

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

LATINOJUSTICE PRLDEF,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN
DEVELOPMENT,

Defendant.

Civil Action No. 1:20-cv-4859

COMPLAINT

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, seeking to compel the United States Department of Housing and Urban Development (“HUD”) to immediately respond to a request and disclose records under the Freedom of Information Act concerning HUD’s 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), amending Section 214 of the Housing and Community Development Act of 1980, 42 U.S.C. § 1436a (the “Proposed Rule”). This information is subject to disclosure and critical to understand the disproportionate impact that the Proposed Rule will have on communities of color, in particular the Latino community, as well as families with U.S. citizen children and immigrant parents.

2. Currently, families are eligible to receive federal rental assistance from HUD if at least one member of a household has eligible immigration status. When the eligibility of at least one family member is established, the household’s subsidy is prorated to account only for members eligible for rental assistance. Family members without an eligible immigration status (including,

but not limited to, individuals who have a legal right to be present in the United States, such as on a student visa or an employment visa) can live in a household, but do not receive a federal subsidy.

3. Accordingly, families with (i) eligible U.S. citizens or members with eligible immigration status and (ii) members without such status meet the eligibility requirements for receiving prorated financial assistance (hereinafter, a “mixed status family”).

4. On May 10, 2019, HUD published the Proposed Rule, which would exclude mixed status households from receiving federal rental assistance. Under the Proposed Rule, any household whose leaseholder is not an eligible immigrant will not receive any financial rental assistance—regardless of the proration of rent or presence of eligible U.S. citizens or immigrants in the household. Further, the Proposed Rule would require families applying to or currently receiving financial rental assistance to verify the immigration status of each household member. Households containing family members without eligible status will be forced to either have non-eligible family members move out (thus threatening familial integrity) or face having their entire household’s assistance terminated (thus facing near certain homelessness).

5. Under the Fair Housing Act (the “FHA”), HUD has an obligation to ensure that its programs and activities affirmatively further fair housing, including ensuring that their conduct does not have disparate impact on a group of persons on the basis of race, color, national origin, or family status. 42 U.S.C. § 3608(d), (e)(5); *see also Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (“[D]isparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language.”).

6. The Proposed Rule has a clear discriminatory effect on the basis of race/national origin and familial status in violation of HUD’s duty to affirmatively further the policies of the

FHA and would therefore “not [be] in accordance with law” under the Administrative Procedure Act (the “APA”). 5 U.S.C. § 706(2)(A).

7. In order to learn the actual impact of HUD’s proposed rule which appears to be contrary to law and in stark opposition to familial integrity constitutional protections, a request to HUD for records concerning the Proposed Rule was submitted on February 10, 2020, (the “FOIA Request”) by LatinoJustice PRLDEF (“LatinoJustice”).

8. Currently, the Proposed Rule is expected to be finalized as early as July 1, 2020 and will take effect 60 days later.

9. Despite the imminent finalization of the Proposed Rule which threatens the integrity of the family unit (a fundamental due process right), Defendant HUD has failed to provide a determination within the statutory timeframe mandated by law. As a result, the Proposed Rule which will have a devastating, permanent, and unnecessary impact on communities of color and U.S. citizen children will be allowed to go into effect without a transparent examination of the factors considered by the agency.

10. LatinoJustice files this action to compel Defendant HUD to respond to the FOIA Request.

JURISDICTION AND VENUE

11. This Court has subject-matter jurisdiction pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i), (a)(6)(E)(iii) and 28 U.S.C. § 1331.

12. This Court has jurisdiction to grant declaratory and further proper relief pursuant to 28 U.S.C §§ 2201-2202 and the Federal Rules of Civil Procedure 57 and 65.

13. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because LatinoJustice has its principal place of business within the Southern District of New York.

PARTIES

14. Plaintiff LatinoJustice is a nonprofit organization incorporated under section 501(c)(3) of the Internal Revenue Code, headquartered at 475 Riverside Drive, Suite 1901, New York, NY 10115. LatinoJustice is a New York-based national civil rights organization that uses and challenges the rule of law to secure transformative, equitable, and accessible justice.

15. Defendant HUD is an agency of the United States government and an agency within the meaning of 5 U.S.C. § 552(f). HUD is the Federal agency responsible for national policy and programs that address America's housing needs, that improve and develop the nation's communities, and enforce fair housing laws. HUD is responsible for helping create a decent home and suitable living environment for all Americans, and giving a strong national voice to America's low-income housing communities at the Cabinet level.

