost of the Proposed Rule Will Result in Higher Costs to the States, and Will Reduce Access to Subsidized Housing Programs.

The Proposed Rule requires housing providers to undergo additional retroactive screening for current program participants, particularly for household members who initially did not declare eligible status and thus were not required to submit proof of eligibility. In the event mixed-status families who once were eligible for participation are now deemed ineligible under the Proposed Rule, housing providers would be required to evict mixed-status families from assisted housing and usher in households where all members are eligible for assistance. Furthermore, housing providers would be required to process a new applicant's and his or her household members' documentation to determine eligibility, whereas previously one or more household members could choose not to declare eligibility. Since the Proposed Rule applies to public housing that is owned and/or operated by State agencies, States would be burdened with substantially higher administrative costs to implement the Proposed Rule retroactively for current participants and for prospective applicants.[3]

A substantial number of families currently residing in assisted housing have mixed immigration status and receive prorated assistance; the transition from prorated households to fully-funded households will impose substantial costs that will ultimately be borne by the States. The Department currently provides prorated financial assistance to approximately 25,000 households having at least one ineligible member. *See* RIA at 6. The Department estimates that the yearly cost of providing assistance to these "replacement households" will result in an aggregate increase ranging from $193 million to $227 million annually. *Id*. at 3. However, the Department fails to identify a sufficient funding source to accommodate such an increase in its annual budget. In fact, the Department admits that its proposed sources of funding are all either highly unlikely to occur or would result in defunding other crucial programs and services offered by the Department.

The Department concedes that the most likely scenario[4] would be for the Department to "reduce the quantity and quality of assisted housing in response to higher costs," which the

[3] For example, the California Housing Finance Agency oversees 78 project-based rental assistance projects across the State, which include 4,900 households receiving federal assistance. Additionally, the District of Columbia Housing Authority (DCHA) consists of more than 8,000 apartment or townhome units across 56 properties, which serve as housing for close to 20,000 residents. For complete list of DCHA properties, *see* https://www.dchousing.org/topic.aspx?topid=3.

[4] The other possible sources of funding identified by the Department are similarly unavailing. A Congressional allocation of funds is, as the Department concedes, unlikely to come to fruition. *See HUD Regulatory Impact Analysis* at 13 (acknowledging that "the federal budget for housing is not expected to increase because of this rule"). And to the extent that costlier households are served without an increase in funding, the Department acknowledges that cuts to other Department activities—such as mortgage insurance through the Federal Housing Administration, Community Development Block Grants (CDBG), the HOME Investment Partnerships Program, and homelessness assistance programs—would be necessary. *Id.* at 3. Such cuts would undermine the Department's mission to "create strong, sustainable, inclusive communities and quality affordable homes for all." U.S. Dep't of Hous. & Urb. Dev., *Mission*, https://www.hud.gov/about/mission (last visited July 2, 2019). *See also* U.S. Dep't of Hous. & Urb. Dev., *Questions*

Department further admits would lead to fewer households being served under the Housing Choice Voucher Program, and further deterioration of public housing units due to underfunded maintenance programs and other services. *Id*. By reducing the quantity of available housing under federal voucher and project-based assistance programs, waitlists for applicants in these programs would become longer.[5] Additionally, any continued underfunding of the nation's public housing stock will exponentially exacerbate the affordable housing crisis.

Against this backdrop, States and municipalities will be forced to bear an even greater financial burden. Many local jurisdictions already have local voucher and project-based assistance programs aimed at supplementing federal programs. For instance, the District of Columbia serves its low-income residents through programs such as the Local Rent Supplement Program, *see* D.C. Fiscal Policy Inst., *The Local Rent Supplement Program* 1 (2016), District of Columbia Department of Behavioral Health "Home First" Program, 22A D.C.M.R. §§ 2300, *et seq.*, and the Family Re-Housing Stabilization Program, 29 D.C.M.R. §§ 7800, *et seq.* ("Rapid Re-Housing"). In the State of New York alone there are at least 3,160 households with an ineligible non-citizen in their household. *See* Ctr. on Budget & Policy Priorities, *Analysis of 2017 HUD Admin. Data* 1 (2017). The City of New York also has rental assistance and affordable housing programs, which preference city-funded properties that assist with reducing homelessness, including allowing housing vouchers for the homeless.[6] Without federal funding, States would need to increase their budgets to replace Department subsidized housing options. Additionally, since some local subsidy programs require partnership with certain government agencies or nonprofit organizations, States would have to increase funding to provide the staffing needed to meet the demand of residents who utilize social services as well as the subsidies.[7]

In addition to necessitating increased State budget allocations toward voucher programs, project-based assistance, and other housing programs, the Proposed Rule will result in greater

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and Answers about HUD, https://www.hud.gov/about/qaintro (last visited July 2, 2019) (listing the Department's programs).

