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VIA ELECTRONIC SUBMISSION

Samantha Deshommes, Chief
Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

Re: DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds

Dear Chief Deshommes:

The National Center for Law and Economic Justice ("NCLEJ") provides comments in response to the Department of Homeland Security's ("DHS") Notice of Proposed Rulemaking ("NPRM" or the "proposed rule"), published in the Federal Register on October 10, 2018.[1] We strongly oppose the proposed changes to the definition of "public charge" and to the administration of the public charge test. We urge DHS to withdraw the rule in its entirety and to continue implementing long-standing principles clarified in the 1999 Field Guidance.

NCLEJ advances economic justice and preserves fundamental rights for low-income families, individuals, communities, and organizations nationwide through impact litigation, policy advocacy, and support for grassroots organizing. We work to ensure that public benefits programs, such as Medicaid and the Supplemental Nutrition Assistance Program ("SNAP," more commonly known as Food Stamps), operate efficiently and fairly to serve those who are eligible and in need of help.

NCLEJ also protects the rights of persons with disabilities by ensuring that federal, state, and local social services agencies afford them an opportunity to participate meaningfully in benefits programs. Furthermore, because poverty disproportionately affects communities of color, immigrants, low-wage workers, and families headed by women, NCLEJ also advocates for racial justice, immigrant justice, workers' rights, and gender justice.

The proposed rule would harm many of the constituencies NCLEJ represents. The rule proposes dramatic changes to the way the "public charge" determination is made, contradicting clear Congressional intent, administrative guidance, and federal law that prohibits discrimination based on disability. Furthermore, the rule will hurt the immigrant community, disproportionately

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[1] 83 Fed. Reg. 51114-296

impacting low- to- moderate-income families and immigrants of color. Finally, the proposed rule's "chilling effect" will result in significant economic losses and have harmful ripple effects upon non-immigrant families, states, healthcare providers and facilities, and local governments.

I. The Proposed Rule Is A Massive Change In Current Immigration Policy.

Current policy defines a "public charge" as an immigrant who is "likely to become primarily dependent on the government for subsistence."[2] The proposed rule expands the definition to include any immigrant who merely "receives one or more public benefits."[3] This change significantly widens the scope of who can be considered a public charge to include immigrants who use basic needs programs to supplement their earnings from low-wage work. The expanded definition also includes families that find themselves "in crisis" due to unforeseen job loss, the sudden onset of illness or disability, or other unexpected difficulties and, as a result, need short-term assistance.

Under long-standing guidance, immigration officials may consider only two forms of public benefits in the public charge test: (1) cash "welfare" assistance received through Supplemental Security Income ("SSI"), Temporary Assistance for Needy Families ("TANF"), and comparable state or local programs; and (2) government funded long-term institutional care—and only when receipt of those benefits represents the majority of a person's support. Under the proposed rule, immigration officials must consider the following additional programs in the public charge determination: most Medicaid programs; forms of housing assistance such as Section 8 housing vouchers, Project-based Section 8, and Public Housing; SNAP; and even assistance for seniors who have amassed the work history needed to qualify for Medicare and need help paying for prescription drugs.[4]

II. The Proposed Rule Conflicts with Clear Congressional Intent and Administrative Rule Making Guidance.

As DHS observes in the preamble to the proposed rule, Congress significantly altered immigrant eligibility for federal means-tested public benefits in 1996. The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") provided immigrants eligibility for certain public benefits, including emergency medical services, public housing assistance, and disaster relief.[5] That same year, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress codified the "totality of circumstances" test that considered five minimum factors in the public charge determination: the applicant's age; health; family status; financial status; and education or skills.[6] Notably, in passing PRWORA and IIRIRA, Congress *did not amend the public charge law* to change the types of benefits programs that should be considered in the public charge test.

[2] The Immigration and Nationality Act (INA) does not explicitly define "public charge." Thus, current policy relies on the definition issued in 1999 via administrative guidance. S*ee* U.S. Dep't of Justice, Immigration and Naturalization Service, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* (May 26, 1999), 64 Fed. Reg. 28689.
[3] Proposed 8 CFR 212.21(b); *see* 83 Fed. Reg. 51157.
[4] Proposed 8 CFR 212.21(b); *see* 83 Fed. Reg. 51158-59.
[5] 83 Fed. Reg. 51131-32; *see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2261 (codified as amended at 8 U.S.C. § 1611).
[6] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div C, § 1(a), 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(13)).

Since then, Congress has expanded eligibility (or permitted states to do so) for other benefits programs, without making accompanying changes to the public charge test. For example:

- *The 2002 Farm Bill expanded SNAP for immigrant children.* Section 4401 of the Farm Security and Rural Investment Act of 2002 restored access to SNAP (then called Food Stamps) to immigrant children, immigrants receiving disability benefits, and any qualified immigrant living in the U.S. for more than five years.

- *The 2009 Children's Health Insurance Program Reauthorization Act ("CHIPRA") expanded access to Medicaid and CHIP for immigrant women and children.* Section 214 of CHIPRA gave states a new state plan amendment option to cover lawfully residing children and pregnant women on Medicaid and CHIP during their first five years in the U.S. using federal matching dollars.

After Congress passed PROWRA and IIRIRA in 1996, immigrants and public servants charged with administering various public benefits programs were unsure as to how the public charge test should be applied to immigrants receiving non-cash benefits. As a result, the use of non-cash public assistance programs by legal immigrants declined significantly, including by those who were not otherwise subject to a public charge determination.[7]

In 1999, to address concerns that the then-Immigration and Naturalization Service (INS) was inappropriately applying the public charge test by considering use of non-cash benefits by immigrants, INS issued proposed regulations that would set clear standards for the public charge test. The preamble to the 1999 NPRM provides that INS did not seek to change its policies or previous practices, but rather to issue a regulation that would "reduce the negative public health consequences generated by the existing confusion" and provide immigrants with "better guidance."[8]

Additionally, INS attached an administrative Field Guidance, which remains in effect, to its official notice of proposed rulemaking to, in part, alleviate public confusion over the meaning of the term "public charge." The 1999 Field Guidance clarified that *the public charge test applies only to those "primarily dependent on the government for subsistence,"* demonstrated by receipt of public *cash assistance* for "income maintenance," or institutionalization for long-term care at the government's expense.[9] The guidance also specifically listed non-cash programs such as Medicare, Medicaid, SNAP, WIC, Head Start, child care, school nutrition, housing, energy assistance, and emergency/disaster relief *as programs not to be considered for purposes of public charge*.[10]

The proposed rule will end immigrant eligibility for benefits programs and penalize immigrant families for using benefits that they are lawfully allowed to use under the PRWORA. DHS contends that "[t]here is no tension between the availability of public benefits to some

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[7] Fix, Michael and Jeffrey Passel, "Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-97," (Washington, D.C.: The Urban Institute, 1999).

[8] Inadmissibility and Deportability on Public Charge Grounds, A Proposed Rule by the Immigration and Naturalization Service on 05/26/1999, 64 Federal Register 28676.

[9] U.S. Dep't of Justice, Immigration and Naturalization Service, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* (May 26, 1999), 64 Fed. Reg. 28689.

[10] 64 Fed. Reg. 28693

[immigrants] as set forth in PRWORA and Congress's intent to deny visa issuance, admission, and adjustment of status to [immigrants] who are likely to become a public charge."[11] DHS also asserts that Congress "must have recognized that it made certain public benefits available to some [immigrants] who are also subject to the public charge grounds of inadmissibility, even though receipt of such benefits could render the [immigrant] inadmissible as likely to become a public charge."[12] On the contrary, taken together, the passage of PRWORA and IIRIRA, along with the aforementioned guidance issued by INS, suggest that Congress and INS specifically took great care to ensure that receipt of these benefits would *not* be considered against any immigrant seeking to secure admission or legal permanent resident ("LPR") status. As such, the proposed rule is inconsistent with Congressional intent.

