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Samantha Deshombres, 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 Sir/Madam:

I am writing on behalf of Asian Americans Advancing Justice-Los Angeles (“Advancing Justice-LA”) in response to the Department of Homeland Security’s (“DHS” or “the Department”) Notice of Proposed Rulemaking (“NPRM,” “proposed rule” or “rule”) to express our strong opposition to the changes to the public charge test, published in the Federal Register on October 10, 2018. (83 Fed. Reg. 51114-51296)

The proposed rule is an arbitrary and unsubstantiated departure from long-standing practice that is inconsistent with Congressional intent, will negatively impact millions of immigrants and U.S. citizen children, and will have a devastating and disproportionate impact on immigrants of color. Indeed, the proposed rule is a backdoor way to fundamentally transform our immigration system, shifting immigration trends away from the reunification of families from diverse parts of the world toward Europe and other predominantly white areas in which people are more likely to be wealthy, formally educated, and proficient in English.

Although Asian American and Pacific Islander (“AAPI”) people in this country are workers and taxpayers who contribute in the same essential ways to our society and economy as other groups of Americans, the impact on AAPI communities if this rule is given effect will be devastating. As our families seek to reunite, it will bar the most vulnerable members of our communities, including seniors, children, women, low-income people, people who are not proficient in English, and people living with chronic health conditions, such as asthma, diabetes, or HIV/AIDS, from obtaining green cards, seeking entry or reentry into the U.S., or extending or changing their nonimmigrant visas, and will force many to choose between life-saving public benefits and separation from their families. Millions of AAPI immigrants could disenroll or fail to apply for—health, nutrition, and housing benefits that they desperately need for their families to thrive—even if they are not subject to the public charge test. Indeed, the proposal is not even in effect and scores of immigrants are already avoiding benefits. Despite the sweeping harmful impact of the rule, DHS does not provide justification for why changes purportedly are needed.

We urge that the rule be withdrawn in its entirety, and that the public charge standards and principles adopted in 1999 by the Immigration and Naturalization Service (“INS”)¹ remain in effect.²

Asian Americans Advancing Justice-Los Angeles

Advancing Justice-LA advocates and provides services for many of the immigrant communities impacted by the proposed rule. Founded in 1983 as the Asian Pacific American Legal Center, Advancing Justice-LA is the nation’s largest legal and civil rights organization for Asian Americans and Native Hawaiian and Pacific Islanders (“NHPI”) and is based in Los Angeles, with satellite offices in Orange County and Sacramento. Advancing Justice-LA is part of a national affiliation of five civil rights nonprofit organizations that joined under one name in 2013, which also includes Asian Americans Advancing Justice-AAJC, Asian Americans Advancing Justice-Asian Law Caucus, Asian Americans Advancing Justice-Atlanta, and Asian Americans Advancing Justice-Chicago, to build a clear, more unified voice for Asian American and NHPI communities.

Advancing Justice-LA serves more than 15,000 individuals and organizations every year. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, Advancing Justice-LA focuses on the most vulnerable members of Asian American and NHPI communities, such as seniors, immigrants, low-wage workers, low-income individuals, and those who speak or understand little or no English. Our services and advocacy include:

- Assisting immigrants nationally and locally who are seeking help with naturalization and immigration relief such as adjustment of status, representation in immigration court, and other forms of family-based immigration.
- Addressing the health-related needs of Asian American and NHPI communities and immigrants by increasing access to public benefits, especially health programs, including conducting outreach, education and enrollment into the marketplaces created under the Patient Protection and Affordable Care Act (“ACA”), Medicaid, Medicare, and other state and local programs; assisting immigrants to overcome cultural and linguistic barriers to health coverage and services; educating our diverse communities about health care and their health care rights; and advocating with policy makers to create a more equitable, accessible, and inclusive health system.

¹ The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, abolished the INS, and transferred its relevant functions and responsibilities to United States Citizenship and Immigration Services (“USCIS”), a new component of the Department of Homeland Security (“DHS”).

² Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (March 26, 1999) [hereinafter 1999 Field Guidance]; Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (proposed May 26, 1999) [hereinafter 1999 Public Charge Standards].

- Researching and publishing national, state and local reports that disaggregate data for AANHPI communities and providing training on Asian American and NHPI data to promote a better understanding of our growing and diverse communities.
- Developing the leadership skills of immigrant families by working with racially diverse youth in Los Angeles and the San Gabriel Valley through school-based programs and by providing multilingual parent training programs for Asian and Latino immigrants to help them advocate for their children and their community.
- Providing legal services and representation to low-income seniors, survivors of domestic violence, human trafficking victims, and low-wage workers.
- Providing toll-free hotlines in Cambodian (Khmer), Chinese (Mandarin and Cantonese), English, Filipino (Tagalog), Hindi, Korean, Thai, and Vietnamese through our Asian Language Legal Intake Project (“ALLIP”) to help callers receive resources, counseling, or referral to Advancing Justice-LA attorneys or other legal aid organizations.
- Advocating for systemic change through impact litigation and policy advocacy on a wide range of civil rights issues impacting Asian American and NHPI communities, including language access, health care, education, employment, voting, and immigrants’ rights.

In short, Advancing Justice-LA has deep expertise in immigration, public benefits, and civil rights enforcement. We exist to fight against the various manifestations of structural racism that affect our communities, including illogical and cruel measures such as the proposed changes to public charge at issue in this comment.

Summary of Arguments

We oppose the proposed rule for many reasons but these are the four overarching reasons:

- First, the public charge concept is historically discriminatory and will have a disproportionate impact on Asian Americans and other communities of color by shifting immigration trends away from diverse world regions and towards Europe.
- Second, the proposed rule could separate hundreds of thousands of Asian American immigrant families within the next 5 years alone.³
- Third, the change in the public charge definition from “primarily dependent on the government for subsistence” to “receipt of one or more public benefits,” is a dramatic and unjustified expansion of the public charge doctrine that goes far beyond the

³ See Randy Capps et al., Migration Policy, Inst., *Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration* (Nov. 2018); <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

statute and is contrary to Congressional intent.⁴ The rule's expansion to include non-cash aid, such as health, nutrition, and housing health programs, will cause both a direct impact and chilling effects that could make millions of immigrants fearful of using critical life-saving programs that keep them healthy, housed, and able to work, which in turn will have a negative economic impact on states, localities, school districts, and our health care systems.

- Fourth, the proposed interpretation of the statutory factors for the public charge determination are vague, unrelated to predicting future benefit use, discriminatory, and will have a disproportionate impact on immigrants of color.

I. We oppose the proposed rule because it appears to be driven by the Administration's racial animus and designed to shift immigration patterns away from diverse parts of the world and towards Europe.

The history of public charge is steeped in deep-rooted prejudice against those who comprise a racial, ethnic, or social underclass. The first public charge laws in this country were adopted by the states. For example, New York State passed a law in 1847 that prohibited the landing of “any lunatic, idiot, deaf and dumb, blind or infirm persons, not members of emigrating families, and who are likely to become permanently a public charge.”⁵ The motivation for these laws derived from both financial concerns and cultural prejudice against the Catholic Irish who often arrived in the United States without the financial resources to support themselves.⁶ The first federal statute precluding the admission of immigrants based on potential public charge was passed by the 47th Congress and signed into law on August 3, 1882,⁷ three months after it had passed the Chinese Exclusion Act.⁸ After the establishment of immigration quotas based on national origin in the 1920s, the public charge provision was used to exclude European Jews seeking to escape Nazi genocide.⁹

Today's proposal targets individuals who come from majority non-white countries, which is consistent with President Trump's racist rhetoric toward immigrants of color. The President has repeatedly disparaged immigrants from Mexico and Latin America as “criminals, drug dealers,

⁴ Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,289 (proposed Oct. 10, 2018).

⁵ Annual Reports of the Commissioners of Emigration of the State of New York: From the Organization of Commission, May 5, 1847, to 1860, Inclusive (New York: John F. Trow, 1861)

⁶ Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States & the 19th-Century Origins of American Immigration Policy* 2 (2017).

⁷ Immigration Act of August 3, 1882, 22 Stat. 214.

⁸ Immigration Act of May 6, 1882, 22 Stat. 58.

⁹ Barbara L. Bailin, *The Influence of Anti-Semitism on United States Immigration Policy With Respect to German Jews during 1933-1939* (May 10, 2011) (thesis, City University of New York), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1261&context=cc_etds_theses

rapists”¹⁰ and called them “bad hombres;”¹¹ he stated that 15,000 recent immigrants from Haiti “all have AIDS” and that 40,000 Nigerians, once seeing the United States, would never “go back to their huts” in Africa;¹² and he called for “a total and complete shutdown of Muslims entering the United States,”¹³ which he partially realized by implementing a ban on millions of people from predominantly Muslim countries entering or reentering the United States, including Asian immigrants from Syria, North Korea, Iran, and Yemen.¹⁴ President Trump has also made statements that reflect his animus towards Asian Americans, such as using broken English to impersonate Asian negotiators,¹⁵ mimicking Asian leaders,¹⁶ and suggesting that all students from China are spies.¹⁷ On January 11, 2018, he explicitly expressed his view that America should not be a haven for “people from shithole countries,” but should accept more immigrants from countries like Norway—that is overwhelmingly white.¹⁸ The proposed rule is a concrete effort to make this statement a reality.

If the rule becomes final in its current form, it will dramatically reduce the diversity of immigrants entering the United States and fundamentally change the demographics of our country. It is indisputable the proposed rule will have a disproportionate impact on people of color. While people of color account for approximately 36% of the total U.S. population, of the 25.9 million people potentially chilled from seeking services by the proposed rule, approximately 90% are people from communities of color (23.2 million).¹⁹ Among people of color potentially chilled by the rule, an estimated 70% are Latino (18.3 million), 12% are AAPI (3.2 million), and

¹⁰ Hunter Walker, *Donald Trump just released an epic statement raging against Mexican immigrants and “disease,”* Business Insider, July 6, 2015, <https://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7#ixzz3fF897EIH>.

¹¹ Emily Cochrane, *Playing Up Support Among Hispanic Voters, Trump Takes Aim at Immigration Laws*, N.Y. Times, Oct. 20, 2018, <https://www.nytimes.com/2018/10/20/us/politics/trump-arizona-rally-immigration.html>.

¹² Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times, Dec. 23, 2017, <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

¹³ Tessa Berenson, *Donald Trump Calls For ‘Complete Shutdown’ of Muslim Entry to U.S.*, TIME, Dec. 5, 2017, <http://time.com/4139476/donald-trump-shutdown-muslim-immigration/>.

¹⁴ *Exec. Order Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

¹⁵ Darran Simon, *President Trump’s other insensitive comments on race and ethnicity*, CNN, Jan. 13, 2018, <https://www.cnn.com/2018/01/11/politics/president-trump-racial-comments-tweets/index.html>.

¹⁶ Maya Oppenheim, *Donald Trump appears to mock Asian leaders’ gestures during speech on tax reform*, Independent, Nov. 30, 2017, <https://www.independent.co.uk/news/world/americas/donald-trump-appears-to-mock-asian-leaders-gestures-during-speech-donald-trump-asian-leaders-a8084281.html>.

¹⁷ Annie Karni, *Trump rants behind closed doors with CEOs*, Politico, Aug. 8, 2018, <https://www.politico.com/story/2018/08/08/trump-executive-dinner-bedminster-china-766609>.

¹⁸ Josh Dawsey, *Trump derides protections for immigrants from ‘shithole’ countries*, Wash. Post, Jan. 12, 2018, https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.7fc895490993.

¹⁹ Jeanne Batalova et al., Migration Policy Inst., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use* 26 (2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

7% are Black people (1.8 million).²⁰ Although Asian Americans represent only 5.8% of the U.S. population, they comprise approximately 12% of those who will potentially be chilled by the rule from seeking benefits which are important for helping them make it through difficult times and to which they are entitled.²¹

Moreover, the proposed interpretation of the statutory factors will also disproportionately impact people of color, resulting in a staggering denial of green card applications. Sixty percent of green card applicants from Mexico and Central America and 41% from Asia had two or more negative factors, whereas only 27% of immigrants from Europe, Canada, and Oceania have two or more negative factors.²² Immigrants from Asia will be dramatically affected by these changes; over the next 5 years alone, more than 300,000 Asian immigrants could be denied green cards because they possess two or more negatively weighted factors under the rule.²³ More than half of the immigrants from Vietnam and Bangladesh, nearly half of the immigrants from China and Pakistan, and more than 30% of immigrants from India and Korea could be denied a green card due to having two or more negative factors under the proposed rule.²⁴ Immigrants from Europe and Canada, and Oceania (primarily Australia and New Zealand) are the least likely to be affected by the proposed changes to public charge because they are generally wealthier, more educated, and more likely to speak English.²⁵ In fact, immigrants from these regions with predominantly white populations have the highest proportion of recent lawful permanent residents (“LPRs” or green card holders) with family income above 250% FPG, the only heavily weighted positive factor under the proposed rule; and no negative factors (40%).²⁶ Thus, the public charge rule is a continuation of the administration’s targeted attacks on non-white people.

According to a recent analysis by the Migration Policy Institute, the proposed rule would likely cause a significant shift in the origins of immigrants seeking visas and green cards, away from diverse regions of the world and towards Europe.²⁷ This trend would not only reduce the diversity of immigration to the United States, it would disproportionately increase family separation among immigrants of color – and US citizens - already residing in the US.

II. We oppose the proposed rule because it would disproportionately harm Asian Americans and Pacific Islanders.

²⁰ *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, Manatt, Oct. 11, 2018, <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population> (last visited Dec. 10, 2018).

²¹ Jeanne Batalova, et al., *supra* note 19, at 9; Gustavo Lopez et al., Pew Research Ctr., *Key facts about Asian Americans, a diverse and growing population* (Sept. 8, 2017) <http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

²² Randy Capps et al., *supra* note 3.

²³ *Id.*

²⁴ *Id.* at tbls.B-1 to B-6, <https://www.migrationpolicy.org/sites/default/files/MPI-PublicChargeImmigrationImpact-Appendices-FINAL.xlsx>

²⁵ *Id.*

²⁶ *See id.* at 3.