[5] Currently, waitlists for many public housing and voucher programs across the country are several thousand people long. DCHA stopped accepting new applicants to its waiting list in 2013 at a time when the combined total of households waiting to apply for project-based and voucher assistance reached over 149,000. In its fiscal year 2017, DCHA calculated that 89,326 households remained on various waiting lists, and DCHA does not have immediate plans to reopen the general waiting list. *See* D.C. Hous. Auth., *2019 Performance Oversight Hearing, Comm. on Hous. and Neighborhood Revitalization Responses to Pre-Hearing Questions* 16 (2019), http://dccouncil.us/wp-content/uploads/2019/02/dha.pdf.

[6] *See* NYC Human Resources Administration, *Supportive Housing*, NYC.gov, https://www1.nyc.gov/site/hra/help/affordable-housing.page (listing housing resources available in New York City). *See also* Nikita Stewart, *New York City to Consolidate Housing Subsidy Programs*, N.Y. Times (July 18, 2018), https://www.nytimes.com/2018/07/18/nyregion/homeless-housing-vouchers-nyc.html; Joe Anuta, *Launch date set for consolidated rent-voucher program*, Crain's New York Business (Oct. 2, 2018), https://www.crainsnewyork.com/real-estate/launch-date-set-consolidated-rent-voucher-program.

[7] Programs such as the Rapid Re-Housing Program require participants to undergo regular case management services from community-based providers, which are nonprofit organizations around the District that rely on public and limited private grants for operations. These costs are in addition to administrative costs associated with facilitating the program through the District of Columbia Department of Human Services and the DCHA. *See generally* D.C. Dep't of Human Serv., *Rapid Rehousing: An Effective Tool to End Homelessness*, Medium (Jan. 11, 2018), https://medium.com/@DCHumanServ/rapid-rehousing-an-effective-tool-to-end-homelessness-38191440fcaa.

dependence on social benefit systems funded and administered by the States.[8] The Department acknowledges that one expected impact of the Proposed Rule is that individuals or families may become homeless, and that "[t]he costs of homelessness to society can be substantial, arising from the provision of transitional shelters and community supports, emergency services, health care, and criminal justice." *See* RIA at 13. Yet HUD does not consider how these costs will be borne by the States. As reflected in analyses by both the Congressional Research Service and the Department, the Proposed Rule would likely displace over 25,000 families, including 55,000 children who are U.S. citizens. *See* Maggie McCarty & James A. Carter, Cong. Research Serv., *HUD's Proposal to End Assistance to Mixed Status Families* 2 (2019). Based on the Department's Annual Homeless Assessment Report for 2018, fourteen percent of the U.S. homeless population is in New York City and 22% is in California; this Rule could cause a significant increase.[9] Although many of these families may participate in other social benefits systems,[10] displacement from their homes would cause greater dependence by mixed-status families on shelter systems and Medicaid due to health emergencies that arise from being homeless. Likewise, homelessness will result in higher reliance on the States' agencies serving families and children in need.

B. New Administrative Burdens Will Deter Housing Providers from Participating in Subsidized Housing Programs.

The Proposed Rule will impose substantial new administrative burdens on private housing providers. Private housing providers account for approximately 80% of housing providers among the Department's five major programs.[11] The Proposed Rule would require these landlords to face greater administrative burdens to verify eligibility for prospective tenants. For instance, housing providers would be required to collect more documents to prove prospective tenant immigration status and eligibility for assistance. Not only would landlords be required to collect these additional documents, but these documents would have to be transmitted to the United States Citizen and Immigration Services' Systematic Alien Verification for Entitlements Program ("SAVE"), which may cause further delay in application approval.

In addition to the effect on prospective tenants, the Proposed Rule would require housing providers to make retroactive eligibility determinations for their existing tenants, which would

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[8] For example, CalWORKs Homeless Assistance Program, which serves families that are homeless and those at risk of homelessness, will face an influx of families searching for permanent housing. Dep't. of Soc. Serv., *CalWORKs Homeless Assistance Program Fact Sheet* (2019), http://www.cdss.ca.gov/Portals/9/Housing/Homeless%20Assistance%20(HA)%20Fact%20Sheet_May%202019.pdf?ver=2019-05-09-164314-283.

[9] Kristin Toussaint, *14 percent of the nation's homeless population are in New York City*, Metro (Dec. 19, 2018), https://www.metro.us/news/local-news/new-york/homelessness-in-nyc-hud-report.

[10] Currently programs such as Temporary Assistance for Needy Families ("TANF") and the Supplemental Nutrition Assistance Program ("SNAP") pay reduced benefits to mixed-status families, similar to the prorated assistance currently paid by the Department.