III. The Proposed Rule Contravenes Federal Anti-Discrimination Law That Protects Persons With Disabilities.

The NPRM would create a regime that discriminates against lawful immigrants with disabilities and chronic health conditions, effectively providing no way for them to overcome an unfavorable public charge determination and thereby denying them admission or LPR status because of their disability. The proposed rule is thus inconsistent with Section 504 of the Rehabilitation Act which prohibits disability-based discrimination in federal agency programs and activities.

A. The proposed rule discriminates against immigrants with disabilities and their families and communities.

First, the proposed rule would require DHS to consider medical conditions as negatively-weighed factors in the public charge test, which will drastically impact immigrants with disabilities or chronic health conditions who are seeking admission or LPR status. Second, the proposed rule adds more social safety net programs to the list of benefits to be considered in the public charge test, which disproportionately affects individuals with disabilities who rely on these programs to maintain their health and nutrition. Finally, the proposed rule allows officials to consider a person's inability to pay for healthcare services as part of the public charge test, which will cause unequal treatment of people with disabilities. Taken together, these proposed changes will result in significant and undue hardships for immigrants with disabilities and chronic health conditions, as well as immigrant families supporting a relative with a disability.

1. The proposed rule negatively weighs health factors in the public charge test, which discriminates against immigrants with disabilities and chronic health conditions such as HIV/AIDS.

The proposed rule would allow DHS to consider a wide range of medical conditions, many of which constitute disabilities, as well as the existence of disability itself, in determining whether an immigrant is likely to become a public charge. If the proposed rule is finalized, DHS would consider whether an immigrant has a medical condition that is "significant enough to interfere with the person's ability to care for him- or herself or to attend school or work, or that is likely to require extensive medical treatment." If an immigrant has a serious medical condition that meets the criteria, DHS could use this diagnosis to support a denial of admission or LPR status on health-related grounds, reasoning that because the immigrant is unlikely to work due to the

[11] 83 Fed. Reg. 51132.
[12] 83 Fed. Reg. 51132.

medical condition and may need benefits to receive healthcare services, the immigrant is likely to become a public charge and thus should be excluded from the U.S.[13] DHS's broadened evaluation of the health factor and the negative weight placed upon it will effectively deny admission or LPR status to untold numbers of people with disabilities, including people with intellectual, developmental, psychiatric, or behavioral disabilities, as well as persons with physical limitations requiring personal care services and other assistance with activities for daily living.

The proposed rule would also allow DHS to consider a diagnosis of a Class B medical condition, or "a physical or mental condition, disease, or disability serious in degree or permanent in nature."[14] But if an immigrant is diagnosed with a "Class A medical condition," which includes "communicable disease[s] of public health significance," DHS could outright deny them admission or LPR status on health-related grounds.[15] As a result, DHS would undoubtedly exclude immigrants living with HIV/AIDS from the U.S, drawing disturbing parallels to the 1987 HIV travel and immigration ban, which was ultimately lifted in 2010.[16]

In contrast, the NPRM's preamble states that DHS will consider positively the absence of a medical condition—*a criteria that virtually no person with a disability can meet*. The proposed rule discriminates against immigrants with disabilities by including a negatively-weighed health factor in the public charge test. The rule undeniably singles out persons with disabilities and chronic health conditions and counters decades of federal efforts to combat disability-based discrimination and stigma.

2. **The proposed rule includes receipt of non-cash benefits as a negatively-weighed element in the financial status factor in the public charge test, which discriminates against immigrants with disabilities and immigrant families supporting children with special healthcare needs.**

The proposed rule expands the list of benefits DHS would weigh negatively as part of the financial status factor of the public charge test to include: Medicaid-funded healthcare services, SNAP, and housing benefits. Under the proposed rule, DHS will screen out many people with disabilities as "likely to become a public charge" because persons with disabilities and chronic health conditions disproportionately rely on non-cash benefits, often due to their disabilities.

Medicaid

Medicaid provides persons with disabilities access to critical disability services that are often not covered by private insurance plans, such as long-term healthcare services, mental healthcare, and substance abuse treatments. Medicaid is also the only source for much-needed home- or community-based treatment services and living support for persons with disabilities, such as personal care services, nursing services, respite, intensive mental health services, and employment/work support Additionally, Medicaid is uniquely helpful for many children with disabilities and their families. Roughly 2.6 million children in immigrant families have a

[13] Proposed 8 CFR § 212.22(b)(2); *see* 83 Fed. Reg. 51182.
[14] *see* 83 Fed. Reg. 51183.
[15] *see* 83 Fed. Reg. 51182.
[16] Human Rights Campaign, www.hrc.org/press/after-22-years-hiv-travel-and-immigration-ban-lifted

disability or special healthcare need.[17] Parents of children with disabilities often work fewer hours and ultimately earn less income due to their children's caregiving needs.[18] As a result, roughly half of all children with a disability rely on Medicaid for respite care; occupational, physical, or speech therapies; and prescription drugs.[19] While the proposed rule exempts services funded by Medicaid but provided through the Individuals with Disabilities Education Act ("IDEA"), it is unclear how this carve-out would work in practice because children with special needs cannot and do not receive Medicaid for educational services alone.

Medicaid plays a crucial role in ensuring that people with disabilities and chronic health conditions, including children with special needs, have access to care. Without Medicaid, many persons with disabilities and their families could not afford to pay for healthcare costs out-of-pocket because disability-related services are often more expensive than other healthcare services. By including receipt of Medicaid benefits as a negatively-weighed element in the financial status factor of the public charge test, the proposed rule discriminates against immigrants with disabilities and may prevent them from managing their medical conditions, participating in the workforce, or maintaining their independence and self-sufficiency.

SNAP & Housing Supports

The proposed rule requires DHS to consider receipt of SNAP and housing support as part of the financial status factor of the public charge test. SNAP enables persons with disabilities to access healthy and nutritious food. More than one-quarter of people who use SNAP benefits for nutritional support have a disability.[20] As a group, children with disabilities are more likely to live in low-income households experiencing food insecurity and housing instability, making programs like SNAP and housing assistance vital to their long-term well-being.[21] In addition, access to affordable and safe housing can help improve health conditions and economic stability for persons with disabilities and chronic health conditions who often rely on housing supports to remain independent and to live in their communities.

By declaring an immigrant a public charge for using non-cash assistance like Medicaid, SNAP, and housing supports, the proposed rule disparately harms individuals with disabilities and their families. Persons with disabilities often rely upon these benefits to remain healthy and continue to work. The proposed rule will impede their ability to maintain the very self-sufficiency that

[17] Data query, National Survey of Children's Health (2016).
[18] Sloan Work and Family Research Network, Questions and Answers about Employed Parents Caring for Children with Disabilities, https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/Child_Disability.pdf.
[19] MaryBeth Musumeci and Julia Foutz, Medicaid's Role for Children with Special Health Care Needs: A Look at Eligibility, Services, and Spending, Kaiser Family Foundation, 2018, https://www.kff.org/medicaid/issue-brief/medicaids-role-for-children-with-special-health-care-needs-a-look-at-eligibility-services-and-spending/.
[20] Steven Carlson, Brynne Keith-Jennings, and Raheem Chaudhry, "SNAP Provides Needed Food Assistance to Millions of People with Disabilities," Center on Budget and Policy Priorities (June 14, 2017), https://www.cbpp.org/sites/default/files/atoms/files/6-14-17fa.pdf
[21] Rebecca Ullrich, *Cuts to Medicaid Would Harm Young Children with Disabilities*, Center for American Progress, 2017, https://www.americanprogress.org/issues/early-childhood/reports/2017/05/03/431766/cuts-medicaid-harm-young-children-disabilities; Susan L. Parish, Roderick A. Rose, Megan Andrews, et al., *Material Hardship in US Families Raising Children with Disabilities: Research Summary and Policy Implications,* UNC School of Social Work, 2009, https://www.realeconomicimpact.org/data/files/reports/outside%20reports/material%20hardship%20children%20with%20disabs.pdf.

