22-1660

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE REYES, *ET AL.*,
Plaintiffs-Appellants
v.
WAPLES MOBILE HOME PARK LTD., *ET AL.*,
Defendants-Appellees,

Appeal from the United States District Court for the Eastern District of Virginia,
No. 1:16-cv-00563, Judge Liam O'Grady

BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS' REQUEST FOR REVERSAL

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INTEREST OF AMICI CURIAE

Amici are national organizations devoted to ensuring that all individuals, regardless of immigration status, have access to safe and affordable housing and homelessness assistance services.[1] Collectively, they share a strong and unique interest in ensuring that immigrants do not face unnecessary, unlawful, and discriminatory barriers to securing housing.

This case is particularly important to Amici because of the millions of undocumented and mixed-status families who live in rental housing. The trial court's decision could invite various forms of troubling and illegal conduct by rental property owners. As national organizations who work on federal housing and immigration policy, Amici can show how the lower court's decision runs contrary to a complex federal scheme enacted to allow many housing and homelessness assistance

[1] No party's counsel authored any part of this brief, and no party or party's counsel, other than *amicus*, its members, or its counsel made any monetary contribution intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4)(E).

programs to operate without collecting information regarding immigration status. Amici can also show how there are other programs that permit mixed-status families to live together in federally assisted housing or receive other federal assistance, without requiring every person in the home to establish an eligible immigration status. Amici will illustrate the perverse result – potentially millions of undocumented individuals and mixed-status households threatened with eviction and homelessness – if property owners are actually at serious risk of violating the anti-harboring statute, simply for not interrogating the immigration status of every member of a household.

Founded in 1989, the **National Homelessness Law Center**[2] (the "Law Center") is a national legal organization with the mission to prevent and end homelessness. The Law Center believes that the human rights to housing, food, and education lie at the heart of human dignity, regardless of national origin or immigration status. Through policy advocacy, public education, and impact litigation, the Law Center's programs address legal and policy questions affecting homeless

[2] The Law Center was formerly known as the National Law Center on Homelessness & Poverty.

people and the root causes of homelessness, and advance the immediate and long-term needs of those who are homeless or at risk of becoming homeless. The Law Center provided extensive comments on proposed revisions to the Department of Housing & Urban Development's proposed "mixed-status rule." Insights derived from that experience and others will assist this Court in understanding the discriminatory, illegal, and counterproductive nature of a ruling that would require showing proof of immigration status prior to a landlord renting a home.

The **National Immigrant Law Center** ("NILC") is a national organization dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. NILC focuses on issues that affect immigrant communities' well-being and economic security, including housing rights and benefits.

The **National Low Income Housing Coalition** ("NLIHC") is a national non-profit membership-based organization with over 1,000 organizational members across the United States, including housing developers and landlords, public housing agencies, state and local government bodies, nonprofit organizations, and individuals. NLIHC advocates to preserve and increase the supply of federal affordable

housing, protect low-income renters, promote equitable access to affordable housing, and for the rights of mixed-status families in federally assisted housing. In May 2019, in response to a proposed rule to prevent mixed-status families from living together in HUD assisted housing, NLIHC worked with the National Housing Law Project to create the Keep Families Together campaign to oppose the rule.

The **National Housing Law Project** ("NHLP") is a nonprofit organization that advances housing justice for poor people and communities, through technical assistance and training, policy advocacy, and litigation. NHLP works to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of affordable homes. NHLP also coordinates the Housing Justice Network, a collection of over 1,400 legal aid attorneys, advocates, and organizers who advance model policies and litigation that protect tenants and their housing. In response to the now rescinded HUD mixed-status rule, NHLP co-led the Keep Families Together campaign with NLIHC. NHLP continues to advise state and local governments, property owners, attorneys, and

social service providers on the rights of immigrants to access federally housing and homeless prevention programs.