²⁷ *Id.*

Asian Americans were the first targets of race-based restrictions on immigration. Asian immigrants began arriving in the United States in the 1800s intending to work. In response, Congress passed the Chinese Exclusion Act of 1882, which barred immigration by Chinese laborers and was the first law in the U.S. to restrict immigration based on race and nationality.²⁸ These restrictions were extended to virtually all of Asia through the Immigration Act of 1917 and the National Origins Act of 1924.²⁹ These restrictions were not repealed until 1965, when Congress finally eliminated racial quotas on immigration and established the family-based immigration system, which has contributed to Asian Americans becoming the fastest growing racial group in the U.S.³⁰ Between 2000 and 2015, the population of Asian Americans in the United States grew by 72%.³¹ According to the Pew Research Center, Asians will make up 38% of all U.S. immigrants in 50 years, surpassing any other racial group.³² The proposed rule could chill as many as 3.2 million Asian Americans from using vital health, nutrition, and housing benefits that they need to thrive and could prevent 41% of Asian green card applicants from receiving permanent residency and the opportunity to reunite with family.³³ In addition, the proposed rule will also affect 2.3 million individuals on nonimmigrant temporary visas, such as student visas or H-1B visas, who seek to extend their stay or change their status. Two-thirds of H-1B visa holders are from Asian countries.³⁴

A. The proposed rule is an attempt to circumvent the current family-based immigration system and would negatively impact hundreds of thousands of Asian American immigrant families within the next 5 years alone.

The proposed rule will primarily affect individuals adjusting their status to become LPRs, two thirds of whom apply through family-based petitions.³⁵ We oppose the proposed rule as a backdoor way to change the family-based immigration system, which is the primary path for many AAPIs to obtain legal permanent residency. In recent years, three out of every ten individuals obtaining permanent residence status and 40% of the millions of individuals and families waiting in long backlogs for family-based immigration are from Asia and Pacific Island nations.³⁶ According to a recent Migration Policy Institute report, approximately 332,000 recent LPRs from Asia had two or more negative factors under the proposed rule, putting them at risk

²⁸ Immigration Act of May 6, 1882, 22 Stat. 58; Paul Yin, *The Narratives of Chinese-American Litigation during the Chinese Exclusion Era*, 19 Asian Am. L.J. 145 (2012).

²⁹ Immigration Act of 1917, 39 Stat. 874; Immigration Act of 1924, 43 Stat. 153.

³⁰ Asian Am. Ctr. for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States: 2011* 3, 5 (2011), https://www.advancingjustice-la.org/sites/default/files/ENTERED_Community_of_Contrasts_2011.pdf.

³¹ Gustavo Lopez et al., *supra* note 21.

³² *Id.*

³³ Jeanne Batalova, et al., *supra* note 19; Gustavo Lopez et al., *supra* note 21.

³⁴ Randy Capps et al., *supra* note 3.

³⁵ *Id.* at 3.

³⁶ U.S. Dep't of State, Annual Report of Immigrant Visa Applicants (2017), https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2017.pdf.

of green card denials.³⁷ That is literally hundreds of thousands of families that could be torn apart or remain separated because of this rule, potentially in violation of constitutional and statutory mandates.

Advancing Justice-LA assists hundreds of low-income immigrants obtain green cards each year through family-based petitions. Some of our clients are currently receiving CalFresh, California's Supplemental Nutrition Assistance Program ("SNAP"), Medi-Cal, California's Medicaid program, or housing assistance. Our Health Access Project with its Health Justice Network (HJN) partners, comprised of over 60 community-based organizations and community health clinics, has reached over 2 million AAPIs in California and across the country, and educated and enrolled over 20,000 community members into Medi-Cal and over 10,000 community members into Covered California, California's state-based marketplace created under the ACA. Under current law, these benefits are irrelevant for public charge purposes and we can confidently inform our clients that they can submit their Form I-485 without fear; under the proposed rule, we will be forced to ask our low-income clients who are seeking to reunite with their parents, their children, or their spouse to choose between food, housing, and medical care or a green card. This is not a choice that Congress intends people to be forced to make.

Negative Income Factor: The vast majority of our clients are low-income. Under current law, the economic status of the applicant is not considered as long as they have a sponsor who agrees to support them. The proposed rule's unprecedented use of an income threshold will prevent many of our low-income clients from getting a green card or coming to the United States to join their families, to the detriment of the U.S. citizens and green card holders who seek to be reunited with their mothers, fathers, husbands, wives, brothers, sisters, and children.

English Proficiency Requirement: Another unprecedented factor in the proposed rule is proficiency in English, which has never been a consideration for obtaining a green card. This proposed change will disproportionately impact the Asian community because nearly 3 out of 4 speak languages other than English at home and with nearly 1 out of 3 Asian Americans experiencing some difficulty communicating in English or do not speak English very well.³⁸ Of individuals adjusting to LPR status who do not speak English very well, 59% are from China, 25% from India, and 38% from Asian countries as a whole.³⁹ The use of this factor is stigmatizing and reinforces negative immigrant stereotypes that do not take into account the time required for English language acquisition once immigrants enter dominant English work and school places. Nationally, the percentage of Asian Americans who have difficulty speaking English has been declining in the U.S., as has the rate for Latinos.⁴⁰ By giving *de facto* preference to individuals from English-speaking nations, DHS is upending the careful balancing that Congress did to move the country away from the pre-1965 racist quota system.

³⁷ Randy Capps et al., *supra* note 3.

³⁸ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

³⁹ Randy Capps et al., *supra* note 3.

⁴⁰ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

Age, Health, and Family Size Factors Undermine Asian Intergenerational Families: The proposed rule will also make it nearly impossible for older Asian immigrants to be reunited with their adult children in the United States and contribute to the intergenerational household, which is so important for many Asian American families. In fact, Asian Americans are more likely to live in intergenerational families than any other group.⁴¹ If this rule were implemented, many U.S. citizens may no longer be able to welcome their own parents into the country because it will be nearly impossible for older adults to pass the “public charge” test under the new criteria. In Los Angeles (LA) County for example, older AAPIs, who make up the majority of those entering the U.S. on family-based petitions and are the fastest growing age group among Asian Americans,⁴² are more likely than average to live below the poverty level and have low incomes, to not speak English, to be uninsured and to have low educational attainment.⁴³ Instead of recognizing the value of intergenerational families who support each other, the proposed rule callously labels parents and grandparents as a burden because of their age and health needs, penalizes larger intergenerational families, and ignores the critical role many grandparents play in caring for their grandchildren and other family member and contributing to the household in other ways, often enabling others to work.

In addition to the hundreds of thousands of Asian immigrants who could be denied green cards and separated from their families as a result of the proposed rule, many more current green card holders will be impacted if they stay outside of the U.S. for over six months because they will be subject to the public charge test when they seek readmission. More than any other racial group, AAPIs in the U.S. believe that caring for parents is expected of them;⁴⁴ many spend extended time in their home countries to take care of family members. Under the expansive proposed rule, many would be prevented from returning home to their families in the U.S.

B. The proposed rule will negatively impact Pacific Islander communities.

The proposed rule would also have a severe and disproportionate impact on Pacific Islanders, many of whom are Compact of Free Association (“COFA”) migrants who are able to reside in the U.S. as “non-immigrants” under ongoing treaty obligations that arise from the U.S. occupation and exploitation of Pacific Islander nations.⁴⁵ Citizens of Palau, the Marshall Islands, and Micronesia are eligible to freely enter and exit, and reside indefinitely, in the U.S. (and U.S. Pacific jurisdictions, including Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands). Under the COFA, such Freely Associated States (“FAS”) citizens do not require visas to enter the U.S., and are given a unique “non-immigrant”

⁴¹ D’vera Cohn & Jeffrey S. Passel, Pew Research Ctr., *A record 64 million Americans live in multigenerational households* (Apr. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/>.

⁴² Asian Am. Ctr. for Advancing Justice, *supra* note 30, at 4.

⁴³ *Id.* at 4–5.

⁴⁴ Belden Russenello & Stewart and Research/Strategy/Management, *AARP Multicultural Survey: In the Middle: A Report on Multicultural Boomers Coping With Family and Aging Issues* 8–9, 44 (July 2001), https://assets.aarp.org/rgcenter/il/in_the_middle.pdf.

⁴⁵ 48 U.S.C. §§ 1901, 1931.

immigration status that does not have any expiration date.⁴⁶ FAS citizens residing in the U.S. are authorized to work in the U.S.⁴⁷ There are over 61,000 FAS citizens currently residing in the U.S. and its associated Pacific jurisdictions.⁴⁸

While COFA migrants are not eligible for many federal benefits, some do participate in federal housing programs and state and local programs.⁴⁹ If this rule is finalized, many COFA migrants may be discouraged from enrolling or disenroll from these types of programs, creating greater public health and other problems. Others would be blocked from entering or reentering the U.S., separating them from their families. Given the fact that many COFA families move to the U.S. for better employment, this would have a devastating impact on COFA families with citizen children and directly undermine their ability to provide financial stability for their families.

C. Conclusion

In summary, the proposed rule will negatively affect AAPIs. It would fundamentally reshape our legal immigration system, shifting immigration away from family reunification for working people of color and the world's dreamers and strivers towards those who are white, between 18-61, and English speaking, and bring high incomes, financial assets, and advanced degrees.

III. We oppose the unjustified change in the public charge definition from a standard of “primary dependence on government for subsistence” to one where simply receiving one or more benefits would trigger a public charge determination.

For almost two decades, U.S. immigration officials have explicitly reassured, and immigrant families have relied on the reassurance that participation in programs like Medicaid and SNAP

⁴⁶ The passports for FAS citizens entering the U.S. are stamped “CFA/PAL”, “CFA/MIS” (or “CFA/RMI”), or “CFA/FSM” and they are provided a Form I-94 (Arrival/Departure Record), with an 11-digit number that serves as their “alien registration number.” See USCIS, *Fact Sheet: Status of Citizens of the Freely Associated States of the Federated States of Micronesia and the Republic of the Marshall Islands*, Oct. 26, 2018, https://www.uscis.gov/sites/default/files/USCIS/Verification/I-9%20Central/FactSheets/FactSheet-Status_of_Citizens_of_Micronesia_Marshalls_Islands.pdf. This “non-immigrant” status is unique because all other nonimmigrant statuses have expiration dates and must be renewed periodically. *Id.* The I-94’s are stamped “D/S”, meaning for an (indefinite) “duration of status”. Because they have the right to remain in the U.S. indefinitely, FAS citizens also are not required to meet the usual requirement for non-immigrant status of only having an intention to reside temporarily (rather than permanently) in the U.S. *Id.*

⁴⁷ *Id.*

⁴⁸ U.S. Dep’t of Interior, *Interior Assistant Secretary Discusses Health Care Coverage Options with Representatives from the Freely Associated States of Micronesia, Marshall Islands, and Palau Living in Hawaii and U.S. Mainland* (Nov. 10, 2016), <https://www.doi.gov/oia/interior-assistant-secretary-discusses-health-care-coverage-options-representatives-freely-0>.

⁴⁹ Nat’l Housing Law Project & Nat’l Law Ctr. on Homelessness & Poverty, *Trump Administration’s Proposed “Public Charge” Rule: What Housing and Homelessness Advocates Should Know* (last updated October 2, 2018), <https://bit.ly/2IECGno>. COFA/FAS citizens living in the U.S. are listed as a category of aliens eligible for HUD assistance in Title 42 §1436(a). Maggie McCarty & Alison Siskin, Congressional Research Serv., *Immigration: Noncitizen Eligibility for Needs-Based Housing Programs 1* (Dec. 8, 2015), <https://fas.org/sgp/crs/homesecc/RL31753.pdf>. Note that HUD programs are not considered “federal means-tested public benefits.” *Id.* at 1.

would not affect their ability to become LPRs.⁵⁰ The proposed rule represents a massive change in the long-held definition of public charge and its current policy – yet it is put forward with no rationale and in contradiction of the available evidence that demonstrates the devastating impact that it will have on individuals, families, and communities.

Under current policy, a public charge is defined as an immigrant who is “likely to become primarily dependent on the government for subsistence as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”⁵¹ This definition has been used for over a hundred years and was most recently published in the Field Guidance issued by the Immigration and Naturalization Service at the Department of Justice in 1999 (Field Guidance),⁵² which is now the U.S. Citizenship and Immigration Services (USCIS) at DHS. The proposed rule radically changes the definition to include any immigrant who simply “receives one or more public benefits,” which would include vital non-cash public benefit programs, including non-emergency Medicaid, Medicare Part D Low Income Subsidies (which assists seniors who have amassed the work history needed to qualify for Medicare and need help paying for prescription drugs), housing assistance, such as Section 8 housing vouchers, Project-based Section 8, or Public Housing, and the Supplemental Nutrition Assistance Program (SNAP, formerly known as the Food Stamp Program).

In a major departure from the “primarily dependent” standard,⁵³ the proposed rule will deem an immigrant a public charge if they receive SNAP, Section 8 housing subsidies, or cash aid worth as little as 15 % of the federal poverty level (which is just \$5 a day regardless of family size) or are enrolled in Medicaid for 12 months out of the last 36 months (or 9 months if the individual also uses non-monetizable benefits)⁵⁴—even if the Medicaid benefits are never used. For example, since the ACA was implemented in 2013, when most individuals were mandated to have health coverage,⁵⁵ our Health Access Project and its Health Justice Network partners have assisted over 20,000 community members to enroll into Medi-Cal to ensure they are complying with the law; but, many of the enrollees have not necessarily used their coverage or have used it infrequently. The proposed rule stands in stark contrast to the agency’s prior definition of public charge, which excluded short periods of institutionalized care and required complete or near complete reliance on the government.⁵⁶ To put this in perspective, a family of four that earns \$43,925 annually in private income but receives just \$2.50 per day per person in food stamps would be receiving just 8.6% of their income from the government programs, meaning that they are 91.4% self-sufficient. Yet this family will be in grave danger of green card denial because their receipt of minimal benefits is considered a heavily weighed negative factor in the public

⁵⁰ USCIS, *Green Card Processes and Procedures: Public Charge*, <https://www.uscis.gov/greencard/public-charge> (updated Oct. 16, 2018) (last accessed Dec. 10, 2018).