DHS purports to promote and which statutes like the Rehabilitation Act and the Americans with Disabilities Act ("ADA") sought to ensure.

3. **The proposed rule includes inability to pay for private health coverage as a negatively-weighed element in the financial status aspect of the public charge test, which discriminates against immigrants with disabilities and chronic health conditions, and immigrant families supporting children with special care needs.**

Under the proposed rule, DHS would consider whether a person's family can cover likely medical costs necessitated by a disability or health condition, including whether the family can pay out-of-pocket for health services or for private health insurance.[22] Thus, to satisfy this requirement, many immigrants with disabilities and other chronic health conditions like HIV/AIDS, as well as immigrant families supporting children with special healthcare needs, would essentially have to purchase private, non-subsidized medical insurance to improve their chances of admission or LPR status.

As a perverse consequence, the proposed rule incentivizes U.S. citizens and permanent residents to terminate their subsidized health care coverage in order to remain eligible for admission or LPR status, or to petition for family members living abroad. Reports are already emerging of individuals considering deferral of HIV treatment and management, upon the belief that this will ensure their eligibility to reunite with family.[23] Effective treatment and management of HIV significantly contribute to cabining its spread (often referred to as "treatment as prevention").[24] Therefore, the proposed rule's measures could have catastrophic public health implications, undoing hard won progress towards ending the HIV/AIDS epidemic in the U.S.

Additionally, children with special health and developmental needs may require additional medical, behavioral, and/or educational services to remain healthy and promote positive development. These needs make children with disabilities in immigrant families vulnerable to the economic burdens associated with requiring specialized care. These services are typically costly even with insurance and are out of reach for families who lack coverage. At a minimum, forgoing critical services could hamper children's developmental progress and would lead to ongoing and/or more costly future healthcare. For some families, the stakes are even higher: comprehensive coverage through these programs is necessary to keep their children alive.

By considering whether or not an immigrant can pay for medical services or private health insurance, DHS discriminates against persons with disabilities who often face high expenses related to receiving costly disability-related health services and support. The proposed rule further exacerbates the economic hardships that many people with disabilities and their families already experience due to disability.

[22] Proposed 8 CFR § 212.22(b)(4)(B); *see* 83 Fed. Reg. 51291

[23] The Body http://www.thebody.com/content/81028/public-charge-rule-devastating-hiv-immigrants.html?ic=tbhtrump

[24] See https://www.cdc.gov/hiv/risk/art/index.html.

4. The proposed rule assigns a heavily positive weight to household income of at least 250 percent above the Federal Poverty Level, which discriminates against persons with disabilities who disproportionately experience poverty.

In contrast to the negatively-weighed factors above, the NPRM proposes only one positively-weighed factor—that the immigrant household has or will make at least 250 percent of the federal poverty level ("FPL").[25] As a result, low- and middle-income families will not have the benefit of a heavily-weighed positive factor as part of their public charge calculation to offset any negative factors. [26] Even fewer people with disabilities and their families will meet this criteria.[27] Overall, people with disabilities in the U.S. live in poverty at a rate twice as high as people without disabilities.[28] People with disabilities in the U.S. are also more "asset poor," in part due to economic disparities related to the higher costs associated with living with a disability, including costs for assistive technology, and the need for and expense of accessible housing and transportation.[29] The proposed rule would disproportionately impact people with disabilities and their families and use a long legacy of social and economic disadvantages as the basis for further discrimination and exclusion of persons with disabilities and chronic health conditions.

In sum, the proposed rule discriminates against immigrants with disabilities, immigrants living with chronic health conditions like HIV/AIDS, and immigrant families supporting children with special care needs—*because they have a disability*. As explained above, the proposed rule (1) places a negative weight on having a disability or health condition, (2) expands the list of types of public benefits considered to include Medicaid, SNAP, and housing support, upon which persons with disabilities disproportionally rely, and (3) considers inability to pay for private health coverage as a negative factor in the public charge determination. These proposed changes will allow DHS officials to declare immigrants with disabilities or health conditions as "likely to become a public charge" on the basis of their disability, discriminatorily denying them admission or LPR status.

B. Because the proposed rule discriminates against immigrants with disabilities, it is inconsistent with Section 504 of the Rehabilitation Act.

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[25] Proposed 8 CFR § 212.22(c)(2).

[26] Kelly Whitener, "Administration Moves Forward with Proposed Public Charge Regulation; Comments Due in December" (Oct. 5, 2018) *at* https://ccf.georgetown.edu/2018/10/05/administration-moves-forward-with-proposed-public-charge-regulation-comments-due-in-december/.

[27] Results from the American Community Survey (Americans With Disabilities Act Participatory Action Research, 2016) reveal significant disparities in the median incomes for those with and without disabilities, suggesting that "many more people with disabilities and their families live in poverty than people without disabilities and their families, and may struggle to meet basic needs," *at* http://centerondisability.org/ada_parc/utils/indicators.php?id=38.

[28] Poverty among people with disabilities was at 20.9% in 2016, compared with 13.1% for people without disabilities that same year. The poverty percentage gap, or the difference between the percentages of those with without disabilities, has been between 7.4 and 8.3 percentage points over the 8 years from 2009 to 2016. L. Kraus et al., "2017 Disability Statistics Annual Report," 2 (2018) *at* https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf.

[29] Katherine McDonald et al., "Poverty Among Adults with Disabilities: Barriers to Promoting Asset Accumulation in Individual Development Accounts" (2010). Public Health, Food Studies, and Nutrition. *at* https://surface.syr.edu/nsd/.

As shown above, the NPRM echoes the types of bias and "archaic attitudes" about disabilities that the Rehabilitation Act, and more recently the ADA, were meant to overcome.[30] Section 504 of the Rehabilitation Act ("Section 504") prohibits discrimination based on disability in federal agency programs, including those implemented by DHS.[31] Section 504 thus regulates DHS as a federal agency. Furthermore, after the passage of the ADA, the Immigration and Nationality Act ("INA") was amended to ensure that individuals were not found inadmissible based on disability.[32] Therefore, to the extent that DHS carries out the public charge provisions of the INA and the agency will implement the finalized version of the proposed rule, DHS conduct must be evaluated in light of Section 504.

As discussed above, under the proposed rule, DHS would deny admission or LPR status to immigrants with disabilities simply because they receive Medicaid to access healthcare services related to their disability; use SNAP benefits to access nutritious food; rely on housing support to maintain their independence and economic stability; or cannot pay for costly disability-related healthcare services. Even more egregious, DHS would directly consider an individual's disability during the public charge test and adversely treat the existence of a disability to conclude that an immigrant will likely become a "public charge." The proposed rule creates a procedure through which DHS can treat immigrants with disabilities and chronic health conditions, including immigrant families supporting children with special needs, unfairly and unjustly, thereby violating Section 504's prohibition on discrimination based on disability.

The NPRM states that DHS will not consider disability as the "sole factor" in the public charge determination, but as one factor in the "totality of circumstances" test.[33] However, the proposed rule effectively authorizes a sweeping determination that anyone with a disability will likely become a public charge and thus be denied admission or LPR status. Additionally, although DHS acknowledges that a person with a Class B medical condition cannot be automatically deemed inadmissible under the INA's prohibition on disability-based discrimination, the proposed rule nevertheless includes the existence of a disability itself as a negatively-weighed factor in the public charge test, effectively making it very difficult for an immigrant with a disability to overcome an unfavorable public charge determination.[34]As such, DHS' proposed rule runs afoul of the INA's prohibition against discrimination due to disability.