16. Defendant has custody and control over the records that Plaintiff seeks to make publicly available under 5 U.S.C § 552(a)(3)(A).

FACTUAL ALLEGATIONS

I. Background

a. History of Section 214 of the Housing and Community Development Act

17. In the 1980s, Congress, for the first time, limited assistance under federal housing programs to certain categories of eligible immigrants in Section 214 of the Housing and Community Development Act (the "Act"). However, Congress (and the courts) ultimately voided efforts to deem mixed-status families ineligible for housing assistance.¹

¹ See, e.g., Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1153 (1983); 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

18. In 1994, HUD proposed a rule to finally implement Section 214. *See* Restrictions on Assistance to Noncitizens, 59 Fed. Reg. 43,900, 43,901 (Aug. 25, 1994). This rule was finalized in March 1995 and expressly mandated prorated assistance to mixed-status families. Restrictions on Assistance to Noncitizens, 60 Fed. Reg. 14,816, 14,817 (Mar. 20, 1995). As HUD explained, “[p]roration of assistance is consistent with the preservation of Families [sic] provisions of Section 214.” *Id.* at 14,822.

19. Thereafter, in 1996, Congress added language to Section 214 that made clear that where “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, any financial assistance made available to that family... shall be prorated.” 42 U.S.C. § 1436a(b)(2).

20. Further, Congress expressly sought to avoid disrupting the family unit by excepting mixed-status families from the category of households that could lose their eligibility of financial assistance if it was determined that an individual within that household allowed an ineligible individual to reside with them: “The applicable Secretary shall terminate the eligibility for financial assistance of an individual and the members of the household of the individual . . . upon determining that such individual has knowingly permitted another individual who is not eligible for such assistance to reside in the public or assisted housing unit of the individual. **This provision shall not apply to a family if the ineligibility of the individual at issue was considered in calculating any proration of assistance provided for the family.**” 42 U.S.C. § 1436a(d)(6) (emphasis added).

21. This language remains in Section 214(b) to this day.

Assisted Housing, 51 Fed. Reg. 42,088 (Nov. 21, 1986) (delaying the effective date of the rule until at least October 31, 1987); Memorandum and Order, *Yolano-Donnelly Tenant Ass’n v. Pierce*, No. S-86-0846 MLS (E.D. Cal., July 15, 1986) (finding, *inter alia*, that plaintiffs raised serious questions on the merits of their claim that the rule violated their Fifth Amendment right to due process because it denied the right to cohabit with their families).

22. An interim rule published in November 1996 continued the practice of prorated assistance, “requir[ing] that continued financial assistance be 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 described in Section 214.” Revised Restrictions on Assistance to Noncitizens, 61 Fed. Reg. 60,535, 60,536 (Nov. 29, 1996).

23. Despite having opportunities to change its mandate to HUD that mixed-status families are entitled to assistance, Congress has repeatedly chosen not to do so.

b. The Proposed Rule

24. On May 10, 2019, HUD published the Proposed Rule. A copy of the Proposed Rule is attached as Exhibit A.

25. The Proposed Rule aims to make two changes to Section 214. First, it would “require the verification of the eligible immigration status of all recipients of [housing] assistance.” Second, it would require “that individuals who are not in eligible immigration status may not serve as a leaseholder, even as part of a mixed family whose assistance is prorated based on the percentage of members with eligible status.” Ex. A at 1.

26. As a result of these two changes, the Proposed Rule will make “prorated assistance a temporary condition pending verification of eligible status, as opposed to under the current regulation where it could continue indefinitely.” *Id.* As such, households that do not consist exclusively of eligible members (*i.e.*, mixed-status families) will no longer be eligible to receive housing assistance.

27. Consequently, the Proposed Rule cruelly forces mixed-status families to choose between staying together as a familial unit and losing critical housing assistance (risking homelessness) or separating in order to allow eligible family members to maintain their housing assistance.

28. The Proposed Rule is currently expected to be finalized in July 2020.

c. Impact of the Proposed Rule

29. According to HUD's own admission, the Proposed Rule will impact approximately 108,000 individuals residing in mixed-status family households.² This includes approximately 55,000 U.S. citizen children who would otherwise be entitled to housing assistance. Within New York City alone, the Proposed Rule threatens to render 11,400 individuals, including approximately 5,000 children, homeless.³

30. Of these 108,000 individuals living in mixed-status families projected to be impacted, HUD acknowledges that approximately 70% are households with eligible children and ineligible parents.⁴ Therefore, most families who will be impacted face the prospect of one or both parents being forced to leave the family home.