SUMMARY OF ARGUMENT

There are millions of undocumented and mixed-status families in the United States. Many are low-income and live in rental housing. The trial court's decision could have a disastrous impact on undocumented and mixed status families. Allowing such a brazenly discriminatory policy to stand will greenlight not only the refusal of landlords to rent to households based upon their actual or perceived immigration status, but it could invite a host of other illegal behaviors by property owners. The trial court's decision also runs contrary to a complex framework the United States Congress and federal agencies have created to allow households to secure housing assistance and other public benefits without proof of eligible immigration status, and in some cases, to permit mixed-status families to live together in federally assisted housing and access other assistance. This scheme does not force every person in the home to prove that they have eligible immigration status or permit discrimination on the basis of national origin or race. This balanced approach signals that housing providers are not expected to

actively interrogate the immigration status of every household member. Federal law does not require that private landlords inquire about or require their tenants to establish their citizenship or immigration status. To allow a court to construct such a requirement and allow that faulty interpretation to shield allegations of discrimination would be extremely harmful to the millions of undocumented immigrants and mixed status families.

ARGUMENT

I. AFFIRMING THE TRIAL COURT'S RULING COULD HAVE A DISASTROUS IMPACT ON THE HOUSING STABILITY OF UNDOCUMENTED AND MIXED-STATUS HOUSEHOLDS.

There are approximately 11 million undocumented persons in the United States.[3] Millions of U.S. citizens also live with at least one person who is undocumented.[4] More than 10.5 million U.S. citizens,

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[3] Migration Policy Institute, Profile of the Unauthorized Population: United States, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited Sept. 9, 2022).

[4] Fact Sheet: Immigrants in the United States, American Immigration Council, https://www.americanimmigrationcouncil.org/research/immigrants-in-the-united-states (last visited Sept. 9, 2022).

adults and children, live with undocumented immigrants.[5] Indeed, more than 22 million people in the U.S. live in mixed-status households, where at least one undocumented person lives with U.S. citizens, green card holders, or lawful temporary immigrants. *Id.* About 5.8 million U.S. citizen children live with undocumented household members, with 4.9 million of these children having at least one undocumented parent. *Id.* Nearly 1.7 million U.S. citizens have a spouse who is undocumented. *Id.* Households headed by undocumented immigrants paid an estimated $18.9 billion in federal taxes and $11.7 billion in combined state and local taxes in 2019.[6]

Immigrants often face barriers to homeownership, including lending discrimination, which may mean they are more likely to rent their homes.[7] Immigrant households without legal status already

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[5] FWD.us, *Immigration Reform Can Keep Millions of Mixed Status Families Together,* https://www.fwd.us/news/mixed-status-families/ (last visited Sept. 9, 2022).

[6] Fact Sheet: Immigrants in the United States, American Immigration Council, *supra* note 4.

[7] Charu A. Chandrasekhar, Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities, 39 Harv. C.R.-C.L. L. Rev. 169, 182–91 (2004) (discussing mortgage lending discrimination faced by immigrants and variations among immigrants in the U.S. based on citizenship status, length of residence, and country of origin).

struggle to find housing in the formal market.[8] According to a study on immigrants' housing conditions in New York City, immigrants are more likely to pay higher portions of their income for rent than native-born tenants and more likely to live in overcrowded, illegal, and substandard conditions.[9] Already vulnerable in the rental market, validating the "show me your papers" policy of the appellees will only encourage other owners to refuse to rent to or threaten to evict households based upon their actual or perceived immigration status or to engage in other unlawful conduct, such as retaliation or sexual harassment, under threat that the tenant's immigration status might be revealed if they complain.[10] Such policies will then force undocumented immigrants and mixed-status families further into the shadows and into housing that is uninhabitable and unsafe.[11]

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[8] Mekonnen Firew Ayano, *Tenants Without Rights: Situating The Experiences of Immigrants in the U.S. Low Income Housing Market*, 28 Geo. J. on Poverty L. & Pol'y., 159, 180-81 (2021).
[9] Pratt Center for Community Development and New York Immigrant Housing Collaborative, *Confronting the Housing Squeeze: Challenges Facing Immigrants Tenants and What New York Can Do,* 3, 14 (2008).
[10] Mexican American Legal Defense and Education Fund, *Civil Rights Organization Sues Landlord For Calling Ice on Tenant,* (Sept. 2, 2021), https://www.maldef.org/2021/09/civil-rights-organization-sues-landlord-for-calling-ice-on-tenant/; Ayano, *supra* note 8 at 191.
[11] Ayano, *supra* note 8 at 161.