⁵¹ 1999 Field Guidance, 64 Fed. Reg. at 28,689.

⁵² 1999 Public Charge Standards, 64 Fed. Reg. 28,676.

⁵³ *Id.* at 28,677–79.

⁵⁴ 83 Fed. Reg. at 51,289–90 (proposed 8 C.F.R. § 212.21(b)(3)).

⁵⁵ 26 U.S.C. § 5000A (Requirement to maintain minimum essential coverage).

⁵⁶ 1999 Public Charge Standards, 64 Fed. Reg. 28,676.

charge determination. If the proposed changes to the public charge test were imposed on the total U.S. population, one-third of the country would fail this test.⁵⁷

This proposed rule fundamentally changes the public charge doctrine from affecting people who receive benefits as their main source of support to people who use basic needs programs to supplement their earnings from low-wage work, which is contrary to Congressional intent and long-standing practice. Millions of immigrant families will be deterred from using public benefits that they need to thrive, to the detriment of public health, the economy, and the overall well-being of our society. The proposed rules also present an administrative nightmare that will impose significant costs on the government and introduce even longer delays in the green card process.

A. The proposed definition of public charge is contrary to Congressional intent and long-standing practice.

The proposed rule would reverse more than a century of existing law, policy, and practice in interpreting the public charge law, which never considered the receipt of non-cash benefits as the determining factor in deciding whether an individual is likely to become a public charge.⁵⁸ The term “public charge” is not defined by statute. However, at the time that the public charge doctrine was created, the country had a very different model of public assistance than we have today.⁵⁹ At that time, individuals who became dependent on the government for support were institutionalized or placed in “almshouses” for the poor. Unlike today, when millions of Americans rely on some form of public benefits for some purpose despite working full-time, public assistance in the 1800s connoted complete or nearly complete dependence on the government. Immigration court cases adjudicating the public charge issue adhered to this definition.⁶⁰

Congress has had several opportunities to amend the public charge statute but has only affirmed the existing administrative and judicial interpretations of the law. For example, in 1986, Congress enacted a “special rule” for overcoming the public charge exclusion as part of the legalization program “if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.”⁶¹ The implementing regulation published in 1989 defined “public cash assistance” as “income or needs-based

⁵⁷ Danilo Trisi, Ctr. on Budget & Policy Priorities, *One-Third of U.S.-Born Citizens Would Struggle to Meet Standard of Extreme Trump Rule for Immigrants*, Sept. 27, 2018, <https://www.cbpp.org/blog/one-third-of-us-born-citizens-would-struggle-to-meet-standard-of-extreme-trump-rule-for>.

⁵⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (110 Stat. 3009); USCIS, *Green Card Processes and Procedures: Public Charge*, *supra* note 50; *see also e.g., Matter of A-*, 19 I. & N. Dec. 867 (B.I.A. 1988); *Martinez-Farias v. Holder*, 338 F. App'x 729 (9th Cir. 2009).

⁵⁹ 1999 Public Charge Standards, 64 Fed. Reg. 28,676.

⁶⁰ *See, e.g., Matter of C-R-*, 7 I. & N. Dec. 124 (B.I.A. 1956) (deportation based on public mental hospital institutionalization); *Matter of Harutunian*, 14 I. & N. Dec. 583 (B.I.A. 1974) (receipt of old age assistance for principal financial support was an important factor in denying admission).

⁶¹ INA § 245A(d)(2)(B)(iii). IRCA also created a waiver of the public charge exclusion for applicants who were aged, blind, or disabled (and might be in need of long-term institutional care). *See* INA § 245A(d)(2)(B)(ii)(IV).

monetary assistance,” such as programs like SSI, but specifically excluded “in kind” assistance, like food stamps and public housing, or other non-cash benefits, including medical assistance programs, such as Medicaid.⁶² This special rule and its implementing regulation is consistent with the case law on public charge and inconsistent with the proposed rule.

The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) limited eligibility for “federal means-tested public benefits” to “qualified immigrants” and limited eligibility of lawful permanent residents for “means-tested public benefits” during their first five years in the U.S. However, Congress did not amend the public charge law to specify that all or some means-tested non-cash benefits should be considered. Instead, that same year, in the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), Congress chose to codify the case law interpretation of public charge by adding the “totality of circumstances” test to the statute, which considers the applicant’s: (1) age, (2) health, (3) family status, (4) assets, resources, and financial status, and (5) education and skills.” Congress also made the affidavits of support legally enforceable contracts.⁶³ Accordingly, since 1996, having such an affidavit of support generally has been sufficient to overcome any concerns about public charge. If Congress wanted to conform the public charge law with its recently enacted welfare reform package, it could have done so when it amended the public charge statute through IIRIRA. The fact that it did not suggests that it did not want to add non-cash benefits to the public charge consideration. An agency cannot thwart Congressional intent.

After the changes to public benefits eligibility in 1996, there was a lot of confusion about how the public charge test might be used against immigrants who were eligible for, and receiving certain non-cash benefits. In response to concerns that some consular officials and employees of the then-INS were inappropriately scrutinizing the use of health care and nutrition programs, and the strong evidence of chilling effects from PRWORA (see below), INS issued an administrative guidance in 1999, as mentioned above, and a notice of proposed rulemaking clarifying the definition of public charge as limited to cash benefits for subsistence and government-supported long-term institutional care. The 1999 NPRM preamble makes clear that it was not seen as changing policy from previous practice, but was issued in response to the need for a “clear definition” so that immigrants could make informed decisions and providers and other interested parties could provide “reliable guidance.”⁶⁴

Although the proposed 1999 regulation was never finalized, the administrative guidance remains in effect and 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 Government expense; it specifically EXCLUDED all of the non-cash programs included under the proposed rule from public charge consideration, including, Medicaid, CHIP, food stamps, WIC, Head Start, child care, school nutrition, housing benefits, energy assistance, emergency/disaster relief.⁶⁵ The 1999 Guidance is

⁶² See 8 C.F.R. § 245a.1(i). There was a similar regulatory interpretation for special agricultural workers. See 8 C.F.R. § 210.3(e)(4).

⁶³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009; INA § 212(a)(4).

⁶⁴ 1999 Public Charge Standards, 64 Fed. Reg. 28,676.

⁶⁵ *Id.*

consistent with Congressional intent and case law, has been relied upon by immigrant families for decades, and should continue to be used in interpreting and applying the public charge law.

In contrast to the 1999 Guidance, the proposed changes to public charge determinations conflict with Congressional actions that recognize the importance of access to preventive care and nutrition benefits for immigrants. Since the 1996 welfare reform law that overhauled immigrant eligibility for programs and the 1999 INS field guidance, Congress has passed several laws that explicitly loosened or created new eligibility for means tested programs for immigrant populations. The following are two specific examples of Congress' effort to expand access to key health and nutrition programs:

- *The 2002 Farm Bill expanded SNAP for immigrant children.* Section 4401 of the Farm Security and Rural Investment Act of 2002 restored access to what was then called Food Stamps (now the Supplemental Nutrition Assistance Program, SNAP) to immigrant children, immigrants receiving disability benefits and any qualified alien living in the U.S. for more than five years.⁶⁶
- *The 2009 Children's Health Insurance Program Reauthorization bill expanded access to Medicaid and CHIP for immigrant women and children.* Section 214 of the 2009 Children's Health Insurance Program Reauthorization Act (CHIPRA) gave states a new state plan amendment option to cover, with regular federal matching dollars, lawfully residing children and pregnant women on Medicaid and CHIP during their first five years in the U.S.⁶⁷

Because immigrants and their families will be penalized for using programs that they are lawfully allowed to use, this proposal effectively ends their eligibility. Families should be able to access and use the benefits they are eligible for, focused on remaining healthy and productive, without compromising their immigration status at the same time. Congress has clearly understood this over time, intentionally avoiding and removing barriers to immigrant access to programs like SNAP, CHIP and Medicaid. Statutory text, congressional debate and contemporary media coverage demonstrate these decisions were an intentional use of legislative power that should not be undermined by a regulation. DHS must defer to Congressional intent on this issue.

B. DHS has provided no legitimate rationale for expanding the definition of public benefits to include non-cash health, nutrition, and housing programs.

Research over the nearly 20 years that the Field Guidance has been in effect provide ample evidence that there is no problem now and no persuasive rationale for change. Immigrants consume 39% fewer welfare benefits relative to native-born individuals and 27% fewer benefits

⁶⁶ Farm Security and Rural Investment Act of 2002, H.R. 2646, PL 107-171, 116 Stat. 134, May 13, 2002, Title IV, Section 4401.

⁶⁷ Children's Health Insurance Program Reauthorization Act of 2009, H.R. 2, PL 111-3, 123 Stat. 8, Feb. 4, 2009, Title II, Section 214.

relative to native-born individuals with similar incomes and ages.⁶⁸ According to DHS' own data, only 7% of participants in these programs are non-citizens and most of those participants are LPRs who will not be subject to the public charge doctrine unless they leave the country for more than 6 months and seek to re-enter.⁶⁹ There is simply no evidence that immigrants subject to the public charge determination—lawfully present immigrants who do not yet have their green cards, undocumented immigrants, immigrants residing overseas seeking admission, and LPRs who leave the country for 6 months and seek to re-enter—participate in these programs in any significant way. Therefore, the only reasonable conclusion is that these programs were added to deter immigrant families who are entitled to these benefits to stop using them, *even if they are not subject to the public charge test.*

C. The unjustified expansion of the programs considered for public charge determinations will deter immigrant families from accessing vitally important health, nutrition, and housing programs.

The rule would directly impact about 1.1 million individuals from seeking lawful permanent resident status, with about half residing in the U.S.⁷⁰ and potentially deter as many as approximately 26 million people from accessing life-saving benefits.⁷¹ For many working immigrant families that are victims of racialized labor, housing, and health care policies, Medicaid, food stamps, and subsidized housing are necessary supplements to ensure the health and well-being of their families. There is extensive evidence that supports the conclusion that health insurance coverage increases access to care and improves a wide range of outcomes.⁷² Moreover, Medicaid and health-related benefit programs have had a positive impact on public health and have been found to improve both individual quality of life and population health of the U.S.⁷³ Children of immigrants who participate in the SNAP are more likely to be in good or

⁶⁸ Alex Nowrasteh & Robert Orr, CATO Inst., *Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs*, May 10, 2018, <https://www.cato.org/publications/immigration-research-policy-brief/immigration-welfare-state-immigrant-native-use-rates>.

⁶⁹ 83 Fed. Reg. at 51,162, tbl.11 (indicating that out of 65,038,000 participants in cash or non-cash benefit programs, 4,558,000 (7%) are foreign-born noncitizens). *See also*, Samantha Artiga et al., Kaiser Family Found., *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid*, Oct. 18, 2018, <https://www.kff.org/report-section/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid-appendices/>.

⁷⁰ Dep't of Homeland Sec., *2017 Yearbook of Immigration Statistics: Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2015 to 2017*, tbl.6, <https://www.dhs.gov/immigration-statistics/yearbook/2017/table6>.

⁷¹ Jeanne Batalova et al., *supra* note 69.

⁷² Benjamin D. Sommers et al., *Health Insurance Coverage and Health—What the Recent Evidence Tells Us*, *New England J. of Med.*, July 21, 2017, <http://www.nejm.org/doi/full/10.1056/NEJMsb1706645>.

⁷³ *See generally* U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., *Medicaid & CHIP: Strengthening Coverage, Improving Health* (Jan. 2017), <https://www.medicaid.gov/medicaid/program-information/downloads/accomplishments-report.pdf>; Kaiser Family Found., *Key Lessons from Medicaid and CHIP for Outreach and Enrollment Under the Affordable Care Act* (June 2013), <https://kaiserfamilyfoundation.files.wordpress.com/2013/06/8445-key-lessons-from-medicaid-and-chip.pdf> Kaiser.

excellent health, be food secure, and reside in stable housing.⁷⁴ For example, families with children who participate in SNAP have more resources to afford medical care and prescription drug medications compared to children in immigrant families without SNAP.⁷⁵ An additional year of SNAP eligibility for young children with immigrant parents is associated with significant health benefits in later childhood and adolescence.⁷⁶ Children whose families receive housing assistance are more likely to have a healthy weight and to rate higher on measures of well-being—especially when housing assistance is accompanied by food assistance.⁷⁷

As noted above, in 1996, the chilling effect after the enactment of the PRWORA caused so much confusion and such widespread disenrollment by many immigrants that the government issued its 1999 Field Guidance and Proposed Rule.⁷⁸ Even among groups of immigrants who were explicitly excluded from the 1996 eligibility changes, and U.S citizen children in mixed-status families, participation dropped dramatically.⁷⁹ PRWORA’s chilling effect caused serious negative effects, including decreased rates of Medicaid coverage and led to immigrants avoiding treatment, delaying care, using “underground” sources of care, and seeking uncompensated care.⁸⁰ These trends were even stronger in exempt populations, such as refugees, despite protections included in PRWORA to carve them out of the law’s restrictive scope.⁸¹ This illustrates the power of chilling effects in the immigrant community.⁸²

Given the growing fear and anxiety that immigrant communities have been experiencing for the last two years since the federal administration’s more stringent immigration policies, we can expect an even greater negative impact than the widespread “chilling effect” that occurred in 1996. In fact, we have already seen families withdraw from benefits due to public charge fears

⁷⁴ Children’s Health Watch, *Report Card on Food Security and Immigration: Helping Our Youngest First-Generation Americans to Thrive* (Feb. 2018), <http://childrenshealthwatch.org/wp-content/uploads/Report-Card-on-Food-Insecurity-and-Immigration-Helping-Our-Youngest-First-Generation-Americans-to-Thrive.pdf>.

⁷⁵ *Id.*

⁷⁶ Chloe N. East, *The Effect of Food Stamps on Children’s Health: Evidence from Immigrants’ Changing Eligibility*, (Univ. of Colorado Working Paper, Aug 6. 2017), http://www.chloeneast.com/uploads/8/9/9/7/8997263/east_fskids_r_r.pdf.

⁷⁷ Kathryn Bailey et al., Children’s Health Watch, *Overcrowding and Frequent Moves Undermine Children’s Health*, (Nov. 2011), www.issuelab.org/resources/13900/13900.pdf.