IV. Beyond The Proposed Rule's Contradiction Of Congressional Intent And Federal Anti-Discrimination Laws, The Proposed Rule Will Cause Major Harm To Immigrants And Their Families.

The proposed rule will have profound negative consequences for immigrant families' overall well-being and long-term success. The NPRM has already begun to have a "chilling effect" in immigrant communities, discouraging individuals from applying for or receiving public benefits

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[30] *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 279 (1987).

[31] 29 U.S.C. § 794(a).

[32] Immigration Act of 1990, PL 101-649, 104 Stat 4978, sections 601-603 (Nov. 29, 1990) (deleting and replacing language excluding "[a]liens who are mentally retarded," "[a]liens who are insane," "[a]liens who have had one or more attacks of insanity," "[a]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect," and "[a]liens who are … chronic alcoholics").

[33] 83 Fed. Reg. 51183.

[34] *see* 83 Fed. Reg. 51182, n. 452 ("Class B medical conditions do not make an alien inadmissible on health-related grounds under INA section 212(a)(1), 8 U.S.C. 1182(a)(1), but are relevant to the public charge determination.")

for fear that DHS will consider doing so as grounds to deny them or their family members admission or LPR status.[35] If finalized and implemented, the proposed rule would prevent many immigrants from using the programs that their own tax dollars help support, curbing access to essential healthcare services, healthy and nutritious food, and secure housing for immigrant communities, and thereby increasing poverty, hunger, sickness, unstable housing and economic instability in their communities.

A. The proposed rule will have a "chilling effect," deterring as many as 26 million people from receiving critical support and leading to mass disenrollment from public programs.

The proposed rule will deter approximately 26 million people from accessing public benefits. This number represents individuals and family members with at least one non-citizen in the household and who live in households with earned incomes under 250 percent of the FPL.[36]

If the proposed rule is finalized and implemented, an estimated 2.1 million (15%) to 4.9 million (35%) Medicaid/CHIP enrollees would disenroll.[37] Furthermore, based on enrollment patterns observed in the wake of significant changes to cash assistance programs during the 1990s, immigrants' use of health, nutrition, and social services would decline significantly.[38] For instance, after new eligibility restrictions were implemented for recent immigrants in the 1990s, there was a 25 percent drop in enrollment from Medicaid among children of foreign-born parents, even though the majority of these children were not affected by the changes and remained eligible.[39] These figures may actually *underestimate* the impact of the proposed rule on immigrants' use of benefits because changes to cash assistance programs in the 1990s did not affect immigration status directly, yet still resulted in marked drops in benefits enrollment.[40] In contrast, the proposed rule *would* alter immigration status.

Research conducted in 2017 and 2018 confirms that health and nutrition service providers have noticed an increase in cancelled appointments and requests to disenroll from means-tested programs.[41] SNAP participation has dropped significantly to 34.8 percent for the first half of this

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[35] American Public Health Association, "Study: Following 10-year gains, SNAP participation among immigrant families dropped in 2018" (November 12, 2018), http://childrenshealthwatch.org/study-following-10-year-gains-snap-participation-among-immigrant-families-dropped-in-2018/

[36] 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 20122016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC) MABLE PUMA-County Crosswalk. Custom Tabulation by Manatt Health, 9/30/2018. Found online at https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population.

[37] Samantha Artiga, Raphael Garfield, and Anthony Damico "Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid" (Washington, DC: Kaiser Family Foundation, 2018). https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/.

[38] Jeanne Batalova, Michael Fix, and Mark Greenberg "Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use" (Washington, DC: Migration Policy Institute, 2018) https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families.

[39] Neeraj Kaushal and Robert Kaestner, "Welfare Reform and health insurance of Immigrants," Health Services Research, 40(3), (June 2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361164/pdf/hesr_00381.pdf.

[40] Samantha Artiga, Raphael Garfield, and Anthony Damico "Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid" (Washington, DC: Kaiser Family Foundation, 2018) https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/.

[41] Jennifer Laird et al, Forgoing Food Assistance Out of Far Changes to "Public Charge" Rule May Put 500,000 More U.S. Citizen Children at Risk of Moving into Poverty," Columbia Population Research Center (April 5, 2018)

year, almost a ten percent drop in participation from 2017 and an overall change in the pattern reflecting a steady increase in participation during previous years. Notably, "the eligibility rules for SNAP remained unchanged between 2017 and 2018;" researchers posit that the drop "may be related to more nuanced changes in national immigration rhetoric" so "[s]ome immigrant families may be forced to make agonizing choices between enrolling in critical nutrition programs and jeopardizing their future immigration status."[42]

Furthermore, early childhood education programs have reported drops in attendance and applications as well as reduced participation from immigrant parents in classrooms and at events.[43] Immigrant families—including those who are lawfully present—across all background and locations are uncertain and afraid to participate in government-related programs.[44] If finalized, the proposed rule would undermine access to critical health, food, and other supports for millions of eligible immigrants and their families.

B. The proposed rule will disproportionately harm immigrants of color.

The proposed rule disproportionately impacts immigrants of Latino, Black, Asian and Pacific Islander descent. Ninety percent of the estimated 26 million people who will be "chilled" by the proposed rule from accessing public benefits are immigrants of color (23.2 million).[45] Among this group, about 70 percent are Latino (18.3 million), 12 percent are Asian and Pacific Islander (3.2 million) and 7 percent are Black (1.8 million).[46]

Other considerable changes in the public charge test, such as introducing an unprecedented income test, establishing a negative weight to family-related factors, and indicating a preference for immigrants proficient in English will also disparately impact immigrants of color.

The proposed rule's income test disproportionately impacts Black and Latino immigrants. The income test requires immigrants to meet a minimum threshold of income equal to 125 percent of the FPL, or an annual income of $31,375 for a family of four. Failure to meet the minimum threshold will result in denial of admission or LPR status. In contrast, a family household with an income of least 250 percent above the FPL, or an annual income of nearly $63,000 for a family of four, will be granted admission or LPR status. The income test will exclude low- to moderate-income families from admission to the U.S. or from achieving LPR status. While more than half of recent LPRs from Europe and Canada have incomes of at least 250 percent above the FPL,

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https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5af1a2b28a922db742154bbe/1525785266892/Poverty+and+Social+Policy+Brief_2_2.pdf

[42] American Public Health Association, "Study: Following 10-year gains, SNAP participation among immigrant families dropped in 2018" (November 12, 2018), http://childrenshealthwatch.org/study-following-10-year-gains-snap-participation-among-immigrant-families-dropped-in-2018/

[43] Hannah Matthews et al, "Immigration Policy's Harmful Impacts on Early Care and Education," The Center for Law and Social Policy (March 2018). https://www.clasp.org/sites/default/files/publications/2018/03/2018_harmfulimpactsece.pdf

[44] Samantha Artiga, "Living as an Immigrant Family in America: How Fear and Toxic Stress are Affecting Daily Life, Well-Being, & Health.

[45] 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 20122016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC) MABLE PUMA-County Crosswalk. Custom Tabulation by Manatt health, 9/30/2018. Found online at https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population.