II. IMMIGRANTS WITHOUT PROOF OF STATUS MAY PARTICIPATE IN A VARIETY OF FEDERAL HOUSING, HOMELESS SERVICES, AND OTHER ASSISTANCE PROGRAMS.

Households in need of federally assisted housing or emergency assistance are not categorically excluded from federal programs due to their immigration status. Indeed, a wide variety of federally funded housing and emergency programs that impose no immigration restrictions.

For example, since its creation in the late 1980s, the Low Income Housing Tax Credit (LIHTC) program has become the largest form of federally assisted rental housing in the United States, creating more than 3.6 million units.[12] It is administered by the United States Department of the Treasury ("The Treasury"). *See* 26 U.S.C. § 42(m)(1)(B)(ii)(2021). The LIHTC program provides rent-restricted units to low-income families who meet the income limits for the project.

[12] Housing Credit Program FAQs, National Council of State Housing Agencies, (March 1, 2022), https://www.ncsha.org/resource/the-housing-credit-program-faq/.

26 U.S.C. § 42(i)(3)(A)(ii). The Treasury has imposed no immigration restrictions as a condition of eligibility for LIHTC housing.[13]

HUD administers several housing and emergency assistance programs which have no immigration eligibility restrictions on prospective tenants and beneficiaries, including:

- The Section 811 Supportive Housing for Persons with Disabilities program funds nonprofit organizations to provide permanent supportive housing for 28,000 low-income, disabled households.[14] 42 U.S.C. § 8013; *see* 24 C.F.R. §§ 891.105, 891.410(c), 891.305 (defining eligible households).
- The Section 221(d)(3) Below-Market-Interest-Rate (BMIR) program, which financed hundreds of thousands affordable housing units by providing subsidized financing to private developers of rental housing for low-income families. 12

[13] Maggie McCarty and Abigail F. Kolker, Cong. Rsch. Serv., R46462, , CRS Noncitizen Eligibility for Federal Housing Programs (2020), https://sgp.fas.org/crs/misc/R46462.pdf.
[14] National Low Income Housing Coalition, 2022 Advocates' Guide to Housing and Community Development Policy, 4-78 (2022).

U.S.C. § 1715l(d)(3); *see* 12 U.S.C. § 1715l(d)(3)(iii) (defining eligible families).

- The Housing Opportunities for Persons with AIDS (HOPWA) program provides federal funds to address the housing needs of low-income people who have Acquired Immunodeficiency Syndrome (AIDS) or are HIV-positive, and their families. *See* 24 C.F.R. § 574.3 (2018) (defining eligible persons). The program serves over 100,000 households annually.[15]
- The Indian Housing Block Grant (IHBG) program authorizes housing assistance under a single block grant to eligible Indian Tribes or their tribally designated housing entities. 25 U.S.C. § 4111(a); *see* 25 U.S.C. § 4137(b) (defining eligible tenants).
- The federal government provides formula grants through the Community Development Block Grant program (CDBG), which many states and local governments use to fund various housing activities, including housing programs to

[15] *Id.*, 4-85.

directly benefit low-income households. 42 U.S.C. §§ 5301–5320; 24 C.F.R. § 570.208(a).

The U.S. Department of Agriculture ("USDA") also administers housing programs serving rural communities, a number of which have no immigration restrictions for eligibility. The largest of these programs is the Section 515 rural rental housing loan program[16] which has created over 533,000 affordable housing units.[17] 7 C.F.R. § 3560.152 (definition of eligible tenants).

For the anti-harboring statute to reach as far as the trial court surmised—applying generally to any landlord that rents a household without inquiring about its members' immigration status, including to housing and homeless assistance providers who are not otherwise

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[16] RD attempted to restrict residency to citizens or "qualified" noncitizens when it adopted regulations in 2005. 7 C.F.R. § 3560.152(a)(1). However, implementation of this provision has been indefinitely delayed and is not being enforced by RD until further notice. 7 C.F.R. § 3560.152 note; 70 Fed. Reg. 8503-01 (Feb. 22, 2005). In addition, if a 515 household receives 521 Rental Assistance, Sec. 214 applies and the rent should be prorated. Section III.A.2, *infra*.