⁷⁸ 1999 Field Guidance, 64 Fed. Reg. at 28,689–93.

⁷⁹ Neeraj Kaushal & Robert Kaestner, *Welfare Reform and Health Insurance of Immigrants*, 40 Health Servs. Res. 697, 697–707 (June 2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361164/pdf/hesr_00381.pdf.

⁸⁰ Leighton Ku & Alyse Freilich, Kaiser Family Found., *Caring for Immigrants: Health Care Safety Nets in Los Angeles, New York, Miami, and Houston* 13–15 (Feb. 2001), <https://aspe.hhs.gov/system/files/pdf/72701/report.pdf>.

⁸¹ Mitchell H. Katz & Dave A. Chokshi, *The “Public Charge” Proposal and Public Health: Implications for Patients and Clinicians*, J. of Am. Med. Ass’n, Nov. 27 2018, at 2053–2160, <https://jamanetwork.com/journals/jama/fullarticle/2705813>.

⁸² Neeraj Kaushal & Robert Kaestner, *supra* note 79, at 713–18; *see also* Michael E. Fix et al., Urban Inst., *The Integration of Immigrant Families in the United States* 31–39 (July 1, 2011), <https://www.urban.org/sites/default/files/publication/61601/410227-The-Integration-of-Immigrant-Families-in-the-United-States.PDF>; Jeanne Batalova et al., *supra* note 19; Namratha R. Kandula et al., *The Unintended Impact of Welfare Reform on the Medicaid Enrollment of Eligible Immigrants*, 39 Health Servs. Res. 1509, 1519–21 (2004).

as a result of rumors of the rule. For the first half of this year, confusion over the proposed rules have resulted in higher than normal rates of disenrollment (10%) from SNAP nationwide.⁸³ In addition, community partners and providers have already reported changes in health care use, including decreased participation in Medicaid and other programs due to community fears stemming from the leaked draft regulations. Likewise, fear has already been driving immigrant families—who are eligible to receive benefits for themselves or their children—to forgo vital health and nutrition assistance, jeopardizing the health of families and communities alike. For example, we recently received a call from an LPR who is presently unemployed and uninsured and was concerned that applying for Medi-Cal would jeopardize his own LPR status and prevent him from reuniting with his wife, a non-citizen who still lives in Asia. Without our assurance that the proposed rule was not in effect yet and that he would not be subject to the new rule unless he left the country for six months, he would not have enrolled into Medi-Cal.

The chilling effect of this rule will have a significant impact on the AAPI community. Nationwide, 1.4 million AAPI non-citizens receive Medicaid, and more than 500,000 AAPI noncitizens are enrolled in SNAP.⁸⁴ The rule will have a significant impact on the Asian American community in California, who make up 8% of enrollees in either CalFresh or Medi-Cal.⁸⁵ Although Asian Americans as a group tend to use public benefits less than the general population, certain sub-groups will be disproportionately affected by the rule. For example, three of five Bangladeshi and one out of two Vietnamese households nationally will be impacted by the rule based on use of public benefits.⁸⁶ In California, of the Asian community, 1,132,066 are enrolled in Medi-Cal and 283,951 in CalFresh, California's SNAP program.⁸⁷ In Los Angeles (LA) County, 64% of Cambodian and 60% of Vietnamese 65 years or older receive Medi-Cal, medical assistance, or other government-assistance plans for those with low incomes or a disability.⁸⁸ Even LPRs who receive these benefits could be subject to the expanded public charge test, if they stay outside the country for longer than 6 months to care for a very ill loved-one.

The proposed rule is already having a chilling effect on our clients. We have received calls from immigrants who are forgoing life-saving benefits in order to keep their families together, even though the rule has not yet been finalized. The callers include an LPR who is forgoing Medicaid benefits because he does not want to risk his pregnant spouse being denied a green card. We also heard from a low-income pregnant woman who was giving up her Medi-Cal because she was mistakenly concerned her sponsors would be fined for her current benefit use. Additionally, we have also heard that some social service caseworkers are confused by the categories of people

⁸³ Am. Public Health Watch, *Study following 10 year gains, SNAP participation among immigrant families dropped in 2018* (Nov. 12, 2018), <http://childrenshealthwatch.org/study-following-10-year-gains-snap-participation-among-immigrant-families-dropped-in-2018/>.

⁸⁴ Jeanne Batalova, et al., *supra* note 19.

⁸⁵ Ninez A. Ponce et al., UCLA Ctr. for Health Policy Research, *Proposed changes to immigration rules could cost California jobs, harm public health* (Dec. 2018), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2018/publiccharge-factsheet-dec2018.pdf>.

⁸⁶ Jeanne Batalova, et al., *supra* note 19.

⁸⁷ Asian Americans Advancing Justice-LA, *Analysis of California Health Interview Survey (CHIS) 2016 Datasets*.

⁸⁸ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

and benefits targeted by the proposal and are consequently misinforming clients about their benefits eligibility.

In addition, immigrants may be chilled from accessing benefits like the ACA, although it is excluded from consideration. Since the passage of the ACA, the uninsured rates have been reduced by almost half, with Asians experiencing the highest drop of any racial group at 59%.⁸⁹ Much of the progress under the ACA and other expansions of public benefits could be wiped out if immigrants stay away from any type of government benefit or subsidy. It would result in harmful health outcomes, including decreased access to preventive services, case management and primary care, which is essential in reducing health care costs, improving health outcomes, and enabling immigrants to live and work in their communities.⁹⁰ Medicaid coverage also improves access to care, which in turn provides short- and long-term health benefits to enrollees, including fewer hospitalizations, better oral health, and lower rates of obesity, among other benefits.⁹¹ Simply being eligible for Medicaid is associated with these improved health outcomes.⁹²

Pregnant women's access to Medicaid is also associated with better health outcomes for children through adulthood including reduced hospitalizations and better oral health.⁹³ Medicaid access during pregnancy is also associated with better overall health in adulthood, such as lower prevalence of high blood pressure, diabetes, heart disease, and obesity, in addition to decreased mortality.⁹⁴ A lack of prenatal care and nutrition assistance for immigrant mothers could have serious implications for their children, affecting their birth and early health outcomes. Negative outcomes would extend decades into the future, diminishing a future generation's opportunity to thrive in tangible and entirely preventable ways.⁹⁵ Moreover, when children are eligible for and

⁸⁹ Kelsey Avery et al., U.S. Dep't of Health & Human Servs., *ASPE Issue Brief: Affordable Care Act Has Led to Historic, Widespread Increase in Health Insurance Coverage* (Sept. 29, 2016), <https://aspe.hhs.gov/system/files/pdf/207946/ACAHistoricIncreaseCoverage.pdf>; see also Dan Mangan, *Obamacare led to similar drops in uninsured rate across all income groups*, CNBC (Sept. 29, 2016), <https://www.cnbc.com/2016/09/29/obamacare-led-to-similar-drops-in-uninsured-rate-across-all-income-groups.html>.

⁹⁰ Karina Wagnerman, Georgetown Univ. Ctr. for Children & Families, *Medicaid: How Does it Provide Economic Security for Families?* (Mar. 2017), <https://ccf.georgetown.edu/wp-content/uploads/2017/03/Medicaid-and-Economic-Security.pdf>; Julia Paradise, Kaiser Family Found., *Data Note: Three Findings about Access to Care and Health Outcomes in Medicaid* (Mar. 23, 2017), <https://www.kff.org/medicaid/issue-brief/data-note-three-findings-about-access-to-care-and-health-outcomes-in-medicaid>.

⁹¹ See *infra* notes 93–99 and accompanying text.

⁹² *Id.*; see also Laura R. Wherry et al., *Childhood Medicaid Coverage and Later-Life Health Care Utilization*, 100 *Review of Econ. & Statistics* 287 (2018).

⁹³ Karina Wagerman et al., Georgetown Univ. Ctr. for Children & Families, *Medicaid Is a Smart Investment in Children 3–4* (March 2017), <https://ccf.georgetown.edu/wp-content/uploads/2017/03/MedicaidSmartInvestment.pdf>.

⁹⁴ *Id.*

⁹⁵ Sharon Parrot, et al., Ctr. on Budget & Policy Priorities, *Trump “Public Charge” Rule Would Prove Particularly Harsh for Pregnant Women and Children* (May 1, 2018), <https://www.cbpp.org/research/poverty-and-inequality/trump-public-charge-rule-would-prove-particularly-harsh-for-pregnant>.

receive Medicaid, they are more likely to do better in school,⁹⁶ be healthier as adults with fewer emergency department visits and hospitalizations,⁹⁷ and pay more in taxes as adults.⁹⁸ Children living in food insecure households are more likely to suffer from poor health and frequent illness and to be hospitalized more frequently.⁹⁹ Without housing assistance, children are more likely to live in overcrowded conditions, become homeless, and move frequently.¹⁰⁰ Therefore, the rule would not only result in a sicker nation but a poorer one with increased poverty, reduced productivity, and reduced learning ability and educational attainment, and increased homelessness.

D. The proposed rule causes substantial harm to citizen children who will be penalized just because they have an immigrant parent.

More than 10 million U.S. citizen children have at least one non-citizen parent, more than one million of whom are Asian.¹⁰¹ Although the rule claims to exempt citizen-children, the evidence shows that citizen children in mixed status families will be harmed in significant ways. In fact, this potential harm is explicitly acknowledged in the cost-benefit analysis of the proposal.¹⁰² In addition, the harms noted above, citizen children will be harmed in at least three ways by the proposed rule:

- *Immigrant parents may withdraw their citizen children from benefits out of fear that it will jeopardize their chances of getting a green card due to the confusion surrounding the rules.* In fact, this is already happening.¹⁰³ Researchers estimate that between 875,000 and 2 million citizen-children will disenroll from health coverage

⁹⁶ Sarah Cohoes et al., *The Effect of Child Health Insurance Access on Schooling: Evidence from Public Insurance Expansions* (Nat'l Bureau of Econ. Research, Working Paper No. 20178, 2014), <http://www.nber.org/papers/w20178>.

⁹⁷ Laura R. Wherry et al., *supra* note 92.

⁹⁸ David W. Brown et al., *Medicaid as an Investment in Children: What is the Long-Term Impact on Tax Receipts?* (Nat'l Bureau of Econ. Research, Working Paper No. 20835, 2015), <http://www.nber.org/papers/w20835>.

⁹⁹ Craig Gundersen & James P. Ziliak, *Food Insecurity and Health Outcomes*, 34 *Health Affairs* 1830 (2015), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2015.0645>; John T. Cook et al., *Food insecurity is associated with adverse health outcomes among human infants and toddlers*, 134 *J. of Nutrition* 1432 (2004), <https://academic.oup.com/jn/article/134/6/1432/4870889>.

¹⁰⁰ Michelle Wood et al., *Housing Affordability and Family Well-Being: Results from the Housing Voucher Evaluation*, 19 *Housing Policy Debate J.* 367 (2008); Janet Currie & Aaron Yelowitz, *Are Public Housing Projects Good for Kids?*, 75 *J. of Public Econ.* 99 (2000), www.yelowitz.com/CurrieYelowitzJPubE2000.pdf; Will Fischer, Ctr. on Budget and Public Policy, *Research Shows Housing Vouchers Reduce Hardship and Provide Platform for Long-term Gains Among Children* (Oct. 7, 2015), www.cbpp.org/sites/default/files/atoms/files/3-10-14hou.pdf.

¹⁰¹ Samantha Artiga et al., Kaiser Family Found., *Potential Effects of Public Charge Changes on Health Coverage for Citizen Children* (May 18, 2018), www.kff.org/report-section/potential-effects-of-public-charge-changes-on-health-coverage-for-citizen-children-issue-brief/.

¹⁰² 83 Fed. Reg. at 51,270.

¹⁰³ Suzanne Gamboa, *Immigrants drop subsidized food, health programs — fearing aid will be used against them*, NBC News, Sept. 8, 2018, <https://www.nbcnews.com/news/latino/immigrants-drop-subsidized-food-health-programs-fearing-aid-will-be-n906246>.

despite remaining eligible.¹⁰⁴ This includes approximately 143,000 to 333,000 children with at least one potentially life-threatening condition, including asthma, influenza, diabetes, epilepsy, or cancer, 122,000 to 285,000 children on prescribed medications, 102,000 to 238,000 newborns, and 53,000 to 124,000 children with musculoskeletal and rheumatologic conditions, like fractures and joint disorders.¹⁰⁵ In California alone, the Children’s Partnership estimates that between 269,000 to 628,000 children would lose Medicaid/CHIP coverage and 113,000 to 311,000 children would lose food assistance, despite remaining eligible, if the proposed rule is finalized.¹⁰⁶ Also, independent researchers find that up to an estimated 3 million U.S. citizen children could lose access to SNAP as a result of the proposed regulation.¹⁰⁷

- *Children’s well-being is inseparable from their parents’ and families’ well-being, so even if immigrant parents are the only ones that disenroll from benefits, U.S. citizen children will be impacted.* Benefits that accrue to the family unit (housing, SNAP) are particularly problematic to include because the disenrollment of one member of the family materially impacts the rest of the family since that person still exists in the household, but is not receiving the subsidy to which she is entitled, reducing the economic health of the family overall. Children thrive when their parents can access needed health or mental health care, when their families have enough to eat, and a roof over their heads. Conversely, parents’ stress and health challenges impede effective caregiving and can undermine children’s development. If millions of non-citizen parents disenroll from healthcare, housing, and nutrition benefits due to the chilling effect, their children will inevitably be compromised as their families are put under more economic and psychological strain.
- *The proposed rule will dramatically increase green card denials, potentially preventing hundreds of thousands of immigrant parents from obtaining long-term status that they would otherwise receive, which will also penalize their citizen children.* Without long-term legal status, parents—and therefore their children—also lose the improved economic opportunities that come with legal status, such as more employment opportunities, higher wages, employer-sponsored healthcare, and access to other important benefits and income supports.¹⁰⁸ For example, a lawfully present

¹⁰⁴ Artiga et al., *supra* note 69.