[11] The Department's five major rental assistance programs include the Housing Choice Voucher Program, Public Housing, Section 8 project-based housing, Supportive Housing for Persons with Disabilities (Section 811), and the United States Department of Agriculture's (USDA) Rural Rental Assistance Program. *See* Ctr. on Budget & Policy Priorities, *United States Federal Rental Assistance Fact Sheet*, (last updated May 14, 2019), https://www.cbpp.org/research/housing/federal-rental-assistance-fact-sheets#US (noting that the current Proposed Rule does not apply to applicants and participants in the USDA Rural Rental Assistance Program).

cause an even more significant administrative and financial burden on the housing provider. First, housing providers would be required to create new policies and disseminate information on the Proposed Rule's implementation and effect on tenant eligibility for continued occupancy. Additionally, housing providers would be required to demand documentation from tenants to prove citizenship, as well as documentation from thousands of elderly immigrants to prove eligibility under the Proposed Rule. Not only would the Proposed Rule result in greater administrative burdens and costs, but the potential delay in retrieving these documents could be significant, particularly as it is difficult for many naturalized citizens and elders to obtain copies of original records for verification of their identity and immigration status.

Furthermore, while the Department recognizes that some households would be evicted from their current housing as a consequence of the Proposed Rule, it unreasonably assumes that evicting mixed-status families is an uncomplicated endeavor. *See* RIA at 14-15. However, a determination that a current tenant is no longer eligible to receive federal housing assistance on its own may not authorize an automatic eviction of that tenant or family under state or local law. In many jurisdictions that only allow evictions for cause, termination from a subsidy program may not qualify as cause. While termination would likely result in non-payment of rent, which could then form a basis for an eviction, tenants still may contest such evictions in court, which could result in significant legal fees for housing providers. Additionally, requiring a tenant to acquire such a significant debt of unpaid rent due to termination of housing assistance through no fault of the tenant, and for that debt to negatively affect that tenant's future creditworthiness, represents a manifest injustice.

Overall, the Proposed Rule would add additional program administration requirements that would require housing providers to divert resources in multiple ways: to verify tenant eligibility, and to engage in eviction proceedings of mixed-status families. Either of these additional burdens will likely deter housing providers from participating in these affordable housing programs. Many landlords already choose not to participate in subsidy programs because of existing administrative burdens. In fact, several studies have found that such burdens are among the top reasons many private landlords cite as justification for rejecting voucher holders. One Department-funded study on landlord acceptance of Section 8 vouchers found that almost 60% of landlords who were contacted by testers refused to rent to voucher holders; and that one in five of the landlords willing to comment on that refusal cited concerns about complexities with administering the voucher program as a deterrent from participating in the program. *See* Mary Cunningham et al., Urb. Inst., *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers* 1 (2018).

Another study conducted by the Greater New Orleans Fair Housing Action Center in 2009 revealed that landlords across 100 rental properties in the greater New Orleans area denied voucher holders the opportunity to rent units 75% of the time. Greater New Orleans Fair Hous. Action Ctr., *Housing Choice in Crisis: An Audit Report on Discrimination Against Housing Choice Voucher Holders in the Greater New Orleans Rental Housing Market* 1 (2009). An additional 7% of landlords who purported to accept vouchers established insurmountable barriers for voucher holders to overcome in order to rent an apartment. *Id.* at 11. Again, one of the main reasons cited by landlords who chose not to rent to voucher holders was the administrative burden. *Id.*

The Proposed Rule "would, in essence, add immigration enforcement to [landlords' and local public housing authorities'] responsibility of providing shelter to some of the nation's most

vulnerable families."[12] Requiring housing providers to determine eligibility of prospective tenants is yet another administrative hurdle that will deter landlords participating in subsidized housing programs, especially because their units would remain vacant whereas an applicant without a subsidy could apply and obtain approval much sooner than an applicant with a subsidy. Additionally, the long and arduous administrative process of verifying current tenants' eligibility and evicting ineligible households deters housing providers from continuing participation in the program. This would lead to a steep decline of affordable housing availability, particularly in competitive housing markets, such as the District of Columbia and New York City where discrimination based on an applicant's source of income is already prevalent.

C. The Proposed Rule Will Cause Serious Harm to Legal Residents and Citizens in the States and Will Impinge on Their Constitutional Rights.

The Department's proposal to eliminate the long-standing practice of prorating assistance to mixed-status families and disallowing ineligible lease-holders will primarily impact legal residents and citizens who live with or are related to individuals who are ineligible for housing assistance. For instance, more than 9 million assisted residents who have already attested, under penalty of perjury, that they are U.S. citizens would be required to collect documents further "proving" their citizenship.[13] Additionally, 120,000 elderly immigrants would be required to submit documents indicating their status. *See id*. Where individuals are unable to timely prove their immigration status, they could be at risk of losing their housing assistance and ultimately their homes. This risk is particularly present for seniors who may require more time and assistance to obtain the proper identifying documents for verification of eligibility. In the event seniors cannot timely submit the proper documentation, they may be forced to find alternate housing, likely institutional settings such as nursing homes.