[17] Housing Assistance Council Rural Research Brief: "Rural America is Losing Affordable Rental Housing At An Alarming Rate" (March 2, 2022), available at https://ruralhome.org/wp-content/uploads/2022/03/rural_research_brief_usda_rural_rental_housing.pdf.

required to screen for immigration status—is inconceivable, especially without these landlords being advised of such a serious potential penalty. The trial court's analysis is especially concerning in light of the number of assisted households served by these federal programs as well as the array of entities responsible for administering and/or operating them – from state and local governments to nonprofit and for-profit owners. *See* Attorney General Order No. 2353-2001,66 Fed. Reg. 3616 (Jan. 16, 2001) ("benefit providers who satisfy the requirements of this Order are not required to verify the citizenship, nationality or immigrations status of applicants seeking benefits."). More importantly, that these families may be eligible for these programs regardless of immigration status further confirms that Congress did not, through the anti-harboring statute, intend to carve out an exception from disparate impact protections whenever a landlord is renting to immigrant families. *Reyes v. Waples Mobile Home Park, Ltd.,* 903 F.3d 415, 431-32 (4th Cir. 2018) ("In the absence of a specific exemption from liability for exclusionary practices aimed at illegal immigrants, we must infer that Congress intended to permit disparate-impact liability for policies

aimed at illegal immigrants when the policy disparately impacts a protected class.").

III. HOUSING, HOMELESS, AND EMERGENCY ASSISTANCE PROGRAMS THAT DO HAVE IMMIGRANT ELIGIBILITY REQUIREMENTS STILL PROVIDE OPPORTUNITIES FOR MIXED-STATUS FAMILIES TO REMAIN TOGETHER.

Even when there are immigration status requirements on the receipt of housing or other emergency assistance, Congress has authorized a balanced approach, understanding the vital importance of housing stability and family cohesion among mixed-status households. Immigration status requirements for these programs are governed by two federal laws, Section 214 of the Housing and Community Development Act of 1980 ("Section 214") and the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). 42 U.S.C. § 1436a; 8 U.S.C. § 1611(a). Even these laws permit mixed-status families to live together in federally assisted housing or impose no restrictions on program access regardless of a person's status.

A. For Nearly the Last 30 Years, Congress has Permitted Mixed-Status Families to Live in Federally Assisted Housing Subject to Section 214.

Section 214 limits federal financial assistance to individuals who are U.S. citizens or who have another eligible status, including lawful permanent residents, VAWA self-petitioners, refugees, asylees, trafficking survivors, parolees, persons granted withholding of removal, or citizens of a Freely Associated State (FAS) living in the United States.[18]

Section 214 provides an exclusive list of federal housing programs subject to its requirements. In the HUD programs, public housing, all programs under Section 8 of the Housing Act of 1937 (including project-based Section 8, project-based vouchers, and tenant-based Section 8 vouchers), Section 235 homeownership, Section 236, HODAG housing, and Rent Supplement are subject to Section 214. 42 U.S.C. § 1436a(b).

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[18] 42 U.S.C. § 1436a (a) (1), (2), (3), (4), (5), (6), (7); Memorandum from Tonya Robinson, Acting General Counsel, to Julian Castro, Secretary, Subject: "Eligibility of Battered Noncitizen Self-Petitioners for Financial Assistance under Section 214 of the Housing and Community Development Act of 1980," (December 15, 2016), http://library.niwap.org/wp-content/uploads/Eligibility-of-VAWASelf-Petitioners-2016-12-14.pdf; Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. No. 117-43, Division C, § 2502; Act of Sept. 30, 2022, Pub. L. No. 117-128, Title IV, § 401.