¹⁰⁵ Leah Zallman & Karen Finnegan, Cal. Health Care Found., *Changing Public Charge Immigration Rules: The Potential Impact on Children Who Need Care* (Oct. 23, 2018), <https://www.chcf.org/publication/changing-public-charge-immigration-rules/>.

¹⁰⁶ The Children’s Partnership, *Potential Effects of Public Charge on California Children* (Nov. 2018), <https://www.childrenspartnership.org/wp-content/uploads/2018/11/Potential-Effects-of-Public-Charge-Changes-on-California-Children-Brief.pdf>.

¹⁰⁷ Jennifer Laird et al., *Forgoing Food Assistance out of Fear: Simulating the Child Poverty Impact of a Making SNAP a Legal Liability for Immigrants* (Working Paper, Nov. 15, 2018), <https://doi.org/10.31235/osf.io/6sgpk>.

¹⁰⁸ Demetrios G. Papademetriou et al., Migration Policy Inst., *The Social Mobility of Immigrants and Their Children*, (2009), <https://www.migrationpolicy.org/research/social-mobility-immigrants-and-their-children>; Lisa A. Keister et al., Stanford Ctr. on Poverty and Inequality, *Mexican American Mobility: An Exploration of Wealth Accumulation Trajectories* (2013),

pregnant women who utilizes Medicaid for health care while she is pregnant could prevent her from getting a green card, thereby forcing her to leave the United States with her U.S. citizen child, to stay and become undocumented and at risk of deportation once her legal status runs out, or to be separated from her child. All of these options will harm the mental and physical health of the U.S. citizen child.¹⁰⁹

Families should be able to access and use the benefits they are eligible for, focused on remaining healthy and productive. Health care, housing, and access to food are basic needs that must be met for families to thrive and all of them are in jeopardy under this rule.

E. The proposed rule will harm victims of domestic violence and sexual assault.

Each year, Advancing Justice-LA assists hundreds of Asian American and Pacific Islander victims of domestic violence and sexual assault obtain immigration relief and resolve family law issues. Although victims of abuse and crime are exempt from the public charge test when they adjust through VAWA and U-visas, many of our domestic violence clients seek green cards through other means and will be subject to the test. Regardless of whether the test actually applies to a particular victims' situation, the confusion and fear surrounding the proposed changes will deter them from seeking or continuing to access assistance that they need to heal from their abusive relationship, rebuild their lives, and maintain the health and well-being of their family. For example, one of our clients, a sexual assault survivor who obtained SNAP and Medi-Cal benefits as a U Visa applicant, feared she had to disenroll from benefits after news of the public charge rule leaked. She contemplated returning to her home country to wait for her U visa application to be processed, because she would not be able to provide basic needs for herself and her children without the assistance. Our client is not alone. Nearly 80% of respondents to a 2017 survey of service providers working with survivors reported that most domestic violence victims rely on SNAP to help address their basic needs and to establish safety and stability, and

https://inequality.stanford.edu/sites/default/files/media/_media/working_papers/keister_agius-vallejo_borelli_mexican-american-mobility.pdf.

¹⁰⁹ Brian Allen et al., *The Children Left Behind: The Impact of Parental Deportation on Mental Health*, J. of Child & Family Studies 24 (2015); IMUMI, *Where Do We Go From Here?* http://uf.imumi.org/recursos/where_challenges.pdf; Luis H. Zayas et al., *The Distress of Citizen-Children with Detained and Deported Parents*, J. of Child & Family Studies 24 (2015); Ajay Chaudry et al., The Urban Inst., *Facing our Future: Children in the Aftermath of Immigration Enforcement* (2010), <http://www.urban.org/sites/default/files/publication/28331/412020-Facing-OurFuture.PD.>; Randy Capps et al., Migration Policy Inst., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature* (Sept. 2015), <https://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families>; S. Goodman, *The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims' Economic Security* (2018), <https://vawnet.org/material/difference-between-surviving-and-not-surviving-public-benefits-programs-and-domestic-and-ement-activities-well-being-children-immigrant-families>.

55% of respondents said the same is true of most sexual assault victims.¹¹⁰ Access to assistance programs is an important factor in victims' decision-making about whether and how they can afford to leave a dangerous situation, and in planning how to keep themselves and their children healthy, well, and housed.¹¹¹ As this data illustrates, publicly-funded resources are imperative for women's safety. Access to health care, housing, food assistance and other safety net benefits play a pivotal role in helping victims overcome domestic violence and sexual assault. Victims should not be discouraged from seeking or relying on economic security programs to escape abuse or recover from the trauma they have experienced.

F. The rule's chilling effect will have a harmful impact on the health sector, jobs and the economy.

The proposed rule would cause major harm to immigrants and their families, communities, health care providers, localities, and the economy. Disenrollment would not only lead to sicker communities, but also have a devastating economic impact due to loss in federal revenue. For example, in California, if participants in Medicaid (Medi-Cal) and SNAP (CalFresh) benefits disenroll at comparable rates as during the 1996 welfare reform—15% to 35%, 765,000 individuals will lose federal benefits.¹¹² The disenrollment based on the chilling effect will significantly impact Asians, who represent 8% of participants.¹¹³ Children would make up 70% of Californians projected to disenroll these benefits.¹¹⁴ The disenrollment from these programs would result in a loss of \$1.67 billion in federal revenue in the state and as many as 17,700 lost jobs, primarily in the health sector and food-related industries.¹¹⁵ This in turn will lead to less consumer spending and up to an economic loss of \$2.8 billion across industries.¹¹⁶

Nationally, 2.1 to 4.9 million will potentially disenroll from Medicaid, the majority of whom will be immigrants not subject to the public charge rule, but will disenroll out of confusion or fear.¹¹⁷ This will lead to a ripple effect on the economy costing \$24.1 billion in decreased consumer

¹¹⁰ Shaina Goodman, *The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims' Economic Security* (Jan. 2018), <https://vawnet.org/material/difference-between-surviving-and-not-surviving-public-benefits-programs-and-domestic-and->

¹¹¹ Eleanor Lyon et al., *Meeting Survivors' needs: A multi-state study of domestic violence shelter experiences*, VAWnet, 2008, <https://vawnet.org/material/meeting-survivors-needs-multi-state-study-domestic-violence-shelter-experiences>; Eleanor Lyon et al., Nat'l Resource Ctr. on Domestic Violence, *Meeting Survivors' Needs through Non-Residential Domestic Violence Services & Supports: Results of a Multi-State Study* (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237328.pdf>; Alvarez R. Kimerling et al., *Unemployment Among Women: Examining the Relationship of Physical and Psychological Intimate Partner Violence and Posttraumatic Stress Disorder*, *J. of Interpersonal Violence* (2009), <https://www.ncbi.nlm.nih.gov/pubmed/18458353>.

¹¹² Ninez A. Ponce et al., *supra* note 85.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Artiga et al., *supra* note 69, at 1, 5–6.

spending and up to 230,000 jobs.¹¹⁸ In addition, the chilling effect of Medicaid disenrollment could cost \$624 million in revenue to community health centers in one year.¹¹⁹ This in turn would result in a loss of 6,100 full-time medical staff positions, and 538,000 fewer patients served due to reduced staffing and capacity.¹²⁰

G. The rule will increase the workload of legal services providers and health care advocates, be extremely onerous for applicants, and increase the administrative burden on government agencies.

The agency dramatically underestimates the cost of the proposed rule. Legal service providers like Advancing Justice-LA have already expended considerable resources responding to increased calls about public charge and educating and reassuring community members who have expressed concerns about the proposed rule dating back to January 2017, when a proposed Executive Order was leaked. For example, HAP has created a Public Charge Fact Sheet and translated it into multiple Asian languages, conducted many trainings and community forums, and provided needed client assistance to community members.

If the proposed rule becomes final, our immigration services team will be forced to spend double the time they currently spend to prepare adjustment of status petitions, which currently takes two weeks on average for each for our experienced staff attorneys. Assisting clients to completing the new form I-944, Declaration of Self-Sufficiency itself will require collection of additional information and documents from clients related to the new factors, such as credit scores, English proficiency, evidence of language certification, trades-related skills training, and waiting for different state agencies to provide information about their benefits use.¹²¹ Although the agency estimates that the time required to fill out this form is 4.5 hours, our experienced immigration attorneys estimate it will take at least double that amount of time. The extraordinary increase in workload will strain our capacity and may force us to serve fewer clients and lose funding. In addition to the increased burden to complete adjustment petitions, the rule will increase the time for our agency to respond to the increased volume of calls on myriad issues related to public charge. We have already been receiving calls from immigrants concerned about losing their immigration status due to their enrollment in public benefits, such as Medi-Cal.

In addition, the proposed rule's creates an onerous burden on the applicant and tremendous administrative burdens on the different state and local agencies that administer public benefit programs. The increased burdens on agencies would at the very least include:

¹¹⁸ Fiscal Policy Inst., *Only Wealthy Immigrants Need Apply, ' How a Trump Rule's Chilling Effect Will Harm the U.S.*, Oct. 10, 2018, at 5, <http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf>.

¹¹⁹ Geiger Gibson, RCHN Cmty. Health Found. Research Collaborative, *How Could the Public Charge Proposed Rule Affect Community Health Centers?* (November 2018), <https://publichealth.gwu.edu/sites/default/files/downloads/GGRCHN/Public%20Charge%20Brief.pdf>.

¹²⁰ *Id.* at 3.

¹²¹ Draft Instructions to Form I-944, Declaration of Self-Sufficiency, at 7–12, <https://www.regulations.gov/document?D=USCIS-2010-0012-0047>.

- *Needing to provide immigrants with documentation regarding their history of the nonmonetizable and monetizable benefit received.* The draft form I-944, Declaration of Self-Sufficiency, instructions 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. Such information will also be extremely onerous and confusing for the applicant, who would not necessarily know which benefits they received, or have any documentation or memory of the exact amounts and dates received. For example, most enrollees do not know if they have restricted Medi-Cal or state-funded Medi-Cal, which would not be subject to public charge consideration. This will generate a huge workload for state and local public benefit agencies, may require new tracking and reporting systems, and may require access to information that has been archived from no longer functional eligibility systems that have been replaced.
- *Responding to consumer inquiries related to the new rule.* Because applicants will have many questions about how to complete the form, state and local agencies will have to prepare answers to consumer questions about the new rule. They will likely 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 receipt of various benefits might play out will require technical knowledge of immigration statuses. Yet, state and local agencies will be put in a difficult position having to advise all consumers that they must speak to an immigration attorney to get their questions answered about the impact of access benefits on their immigration status. 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 to see if getting services will jeopardize their family’s immigration goals.
- *Increasing “churn” among the caseload.* As consumers learn about the new rule, some families will likely terminate their participation in the programs, as already seen in response to draft public charge-related proposed rule changes being released and leaked to the media. However, because these programs meet vital needs for families, some of these families would likely return to their caseworker, repeatedly, as they turn to our staff. This would result in additional time needed for each case and duplicative work for caseworkers. For example, a client may disenroll from a benefit program but later realize that because of their refugee status, they are not subject to a public charge determination and return to enroll again for the benefit program. Others may reapply when circumstances become even more dire. For example, a child may be disenrolled from Medi-Cal but when she needs treatment, such as asthma medication, to avoid her condition from getting worse, the parent will re-enroll the child despite their fear of jeopardizing a family member’s chance to become a lawful permanent resident. This “on again-off again” approach to benefit enrollment—often referred to as churn—not only yields negative results for families, it also results in duplicative work for state and local agencies. Churn is expensive—

in one study of SNAP-related churn, the costs averaged \$80 for each instance of churn that requires a new application.¹²²

- *Modifying existing communications and forms related to public charge.* For almost twenty years, agencies have worked under the consistent and clear rules about when a consumer’s use of benefits could result in a negative finding in their public charge determination. Agencies have incorporated these messages on a variety of consumer communications, including applications, application instructions, websites, posters used in lobbies, in notices and in scripts, and trainings for staff. All of these consumer communications will have to be replaced, and as noted above, the new rules would be so far reaching and complicated, it is unclear states could replace them with messages that would not be confusing and/or inappropriately deter eligible people.

H. We strongly oppose the inclusion of the Children’s Health Insurance Program (CHIP) in the public charge test because it will dramatically increase the number of uninsured children.

DHS requests specific comment regarding whether the public charge test should include CHIP.¹²³ CHIP is a federal-state program for working families who earn too much for their children to be eligible for Medicaid without a share of cost. Its inclusion in the “public charge” definition would exacerbate the chilling effect of this rule by extending its reach beyond low-income families to moderate-income working families – and applicants likely to earn a moderate income at some point in the future.

The strength of our economic future is dependent on the well-being of our nation’s children, who are our future workforce and tax base. Yet child poverty remains high in the United States and costs the United States over \$1 trillion a year, representing 5.4 % of our GDP.¹²⁴ Therefore, everyone— regardless of socioeconomic status— benefits from strategies that improve child wellbeing.

Including CHIP in a public charge determination could lead to millions of eligible children foregoing health care benefits, either because they are directly subject to the public charge rule or because they believe they may be subject to the rule, even if they are not. More than 9 million children across the U.S. depend on CHIP for their health care.¹²⁵ Due to the chilling effect of the

¹²² Gregory Mills et al., Urban Inst. for the U.S. Dep’t of Agriculture, Food & Nutrition Service, *Understanding the Rates, Causes, and Costs of Churning in the Supplemental Nutrition Assistance Program (SNAP) - Final Report* (2014), <https://fns-prod.azureedge.net/sites/default/files/ops/SNAPChurning.pdf>.

¹²³ 83 Fed. Reg. at 51,173.

¹²⁴ Michael McLaughlin & Mark Rank, *Estimating the Economic Cost of Childhood Poverty in the United States*, *Social Work Research*, 42:2 (June 2018), <https://doi.org/10.1093/swr/svy007>.

¹²⁵ Kaiser Family Found., *Total Number of Children Ever Enrolled in CHIP*, <https://www.kff.org/other/state-indicator/annual-chip-enrollment/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last accessed Dec. 10, 2018) (calculating the total number in 2017 at 9,460,160).

rule, many parents would forego enrolling their children into CHIP—or reject health care services altogether—because of fears that they will be deemed a public charge. We already know it is difficult to ensure children of immigrants have health coverage since children living with an immigrant parent are more likely to be uninsured than those living with U.S.-born parents.¹²⁶ Research also shows that the likelihood that children are insured greatly increases when parents are insured,¹²⁷ so a parent’s loss of coverage will almost certainly have negative effects on their children.