31. Further, statistical analysis indicates that the percentage of children who would lose benefits under the Proposed Rule is *double* that of the adults who would lose subsidies.⁵

² See Federal Data Summary School Years 2014-2015 to 2016-2017, NAT'L CENTER FOR HOMELESS EDUC. (February 2019) <https://nche.ed.gov/wp-content/uploads/2019/02/Federal-Data-Summary-SY-14.15-to-16.17-Final-Published-2.12.19.pdf>; 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).

³ Impact Numbers for NYCHA/HPD cited by NYCHA to counsel on 5/16/2019, does not include State HCR-administered vouchers.

⁴ HUD, Regulatory Impact Analysis, *Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No. FR-6124-P-01, at 8 (Apr. 15, 2019).

⁵ See *State of California Office of the Attorney General Comment*; Xavier Becerra, *Comments on Proposed Rule: Docket No. FR-6124-P-01* at 48, (July 9, 2019), available at <https://www.regulations.gov/document?D=HUD-2019-0044-10795>.

32. The Proposed Rule also disproportionately threatens the housing assistance of people of color, and especially individuals who are Latino. Of the 108,000 individuals that will be affected by the Proposed Rule, approximately 95% are people of color, including 85% of who are Latino.⁶

33. The disparate impact on the Latino community is staggering – the percentage of Latino individuals who will lose benefits is *26 times greater* than the percentage of non-Latino persons who would lose subsidies under the Proposed Rule.⁷

34. Further, the Proposed Rule threatens households beyond mixed-status families. Because of the Proposed Rule's verification requirement, the housing security of over 9 million assisted U.S. citizens, who may not have the documents needed to verify citizenship and are unable to retrieve them within the time required, is threatened.⁸

35. As such, the Proposed Rule disproportionately threatens the housing of U.S. citizens who are people of color. According to a NYU Brennan Center for Justice study, 25% of African American citizens lack government issued photo identification, as well as 16% of Hispanic citizens – in comparison to 8% of White citizens.⁹

⁶ See Alicia Mazzara, *Demographic Data Highlight Potential Harm of New Trump Proposal to Restrict Housing Assistance*, CENTER ON BUDGET AND POLICY PRIORITIES (July 1, 2019), <https://www.cbpp.org/research/housing/demographic-data-highlight-potential-harm-of-new-trump-proposal-to-restrict-housing>.

⁷ See *State of California Office of the Attorney General Comment*; Xavier Becerra, *Comments on Proposed Rule: Docket No. FR-6124-P-01* at 49, (July 9, 2019), available at <https://www.regulations.gov/document?D=HUD-2019-0044-10795>.

⁸ See *ACLU Comment*; Douglas Rice, *Trump Proposal Would Jeopardize Rental Aid for Many U.S. Citizens*, Center for Budget and Policy Priorities, (June 18, 2019), available at <https://www.cbpp.org/blog/trump-proposal-would-jeopardize-rental-aid-for-many-us-citizens>.

⁹ See *New York State Office for the Prevention of Domestic Violence Comment*; Gwen Wright, *Comments in Response to Department of Housing and Urban Development's Notice of Proposed Rulemaking*, (July 9, 2019), available at <https://www.regulations.gov/document?D=HUD-2019-0044-9329>; *State of California Office of the Attorney General Comment*; Xavier Becerra, *Comments on Proposed Rule: Docket No. FR-6124-P-01* at 49, (July 9, 2019), available at <https://www.regulations.gov/document?D=HUD-2019-0044-10795>.

36. Likewise, the Proposed Rule threatens the housing of all individuals that have obtained a U-Visa. Recipients of a U-Visa are victims of qualifying criminal activity that are helpful to law enforcement to bring the perpetrator of the crime to justice. These individuals are ineligible for federal benefits, and would be unable to live in federally subsidized housing. From 2012-2018, petitioners for U-Visas were overwhelmingly Latino individuals, comprising of at least 87% of all petitioners.¹⁰

37. HUD fails to show any legitimate interest for this decision as their own projections reveal that the Proposed Rule will likely reduce the quality and quantity of assisted housing in response to higher costs from the “replacement households” for mixed-status family households.¹¹

II. The FOIA Request

38. On February 10, 2020, LatinoJustice submitted its FOIA Request by U.S. certified mail to the Freedom of Information Act Office of the United States Department of Housing and Development. A copy of the Request is attached as Exhibit B.