In 1996, Section 214 was amended by PRWORA to cover the following USDA Rural Housing Service programs: Section 502 Single Family Direct Loan program, the Section 504 Very Low-Income Rural Housing Repair loan and grant program, the Section 521 Rural Rental Assistance program, and the Section 542 Rural Development Voucher program. *See* PRWORA, Pub. L. 104-193, § 441.

Section 214 expressly permits mixed-status families to live together in federally assisted housing. As described in detail below, Congress went to great lengths to ensure that federal agencies subject to Section 214 understood the directive that mixed status families not be forced to live apart.

1. HUD has implemented a mixed-status family rule, where if at least one person in the household has eligible status, the family can live together in HUD housing.

For the HUD programs subject to Section 214, public housing agencies ("PHAs") and private owners must inquire about and document the citizenship or immigration status of their tenants only when those tenants claim eligibility for financial subsidies. But many eligible HUD tenants have family members who are ineligible immigrants, including many who are undocumented. To avoid forcing

such tenants to choose between their housing and living together as families, Congress adopted the "mixed status families" rule, which permits an ineligible immigrant to reside in an assisted household without claiming or showing proof of eligible immigration status, as long as one household member has eligible status. *See* 42 U.S.C. § 1436a(b)(2); *see also* 24 C.F.R. §§ 5.506(b)(2), 5.512(a). The rent subsidy is then reduced by a pro-rated amount. 42 U.S.C. § 1436a(c)(1); 24 C.F.R. § 5.520.

HUD's mixed status rule has remained in effect for nearly thirty years, with more than 25,000 mixed status families (which is over 109,000 individual residents, including 55,000 children) currently residing in HUD-assisted housing units all across the U.S.[19] More than 95% of those individuals are people of color, including 85% who are Latinx residents. *Id.* Having created and maintained in effect a policy that enables undocumented immigrants to live in federally-subsidized housing units, it is unthinkable that a private rental housing owner –

[19] Alicia Mazarra, *Demographic Data Highlight Potential Harm of New Trump Proposal to Restrict Housing Assistance* (July 1, 2019), https://www.cbpp.org/research/housing/demographic-data-highlight-potential-harm-of-new-trump-proposal-to-restrict.

and there are millions of private rental housing owners participating in the federally subsidized housing programs, such as Section 8 – could violate the anti-harboring provision under 8 U.S.C. § 1324 simply by leasing to an undocumented immigrant without inquiring as to that person's immigration status. A closer look at the history of the mixed status families rule brings this conclusion into even sharper relief.

The mixed-status rule came in response to a pair of federal statutes passed in the 1980s. These were Section 214,[20] amended in 1981 to limit eligibility for HUD programs to U.S. citizens, nationals, and certain categories of eligible noncitizens,[21] and a provision of the Immigration Reform and Control Act of 1986 requiring HUD program participants to submit declarations of citizenship or eligible immigration status, and HUD to verify noncitizens' immigration status through the Systemic Alien Verification for Entitlements ("SAVE") system.[22]

[20] Pub. L. No. 96-339, 94 Stat. 1637 (1980).
[21] Pub. L. No. 97-35, 95 Stat. 408 (1981).
[22] Pub. L. No. 99-603, Sec. 121; 100 Stat. 3388 (1986).

HUD first proposed rules to implement these restrictions in 1982,[23] and commenters urged HUD to prorate assistance for mixed status families so that eligible tenants would not be forced to choose between their housing and living with their family members.[24] Laws that "slice deeply into the family" and "select[] certain categories of relatives who may live together and declares that others may not" face exacting constitutional scrutiny. *Moore v. City of E. Cleveland,* 431 U.S. 494, 498–99, (1977) ("when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."). When HUD issued a revised final rule in 1986 that did not include proration for mixed-status households,[25] that final rule and Section 214

[23] 47 Fed. Reg. 43674 (Oct. 4, 1982).
[24] *See* 51 Fed. Reg. 11198 (Apr. 1, 1986).
[25] *See* 51 Fed. Reg. 11198 (Apr. 1, 1986). Note that Congress preempted HUD from implementing the 1982 rules through the Housing and Urban-Rural Recovery Act of 1983. *See* Pub. L. No. 98-181, Sec. 474(e), 97 Stat. 1153 (1983).