Moreover, making CHIP a basis for exclusion under the public charge rule is counter to Congress’ explicit intent to expand coverage to lawfully present children and pregnant women. Section 214 of the 2009 Children’s Health Insurance Program Reauthorization Act (CHIPRA) 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. This was enacted because 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 enjoyed broad, bipartisan support based on the recognition that children need access to health care services to ensure their healthy development. Senator Orrin Hatch (R-UT), one of the original co-sponsors of CHIP, said, “[c]hildren are being terribly hurt and perhaps scarred for the rest of their lives” and that “as a nation, as a society, we have a moral responsibility” to provide coverage.¹²⁸

CHIP has been a significant factor in dramatically reducing the rate of uninsured children across the U.S. According to the Kaiser Family Foundation, between 1997, when CHIP was enacted, through 2012, the uninsured rate for children fell by half, from 14 % to 7 %. 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.”¹²⁹ Specifically, according to the Kaiser Family Foundation, CHIP has had a positive impact on health outcomes, including reductions in avoidable hospitalizations and child mortality and has improved children’s health, which translates into

¹²⁶ Samantha Artiga & Anthony Damico, Kaiser Family Found., *Nearly 20 Million Children Live in Immigrant Families that Could be Affected by Evolving Immigration Policies* (April 18, 2018), <https://www.kff.org/disparities-policy/issue-brief/nearly-20-million-children-live-in-immigrant-families-that-could-be-affected-by-evolving-immigration-policies/>.

¹²⁷ Jennifer E. DeVoe et al, *The Association Between Medicaid Coverage for Children and Parents Persists: 2002-2010*, *Matern Child Health J*, 19 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4864606/>; Julie L. Hudon & Asako S. Moriya, *Medicaid Expansion for Adults Had Measurable ‘Welcome Mat’ Effects on Their Children*, *Health Affairs* 36 (2017), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0347>; Joan Alker & Alisa Chester, Georgetown Univ. Health Policy Inst., Ctr. for Children & Families, *Children’s Health Insurance Rates in 2014: ACA Results in Significant Improvements* (2015), <http://ccf.georgetown.edu/wp-content/uploads/2015/10/ACS-report-2015.pdf>.

¹²⁸ Robert Pear, *Hatch Joins Kennedy to Back a Health Program*, *N.Y. Times*, Mar. 14, 1997, <https://www.nytimes.com/1997/03/14/us/hatch-joins-kennedy-to-back-a-health-program.html>

¹²⁹ *CHIP and Medicaid: Filling in the Gap in Children’s Health Insurance Coverage*, *Econofact* (Jan. 22, 2018) (accessed Jan. 23, 2018).

educational gains, with potentially positive implications for both individual economic well-being and overall economic productivity.¹³⁰

Other studies have shown that continuous, consistent coverage without disruptions is especially critical for young children, including experts' recommendation that children should have 16 well-child visits before the age of six, especially in the first two years, to monitor their development and address any concerns or delays as early as possible.¹³¹ As noted by the Center for Children and Families, "a child's experiences and environments early in life have a lasting impact on his or her development and life trajectory. The first months and years of a child's life are marked by rapid growth and brain development."¹³²

Overall, we believe the benefits of excluding CHIP certainly outweigh their inclusion in a public charge determination. Moreover, including CHIP would be misguided because it directly contradicts DHS's goal of self-sufficiency. CHIP covers children whose parents make too much money to qualify for Medicaid, which means the vast majority of them are employed making this an unwarranted attack on hardworking families. We strongly recommend that DHS continue to exclude CHIP from consideration in a public charge determination in the final rule.

IV. We oppose the proposed interpretation of the statutory factors for the public charge determination because they are vague, unrelated to predicting future benefit use, discriminatory, and will have a disproportionate impact on Asian Americans and other communities of color.

In 1996, IIRIRA codified the current totality of the circumstances test for public charge, which considers age, health, family status, assets, resources, financial status, and education and skills.¹³³ IIRIRA also added the affidavit of support requirement.¹³⁴ Since then, the affidavit of support has generally been sufficient to overcome any concerns about public charge.¹³⁵ The proposed rule is a radical and unsubstantiated departure from this long-standing interpretation of the statutory factors. Under the new rule, all immigrants seeking a green card, all LPRs seeking to re-enter the United States after being gone for more than 6 months, and all non-immigrant visa holders (like students and workers on non-immigrant visas) seeking an extension or a change will be subject to an unprecedented income test and negative weight will be given to children,

¹³⁰ Julia Paradise, Kaiser Family Found., *The Impact of the Children's Health Insurance Program (CHIP): What Does the Research Tell Us?* (Jul. 17, 2014), <https://www.kff.org/medicaid/issue-brief/the-impact-of-the-childrens-health-insurance-program-chip-what-does-the-research-tell-us/>.

¹³¹ Elisabeth Wright Burak, Georgetown Univ. Ctr. for Children & 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>.

¹³² *Id.* at 2.

¹³³ 8 U.S.C. § 1182(a)(4).

¹³⁴ *Id.*

¹³⁵ 1999 Field Guidance, 64 Fed. Reg. at 28,689–91 (noting the Attorney General's ruling that "[a] healthy person in the prime of life cannot ordinarily be considered a public charge" and that "[u]nder the new AOS rules, all family-based immigrants (and some employment-based immigrants) will have a sponsor who has indicated an ability and willingness to come to the immigrants' assistance").

seniors, persons “not familiar with English language,” a poor credit history, a limited education, a large family, a lack of private insurance, application or receipt of a fee waiver for an immigration benefit, or a serious health condition.¹³⁶ These factors do not predict future benefit use or ultimate self-sufficiency. To the contrary, children have incalculable potential to add value to society, seniors often play a critical role in caring for their grandchildren and other family members (often enabling others to work), large families are a source of emotional and economic strength, immigrants with limited English proficiency and immigrants with disabilities are frequently self-sufficient and fulfill a labor demand in many industries, and income status today is not a predictor of individuals’ long-term economic contributions to the United States.

A. The Addition of “Heavily Weighed” Positive and Negative Factors is Vague, Inconsistent with the Statutory Language, and Will Have a Disproportionate Impact on People of Color.

The proposed rule also establishes heavily weighed positive and negative factors that have no support in statute or case law. The only positive heavily weighed factor is assets or income above 250% of FPG, whereas unemployment, receipt of a public benefit (i.e. cash aid, long-term institutionalization, non-emergency Medicaid, SNAP, housing subsidy or voucher, Medicare Part D subsidy), and a serious medical condition without insurance are all heavily weighed negative factors. The statute does not provide a basis for weighing some factors more heavily than others,¹³⁷ and case law cited in the proposed rule make clear that having prospects of employment and/or a sponsor has been sufficient to overcome previous lack of employment or low income.¹³⁸ Moreover, the proposed rule does not weigh the only factor that is singled out in the statute as essential—the provision of a valid affidavit of support.

In addition, the negatively weighted factors are impermissibly vague. For example, the proposed rule states that “lack of current employment, employment history, or **reasonable prospect of future employment**” will be a heavily weighed negative factor, but fails to define or provide guidance for how to assess whether an individual has a “reasonable prospect of future employment.” For example, does a mother who goes to school part-time to get a CNA certificate, but does not work because she still has young children at home have a “reasonable prospect of future employment”? Some adjudicators will likely find that this qualifies as a reasonable prospect of future employment, while others will summarily write her off for not being in school full-time or working. Although it is not clear how adjudicators will apply these factors, they could potentially affect a substantial portion of immigrants from Asian countries, including 37% from China and 48% India.¹³⁹ The rule would also penalize women applicants from these countries (73% from China and 64% from India) at staggering rates as many immigrant women stay at home as caregivers due to the high cost of childcare, instead of participating in the formal economy.

¹³⁶ 83 Fed. Reg. at 51,214.

¹³⁷ 8 U.S.C. § 1182.

¹³⁸ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

¹³⁹ Randy Capps et al., *supra* note 3.

Moreover, the proposed rule provides no guidance on what other non-heavily weighed factors could overcome the existence of one or more heavily weighed factors. In the only example involving heavily weighed factors, an elderly immigrant with arthritis and heart disease who receives a state cash benefit for income maintenance could not overcome those heavily weighted negative factors with an affidavit of support even though she lived with her sponsor relative who was not low-income and had not used any immigration fee waivers.¹⁴⁰ Under current law, the affidavit of support would have been dispositive in admitting this immigrant, but under the proposed rule, she would not get in. It is difficult to imagine what other factors must exist to overcome the strong presumption of denial when a heavily weighed negative factor is present.

These heavily weighed factors have a disproportionate impact on people of color. For example, according to U.S. Census Bureau data analyzed by MPI and available at <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>, more than half (55 %) of recent green card recipients from Europe, Canada, and Oceania have the only positively weighted factor (income or assets/resources more than 250 % of the federal poverty line), whereas only 23 % from Mexico and Central America, 28 % from the Caribbean, 33 % from Africa, 42 % from South America, and 45 % from Asia can meet that income threshold. The difference is even starker when viewed by birth country. More than two-thirds (67 %) of recent green card recipients from the United Kingdom met the heavily weighed factor, whereas less than 30 % from Mexico, the Dominican Republic, Haiti, El Salvador, Guatemala, and Bangladesh are wealthy enough to have it count as a positive factor. In short, the heavily weighed tier of factors lacks statutory authority, fails to provide sufficient guidance, and will make it harder for immigrants from diverse parts of the world to immigrate to the United States, shifting immigration trends away from diverse world regions and towards immigrants from predominantly white countries.

B. The consideration of age as a negative factor for those who are older than 61 years or younger than 18 years is arbitrary and unrelated to future benefit use.

The proposed rule gives negative weight to applicants who are older than 61 or younger than 18, unless the person can demonstrate employment or sufficient household assets and resources. While 37 % of immigrants aged 18 to 61 had two or more negative factors, 45 % of immigrant children under the age of 18 and 72 % of immigrant seniors over the age of 61 had multiple negative factors,¹⁴¹ making it much less likely that these immigrants will get a green card. Yet, the rule provides no justification for why minors under 18 years old should be scrutinized when they are not expected to be self-sufficient, or why immigrants over the age of 61, many of whom work or provide support to the rest of their family should be penalized merely because of their age. The rule does not provide evidence that these age thresholds are predictors of future public benefit use.

Impact on Children: The potential impact of this factor on immigrant children is astounding. According to the MPI subgroup data available at:

¹⁴⁰ 83 Fed. Reg. at 51,217.

¹⁴¹ Randy Capps et al., *supra* note 3.

<https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>, over a five-year period, 180,000 immigrant children could be separated from their families because they possess two or more of the negative factors and are at risk of having their green card denied. Children under the age of 18 make up 26% of Asian Americans and 36% of Pacific Islanders.¹⁴² The rule is not clear what happens when a working-age immigrant parent has more positive factors than negative, but his or her child does not. For example, if the child has a chronic disease and the parent does not, will the parent receive a green card while the child becomes undocumented or forced to return to their country of origin alone? There are long lasting adverse effects on children’s health from being separated from their parents, which the rule does not take into account.¹⁴³ It is particularly absurd and horrific to propose denying entry or immigration status to children because they are not yet old enough to work or do not come from wealthy families. Immigrants who arrive at a young age integrate successfully because they can access the host-country’s education system in their formative years.¹⁴⁴ They form a critical pipeline to the country’s labor markets. More importantly, immigrant children live and grow up in communities where their individual success is critical to the strength of the country’s future workforce and collective economic security.

Impact on Seniors: Over the same period, 175,000 immigrant seniors could be denied green cards, negatively affecting hundreds of thousands of families who depend on the support of grandparents to work. The impact on local intergenerational Asian American families will be considerable. In LA County, older Asian Americans are more likely to be recent arrivals than any other racial group, and therefore the most likely to be subject to the public charge test.¹⁴⁵ Moreover, Asian Americans are more likely to live in multigenerational households than any other racial group.¹⁴⁶ Elders contribute substantially to households, including by providing childcare so other adults in the household may work. Thus, harming elders, by denying them permanent residency or deterring them from enrolling or staying enrolled in Medicaid or SNAP, will undermine the financial stability and the emotional wellbeing of families. The rule will certainly increase poverty in AAPI communities by targeting elders who make it possible for others in the family to work and attend school.

C. The consideration of an immigrant who has a serious medical condition is vague, inhumane and discriminatory.

The rule heavily weighs as a negative factor “any medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the person’s ability to care for him- or herself, to attend school, or to work.”¹⁴⁷ “Although the rule claims to use a

¹⁴² Asian Am. Ctr. for Advancing Justice, *supra* note 30.

¹⁴³ Melissa Healy, *The long-lasting health effects of separating children from their parents at the U.S. border*, LA Times, June 20, 2018, <https://www.latimes.com/science/sciencenow/la-sci-sn-separating-children-psychology-20180620-story.html>.

¹⁴⁴ Papdemetriou Demetrios et al., *supra* note 108.

¹⁴⁵ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

¹⁴⁶ D’vera Cohn & Jeffrey S. Passel, *supra* note 41.

¹⁴⁷ 8 C.F.R. § 212.22(c)(1)(iv)(A).

physician’s medical examination/report with two classes of medical conditions, it is vague, provides the physician with great latitude, and does not provide a clear definition of which medical conditions would be considered as a negative factor, which suggests that any pre-existing condition, chronic or mild, costly or not, may be counted against a green card applicant—regardless of whether it will seriously undermine an individual’s self-sufficiency. For example, diabetes is a chronic condition that requires “extensive medical treatment” if you consider regular insulin injections to be medical treatment, yet many people with diabetes continue to support themselves through work.

