Center for Children's Advocacy

July 9, 2019

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Submitted electronically via www.regulations.gov
Office of General Counsel, Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

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

To Whom It May Concern,

We, the Center for Children's Advocacy (CCA), write to express our strong opposition to the notice of proposed rulemaking (NPRM) published by the Department of Housing and Urban Development (HUD) in the Federal Register on May 10, 2019: Docket No. FR–6124–P–01, RIN 2501–AD89, Housing and Community Development Act of 1980: Verification of Eligible Status. The Center for Children's Advocacy is a nonprofit law firm, established in 1997, that provides legal representation and advocacy for the poorest, most at-risk children and youth in Connecticut. At CCA, our Immigrant Children's Justice Project provides legal assistance to vulnerable immigrant children in the state of Connecticut, as they struggle to navigate the immigration system, assert their educational rights, and seek housing security. Many of our clients have experienced unimaginable trauma. Our work, in the legal trenches on behalf of the most vulnerable, vividly illustrates from the first-person perspective, what sociologists and psychologists already know: children's developmental success and long-term welfare crucially depend on access to familial stability and basic resources, such as housing security.

Children and parents should not have to choose between housing and each other. The proposed rule, if promulgated as outlined in the NPRM—excluding families of mixed immigration status from housing assistance, even though that assistance is prorated to limit the benefit to only those of eligible immigration status—would be devastating to the welfare and security of our clients, and of vulnerable American citizen children. The proposed rule runs contrary to the letter and spirit of the

law as outlined in statute, is inapposite under HUD's statutory grant of authority as it directly counters Congressional intent, and would arbitrarily and capriciously violate citizens' judicially-recognized interests in being united with their relatives.

I. *The Proposed Rule is Contrary to Statute*

In the NPRM, HUD purports that the proposed rule is necessary to bring HUD's regulations into conformity with the underlying statute, which limits housing assistance to those of eligible immigration status. HUD writes,

> The language of Section 214, however, contemplates that HUD assistance under a covered program will generally be contingent on verification of eligible immigration status. While Congress recognized that exceptions to this general verification requirement might be warranted in some cases, this statutory exception is narrowly tailored to individuals 62 years of age or older participating in Section 214 covered programs. In contrast, the "do not contend" provision of the regulation is more broadly applicable to all program participants. The proposed change will better conform HUD's regulations to the statutory language of Section 214.[1]

However, the statute clearly, and explicitly, states that HUD may provide prorated assistance to families with eligible members. In relevant part, the statute reads:

> 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."[2]

While HUD asserts that the statute assumes the eligible immigration status of all family members will be obtained in order for assistance to be granted on an ongoing basis, the actual language of the statute says otherwise. HUD might well believe Congress had something other than what it wrote in mind when Section 214 was codified, but in the words of Justice Antonin Scalia, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[3]

Moreover, Congress has consistently expressed over many years, and through multiple legislative sessions, that it is interested in prohibiting discrimination in housing broadly, including discrimination on the basis of family status and national origin. For instance, under the Federal Fair Housing Act, it is unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color,

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[1] Housing and Community Development Act of 1980: Verification of Eligible Status 84 Fed. Reg, 20591(proposed May 10, 2019) (to be codified at 24 C.F.R. §5).
[2] 42 U.S.C.A. § 1436a(a)(2)
[3] *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998)

religion, sex, familial status, or national origin."[4] It is also unlawful under the Fair Housing Act to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[5]

Indeed, according to educational materials currently available on HUD's own website,[6] and published by HUD itself, discrimination on the basis of immigration status is thereby prohibited under the Fair Housing Act. Promising that if "YOU REPORT IT: WE'LL INVESTIGATE IT!" HUD states, "The Federal Fair Housing Act makes it illegal for landlords, home sellers, mortgage companies and even homeowners associations to discriminate against persons in any housing related transaction based on their national origin or immigration status."[7]

Moreover, HUD is required by statute "to administer the programs and activities relating to housing and urban development in a manner *affirmatively* to further the policies" of the Federal Fair Housing Act (emphasis added).[8] HUD, then, is not only required to abide by the underlying statute, but to act in a manner that affirmatively advances the principles of anti-discrimination and family unity expressed in the Fair Housing Act.