[46] *Id.*

only about one third or fewer of LPRs from Mexico and Central America (23 percent), the Caribbean (28 percent), and Africa (33 percent) do.[47]

The proposed rule also details how DHS will consider factors that have never before been relevant in the public charge determination—like having a large family—as negatively-weighed factors that could lead to a public charge finding. As DHS explains, "[t]he number of people in the [immigrant's] household has an effect on the [immigrant's] assets and resources, and in many cases may influence the likelihood that an [immigrant] will become a public charge. Household size would be used to determine whether the [immigrant's] household income is at least 125 percent of the FP[L] in the public charge inadmissibility determination." Currently, about half of all family-based immigrants granted admission or LPR status come from countries in Africa, Asia, Oceania, and South America.[48] With the proposed rule's income test, this number will drop significantly because, as explained above, immigrants of color are less likely to meet the minimum threshold, among other negatively weighed factors. Research confirms that if the proposed rule is finalized, it will "result in a shift in the origins of immigrants granted green cards . . . . away from Mexico and Central America . . . and toward other world regions, especially Europe" because immigrants from Mexico and Central America are the most likely group to have multiple negative factors, as set out in the proposed rule, present in their case.[49]

Moreover, the proposed rule indicates a preference for immigrants who speak English, which disproportionately impacts Asian and Pacific Islander immigrants. Immigrants from South and East Asia have the lowest rates of English proficiency (54 percent), with Mexico (32 percent) and Central America (33 percent) not too far behind.[50]

Thus, the proposed rule disproportionately immigrants of color by structuring the test in a way that severely disadvantages Black, Latino, Asian and Pacific Islander immigrants.

C. The proposed rule fails to address the realities of low-wage work, thereby excluding low- to middle-income immigrant families from admission or achieving LPR status in U.S.

The proposed rule wrongly assumes that there are only two static categories of people: independent, self-sufficient workers and unemployed benefits recipients. However, contrary to these underlying assumptions, the two categories are in fact very dynamic. For example, there is substantial overlap between people who work and people who receive public benefits to supplement their earned income. In 2016, approximately 24 percent of workers in the United States earned poverty-level wages. Thus, many low-income working families still need

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[47] Randy Capps, Mark Greenberg, Michael Fix and Jie Zong, Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration (Migration Policy Institute, November 2018), https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration

[48] The 2017 Yearbook of Immigration Statistics, U.S. Department of Homeland Security, Table 11 "Persons Obtaining Lawful Permanent Resident Status By Broad Class Of Admission And Region Of Last Residence: Fiscal Year 2017," https://www.dhs.gov/immigration-statistics/yearbook/2017/table11

[49] Randy Capps, Mark Greenberg, Michael Fix and Jie Zong, Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration (Migration Policy Institute, November 2018), https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration

[50] Gustavo Lopez, Kristen Balik, and Jynnah Radford, Key Findings about U.S. Immigrants (Pew Research Center, November 30, 2018), http://www.pewresearch.org/fact-tank/2018/11/30/key-findings-about-u-s-immigrants/

assistance from public benefits programs.[51] Many low-wage workers do not earn enough money to meet basic needs and receive few benefits, if any, from their employers. Some low-wage workers have multiple part-time jobs and thereby do not qualify to receive full-time employee benefits from their employers.

Low-wage jobs occupy a growing share of the labor market with nearly one in three workers earning under $12 an hour.[52] Six of the 20 largest occupations in the country — retail salespersons, cashiers, food preparation and service workers, waiters and waitresses, stock clerks, and personal care aides—have median wages close to or below the poverty threshold for a family of three ($20,420).[53] In comparison, the FPL in 2016 for a family of four was $24,300[54] and in 2018 it is $25,100.[55]

Additionally, people can shift unexpectedly from one category of people to the other. Low-wage jobs are unstable, with fluctuating work hours and frequent company-wide or even industry-wide job losses. Families "in crisis" depend on Medicaid, SNAP, and housing support when unexpected difficulties, such as job loss, illness, and natural disasters, make it difficult to make ends meet. Two-thirds of all Americans between the ages of 20 and 65 will reside in a household that uses a social welfare program such as SNAP or Medicaid *at some point in their life*.[56] No person is immune to all of life's challenges and difficulties, which is precisely why public benefits programs act as a safety net for those who find themselves in need of assistance. For low-wage workers and their families, health care, food, and other programs can supplement earnings and enable them to thrive.

Contrary to the assumptions underlying the proposed rule, benefits like health and nutrition programs encourage and enable people to work and become a source of support for themselves and their families.

V. The Proposed Rule Will Have Wide-Reaching Effects Beyond Immigrant Communities, Negatively Impacting Healthcare Systems, Public Assistance Programs, States, And Local Governments.

The proposed rule will not only impact families who are subject to the "public charge" determination. The chilling effect of the proposed rule will lead to significant disenrollments in public benefits programs, thus resulting in a hungrier, sicker, poorer, and less economically stable nation.

As set forth in the NPRM, individuals who are concerned that receiving any form of assistance will adversely impact their immigration status will likely disenroll from the programs considered during the public charge determination. But the proposed rule fails to elaborate on the scope and

[51] Economic Policy Institute, *State of Working America Data Library*, "Poverty Level Wages," Updated February 13, 2017. https://www.epi.org/data/#?subject=povwage; CPS ORG | Census Bureau (poverty threshold).
[52] Economic Policy Institute and Oxfam America, "Few Rewards: An Agenda to Give America's Working Poor a Raise," 2016, https://www.oxfamamerica.org/static/media/files/Few_Rewards_Report_2016_web.pdf.
[53] Brynne Keith-Jennings and Vincent Palacios, "SNAP Helps Millions of Low-Wage Workers," Center on Budget and Policy Priorities, May 2017, http://www.cbpp.org/research/food-assistance/snap-helps-millions-of-low-wage-workers.
[54] https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references
[55] https://aspe.hhs.gov/poverty-guidelines
[56] Mark R. Rank and Thomas A. Hirschl, "Welfare Use as a Life Course Event: Toward a New Understanding of the U.S. Safety Net," Social Work, Volume 47, Issue 3, 1 July 2002, Pages 237–248, https://doi.org/10.1093/sw/47.3.237.

extent of this chilling effect on families nationwide, and therefore largely ignores the rule's effects beyond immigrant populations.

To illustrate, New York has 4.5 million immigrant state residents.[57] The proposed rule could impact about 2.1 million immigrants in the state, including 645 thousand children.[58] But the inevitable chilling effect could have a wide-ranging impact throughout all of New York: an estimated $2.6 billion decrease in federal funding for benefits programs; about $5 billion in economic losses as part of the ripple effect; and 34,000 jobs that could disappear statewide.[59] These effects will ultimately lead to coverage losses, decreased access to care and nutritious food, and worsened overall health outcomes for many New York families, not just families subject to the proposed rule.

A. The proposed rule will harm our healthcare systems and worsen overall public health and well-being.

Disenrollments will result in a loss of federal funds granted to states. Medicaid, for example, is an indispensable funding source for safety net hospitals and clinics, which are already financially vulnerable. Medicaid covers more than 35 percent of visits to safety-net hospitals.[60] It is also the single largest source of funding for community health centers in both Medicaid expansion and non-expansion states.[61]

Community health centers in Medicaid expansion states have more locations, see more patients, and have better provider-to-patient ratios as compared to non-expansion states, indicating a direct relationship between the number of patients covered by Medicaid in a safety-net facility's service area and the facility's financial health.[62] Hospitals in Medicaid expansion states are also 84 percent less likely to close than those in non-expansion states.[63] Hospital closures affect access to care for all residents of their service areas. A study of California hospitals found increased rates of deaths among inpatients in facilities located in hospital service areas where an emergency department had closed. Rates of death increased by 10 percent among non-elderly adults and 15 percent among patients who had heart attacks. The impact of hospital closure on access to care is particularly significant in rural communities, which generally have difficulty attracting healthcare providers and which providers often leave in the wake of a hospital

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[57] State Immigration Data Profiles 2016: New York, Migration Policy Institute, https://www.migrationpolicy.org/data/state-profiles/state/demographics/NY

[58] 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 2012-2016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder. Custom Tabulations by Manatt Health, 9/30/2018., https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population.