Furthermore, the Department suggests families might be required to make the difficult decision of asking an ineligible family member to leave the assisted household. However, this course of action would infringe on the constitutional rights of families to cohabit. The United States Supreme Court held long ago that the right to cohabit as a family is a liberty "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The integrity of the family unit is protected by fundamental due process principles. *Id.*; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Parents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents. *Troxel v. Granville*, 530 U.S. 57, 65–66. Indeed, "the right of family members to live together[] is part of the fundamental right of privacy." *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *see also Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977), *Nicholson v. Williams*, 203 F. Supp. 2d 153, 235 (E.D.N.Y. 2002). The Department's attempt at separating mixed-status families, particularly when the Department has long prorated assistance for eligible individuals in its housing programs, would

[12] Lola Fadulu & Zolan Kanno-Youngs, *Landlords Oppose Trump Plan to Evict Undocumented Immigrants*, N.Y. Times, Jun. 17, 2019, https://www.nytimes.com/2019/06/17/us/politics/public-housing-immigrants.html.

[13] *See* Nat'l Low Income Hous. Coal., *Trump Administration Publishes Proposed 'Mixed-Status' Rule that Would Lead to Family Separations and Evictions for Certain Immigrant Families* (May 13, 2019), https://nlihc.org/resource/trump-administration-publishes-proposed-mixed-status-rule-would-lead-family-separations.

violate not only its mandate to preserve the family unit, but also the constitutional rights of those families.

Also, the more rigorous eligibility determination process of requiring each prospective and current family member to submit evidence of immigration status to federal officials may create a fear of information retention and potential immigration enforcement against non-citizens and legal residents. Currently, the Department only requires verification of eligibility for noncitizen household members under the age of 62 who certify they are eligible to receive assistance. Like the previous rule, the Proposed Rule's "Notice of Release of Evidence" states that "[e]vidence of eligible immigration status shall only be released to DHS for purposes of verifying the individual has eligible immigration status . . . and not for any other purpose, [but] HUD is not responsible for the further use or transmission of the evidence . . . by DHS." 84 Fed. Reg. at 20,593. Household members who did not claim eligibility may not have feared immigration enforcement because the only family members reporting to DHS were those claiming eligibility. However, under the proposed new requirements, all household must provide proof of eligibility. With this requirement, DHS would have access to information it would not otherwise have if undocumented or ineligible residents simply did not claim eligibility. Thus, fear of immigration enforcement might lead to families separating or otherwise deter even eligible individuals from participation in subsidized housing programs.

D. The Proposed Rule Conflicts with City and State Laws.

The federal Fair Housing Act prohibits discrimination in the sale, rental, and financing of housing based on race, color, national origin, religion, sex, familial status, and disability. *See* 42 U.S.C. §§ 3601 *et seq.* (1968).[14] Many States have passed similar fair housing laws prohibiting discrimination against the same protected classes that are enumerated in the federal Fair Housing Act. Several States have also passed more inclusive fair housing laws that expand the list of protected classes. For instance, the New York City Human Rights Law explicitly prohibits discrimination on the basis of many grounds including actual or perceived race, national origin, alienage, or citizenship status (among other protected classes). *See* N.Y.C. Admin. Code § 8-107 (2019). The District of Columbia Human Rights Act ("HRA") prohibits discrimination against individuals because of their family responsibility to support a person in a dependent relationship, which includes, but is not limited to children, grandchildren, and parents. *See* D.C. Code § 2-1402.21 (2009). California's Fair Employment and Housing Act ("FEHA") prohibits housing discrimination, including the refusal to rent, the denial or withholding of housing accommodations, and/or the cancellation or termination of a rental agreement, on the basis of, among other things, actual or perceived familial status, national origin, disability, and immigration/citizenship status. FEHA further prohibits housing providers from inquiring about a prospective tenant's national origin or familial status. Cal. Gov't. Code §§ 12900, *et seq.* (West, Westlaw through Ch. 5 of 2019 Reg. Sess.). If finalized, the Proposed Rule would require housing providers to violate these laws

[14] The Fair Housing Act also directs the Secretary to administer all HUD programs in a manner that affirmatively furthers fair housing. 42 U.S.C. § 3608(e)(5). The proposed rule's failure even to consider this obligation – especially given the obvious fair housing implications of the proposal – falls far short of the Secretary's statutory obligations. *See NAACP v. HUD*, 817 F.2d 149, 154-55 (1st Cir. 1987); *Shannon v. HUD*, 436 F.2d 809, 819-21 (3d Cir. 1970); *Thompson v. HUD*, 348 F. Supp. 2d 398, 465 (D. Md. 2005).

by denying and evicting residents because of their actual or perceived alienage and citizenship status.

III. The Proposed Rule Would, if Finalized, Violate the Administrative Procedure Act.

The Administrative Procedure Act ("APA") prohibits agency action that is "arbitrary, capricious" or "not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action can be arbitrary and capricious if the agency failed to consider all "relevant factors," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), or ignored "an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43-44 (1983). Here, the Department's proposal entirely fails to consider the impact the Proposed Rule would have on city and state social benefits systems, and the administrative burdens that would be placed on housing providers if implemented. And if the agency action contradicts congressional intent of an underlying law, the action can be set aside as "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also FCC v. NextWave Pers. Comm. Inc.*, 537 U.S. 293, 300 (2003). Here, the Proposed Rule's removal of proration and addition of individualized documentation requirements are not in accordance with the underlying intent of the Act and subsequent amendments, as they fail to preserve two core components–family unity and mitigating the impact on elders. Moreover, the Department's rationale for adopting the Proposed Rule—to prompt congressional action on immigration—is an impermissible basis for agency action under the Act.