were promptly enjoined. *See Yolano-Donnelly Tenant Ass'n v. Pierce,* No. CIV S-86-0846 MLS (E.D. Cal. Dec. 18, 1986).[26]

Congress eased the restrictions on access to HUD subsidized housing for ineligible immigrant family members of eligible tenants, beginning with 1988 amendments to the Housing and Community Development Act.[27] That legislation prohibited termination of assistance to mixed-status families while the SAVE verification was pending, authorized continued financial assistance to some mixed families when "necessary to avoid the division of a family" and allowed deferred termination of assistance to others, and exempted persons over age 62 from the documentation and verification requirements entirely.[28] A House Report accompanying the 1988 legislation explained its purpose was "to clarify the original intent of Congress that families in which at least one person is eligible are not disqualified." H.R. Rep. No. 100-122(I), at 49-50.

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[26] Unpublished decision available at, https://www.nhlp.org/wp-content/uploads/Yolano-Donnelly-Tenant-Assn-v.-Pierce-Dec.-18-1986.pdf.
[27] Pub. L. No. 100-242; 101 Stat. 1815 (1988).
[28] *Id.*

In 1994, HUD proposed a new rule that for the first time defined "mixed family" as "a family whose members include those with citizenship or eligible immigration status, and those without citizenship or eligible immigration status," and made clear that pro-ration of assistance would be available to mixed-status families.[29]

The 1994 proposed rule required non-U.S. citizens under age 62 to establish eligibility through a written declaration, evidence of immigration status, and verification of their status through SAVE.[30] Importantly, however, the rule also provided that some family members could establish eligibility while others could "elect not to contend that he or she has eligible status."[31] Under the "do not contend" provision, family members who choose not to establish eligibility may reside in the assisted dwelling and need not present any declaration or documentation of eligible status. 24 C.F.R. § 5.508(e). The family need only identify which members elect not to contend eligible status, so that the family's financial subsidy may be pro-rated to cover only those

[29] See 59 Fed. Reg. 43900, 43913 (Aug. 25, 1994).
[30] *Id.*, 43902-43903.
[31] *See id.*, 43903.

family members who established eligibility.[32] *See* 24 C.F.R. §§ 5.508(e), 5.520. HUD's final rule included these provisions and took effect on June 19, 1995.[33]

In 1996, Congress then amended Section 214 to explicitly adopt the proration and "do not contend" policies, stating that "[i]f the eligibility for financial assistance of at least one member of a family has been affirmatively established … 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 [HUD] shall be prorated[.]"[34] Apart from a technical change in 1998,[35] Section 214 and HUD's mixed-status families rule have remained substantially unchanged ever since.[36] In short, household members who

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[32] *See id.*, 43913.
[33] *See* Restrictions on Assistance to Noncitizens, 60 Fed. Reg. 14816 (Mar. 20, 1995).
[34] *See* Pub. L. No. 104-208, Sec. 572; 110 Stat. 3009-685 (Sept. 30, 1996); *see also* 42 U.S.C. § 1436a(b)(2).
[35] Veterans Affairs and HUD Appropriations Act, Pub. L. No. 105-276, Title V, § 592(a), 112 Stat. 2653 (Oct. 21, 1998).
[36] HUD briefly promulgated a rule in 2009 that required all residents, even those not seeking to establish eligibility for financial assistance, to provide proof of U.S. citizenship through the submission of a social security number. 74 Fed. Reg. 4382 (Jan. 27, 2009). Rescinding the rule that same year, HUD noted that it wished "to clarify that these requirements are not intended to apply to individuals in mixed families,

do not contend status can continue to live in housing subject to Section 214 but do not have to produce a Social Security Number or have their status verified through the SAVE system.