[59] Fiscal Policy Institute, "Only Wealthy Immigrants Need Apply: How a Trump Rule's Chilling Effect will Harm New York (October 10, 2018), http://fiscalpolicy.org/wp-content/uploads/2018/10/NY-Impact-of-Public-Charge.pdf

[60] Essential Data: Our Hospitals, Our Patients (America's Essential Hospitals 2017) https://essentialhospitals.org/wp-content/uploads/2017/06/AEH_VitalData_2017_Spreads_NoBleedCropMarks.pdf

[61] Community Health Centers: Recent Growth and the Role of the ACA (Kaiser Family Foundation Issue Brief, 2017) https://www.kff.org/report-section/community-health-centers-recent-growth-and-the-role-of-the-aca-issue-brief/

[62] Community Health Centers: Recent Growth and the Role of the ACA (Kaiser Family Foundation Issue Brief, 2017) https://www.kff.org/report-section/community-health-centers-recent-growth-and-the-role-of-the-aca-issue-brief/

[63] Health Affairs Jan 2018 https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0976 Understanding The Relationship Between Medicaid Expansions And Hospital Closures

closure.[64] Hospitals are also major employers and purchasers of goods and services. The loss of jobs associated with a hospital closure is especially devastating in rural areas, which have smaller populations and a historic reliance on declining industries.[65] Moreover, some industries and employers will not locate in an area without a hospital, leaving communities without hospitals unable to attract some employers.[66]

Furthermore, there are numerous immigrants in the healthcare workforce. Among home health aides, 25 percent are foreign-born and a third receive public benefits.[67] If these workers forgo health coverage, they will miss more days of work, burdening their employers and possibly harming people for whom they provide care.[68] Moreover, there will be an increased need for home care workers as the U.S. population ages.[69] If candidates for these low-wage jobs are denied admission on public charge grounds, vulnerable seniors may be forced to leave their homes and receive more expensive care in nursing homes.

The proposed rule would also effectively override state options to extend healthcare coverage. States largely support providing health and nutrition support to all lawfully residing pregnant women and children regardless of their citizenship status. Currently, under federal guidelines, lawfully residing immigrants have a five-year waiting period to qualify for Medicaid and CHIP coverage.[70] However, recognizing the importance of providing prenatal and early childhood health and nutrition support, 29 states provide Medicaid coverage to lawfully residing children and/or pregnant women without a five-year waiting period.[71] Additionally, 21 states use CHIP funding to provide coverage for income-eligible pregnant women regardless of immigration status.[72] Sixteen of these states also provide prenatal care to immigrant women who are not income eligible for Medicaid and/or CHIP under the CHIP unborn child option.[73] This allocation of federal and state funding for health and nutrition support, specifically for pregnant women and children, shows direct state effort to ensure the health and well-being of these groups where

[64] Jane Wishner, Patricia Solleveld, Robin Rudowitz, Julia Paradise, and Larisa Antonisse, A Look at Rural Hospital Closures and Implications for Access to Care: Three Case Studies (Kaiser Family Foundation, July 2016), www.kff.org/medicaid/issue-brief/a-look-at-rural-hospital-closures-and-implications-for-access-to-care

[65] Id (Jane Wishner, Patricia Solleveld, Robin Rudowitz, Julia Paradise, and Larisa Antonisse, A Look at Rural Hospital Closures and Implications for Access to Care: Three Case Studies (Kaiser Family Foundation, July 2016), www.kff.org/medicaid/issue-brief/a-look-at-rural-hospital-closures-and-implications-for-access-to-care)

[66] Id (Jane Wishner, Patricia Solleveld, Robin Rudowitz, Julia Paradise, and Larisa Antonisse, *A Look at Rural Hospital Closures and Implications for Access to Care: Three Case Studies* (Kaiser Family Foundation, July 2016), www.kff.org/medicaid/issue-brief/a-look-at-rural-hospital-closures-and-implications-for-access-to-care/.)

[67] Wendy E. Parmet and Elizabeth Ryan, New Dangers For Immigrants And The Health Care System, Health Affairs Blog, April 20, 2018. https://www.healthaffairs.org/do/10.1377/hblog20180419.892713/full

[68] Allan Dizioli and Roberto Pinheiro, Health Insurance As a Productive Factor (March 2012), https://pdfs.semanticscholar.org/998c/e59138c5ef43be4e20ed5f6fdb8900e34260.pdf.

[69]See E. Tammy Kim, Americans Will Struggle to Grow Old At Home, Bloomberg Businessweek, February 9, 2018.

[70] The Kaiser Family Foundation, New Option for States to Provide Federally Funded Medicaid and CHIP Coverage to Additional Immigrant Children and Pregnant Women, (July 10, 2009), http://kff.org/medicaid/fact-sheet/new-option-for-states-to-provide-federally/.

[71] Healthcare.gov, Coverage for Lawfully Present Immigrants, (June 15, 2018), https://www.healthcare.gov/immigrants/lawfully-present-immigrants/.

[72] The Kaiser Commission on Medicaid and the Uninsured, Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults, (Mar. 28, 2018), https://www.kff.org/medicaid/fact-sheet/where-are-states-today-medicaid-and-chip/.

[73] *Id.*

federal policy allows. The proposed rule would undermine these coverage choices, presenting significant federalism costs.

B. The proposed rule will harm all families—immigrant, non-immigrant, and mixed-status families—who rely on SNAP for food assistance.

The proposed rule would spur mass disenrollment from programs that provide access to healthy and nutritious food. About 40 million people nationwide received food assistance through SNAP this year alone.[74] About 5.1 million of these recipients are members of households with foreign-born non-citizen members.[75] With the proposed rule, immigrant families will likely disenroll, leading to a decrease in federal funding for programs that provide assistance to low-income families facing food insecurity. As discussed above, a recent study showed that SNAP participation dropped significantly to 34.8 percent for the first half of this year, almost a ten percent drop from 2017 and a trend-change from years of the program seeing a steady increase in participation.[76] SNAP is a critical source of support for many low-income households and has been shown to decrease poverty and improve health outcomes.[77] The proposed rule would roll back any progress SNAP has made in alleviating poverty and food security across the country. Just last year, according to the Census Bureau's Supplemental Poverty Measure, SNAP lifted about 3.4 million people out of poverty.[78] Immigrant communities will not be the only ones to feel the effects of the proposed rule. SNAP is critical to providing access to nutritious food for all low-income Americans and helps to address health, education, and economic stability issues that plague many families experiencing poverty today.

C. The proposed rule will harm public benefits agencies that provide access to income supports.

Implementing the proposed rule would pose an administrative burden on the agencies that provide access to public benefits programs, thereby affecting even U.S. citizens' access to housing, food and nutrition, and healthcare services. Because the rules for determining whether someone is a "public charge" are technical and the circumstances under which such a determination is made are often confusing, the number of low-income immigrant families that choose not to receive benefits would likely exceed the number that would ultimately be subject to a "public charge" determination. The rule will create new challenges for state and local agencies administering these programs.

Some issues state and local agencies could face include:

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[74] United States Department of Agriculture, Food and Nutrition Services, Supplemental Nutrition Assistance Program National View Summary FY15 through FY18, as of November 9, 2018, https://fns-prod.azureedge.net/sites/default/files/pd/34SNAPmonthly.pdf

[75] Food Research and Action Center (2018), The Hunger Impact of the Proposed Public Charge Rule, http://frac.org/wp-content/uploads/hunger-impact-proposed-public-charge-rule.pdf

[76] American Public Health Association, "Study: Following 10-year gains, SNAP participation among immigrant families dropped in 2018," November 12, 2018, https://www.apha.org/news-and-media/news-releases/apha-news-releases/2018/annual-meeting-snap-participation

[77] Food Research & Action Center. (2017). *Hunger and Health: The Role of the Supplemental Nutrition Assistance Program in Improving Health and Well-Being*, http://frac.org/wp-content/uploads/hunger-health-role-snap-improving-health-well-being.pdf.