Denying a green card on the basis of such a broad definition of medical condition will be harmful to AAPI communities. For example, Asian Americans have a high prevalence of chronic obstructive pulmonary disease, hepatitis B, smoking, tuberculosis and liver disease.¹⁴⁸ Asian American older adults have higher rates of high blood cholesterol and diabetes than whites do.¹⁴⁹ Pacific Islander adults are more likely than all U.S. adults to have diabetes or asthma.¹⁵⁰ Older-adult Cambodian Americans in LA County have disproportionate rates of disability, ambulatory living difficulty, and cognitive difficulty.¹⁵¹ Older-adult Vietnamese have higher than average rates of cognitive difficulty.¹⁵² The proposed regulations would create significant hardships for, and discriminate against lawful immigrants with disabilities by denying them an opportunity to benefit from an adjustment in their immigration status equal to that available to immigrants without disabilities.¹⁵³ For many AAPIs, these medical conditions are manageable, may not require extensive and costly treatments, or interfere with work or school. It is often hard to predict which medical conditions may “likely” require treatment or cause problems with work or school in the future.

We are also deeply troubled by how this factor affects individuals with disabilities. Under the proposal, the Department will 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. Although DHS states that disability will not be the “sole factor,” in that determination, the Department fails to offer any accommodations for individuals with disabilities and instead echoes the types of bias and “archaic attitudes” about disabilities that the Rehabilitation Act was meant to overcome.¹⁵⁴ Immigrants with disabilities will be affected in the following ways:

¹⁴⁸ U.S. Dep’t of Health & Human Servs., Office of Minority Health, Asian American Profile (June 1, 2018), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=63>.

¹⁴⁹ Asian Am. Ctr. for Advancing Justice, *supra* note 30, at 5.

¹⁵⁰ Adena M. Galinsky et al., U.S. Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Selected Health Conditions Among Native Hawaiian and Pacific Islander Adults: United States, 2014* (Data Brief No. 277) (March 2017), <https://www.cdc.gov/nchs/data/databriefs/db277.pdf>.

¹⁵¹ Asian Am. Ctr. for Advancing Justice, *supra* note 30, at 20.

¹⁵² *Id.*

¹⁵³ 6 C.F.R. § 15.30(b)(1)(ii), (iii), (iv).

¹⁵⁴ *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 279 (1987).

- *The proposed rule will penalize immigrants with HIV/AIDS and other chronic health conditions that do not necessarily impact self-sufficiency.* Immigrants with chronic conditions that are considered disabilities could be unlawfully excluded because of their disability alone.¹⁵⁵ For example, people with HIV, either symptomatic or asymptomatic are protected by the Americans with Disabilities Act (ADA),¹⁵⁶ yet the proposed rule would use an HIV diagnosis to exclude applicants and deny green card applications without considering whether the person is self-sufficient, as so many people diagnosed with HIV are.
- *The proposed rule will discourage the use of programs that promote self-sufficiency for people with disabilities.* The proposal would also discriminate against people with disabilities by defining an immigrant as a public charge for using non-cash benefits (for specified periods and amounts), which individuals with disabilities rely on disproportionately, often due to their disability and the discrimination they experience because of it. For example, about 33% of adults under age 65 enrolled in Medicaid have a disability, compared with about 12% of adults in the general population. Many of these individuals are eligible for Medicaid, and may be unable to obtain private insurance. Likewise, more than 25% of people who use SNAP benefits for nutritional support are also disabled.¹⁵⁷ Many of these individuals rely upon such benefits so that they can continue to work, stay healthy, and remain productive members of the community. By deeming immigrants who use such programs as a public charge, the regulations will disparately harm individuals with disabilities and impede their ability to maintain the very self-sufficiency the Department purports to promote and which the Rehabilitation Act sought to ensure. Because many critical disability services are only available through Medicaid, the rule will prevent many people with disabilities from getting needed services that allow them to manage their medical conditions, participate in the workforce and improve their situation over time.¹⁵⁸
- *The proposed rule will harm children in immigrant families who have a disability or special health care need.* According to estimates from the National Survey of Children’s Health, roughly 2.6 million children in immigrant families have a disability or special health care need.¹⁵⁹ Children with special health and developmental needs tend to require medical, behavioral, and/or educational services

¹⁵⁵ Under Sec. 504 of the Rehabilitation Act, which prohibits discrimination by federal agencies, an individual has a disability if he or she has a “(a) physical or mental impairment that substantially limits one or more major life activities of such individual, (b) a record of such an impairment; or “[is] regarded as having such an impairment.” 29 U.S.C. § 705 (referencing 42 U.S.C. § 12102; 29 U.S.C. § 12102).

¹⁵⁶ *Bragdon v. Abbott*, 524 U.S. 624 (1998).

¹⁵⁷ Steven Carlson et al., Ctr. for Budget Policy & Priorities, *SNAP Provides Needed Food Assistance to Millions of People with Disabilities* (June 14, 2017), <https://www.cbpp.org/research/food-assistance/snap-provides-needed-food-assistance-to-millions-of-people-with>.

¹⁵⁸ Ctr. on Budget & Policy Priorities, “Medicaid Works for People with Disabilities,” Aug. 29, 2017, <https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities>.

¹⁵⁹ Data query, Nat’l Survey of Children’s Health (2016).

above and beyond what typical children need to keep them healthy and promote positive development. These special needs make children with disabilities in immigrant families vulnerable to hardship due to the economic burdens associated with requiring specialized care. Parents of children with disabilities typically work fewer hours and ultimately earn less income due to their children's caregiving needs.¹⁶⁰ As a group, children with disabilities are more likely to live in low-income households and to experience food insecurity and housing instability, making programs like SNAP and housing assistance vital to their wellbeing.¹⁶¹ Ensuring that kids with special health care needs have access to services helps their parents maintain work and improve earnings. The proposed rule would restrict immigrant families' access to public anti-poverty programs and further exacerbate the economic hardships that children with disabilities and other special needs already experience.

It is inhumane to dramatically limit who is allowed into the U.S. and who is allowed to stay on the basis of medical conditions, physical and mental abilities, and the rule does not satisfactorily justify why these conditions should be used to deny people green cards or visa extensions.

D. The factor regarding the lack of having private health insurance or financial resources to pay for costs of a serious medical condition is unreasonable and discriminates against people with disabilities.

The rule also gives heavily negative weight to “being uninsured and ha[ving] neither the prospect of obtaining private health insurance, or the financial resources to pay for reasonably foreseeable medical costs related to” the serious medical condition.¹⁶² This is a vague standard, and the rule does not provide guidance for its interpretation.¹⁶³ The rule's requirement to have private insurance is yet another heavily weighted factor that discriminates against individuals living with disabilities or chronic health conditions. Private insurance does not cover many disability-services and 46.4% of all people in fair or poor health are uninsured or have affordability problems despite having coverage.¹⁶⁴ The INA lists health as a factor for public charge, but by treating all chronic medical conditions in persons without unsubsidized health insurance as heavily weighted negative factors, the rule goes far beyond the scope of the statute in giving adverse weight to disability.

¹⁶⁰ Sloan Work & Family Research Network, *Questions and Answers about Employed Parents Caring for Children with Disabilities*, (accessed Oct. 26, 2018), https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/Child_Disability.pdf.

¹⁶¹ Rebecca Ullrich, Ctr. for Am. Progress, *Cuts to Medicaid Would Harm Young Children with Disabilities* (2017), <https://www.americanprogress.org/issues/early-childhood/reports/2017/05/03/431766/cuts-medicaid-harm-young-children-disabilities>; Susan L. Parish et al., *Material Hardship in U.S. Families Raising Children with Disabilities: Research Summary and Policy Implications* (UNC Sch. of Social Work Research Brief, March 2009),

¹⁶² 83 Fed. Reg. at 51,212 (proposed 8 C.F.R. § 212.22(c)(1)).

¹⁶³ 83 Fed. Reg. at 51,189.

¹⁶⁴ Drew Altman, *It's not just the uninsured—it's also the cost of health care*, 2017, Axios, Aug. 20, 2018, <https://www.axios.com/not-just-uninsured-cost-of-health-care-cdc4c02-0864-4e64-b745-efbe5b4b7efc.html>.

Few immigrants could overcome this heavily weighted negative factor due to the high cost of health care and most families' lack of savings.¹⁶⁵ This is particularly true for some subpopulations of Asian Americans, which have higher uninsured rates than the average for all Asian Americans. Moreover, although the average rate of the uninsured for Asians was 6.8% and 9.9% for NHPs, the uninsured rates for Bangladeshis was 12.2%, Pakistanis at 11%, Thais at 11%, Laotians at 10%, and Micronesians rose to 13.2% and for Samoans, the rate crept up to 9.4%.¹⁶⁶ For example, in LA County, Asian Americans from 50 to 64 years of age are more likely than average to live without health insurance.¹⁶⁷ The rule makes it more likely that immigrants with serious medical conditions will not be able to afford the high costs of treatment or rates of private insurance because it also discourages the use of Medicaid. If CHIP were also included in the public charge test, which helps more moderate-income families, the impact would be even greater.

E. The factor of family household size is vague, irrelevant, and duplicative of other factors, as well as penalizes multigenerational households.

The rule will consider “household size in relation to household assets and resources” without justifying how it contributes to lack of self-sufficiency.¹⁶⁸ This factor is vague and irrelevant to a public charge determination. First, the proposed rule fails to provide clear guidance about how household size will be weighed in the public charge determination. Household size in relation to assets and resources is duplicative of considerations under the financial status factor, which are problematic, as discussed below. Therefore, it is difficult to ascertain what unique information this factor is designed to ferret out.

More importantly, the rule fails to provide any evidence that larger household size results in lack self-sufficiency. In fact, the data on which the rule relies, showing households of 3 have a higher rate (22.5%) of cash and noncash benefit use than households of 4 (20.7%) does not support the assumption that larger households are less likely to be self-sufficient.¹⁶⁹ Moreover, parallel research shows that household size, by itself, is not an indicator of future public benefit use or self-sufficiency. For example, Asian American older adults living alone are almost four times more likely to live in poverty compared with those living with others,¹⁷⁰ which suggests that larger household are more stable. Grandparents and other relatives provide child care, shop for groceries, clean, cook and help with other daily needs. Having a larger family where grandparents or other relatives provide valuable support so that others may work and attend

¹⁶⁵ Sara Rosenbaum, *A New “Public Charge” Rule Affecting Immigrants Has Major Implications for Medicaid*, Commonwealth Fund, Oct. 16, 2018, <https://www.commonwealthfund.org/blog/2018/new-public-charge-rule-affecting-immigrants-has-major-implications-medicare>; Elissa Kirkman, *62% of Americans Have Under \$1,000 in Savings, Survey Finds*, Go Banking Rates, Oct. 5, 2015, <https://www.gobankingrates.com/banking/savings-account/62-percent-americans-under-1000-savings-survey-finds/>.

¹⁶⁶ Chris Fuchs, *Health Coverage Rate Ticks Up for Some Asian American Groups*, NBC News, Sept. 19, 2017, <https://www.nbcnews.com/news/asian-america/health-insurance-rate-ticks-some-asian-american-groups-n802826>.

¹⁶⁷ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

¹⁶⁸ 83 Fed. Reg. at 51,211.

¹⁶⁹ 83 Fed. Reg. at 51,185 tbl.17.

¹⁷⁰ Asian Am. Ctr. for Advancing Justice, *supra* note 30, at 5.

school ensures economic security and upward mobility, and is not an indicator of future public benefit use.

This factor will have a disproportionately negative impact on Asian Americans who are more likely than any other racial or ethnic group to live in a multigenerational household.¹⁷¹ In fact, about half of Bhutanese (53%) and a large percentage of Cambodians (41%) and Laotians (38%) live in multigenerational households. We strongly oppose an interpretation of this factor that penalizes intergenerational families.

F. The consideration of household incomes at or below 125% FPG as a negative factor and household income at or above 250% FPG as the only heavily weighted positive factor greatly skews the public charge test in favor of wealthy immigrants.

The rule negatively weighs having household assets or income at or below 125% of the Federal Poverty Guideline (FPG). This ignores the purpose of a sponsor's affidavit of support attesting to the support of the applicant and would negatively impact significant numbers of AAPIs. Nationally, 1,139,366 out of 4,796,916 (or 23%) AAPI noncitizens have household assets below 125% FPG.¹⁷² Nearly a third or higher of individuals adjusting from Asian countries have family incomes less than 125% FPG: 30% of Asians as a group; 35% from China; 31% from Vietnam; 31% from Korea; 46% Bangladesh; and 42% Pakistan. There is, however, no evidence that this income threshold is a predictor of likely public benefit use.

This factor is negatively compounded with age. For example, in LA County, Asian Americans 65 and older are more likely than average to live below the poverty line and have low-income status.¹⁷³ Among Asian Americans, Korean and Cambodian seniors are more likely than all racial groups to live below poverty line and have low-income status.¹⁷⁴

The rule will also have a disproportionate impact on low-wage workers, who cannot meet the proposed positive income threshold. The majority of immigrant workers in specific industries will have at least one negative factor under the proposed rule: 87% recent LPRs in agriculture, 75% in construction, 61% in hospitality, and 58% in manufacturing.¹⁷⁵ Putting low-wage workers at risk of being denied green cards, the rule will exacerbate labor shortages in industries where immigrants make up a substantial portion of the workforce.

Less sound justification is offered for the 250% of FPG threshold as the only heavily weighted positive factor. At the current federal minimum wage of \$7.25 an hour, even two full-time workers at those wages would not meet the requirements to not be at risk for "public charge". At footnote 583, the Department admits that the differences in receipt of non-cash benefits between

¹⁷¹ D'Vera Cohn & Jeffrey S. Passel, *supra* note 41.

¹⁷² *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, Manatt, *supra* note 20.

¹⁷³ Asian Am. Ctr. for Advancing Justice, *supra* note 30, at 5.

¹⁷⁴ *Id.* at 14.

¹⁷⁵ Randy Capps et al., *supra* note 3.

non-citizens living below 125 % of FPG and those living either between 125 and 250 % of the FPG or between 250 and 400 % of the FPG was not statistically significant. Therefore, this does not show a link to income based on FPG and the use of benefits.

It is worth noting that the combination of these thresholds, which are based on household size, with the proposed rule's expansive definition of household, will have the perverse effect of discouraging people from supporting family members. For example, if a couple with one child making just over the 250% FPG for a family of 3, takes in a brother who is temporarily unemployed and does not charge rent, they will become a household of four and no longer qualify for the heavily weighed positive factor.