In 2019, HUD proposed regulatory changes that would have largely ended the mixed status family rule, in direct contravention of Congress' intent with Sec. 214, by substantially eliminating the "do not contend" provision and requiring proof of citizenship or eligible immigration status for all subsidized household members. *See* 84 Fed. Reg. 20589 (July 9, 2019). The rule, which according to HUD's own analysis would have displaced nearly 19,000 households and 82,000 people, was formally abandoned in 2021. *See* 86 Fed. Reg. 17346-01, 17347 (Apr. 2, 2021). In withdrawing the proposed rule, HUD noted that Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8277, and Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the

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who do not contend eligible immigration status under HUD's noncitizens regulations, nor does it interfere with existing requirements relative to proration of assistance…" 74 Fed. Reg. 6839, 6840 (Feb. 11, 2009).

Federal Government, 86 Fed. Reg. 7009, required that "the Federal Government eliminate[] sources of fear and other barriers that prevent immigrants from accessing government services available to them . . . [and] develop welcoming strategies that promote integration, inclusion, and citizenship . . ." *Id.* at 17347.

2. The USDA similarly has developed a framework consistent with Sec. 214 that allows mixed status families to live together in USDA housing.

USDA's Office of Rural Development ("RD")[37] is also a major administrator of federally-assisted housing with more than 14,000 multifamily properties.[38] RD's current policy has been to determine noncitizen eligibility entirely based on the head of household, with no proration of benefits even if other household members are ineligible.[39] RD has stated its intention to match its own policies on mixed status households to HUD's mixed-status families rule.[40]

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[37] USDA's Office of Rural Development oversees the housing programs for the USDA, while the Rural Housing Service, noted earlier, is responsible for the day-to-day operation of the rural housing programs.
[38] U.S. Dept. of Agriculture, Rural Development, "Multifamily Housing Programs," https://www.rd.usda.gov/programs-services/multi-family-housing-programs (last visited Sept. 9, 2022).
[39] *See* McCarty and Kolker, *supra* note 13, at 4.
[40] *See* USDA, "Implementation of the Multi-Family Housing U.S. Citizenship Requirements" (Spring 2020) ("[Rural Housing Service]

In summary, Congress has not merely acquiesced in the knowledge that some undocumented family members of eligible tenants reside in federally subsidized dwelling units—but has actively modified pre-existing legislation to allow it. The trial court's extreme interpretation of the anti-harboring statute simply cannot be reconciled with the mixed-status families rule as set forth in 42 U.S.C. § 1436a and the implementing HUD regulations at 24 C.F.R. § 5.500 *et seq*., and which USDA has sought to emulate, *see* 70 Fed. Reg. 8503-01 (Feb. 22, 2005).

B. Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 Permits Federal Agencies to Interpret Which Programs are "federal public benefits" with Immigration Status Requirements.

PRWORA restricts access to specified "federal public benefits" as identified by the administering federal agency to U.S. citizens and "qualified" immigrants, including lawful permanent residents, refugees, asylees and others. 8 U.S.C. §§ 1611(a), (c), 1641. Even under this law however, there are important exceptions that permit households not

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plans to publish a proposed rule that would implement the citizenship requirements and harmonize RHS's requirements with those currently established by HUD."), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=0575-AC86.

entirely or partially made up of U.S. citizens or "qualified" immigrants to receive assistance.

Under PRWORA, each federal agency determines which programs under its jurisdiction are "federal public benefits." Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61344, 61415 (November 17, 1997). In the absence of such federal guidance, or another law restricting access to benefits, such services are not subject to PRWORA's immigration and citizenship restrictions. *Id.*; *see also* Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613-01, 3614 (Jan. 16, 2001). Even if the program is determined to be a "federal public benefit" assistance can still be made available regardless of immigration or citizenship status if the program meets certain exceptions. For example, PRWORA's restrictions do not apply to programs that: "(i) are necessary for the protection of life or safety; (ii) deliver in-kind services at the community level; and (iii) do not condition the provision of assistance, the amount of assistance, or the

cost of assistance on the individual recipient's income or resources." Department of Housing & Urban Development, Department of Health and Human Services, and Department of Justice, Joint Letter Regarding Immigrant Access to Housing and Services (Aug. 5, 2016), at 3 ("HUD Joint Letter"). Short-term, non-cash, in-kind, emergency disaster relief falls within another exception as do programs administered by a charitable non-profit. 8 U.S.C. §1611(b)(1)(B); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Public Benefit", 63 Fed. Reg. 41658, 41660 (Aug. 4, 1998); 8 U.S.C. § 1642(d). When these exceptions apply, providers, including housing providers, "must [make these programs] available to eligible persons without regard to citizenship, nationality, or immigration status...." and cannot "single out individuals who look or sound 'foreign' for closer scrutiny, or require them to provide additional documentation of citizenship or immigration status." HUD Joint Letter at 3-5. Providers must also "… ensure that they do not engage in practices that deter eligible family members (within mixed-status families) from accessing benefits based upon their national origin." *Id.* at 5.