[78] United States Census Bureau, Income and Poverty in the United States: 2017 (September 12, 2018), Report P60-263, https://www.census.gov/content/census/en/library/publications/2018/demo/p60-263.html

- *Needing to provide immigrants with documentation regarding their history of benefit receipt.* The instructions for the draft form I-944, Declaration of Self-Sufficiency, which is provided with the NPRM, direct individuals to provide documentation if they have ever applied for or received the listed public benefits in the form of "a letter, notice, certification, or other agency documents" that contain information about the exact amount and dates of benefits received.[79] This will generate a huge workload for agencies, and in many cases may require access to information that has been archived from no longer functional eligibility systems that have been replaced.

- *Responding to increased consumer inquiries related to the new rule.* State and local agencies will have to prepare to answer consumer questions about the new rule. They will experience increased call volume and traffic from consumers concerned about the new policies. Advising a family on whether they would be subject to a public charge determination and how the receipt of various benefits might play out can require technical knowledge of immigration statuses. State and local agencies may simply tell all consumers that they must speak to an immigration attorney to get their questions answered but such advice would likely deter eligible people from enrolling in programs, including many who would never be subject to a public charge determination. Moreover, people who seek public benefits are also unlikely to be able to afford to seek legal counsel.

- *Dealing with the increased "churn" among the caseload.* As discussed above, families will terminate their participation in programs.[80] But, because these programs meet vital needs for families, some will likely return to the caseload, resulting in a new kind of "churn" in agency caseloads. The "on-again off-again" approach to benefit enrollment not only yields negative results for families, but also results in duplicative work for state and local agencies. Churn is also expensive for states. In one study of SNAP-related churn, the costs averaged $80 for each instance of churn that requires a new application.[81]

- *Modifying existing communications and forms related to public charge.* For almost twenty years, agencies have worked under the consistent and clear rules about when an immigrant's use of benefits could result in a negative public charge determination. Agencies have incorporated this information on application forms, instructions, websites, posters used in lobbies, notices, scripts, and trainings for staff. All of these consumer communications will have to be identified, taken down, and updated. As noted above, the new rules would be so far-reaching and complicated that it will be unclear if states could replace them with messages that do not inappropriately deter eligible people.

- *Undermining adjunctive eligibility for WIC.* Congress permitted WIC to presume any individual on Medicaid, SNAP, or TANF to be income-eligible for WIC, thus reducing the paperwork burden during WIC certification. In 2016, 74.9 percent of WIC

[79] https://www.regulations.gov/document?D=USCIS-2010-0012-0047
[80] Emily Baumgaertner, "Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Services," New York Times, March 6, 2018, https://www.nytimes.com/2018/03/06/us/politics/trump-immigrants-public-nutrition-services.html
[81] Mills, Gregory, Tracy Vericker, Heather Koball, Kye Lippold, Laura Wheaton, Sam Elkin,"Understanding the Rates, Causes, and Costs of Churning in the Supplemental Nutrition Assistance Program (SNAP) - Final Report," Prepared by Urban Institute for the US Department of Agriculture, Food and Nutrition Service, November 2014, https://fns-prod.azureedge.net/sites/default/files/ops/SNAPChurning.pdf

participants were eligible for WIC due to eligibility for another program. A National WIC Association survey estimated significant increases in administrative expenditures on the certification process if adjunctive eligibility was undermined. Due to WIC's funding formula, increased administrative expenditures will also result in decreased funding for WIC's nutrition education, breastfeeding support, and client services. WIC complements the work of Medicaid and SNAP to ensure healthy families with adequate access to nutritious foods. Congress has recognized that connection by authorizing adjunctive eligibility, which has helped to reduce paperwork burdens on both clinics and participants, freeing up WIC funding to be used for nutrition education and breastfeeding support. The inclusion of Medicaid or SNAP in public charge review would undercut WIC's efforts to improve efficiency, streamline certification processes, and focus WIC services on its core public health mission.

- *Undermining streamlined enrollment processes for Medicaid and SNAP.* Certain states have explored universal online applications that permit an individual to apply for or pre-screen eligibility for multiple public assistance programs at one time.[82] The proposed rule would permit immigration officials to review an individual's attempt to simply *apply* for Medicaid or SNAP benefits.[83] This provision will discourage states from continuing with efforts to develop innovative enrollment processes, and likewise discourage individuals from using uniform or joint applications or pre-screening tools where an implicated program is listed.

VI. Responding to Specific Questions Posted by the Department in the Proposed Rule

In the proposal, DHS explicitly poses a number of questions with regard to specific elements of the rule. We respond to the questions that directly affect our constituencies. However, our responses should in no way be interpreted to indicate that the rule would be acceptable in its current form.

At FR 51173, the Department asks about unenumerated benefits—both whether additional programs should explicitly be counted, and whether use of other benefits should be counted in the totality of circumstances. We oppose adding any additional programs to the list of considered programs, or in any way including the use of non-listed programs in the totality of circumstances test. No additional programs should be considered in the public charge determination.

At FR 51165, the Department seeks input on whether to consider the receipt of designated monetizable public benefits at or below the 15 percent threshold. The proposed rule would penalize people who are, by definition, nearly self-sufficient. If an individual used even the smallest amount of benefits for a relatively short amount of time, they could be blocked from gaining admission or LPR status. The proposal defines

[82] Urban Institute, "Changing Policies to Streamline Access to Medicaid, SNAP, and Child Care Assistance" (Mar. 2016), https://www.urban.org/sites/default/files/publication/78846/2000668-Changing-Policies-to-Streamline-Access-to-Medicaid-SNAP-and-Child-Care-Assistance-Findings-from-the-Work-Support-Strategies-Evaluation.pdf; *see also* Ctr. for Budget and Policy Priorities, "Modernizing and Streamlining WIC Eligibility Determination and Enrollment Processes," 18 (Jan. 6, 2017), https://www.cbpp.org/sites/default/files/atoms/files/1-6-17fa.pdf.

[83] Dep't of Homeland Security, *Proposed Rule: Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,291 (Oct. 10, 2018) (to be codified in 8 C.F.R. § 212.22(b)(4)(i)(F)(i)).

"public charge" to include anyone who uses more than 15 percent of the poverty line for a household of one in public benefits—just $5 a day regardless of family size. This absolute standard overlooks the extent to which the person is supporting themselves. For example, a family of four that earns $43,925 annually in private income but receives just $2.50 per day per person in monetizable public benefits would be receiving just 8.6 percent of their income from the government programs, meaning that they are 91.4 percent self-sufficient.[84] Yet the rule would still consider the receipt of assistance as a heavily-weighed negative factor in the public charge determination.

DHS proposes to treat income below 125 percent of the FPL for the applicable household size as a negative factor. Conversely, DHS proposes that income above 250 percent of the FPG be required to be counted as a heavily weighed positive factor. At FR 51187, the Department invites comments on the 125 percent of FPG threshold. We strongly oppose the use of these arbitrary and unreasonable thresholds. There is no statutory basis for either threshold, and the statement that 125 percent of the FPG has long served as a "touchpoint" for public charge inadmissibility determinations is deeply misleading. The statute DHS cites refers to the income threshold for sponsors who are required to submit an affidavit of support, not to the immigrant subject to the public charge determination, and DHS provides no justification for why this threshold is appropriate. Even less justification is offered for the 250 percent of FPG threshold. At footnote 583, DHS states that the differences in receipt of non-cash benefits between noncitizens living below 125 percent of FPG and those living either between 125 and 250 percent of the FPG or between 250 and 400 percent of the FPG were not statistically significant. Setting these standards goes well beyond reasonable interpretation of the law and, as shown above, will have discriminatory effects upon immigrants with disabilities.