The APA also requires an agency to engage in "reasoned decisionmaking," *State Farm*, 463 U.S. at 52, and the "agency's decreed result must be within the scope of its lawful authority…[and] must be logical and rational." *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998). Agency action can be arbitrary and capricious if the agency fails to provide a "coherent explanation" of its decision, *Clark Cty. v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008), or if the agency fails to justify departures from past practice. *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012). Here, the Department has failed to provide a reasoned explanation for the removal of its proration policy for mixed-status families, a nearly twenty-five-year old agency policy. The Department also failed to provide any reasoned explanation for the additional individualized documentation eligibility requirements.

A. The Department's Failure to Consider How the Proposed Rule Will Impact City and State Social Benefits Systems, and Will Create Administrative Burdens on Housing Providers is Arbitrary and Capricious.

One critical aspect of the problem that the Department failed to take into account when it promulgated the Rule is the burden it places on local and state services. Absent from the RIA is the fact that within the "approximately 25,000 households" impacted by the Rule, there are 55,000 children who will be impacted. *See* Cong. Research Serv., *HUD's Proposal to End Assistance to Mixed Status Families* at 1. This means that if the head of a household is ineligible to receive assistance under the Proposed Rule (according to the RIA there are approximately 18,000 households in this situation), the family may become homeless, and there is higher likelihood of separation of a child from their parent or caretaker. *See* Douglas Walton, et. al., Office of Planning,

Research & Evaluation, *OPRE Rep. No. 2018-39, Child Separation Among Families Experiencing Homelessness* (2018). Homelessness impacts a child's access to educational opportunities, and certain duties to protect the child's access will fall to city or state social benefits systems. Inst. for Children, Poverty, & Homelessness, *On the Map: The Atlas of Student Homelessness In New York City in 2017* 9 (2017). New York's Educational Law § 3209 details the responsibilities placed on school districts and public welfare officials to ensure that homeless children are provided with "suitable clothing, shoes, books, food, transportation and other necessaries to enable [the children] to attend [school]." *See* N.Y. Ed. Law § 3209(7).[15] In addition, as mentioned in Section II *supra*, the Department failed to consider how higher rates of child homelessness will impact city and state shelter systems, Medicaid, and agencies serving children and families in need. The Proposed Rule will significantly impact city and state social benefits systems.

The Department also failed to consider the administrative burdens that would be placed on housing providers[16] by the Proposed Rule. The Proposed Rule creates administrative burdens on two fronts: 1) all current participants and prospective applicants must submit individualized documentation regarding eligibility; and 2) termination from the subsidized program will not result in automatic eviction, and costs associated with eviction proceedings and subsequent termination from the program will be borne by housing providers.

With respect to the first, both the Proposed Rule and RIA are silent as to who will bear the burden of the administrative costs associated with screening tenants in the Housing Choice Voucher Program or project-based Section 8 properties; as detailed above, it is likely that the responsibility will fall on housing providers who participate in these housing programs. Housing providers will be required to ensure that all current tenants have submitted this documentation, and to the extent they do not, it will mean a loss of tenants and a loss of rent. The Congressional Research Service conducted a similar analysis in the context of citizenship documentation requirements added to the Medicaid Program, and found that the new requirements "appeared to increase administrative costs of the program and served as a barrier to program enrollment or result in loss of benefits for otherwise eligible citizens." Cong. Research Serv., *HUD's Proposal to End Assistance to Mixed Status Families* at 1.

The second set of administrative burdens on housing providers will be in the context of eviction proceedings. In the RIA, the Department states without any evidence "it is not likely that many households including ineligible tenants, especially as adults, will choose to actively protest HUD's decision." RIA at 14. There is no evidence offered as a basis for this conclusion, and in the RIA, the Department admits "some . . . cities[ ] and states have strong tenant and immigrant protection policies and advocates." *Id*. This is especially true in the State of New York, the District of Columbia, and several California jurisdictions, including San Francisco, Oakland, Berkeley, and Santa Monica. *See*, *e.g.*, N.Y. Real Prop. Acts. Law § 711 (2019); D.C. Code § 42-3505.01

[15] Also, as recently as June 13, 2019, the New York State legislature passed regulations which encourage courts to consider the ability to consider "a child's enrollment in a local school," when determining whether to grant a stay in an eviction proceeding. *See* 2019 N.Y. Laws § 753 at 53. *See also* Samar Khurshid, *City to Launch 5 Cross-Agency Projects to Fight Poverty-Related Challenges*, Gotham Gazette, June 21, 2019, https://www.gothamgazette.com/city/8622-city-to-launch-new-cross-agency-projects-to-fight-poverty.

[16] Many landlords would fall under the definition of small entities under the Regulatory Flexibility Act. *See* 5 U.S.C. §§ 601(2), 603(a), 604(a), 605(b).