Federal agencies have gone on to determine that emergency housing, transitional housing and homelessness assistance programs are available regardless of status and that certain cash assistance programs are available to mixed-status households. Department of Housing & Urban Development, Fact Sheet: The Personal Responsibility and Work Opportunity Act of 1996 and HUD's Homeless Assistance Programs (Aug. 16, 2016) (finding that Emergency Solutions Grant and Continuum of Care funded street outreach services, emergency shelter, safe haven, rapid re-housing, and transitional housing owned or lease by a recipient or subrecipient falls into the exceptions); HUD Joint Letter at 2-3 (finding that transitional housing, emergency shelters, and related programming could still be available to battered immigrants and their children); Citizenship and FEMA Eligibility (January 20, 2022)[41] (determining that mixed-status households can access for FEMA Cash assistance.)

More recently, Congress created the Coronavirus Relief Fund (CRF) and the Emergency Rental Assistance Program (ERAP), with

[41] Citizenship and FEMA Eligibility, https://www.fema.gov/fact-sheet/citizenship-and-fema-eligibility (last visited on Sept. 14, 2022).

both programs offering landlords and tenants, in the private and federally subsidized housing markets, emergency rental and utility assistance. Section 501(a) of Division N of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020) ("Appropriations Act"). Congress imposed no immigration restrictions on CRF and ERAP assistance and the Treasury, who administers the programs, has not declared that CRF or ERAP is a "federal public benefit." Appropriations Act Section 501(k)(3)(A) and U.S. Department of the Treasury Emergency Rental Assistance FAQ, rev. March 16, 2021 (eligibility criteria for ERA); Coronavirus Aid, Relief, and Economic Security Act, Section 5001, Pub. L. No. 116-136 (Mar. 27, 2020), 24 C.F.R. Part 570, and Notice of Program Rules, Waivers, and Alternative Requirements Under the CARES Act, 85 Fed. Reg. 51457 (Aug. 20, 2020) (eligibility criteria for CRF). Importantly, Treasury guidance advises state and local governments implementing ERAP to avoid collecting information about the applicant beyond that data required by Treasury, and specifically notes that individuals applying for benefits

should not be required to provide their Social Security numbers.[42] After the City of Phoenix tried to impose immigration restrictions on its CRF-funded rental assistance, a federal district court found that the city was prohibited from doing so. *Poder in Action v. City of Phoenix*, No. CV-20-01429-PHX-DWL, 2020 WL 7245072 (D. Ariz. Dec. 9, 2020).

Taken together, these provisions evidence the federal government's intent to allow a variety of housing and homelessness assistance to be available to mixed-status families and to households regardless of immigration status and to be free from discrimination.

CONCLUSION

For all these reasons, as well as the reasons stated in Appellants' brief, Amici submit that this Court should grant the relief requested by the Appellants.

Dated: September 15, 2022

Respectfully submitted,

[42] "Guidelines for ERA program online applications," available at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/service-design/application-web-sites (last visited September 14, 2022).

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g)(1), I certify that:

This brief complies with Rule 29(a)(5) and 32(a)(7)(B)'s type-volume limitation because it contains 5,323 words, as determined by the Microsoft Word 2016 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Rule 32 (f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32 (a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Katherine E. Walz

Katherine E. Walz

Dated: September 15, 2022

CERTIFICATE OF SERVICE

I certify that I caused this document to be electronically filed with the Clerk of the Court using the appellate CM/ECF system on September 15, 2022. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Katherine E. Walz

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