At FR 51174, DHS asks about whether the effective date of the rule should be delayed in order to help "public benefit granting agencies" adjust systems. Implementation of the proposed rule would create new challenges and, as discussed above, impose a tremendous burden on state and local agencies that administer public benefit programs. The proposal should not be implemented at all, but if it is, implementation should be delayed for as long as possible.

At FR 51174, DHS specifically requests comment on whether the Children's Health Insurance Program (CHIP) should be included in a public charge determination. For many of the same reasons that we oppose the inclusion of Medicaid, we oppose the inclusion of CHIP, a program for working families who earn too much to be eligible for Medicaid without a share of cost. Making the receipt of CHIP a negative factor in the public charge assessment, or including it in the "public charge" definition, would exclude moderate income working families and applicants likely to earn a moderate income at some point in the future.

Including CHIP in a public charge determination would likely lead to many eligible children forgoing healthcare benefits, both because of the direct inclusion in the public

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[84] Bier, David. The Cato Institute. New Rule to Deny Status to Immigrants Up to 95% Self-Sufficient. https://www.cato.org/blog/new-rule-deny-status-immigrants-95-self-sufficient

charge determination as well as the chilling effect discussed above. Nearly 9 million children across the U.S. depend on CHIP for their health care.

In addition, including CHIP would be inconsistent with Congressional intent to expand coverage to lawfully present children and pregnant women, demonstrated by the passage of CHIPRA. Section 214 of the statute gave states a new option to cover, with regular federal matching dollars, lawfully residing children and pregnant women under Medicaid and CHIP during their first five years in the U.S. In enacting this statute, Congress recognized the public health, economic, and social benefits of ensuring that these populations have access to care.

Since its inception in 1997, CHIP has been a significant factor in dramatically reducing the rate of uninsured children across the U.S. Between 1997 when CHIP was enacted through 2012, the uninsured rate for children fell by half, from 14 percent to seven percent. Medicaid and CHIP together have helped to reduce disparities in coverage that affect children, particularly children of color. A 2018 survey of the existing research noted that the availability of "CHIP coverage for children has led to improvements in access to health care and to improvements in health over both the short-run and the long-run."[85] CHIP enrollment can have a positive impact on health outcomes, including reductions in avoidable hospitalizations and child mortality, and improves health, which translates into educational gains, with potentially positive implications for both individual economic well-being and overall economic productivity.[86] Continuous, consistent coverage without disruption is especially critical for young children, as experts recommend 16 well-child visits before age six, more heavily concentrated in the first two years, to monitor their development and address any concerns or delays as early as possible.[87]

Overall, we believe the benefits of excluding CHIP and Medicaid certainly outweigh their inclusion in a public charge determination. We recommend that DHS continue to exclude CHIP from consideration in a public charge determination in the final rule but also exclude receipt of Medicaid for the same reasons.

At FR 51174, DHS asks about public charge determinations for non-citizen children under age 18 who receive one or more public benefit programs. We believe that receipt of benefits as a child should not be taken into account in the public benefits determination. The receipt of benefits allows children to live in more economically stable families, be healthy, and succeed in school. Safety net programs such SNAP and Medicaid have short and long-term health benefits and are crucial levers to reducing the

[85] "CHIP and Medicaid: Filling in the Gap in Children's Health Insurance Coverage. | Econofact". *Econofact*. 2018-01-22. Retrieved 2018-01-23.

[86] Kaiser Family Foundation, *The Impact of the Children's Health Insurance Program (CHIP): What Does the Research Tell Us?,* Jul. 2014, https://www.kff.org/medicaid/issue-brief/the-impact-of-the-childrens-health-insurance-program-chip-what-does-the-research-tell-us/.

[87] Elisabeth Wright Burak, Georgetown Center for Children and Families, *Promoting Young Children's Healthy Development in Medicaid and the Children's Health Insurance Program (CHIP),* Oct. 2018, https://ccf.georgetown.edu/wp-content/uploads/2018/10/Promoting-Healthy-Development-v5-1.pdf.

intergenerational transmission of poverty.[88] Moreover, negatively weighing a child's enrollment in health and nutrition programs would be counter to Congressional intent under both the 2009 CHIPRA and section 4401 of the Farm Security and Rural Investment Act of 2002, which restored access to what was then called Food Stamps (now the Supplemental Nutrition Assistance Program, SNAP) to immigrant children.

At FR 51200, DHS asks whether 36 months is the right lookback period for considering previous use of public benefits and whether a shorter or longer timeframe would be better. We oppose any arbitrary lookback period for use of public benefit programs. Inclusion of a retrospective test is fundamentally inconsistent with the forward-looking design of the public charge determination as mandated by law. Past use of a government-funded program is not necessarily predictive of future use. If the specific circumstances that led to the use of public benefits no longer apply, the previous use of benefits is irrelevant. The studies cited in the proposed rule that indicate that families that stop receiving cash assistance under TANF frequently continue to receive nutrition and health assistance are irrelevant to this question, as cash assistance is only available to an extremely limited population of families with children, living in deep poverty. These studies provide zero evidence that previous receipt of the newly added benefits is an indicator of future use.

Finally, at FR 51210, DHS asks whether receipt of benefits previously considered (cash and long term institutionalization) should be considered in "some other way" than as a negative factor in the totality of the circumstances test. The agency's proposal to heavily weigh receipt of benefits—including benefits previously considered—is inconsistent with the plain meaning of the statutory "totality of circumstances" test. The public charge determination was designed to be a narrow tool to identify individuals likely to become primarily dependent on the government for support. The test was never designed to prevent immigration of low- and moderate-income families that may at some point need access to public programs that provide support which allows them to help them continue working. Even if an individual has received cash assistance or long-term care at government expense, the agency must assess the individual's overall circumstances with respect to the future likelihood of the applicant becoming a public charge.

In sum, NCLEJ strongly urges that the proposed rule be withdrawn in its entirety. The proposed rule is contrary to clear Congressional intent, long-standing administrative guidance, and federal anti-discrimination law. The proposed rule will harm immigrant families and discriminate against immigrants with disabilities or serious health conditions. Beyond its direct impact on the immigrant community, the proposed rule will also result in a spillover effect of economic loss and harm to healthcare systems, public benefits programs that support all families in need, and state and local government agencies. For these reasons, we urge DHS to withdraw the rule in its entirety and to continue to implement current policy regarding public charge.

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[88] Page, Marianne, "Safety Net Programs Have Long-Term Benefits for Children in Poor Households", Policy Brief, University of California, Davis, 2017 https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-health_and_nutrition_program_brief-page_0.pdf

NCLEJ's comment includes numerous citations to supporting research, including direct links to relevant studies and other data. We direct DHS to each of these cited studies and the links that we have provided, and we request that the full text of each of the documents, data, research, or studies cited, along with the text of this comment, be considered part of the formal administrative record on the NPRM for the purposes of the Administrative Procedure Act.

NCLEJ appreciates the opportunity to comment on this proposed rule. If you have any questions regarding NCLEJ's comments, you may contact Senior Attorney Travis England (england@nclej.org), Senior Attorney Leah Lotto (lotto@nclej.org), Staff Attorney Britney Wilson (wilson@nclej.org) and Equal Justice Works Fellow Jen Rasay (rasay@nclej.org). Thank you for your consideration of our comments.

National Center for Law and Economic Justice