II. *The Proposed Rule Lacks Reasoned Basis, is Contrary to Congressional Intent, and is Inapposite under HUD's Statutory Grant of Authority*

According to the Regulatory Impact Analysis (RIA), the only stated benefit of the proposed rule is that is that it would eliminate the provision of prorated assistance for mixed status families, which is provided for by statute, but which HUD believes does not reflect the intention of Section 214.[9] However, the Regulatory Impact Analysis found that unlike its limited benefits, the proposed rule risks many significant harms.

For instance, the RIA predicts that the NPRM would impose budgetary costs on HUD as high as $227 million, annually. The RIA further predicts that under the proposed rule, HUD would provide lower quality service, to fewer households, in order to meet this budgetary burden. Per the RIA, public housing would expect lower quality of "maintenance of the units and possibly deterioration of the units that could lead to vacancy."[10]

Moreover, displaced households (which the RIA predicts will result from causes including "fear of the family being separated,"[11] recognition that families "would probably suffer a worse outcome by trying

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[4] 42 U.S.C.A. § 3604
[5] *Id*.
[6] Department of Housing and Urban Development, "Did You Know? Housing Discrimination Against Immigrants or Because of a Person's National Origin Is Illegal!" *available at* https://www.hud.gov/sites/documents/Immigration_Status_Asian.pdf (Last accessed July 9, 2019)
[7] *Id*.
[8] 42 U.S.C.A. § 3608
[9] 6124-P-01 Housing and Community Development of 1980 Verification of Eligible Status RIA 5.8.19, 10
[10] *Id*. at 3
[11] *Id*. at 7

to adapt to the new rules than by leaving together,"[12] and on account of the eviction of families which will face homelessness "if they are unable to find alternative housing"[13]) are expected to bear up to $13 million in moving costs.

HUD's own data indicate that 71% of those living in mixed status households are eligible for assistance; 73% are children. HUD does not have the authority to create regulatory inefficiency in order to punish immigrants and their children.

III. *The Proposed Rule Arbitrarily and Capriciously Violates Citizens' Interests in Being United with Relatives*

The Supreme Court has recognized that American citizens have a protected interest in being united with certain foreign nationals, including, and especially, family members.

> We agree that a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. This Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals. See *Kerry v. Din,* 576 U.S. ——, ——, 135 S.Ct. 2128, —— , 192 L.Ed.2d 183 (2015) (plurality opinion); *id.,* at ——, 135 S.Ct., at 2139 (KENNEDY, J., concurring in judgment); *Kleindienst v. Mandel,* 408 U.S. 753, 762, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). Likewise, one of our prior stay orders in this litigation recognized that an American individual who has "a bona fide relationship with a particular person seeking to enter the country ... can legitimately claim concrete hardship if that person is excluded." *Trump v. IRAP,* 582 U.S., at ——, 137 S.Ct., at 2089.[14]

The NPRM represents an attack on this interest, posing those HUD serves with an impossible dilemma: abandon your ineligible family members, or lose your own housing assistance. One of our clients, a 16 year old boy who lives in Connecticut with his US Citizen grandparents, suffered from neglect and abandonment at the hands of his parents. He is also undocumented. He lives here, with his grandparents, because he had nowhere else to turn. His grandparents live in federally subsidized housing. HUD's proposal would require them to give up loving care of their grandson—a boy who has already experienced far too much cruelty—or risk homelessness without HUD's assistance. As those who, like our client, are ineligible for assistance are already excluded from receiving benefits under the current regulations, the NPRM, if promulgated, would constitute arbitrary and capricious agency action.

Sincerely,

Patricia Marealle and Kathryn Pogin
On behalf of the Center for Children's Advocacy
Immigrant Children's Justice Project

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[12] *Id*. at 9
[13] *Id*. at 16
[14] *Trump v. Hawaii,* 138 S. Ct. 2392 (2018)