(2019); Cal. Civil Code § 1954.53 (2005). Further, the Department fails to mention that at the start of an eviction proceeding, housing providers will have to administer the paperwork and processes necessary to terminate the tenant from the housing assistance program. As mentioned above, if families fight eviction, this could lead to non-payment under the subsidy, and potentially prolonged litigation.

B. The Department's Underlying Reasoning in Creating The Proposed Rule—To Prompt Congress to Pass Comprehensive Immigration Reform—is Arbitrary and Capricious As It Is Outside the Factors Congress Intended the Agency to Consider When Taking Regulatory Action.

The Department's admitted rationale for the Proposed Rule is plainly improper. On May 21, 2019, in a hearing before the House Financial Services Committee, Secretary Carson testified that the six-month deferral periods built into the Proposed Rule for individuals currently in public housing creates "enough time for Congress to engage in comprehensive immigration reform so that this [the Proposed Rule] becomes a moot point as does the DACA situation." *Housing in America: Oversight of the U.S. Dep't. of Housing and Urb. Dev.,* 114th Cong. (2019) (statement of Hon. Dr. Benjamin Carson, Secretary, U.S. Dep't. of Housing and Urb. Dev.).[17] This testimony suggests that the Proposed Rule was devised to prompt congressional action—which both contradicts the stated bases for the proposal in the notice of proposed rulemaking and is an impermissible ground for agency action under the Act. *See State Farm*, 463 U.S. at 43.

Secretary Carson went on to further indicate that the Department's underlying intent of the Proposed Rule is to prompt Congressional action, stating that "Congress has the responsibility for making the laws that govern this [the Proposed Rule], and they have the ability to change that, and if in fact, you want to explain to the American citizens, who've been on the wait list for several years in your district in New York, why we should continue to support families that are not here legally, I would be happy to join you in helping to explain that to them." Tracy Jan, *HUD Secretary Ben Carson Defends Plan to Evict Undocumented Immigrants: 'It's Not That We're Cruel, Mean-hearted. It's That We Are Logical'*, Wash. Post (May 21, 2019), https://www.washingtonpost.com/business/2019/05/21/house-democrats-grill-hud-secretary-ben-carson-plan-evict-undocumented-immigrants/. In this testimony, Secretary Carson creates a non-existent tie between U.S. citizens on the waitlist in the State of New York, and eligible New York residents who receive benefits under Section 214, propagating the falsehood that ineligible individuals benefit from proration. As stated *infra* in Section III.D., the Department has failed to point to any evidence suggesting that ineligible individuals are benefitting from or engaging in any fraudulent activity in this context.

In essence, Secretary Carson's testimony is an admission that the Department is taking regulatory action through the Proposed Rule, action which the Department acknowledges could lead to homelessness for U.S. citizens and benefits-eligible children, in order to influence Congressional action. Therefore, the Proposed Rule is not in accordance with the authority delegated to the Secretary under the Act and outside the factors under which Congress intended regulatory action to be taken in this context. *See State Farm*, 463 U.S. at 43.

[17] Also available at 39:20-39:39, https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403654.

C. Removing Proration and Placing Documentation Burdens on Elders Directly Conflicts With the Underlying Stated Purpose of the HCD Act of 1980, and Subsequent Amendments.

The extensive legislative and regulatory history of Section 214, detailed in Section I *supra*, indicates that proration of assistance was implemented by the Department and Congress to preserve family unity, especially for mixed-status families; removal of proration is contrary to this purpose and a violation of the APA. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Indeed, Congress has made clear that mixed-status families may remain in public housing; as the plain statutory language sets forth, the ineligibility of a single household member should *not* result in the eviction or termination of housing assistance to eligible household unless there is intentional fraud. *Compare* 42 U.S.C. § 1436a(d)(6) (describing the only circumstance under which the congressional scheme contemplates evicting the whole family—where there is intentional fraud) *with id.* § 1426a(d)(5) (where an *individual* is ineligible for assistance, denying benefits to that individual, but nowhere suggesting that such individual ineligibility should result in denial of assistance for the entire household). This statutory scheme reflects clear congressional intent to disfavor eviction of mixed-status families and, instead, a preference for keeping families together.

In particular, the exact issues the Department purports to address through the Proposed Rule have been debated, contemplated, and foreclosed through Congressional and Department action, court decisions, and agency rule-making as early as 1986. Proration was the outcome, consistently reaffirmed, of these debates.

Further, through the addition of specific language in the Omnibus Consolidated Appropriations Act of 1997, Congress indicated that individuals aged 62 and older were exempt from mandatory verification of their immigration status. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 574, 110 Stat. 3009 (1996); *see also* H.R. Rep. No. 104-863, at 702 (1996) (Conf. Rep.). To now require those over 62 years of age to submit documentation proving eligibility is a clear contradiction of Congress's intent. Moreover, the new documentation burdens would likely result in the separation of eligible elderly citizens from their families, as they may be unable to produce the needed documentation in a timely manner.