39. The FOIA Request requests HUD provide records and communications relating, *inter alia*, to: 1) demographic and other data and information (including data generated by the White House) that HUD reviewed and/or relied upon in creation of the Proposed Rule, 2) HUD’s termination of tenancy of mixed-status households, and 3) HUD’s policy or practice of sharing information on mixed-status households with federal, state and local agencies.

40. LatinoJustice requested expedited processing pursuant to 24 C.F.R. § 15.105(b) because “[t]he imminent ratification of the Proposed Rule threatens the integrity of the family unit—long recognized as a fundamental due process right, *see Moore v. City of East Cleveland*,

¹⁰ https://www.uscis.gov/sites/default/files/USCIS/statistics/U_Visa_Report_-_Demographics.pdf

¹¹ *See* Regulatory Impact Analysis, *Housing and Community Development Act of 1980: Verification of Eligible Status*, Proposed Rule Docket No: FR-6124-P-01, HUD, 3 (Apr. 15, 2019).

431 U.S. 494, 503 (1977)—as mixed-status families will face the possibility of asking an ineligible member to leave an assisted household.” Ex. B at 3. Accordingly, the “failure to obtain the requested records on an expedited basis could reasonably be expected to pose... a threatened loss of a substantial due process right.” *Id.*

41. In a letter dated February 21, 2020, HUD acknowledged that it had received the FOIA Request, determined that unusual circumstances existed, purported to “extend the time limit to respond beyond the ten additional days provided by the statute,” and assigned the FOIA Request to HUD’s “complex track.” HUD granted LatinoJustice’s request for expedited processing, determining that the FOIA request was in response to a “compelling need.” A copy of the letter is attached as Exhibit C.

42. In a letter dated March 30, 2020, more than one month after HUD’s determination that the FOIA Request was eligible for expedited processing, HUD reversed its determination. This belated reversal occurred outside of statutory period (10 days after the date of the request) by which an agency must provide notice of a determination. 5 U.S.C. § 552(a)(6)(E)(ii)(I). A copy of the letter is attached as Exhibit D.

43. On March 12, 2020, LatinoJustice called HUD, leaving a voicemail message seeking a status update on the request and asking how best to assist HUD in retrieving the records sought.

44. By email dated March 19, 2020, LatinoJustice again inquired about the status of the FOIA Request and sought a response by March 24.

45. By email dated March 24, 2020, HUD informed LatinoJustice that the FOIA Request was “still being processed . . . [that] the search can take between 3 – 6 months to process

. . . [and that there is] no timeline on when information [sought] will be available.” A copy of these emails is attached hereto as Exhibit E.

46. By email dated April 28, 2020, HUD provided an interim response (the “Interim Response”), which did not include an appealable final determination. A copy of the Interim Response is attached as Exhibit F.

47. The Interim Response only provided a partial response to item 4 of the FOIA Request, indicating that “[t]he remaining items of your request is still being processed by the appropriate offices.” *See* Ex. F.

48. Implausibly, the Interim Response provided only a 29-page record for release. Of the 29 pages, 26 were withheld in the entirety, or almost in the entirety, based upon the “deliberative privilege” pursuant to 5 USC § 552(a)(8)(b)(5). A copy of the redacted record is attached as Exhibit G.

49. The Interim Response also provided that item 5 of the FOIA Request required responses to be obtained from a third-party vendor with which HUD contracts to maintain its eDiscovery tool. HUD indicated that it does not maintain control over the contractor’s collection process and that the contractor is operating with significant backlogs, but will respond to the request when its collection and review process are completed. *See* Ex. F.

50. To date, HUD has failed to conduct an adequate search and have unlawfully withheld responsive records to items 1 - 7 of the FOIA Request.

51. To date, HUD has failed to provide a final determination to the FOIA Request.

52. HUD has violated the applicable statutory time limit for processing of FOIA requests. Under 5 U.S.C. § 552(a)(6)(A) and (B), HUD was required to make a determination on

the FOIA Request within thirty business days. Therefore, HUD's response to the FOIA Request was due by April 3, 2020.

53. Because Defendant has failed to provide a final determination to the FOIA Request within the applicable statutory period, any administrative remedies are deemed exhausted. 5 U.S.C. § 552(a)(6)(C)(i).