The extensive legislative history here outlines how both Congress and the Department both implemented proration of assistance as a mechanism to preserve family unity and sought to mitigate the impact of eligibility verification on elders. Removal of proration and the additional documentation burdens placed on the elderly contradict both purposes.

D. The Removal of Proration for Mixed-Status Families and the Creation of New Documentation Eligibility Requirements for the Elderly Under the Proposed Rule Reverses Long-Standing Agency Policy Without Reasoned Support.

The Proposed Rule, if finalized, would be arbitrary and capricious because it would reverse almost twenty-five years of consistent agency interpretation without reasoned support. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings

that contradict those which underlay its prior policy'") (quoting *F.C.C. v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009)). Here, the Department proposes removal of proration for mixed-status families without explaining why such an overhaul is needed, let alone at this time. The Department fails to point to any fact, statistic, or even specific instance of how proration or the existing legal framework have resulted in ineligible individuals taking unfair advantage of the prorated subsidies their families receive. Indeed, Section 214 prohibits subsidizing ineligible individuals in this context,[18] and proration was determined to be the best mechanism to prevent such fraudulent activity. Therefore, the absence of any reasoning about how the current proration framework contributes to fraudulent activity or misallocated monies benefitting ineligible individuals renders this reversal in policy arbitrary and capricious.

Further absent from both the Proposed Rule and the RIA is any reasoning as to how the removal of proration will serve family preservation and how the additional individualized documentation requirements for all current and prospective tenants will impact elders. As detailed in Section I *supra*, the underlying intent of the Act and subsequent amendments was to preserve family unity and mitigate impact on elders. And the extensive regulatory and legislative history of Section 214 depicts the centrality of proration as a legislative and regulatory solution that both Congress and the Department have recognized for decades. In the RIA, the Department simply states that it "is assumed" households will not separate in order to retain housing assistance. *See* RIA at 14. There is no reasoning provided for the basis of this assumption.

The Department's lack of reasoning or explanation for why the removal of proration is necessary at this time and how proration causes any fraudulent activity or misuse by ineligible individuals amount to a failure in providing a reasoned explanation and a failure to establish "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 56 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

IV. The Proposed Rule Does Not Meet the Requirements of the Paperwork Reduction Act.

The Proposed Rule imposes new requirements on every applicant and household member for covered subsidized housing programs to submit identifying documents and information to housing providers to prove eligibility, which housing providers must then submit to DHS's SAVE program for citizenship or immigration status verification. Because the Department has imposed these requirements without adhering to the statutory obligations it must follow before demanding this information from individuals and housing providers, this requirement is not in accordance with law.

The Paperwork Reduction Act ("PRA") was enacted by Congress to "minimize the paperwork burden for," among others, "individuals, small businesses . . . nonprofit institutions . . . [and] State, local and tribal governments . . . resulting from the collection of information by or for the Federal Government." 44 U.S.C. § 3501(1). The PRA requires the Department to submit any

[18] *See* Restrictions on Assistance to Noncitizens, 60 Fed. Reg. 14816-01 (Mar. 20, 1995) (to be codified at 24 C.F.R. pt. 200) ("The rule does not hold owners responsible for pursuit of repayments of subsidies to ineligible tenants, but rather when it is determined, that HUD assistance was paid to an ineligible tenant, the project owner is encouraged to refer to the case to the HUD Inspector General's office for further investigation." (internal quotations omitted)).

proposed collection of information to the Office of Management and Budget ("OMB") for review and approval prior to the date of publication of a notice of proposed rulemaking in the Federal Register. 44 U.S.C. § 3507(a). The Department's Proposed Rule regarding submission of evidence of citizenship or eligible immigration status appears to be a proposed collection of information as defined by the PRA and its implementing regulations. 84 Fed. Reg. at 20,592-94 (§ 5.508). However, nothing in the Proposed Rule indicates that the Department followed this submission process to the Director of OMB for review. In fact, the Department altogether fails to acknowledge its obligations under the PRA.[19] Since the Department has no legal authority to demand collection of documentation of families' citizenship and immigration status without prior OMB approval as required by the Paperwork Reduction Act, the Department's proposal to collect these documents are therefore not in accordance with law. *See NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108-13 (2d Cir. 2018) (vacating the agency's decision for failure to comply with unambiguous statutory requirements).

V. The Proposed Rule Fails to Meet the Requirements of Executive Order 13132 Because it Fails to Address the Substantial Direct Effects on the States.

As explained above, the Department's failure to consider all aspects of the problem—specifically, the significant costs that the Proposed Rule would shift to state and local governments—violates the APA. *See supra* Sections II & III.A. The requirement that the Department consider the costs to state and local governments associated with the Proposed Rule implicates not only the APA but also Section 6(b) of Executive Order 13132, which mandates that:

> no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless: (1) funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government; or (2) the agency, prior to the formal promulgation of the regulation, (a) consulted with State and local officials early in the process of developing the proposed regulation; (b) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget (OMB) a federalism summary impact statement, which consists of a description of 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 [OMB] Director any written communications submitted to the agency by State and local officials.

Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

The Proposed Rule does not contain a federalism summary impact statement because the Department claims, without citing any data or analysis, that the Proposed Rule "does not have

[19] The Department could have sought PRA clearance for this information collection through the notice-and-comment process for the Proposed Rule by complying with 44 U.S.C. §§ 3506(c)(2)(B) and 3507(d), but did not do so.

federalism implications and does not impose substantial direct compliance costs on State and local governments." 84 Fed. Reg. at 20,592. The Department is incorrect.

First, the Proposed Rule clearly has "federalism implications." Executive Order 13132 itself defines "[p]olicies that have federalism implications" as, *inter alia*, "actions that have substantial direct effects on the States." As detailed above, the Proposed Rule will impose substantial direct compliance costs on State and local governments. Indeed, the Proposed Rule, if finalized, will have direct effects on the States—including by stripping federal housing assistance from more than 100,000 of their residents, which will in turn impose significant costs on State and local governments to protect the health and well-being of their residents. *See supra* Part II.A. Accordingly, a federalism summary impact statement should be provided.

VI. The Proposed Rule Fails to Meet the Requirements of Executive Orders 12866 & 13563.

The Proposed Rule does not comply with Executive Order 12866, "Regulatory Planning and Review," 58 Fed. Reg. 51,735 (Oct. 4, 1993), which has been maintained across Republican and Democratic administrations. Executive Order 12866 requires the Department to assess *all* costs and benefits of the Proposed Rule and of all the possible or feasible regulatory alternatives (including the alternative of not issuing the regulation). Executive Order 13563 also requires that agencies quantify the costs and benefits of their proposed regulations wherever possible. *See* Exec. Order 13,563,76 Fed. Reg. 3821 § 1(c) (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* White House Office of Mgmt. & Budget, Circular A-418-27 (2003). These requirements are designed to ensure that the government only issues regulations when the benefit of the new policy is greater than the costs associated with that new policy, and when the new policy has net benefits that are greater than any other possible policy alternative.

The Proposed Rule fails to meet the requirements of Executive Order 12866 and 13563 because, as demonstrated above, *supra* Sections II & III.A., the Proposed Rule does not properly analyze the harms of the Proposed Rule. Specifically, the Proposed Rule does not sufficiently identify and quantify its costs, particularly, the harms that States and their residents will face should families with mixed immigration status be forced apart or be denied housing assistance. Moreover, the States' economies and the public health benefit from keeping families together and providing prorated assistance to families with members who are eligible for housing assistance. When a greater share of these families' incomes is used to pay for housing, despite the eligibility of some members for housing assistance, those families have fewer dollars to spend in their local economies. The Department should conduct a thorough economic impact analysis to address these issues.

VII. Conclusion

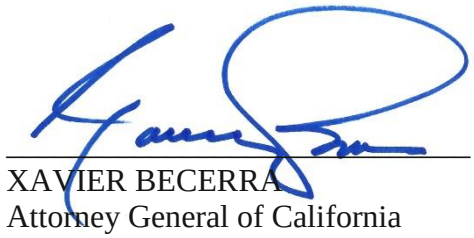
Access to public housing has been restricted to certain categories of non-citizens for decades, and within that restriction both Congress and the Department prorated assistance as a mechanism to serve two key core purposes: family preservation and mitigating the impact on elders. Eliminating proration now will undermine both purposes, and is contrary to law and arbitrary and capricious under the APA. The Rule will also cause homelessness, separate families,

impact children's access to education, and create administrative burdens on housing providers. If finalized, the Proposed Rule would cause significant, direct harm to our states and residents. We urge you to withdraw the Proposed Rule.

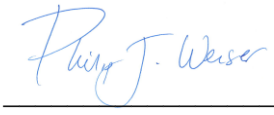
Sincerely,

LETITIA JAMES
Attorney General of New York

KARL A. RACINE
Attorney General for the District of Columbia



XAVIER BECERRA
Attorney General of California



PHIL WEISER
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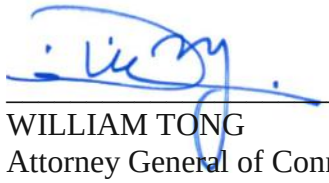

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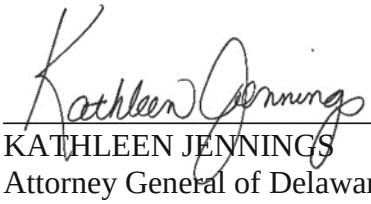
Attorney General of Connecticut



KATHLEEN JENNINGS
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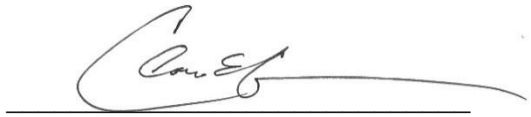

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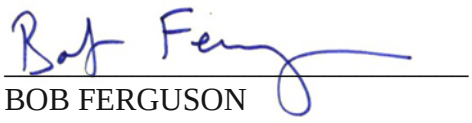

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