CLAIM FOR RELIEF

FIRST CAUSE OF ACTION

Violation of the Freedom of Information Act, 5 U.S.C. § 552: Denial of Expedited Processing

54. Plaintiff realleges paragraphs 1 through 53 as if fully set forth herein.

55. Defendant is obligated under 5 U.S.C. § 552(a)(6)(E)(ii)(I) to make a determination of whether a FOIA request is entitled to expedited processing within 10 days after the date of the request.

56. While Defendant granted expedited processing to the FOIA Request on February 21, 2020, Defendant reversed its determination on March 30, 2020 (*i.e.*, 49 days after the FOIA Request), effectively invalidating its February 21, 2020 determination.

57. Defendant's denial of expedited processing 49 days after the submission of the FOIA Request violated 5 U.S.C. § 552(a)(6)(E)(ii)(I).

58. Notwithstanding Defendant's failure to make a timely determination as to expedited processing of the FOIA Request, Defendant is required to grant requests for expedited processing where the request involves the loss of substantial due process rights. 5 U.S.C. § 552 (a)(6)(E)(iii); 24 CFR § 15.104(c)(1)(iii).

59. The Proposed Rule threatens the integrity of the family unit—long recognized as a fundamental due process right, *see Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)—

as mixed-status families will face the possibility of asking an ineligible member to leave an assisted household.

60. Accordingly, Defendant violated 5 U.S.C. § 552 (a)(6)(E)(iii) and 24 CFR § 15.104(c)(1)(iii) by denying expedited processing of the FOIA Request and by its untimely adverse determination on the request for expedited process.

SECOND CAUSE OF ACTION
Violation of the Freedom of Information Act, 5 U.S.C. § 552:
Failure to Disclose Responsive Records

61. Plaintiff realleges paragraphs 1 through 53 as if fully set forth herein.

62. Defendant is obligated under 5 U.S.C. § 552(a)(3) to promptly produce all records responsive to Plaintiffs' FOIA Request.

63. Plaintiff has a legal right to obtain such records, and no legal basis exists for Defendant's failure to disclose them.

64. Defendant's failure to disclose all responsive records within the statutory timeframe violates 5 U.S.C. § 552 (a)(3)(A) and 5 U.S.C. § 552(a)(6)(A)(i).

65. Because of these failures to comply with FOIA's response deadlines, and because exceptional circumstances do not exist, HUD may not assess any search fees. 5 U.S.C. § 552(a)(6)(C)(i).

THIRD CAUSE OF ACTION
Violation of the Freedom of Information Act, 5 U.S.C. § 552:
Failure to Adequately Search for Responsive Records

66. Plaintiff realleges paragraphs 1 through 53 as if fully set forth herein.

67. Defendant is obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to the FOIA Request.

68. Plaintiff has a legal right to obtain such records, and no legal basis exists for failure to search for them.

69. Defendant's failure to conduct a reasonable search for records responsive to the FOIA Request violates 5 U.S.C. § 552(a)(3).

PRAYER FOR RELIEF

For the foregoing reasons, LatinoJustice respectfully requests that judgment be entered in their favor against Defendant, and that the Court:

70. Order Defendant to grant expedited processing of the FOIA Request;

71. Order Defendant and any of its departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendant to conduct a reasonable search for all records responsive to the FOIA Request;

72. Enjoin and order the Defendant and any of its departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendant from improperly withholding records or portions of records responsive to the FOIA Request and order them to promptly produce the same;

73. Enjoin Defendant from charging LatinoJustice fees for the processing of the FOIA Request;

74. Award LatinoJustice reasonable attorney's fees and costs; and

75. Grant such other relief as the Court may deem just and proper.

June 24, 2020

Respectfully Submitted,

By: /s/ Jeffrey L. Kessler

Jeffrey L. Kessler
Jeffrey J. Amato

Kerry C. Donovan
Mohammad B. Pathan
Jay Wexler
WINSTON & STRAWN, LLP
200 Park Avenue
New York, New York 10166
Tel: (212) 294-6700
Fax: (212) 294-4700
jkessler@winston.com
jamato@winston.com
kcdonovan@winston.com
mpathan@winston.com
jwexler@winston.com

By: */s/ Francisca Fajana*

Francisca Fajana
Natasha Bannan
LATINOJUSTICE PRLDEF
475 Riverside Drive, Suite 1901
New York, New York 10115
Tel: (212) 219-3360
ffajana@latinojustice.org
nbannan@latinojustice.org

Counsel for Plaintiff