Setting these standards goes well beyond reasonable interpretation of the law and is in fact an attempt to achieve by regulation a change to the immigration policy of the U.S. that the Administration has sought but that would require Congressional action. In fact, Congress previously rejected setting a standard requiring sponsors have 200% FPG.¹⁷⁶ Furthermore, a standard of 250 % FPG, which is nearly \$63,000 a year for a family of four, is above the annual mean wages of workers in America. According to Bureau of Labor Statistics (BLS) data, the seasonally adjusted annual mean wage for private, nonfarm occupations was less than \$50,000 in October, 2018 - below 250 % FPL for a three-person household.¹⁷⁷ Among production and nonsupervisory workers, mean wage was just over \$40,000—less than 250 % FPL for a household of two.¹⁷⁸ A single individual who works full-time year round—who does not miss a single day of work due to illness or inclement weather—but is paid the federal minimum wage would fail to achieve the 125% of FPG threshold. This is clearly not the person that Congress envisioned when they directed DHS to deny permanent status, entry or re-entry to those at risk of becoming a public charge.

We strongly oppose the use of arbitrary and unreasonable thresholds. There is no statutory basis for giving negative weight to income below 125% FPG or heavily positive weight to 250% FPG—the only heavily positive factor under the rule. The rule does not provide justification for why income at 125% FPG results in lack of self-sufficiency. The cited statute 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 the Department provides no justification for why this threshold is appropriate. In fact, our current family-based immigration system recognizes that family members provide support, both financially and in other ways, including through the use of affidavits of support to promote self-sufficiency of other family members and does not rely on certain income levels to determine self-sufficiency.

G. The use of receipt of one or more public benefits as a factor is very broad, vague and contrary to the totality of circumstances test.

¹⁷⁶ Immigration in the National Interest Act of 1995, H.R. Rep. 104-469(I), Mar. 4, 1996, 104th Cong., 2nd Sess. 1996, 1996 WL 168955, at *544.

¹⁷⁷ U.S. Dep't of Labor, Bureau of Labor Statistics, *Economic News Release*, tbl.A-1 (Nov. 14, 2018), <https://www.bls.gov/news.release/realer.t01.htm> (“Current and real (constant 1982-1984 dollars) earnings for all employees on private nonfarm payrolls, seasonally adjusted”).

¹⁷⁸ *Id.*

The rule gives heavily negative weight to having received one or more public benefits “within the 36 months immediately preceding the alien’s application for a visa, admission, or adjustment of status.”¹⁷⁹ As discussed in detail above, this broad, vague factor is not supported by statute and is inconsistent with the prospective nature of the public charge test. According to the 1999 Guidance, “[i]t has never been Service policy that the receipt of any public service or benefit must be considered for public charge purposes.”¹⁸⁰ The rule also does not provide evidence that this factor leads to lack of self-sufficiency.

Furthermore, in counting against immigrants 12 cumulative months of use of nonmonetizable public benefits in a 36 month period, the rule disregards the fact that, as in the case of some of our clients, immigrants may be enrolled in benefit programs such as Medicaid for many months but rarely use those benefits, such as attend a medical appointment. The instructions for the proposed Form I-944 included in the rule requires information on the duration “benefits are received,” but it is unclear whether the months an individual is enrolled in, but does not access Medicaid counts in the public charge test.¹⁸¹ Thus, under this vague standard, individuals may be penalized just based on the months of enrollment, not actual benefit use. The rule fails to provide evidence that mere enrollment as opposed to actual benefit use predicts future benefit use.

In addition, the agency’s proposal to heavily weigh receipt of benefits – including benefits previously considered – is deeply problematic and 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 temporary access to public programs that provide support, which allows them to continue working. AAPI households use noncash benefits to thrive and temporarily help make ends meet as they establish new lives in the U.S; many participate in the economy and attend schools.¹⁸² In fact, the majority of working age AAPIs that use benefits are employed.¹⁸³ Immigrants in benefits-receiving families have higher rates of employment (63% for noncitizens and 66% of naturalized citizens) than U.S. born working-age adults (51%), which indicates immigrants use benefits as work supports.¹⁸⁴ Therefore, the rule’s self-sufficiency assumptions are very harmful to immigrants and appear to be based on the misperception of low waged workers who use public benefits.

H. The use of credit scores is vague and unrelated to a person’s likelihood to use public benefits.

¹⁷⁹ 83 Fed. Reg. at 51,292 (proposed 8 C.F.R § 212.22(c)(iii)).

¹⁸⁰ 1999 Public Charge Standards, 64 Fed. Reg. at 28,678.

¹⁸¹ 83 Fed. Reg. at 51,165; USCIS, *Draft Instructions to Form I-944*, at 9, <https://www.regulations.gov/document?D=USCIS-2010-0012-0047>.

¹⁸² Asian Am. Ctr. for Advancing Justice, *supra* note 30, at 11–12, 39, 49; Ninez A. Ponce et al., *supra* note 85.

¹⁸³ Jeanne Batalova, et al., *supra* note 19.

¹⁸⁴ Jeanne Batalova, et al., *supra* note 19.

The rule proposes another new factor to be considered, an immigrant’s credit score. It gives negative weight to having a “bad credit and a low credit score.” These are vague terms and make it difficult to understand how adjudicators will assess what “bad credit” or “a low credit score”¹⁸⁵ may be for public charge determinations. Furthermore, there is no statutory basis nor sufficient evidence to use this factor to determine likely future benefit use. Credit scores represent the creditworthiness based on credit reports from credit bureaus and are not meant as a judge of character or admissibility and should not be used as part of the “public charge” determination. Neither credit reports nor credit scores were designed to provide information on whether a consumer is likely to rely on public benefits or on the character of the individual. DHS offers no evidence to support its claim that a low credit score or a bad credit record are indications of lack of future self-sufficiency. Moreover, a bad credit record or low credit scores are often the result of circumstances beyond a consumer’s control, such as illness or job loss, from which the consumer may subsequently recover. Credit scores also do not take into consideration rent payments, typically a family’s largest recurring expense. Using credit reports and credit scores to determine public charge status is also inappropriate because many immigrants will not even have a credit history for USCIS to consider. Studies show that even when immigrants do have credit histories, their credit scores are artificially low because they have not had enough time to build a credit history in the U.S.¹⁸⁶ The rule does not justify having bad credit or a low credit score means that a person will likely use public benefits.

I. English proficiency as a factor in the public charge test is discriminatory, unrelated to self-sufficiency, is not administrable, and has a disproportionate impact on Asian immigrants.

When considering an immigrant’s education and skills, USCIS proposes to consider “whether the [immigrant] is proficient in English or proficient in other languages in addition to English.” For the first time, the issue of English language proficiency has been introduced into the public charge test without justification or statutory support. The rule unjustly links English language proficiency to employability and use of public benefits, and fails to provide proper guidance on how to assess “proficiency.”

1. There is no statutory support for considering English proficiency in the public charge test.

The public charge statute does not include English proficiency as a factor to be considered in an individual’s assessment and instead refers only to “education and skills,” among other factors. There is no evidence that English proficiency has ever been considered in public charge determinations. To the contrary, when Congress enacted the Naturalization Act of 1906 that required immigrants to learn English in order to become naturalized citizens, it did not update the

¹⁸⁵ 83 Fed. Reg. at 51,213.

¹⁸⁶ Nat’l Consumer Law Ctr., *The Wrong Tool for the Wrong Purpose: Why the Credit Scoring Provision in the Immigration Public Charge Proposal is Illogical and Ill-Advised* (October 2018), <https://www.nclc.org/issues/wrong-tool-wrong-purpose-credit-scoring-ill-advised.html>.

public charge statute to include a similar English proficiency requirement.¹⁸⁷ Congress did not impose an English language test on applicants for lawful permanent residence but only required an English test for lawful permanent residents who have lived in the U.S. for a number of years—when they apply to become a U.S. Citizen. This reflects our historic commitment to welcoming and integrating immigrants, who are less likely to have gained proficiency in English when they first enter the U.S. or apply for lawful permanent residence than when they naturalize after living in the United States for a number of years. The proposed rule would bypass Congress in imposing a new requirement. If Congress had intended to make English proficiency a factor in admission to the United States, it would have done so explicitly. The fact that it has not, combined with its support for acquisition of English by immigrants already in the United States,¹⁸⁸ strongly suggests that Congress did not intend for English proficiency to be a factor in the public charge test.

2. The English proficiency factor in the public charge test is a proxy for national origin discrimination.

We are very concerned that use of language proficiency or language ability to determine the admissibility of immigrants may violate constitutional mandates, federal immigration statutes, and state and federal anti-discrimination guidance, regulations and statutes, including Section 1152 of the Immigration and Nationality Act, Title VI of the 29164 Civil Rights Act, Section 1557 of the Patient Protection and Affordable Care Act,¹⁸⁹ and Executive Order 13166.¹⁹⁰ It is well established that national origin or nationality discrimination includes discrimination based on language and English proficiency.¹⁹¹ Both the Immigration and Nationality Act¹⁹² and Title VI of the Civil Rights Act¹⁹³ explicitly prohibit discrimination based on race and national origin. Moreover, the U.S. does not have a national language and has not allowed any agency to give preference to those who speak English over those who do not.

¹⁸⁷ Act of June 29, 1906, sec. 6, 34 Stat. 596, 598.

¹⁸⁸ U.S. Dep’t of Labor, *Training and Employment Notice No. 28-16* (Jan. 18, 2017), https://wdr.doleta.gov/directives/attach/TEN/TEN_28-16_Change_2_acc.pdf.

¹⁸⁹ 42 U.S.C. § 18116 (prohibiting discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities and incorporates Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975).

¹⁹⁰ 65 Fed. Reg. 50121 (Aug. 16, 2000) (Improving Access to Services for Persons with Limited English Proficiency).

¹⁹¹ See, e.g., *Lau v. Nichols*, 414 U.S. 564–69 (1974); *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009) (concluding that “discrimination against LEP individuals was discrimination based on national origin”); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995) (en banc) (noting that “language is a close and meaningful proxy for national origin”), *vacated on other grounds sub nom, Arizonans for Official English v. Ariz.*, 520 U.S. 43 (1997).

¹⁹² 8 U.S.C. § 1152(a)(1)(A)(no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of a person’s race, sex, nationality, place of birth, or place of residence).

¹⁹³ 42 U.S.C. § 2000d (no person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance).

3. English proficiency is not a good predictor of self-sufficiency or future benefit use.

The agency offers a limited number of justifications for its proposal to add English proficiency to the list of factors, all of which are without merit. For example, the agency states that those who cannot “speak English may be unable to obtain employment in areas where only English is spoken.” The rule only focuses on spoken English and disregards immigrants’ ability to listen, read and write in English; the latter set of proficiency skills are common in some Asian countries where the pedagogy focuses more on written rather than spoken English.¹⁹⁴ There is also a significant difference between English proficiency and having no ability to speak the language, which the agency appears to conflate here. Many individuals who have limited English proficiency are able to serve important employment roles. For example, there is evidence that many immigrants contribute to the economy by owning businesses or working in service, construction and personal caregiving industries, the latter being a sector that is facing labor shortages as the baby boomer generation ages.¹⁹⁵ In fact, Asian Americans owned over 1.5 million businesses in 2007, generating more revenue and employing more persons than any other racial group except non-Hispanic Whites.¹⁹⁶ Therefore, language ability does not determine one’s ability to work or own a business and is not a proxy for earnings or lack of self-sufficiency.

Second, the U.S. is a deeply multilingual country, where 63 million people speak a language other than English at home. In fact, there are at least 60 counties in the United States where over 50 % of the population speaks a language other than English including some of the most heavily populated.¹⁹⁷ In 2016, approximately 49 % (21.3 million) of the 43.4 million immigrants ages 5 and older were LEP.¹⁹⁸ As noted above, there are a myriad of areas where a person who speaks a language other than English can meaningfully contribute to the workforce and to civic society.

For evidence to support its assertion that an inability to speak and understand English may adversely affect employability, DHS cites to only one 13 year old study used outdated data from a 2005 Census long form where individuals self-identified their language and their ability to speak English based on a Census determined scale. The study was also based on even older 2000 data and no recent data to support its claim that those who are not proficient in English have lower rates of employment. To the contrary, individuals who may not be proficient in English are needed for many industries and DHS does not consider or analyze the impact on the greater labor force of excluding those individuals who likely occupy jobs, even part-time jobs, in many low-wage industries. For example, farmworkers often have limited formal education, such

¹⁹⁴ Jae Ik Moon, *Groping for a New English Teaching Strategy*, Sci. Direct Vol. 16, Issue 4 (Dec. 2014), <https://www.sciencedirect.com/science/article/pii/S1229545014000163>.

¹⁹⁵ Migration Policy Inst., *Language Diversity and English Proficiency in the United States* (Nov. 11, 2016), <https://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states>.

¹⁹⁶ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

¹⁹⁷ U.S. Census Bureau, 2012-2016 American Community Survey Estimates, tbl. S1601.

¹⁹⁸ Migration Policy Inst., *Frequently Requested Statistics on Immigrants and Immigration in the United States* (2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

as around or below an 8th grade education,¹⁹⁹ and fifty-nine % of farmworkers report that they speak little or no English.²⁰⁰ We believe that agricultural work is a skilled occupation requiring knowledge, precision, exercise of judgement, endurance, and speed. In fact, the majority of farmworkers have spent many years in agriculture, an average of 16 years,²⁰¹ acquiring the necessary skills to be successful in their work and contributors to their employers' profitability and therefore essential to our highly efficient agricultural system.

The rule also claims that English language proficiency is related to whether an immigrant is likely to become a public charge but DHS fails to provide any causal linkage between the data cited and its conclusions, and fails to consider alternative reasons why people who are more limited English proficient may be more likely to secure services. For example, states such as New York and California, which have higher numbers of LEP populations, also have higher income thresholds for Medicaid. Higher Medicaid eligibility thresholds means higher usage rates, and does not support a conclusion that limited English proficiency leads to higher benefit usage.

DHS also uses incomplete and questionable data for support. At Table 24: "Public Benefit Participation of Noncitizens Age 18+ who Speaks a Language Other than English at Home, by How Well English is Spoken, 2013," the table is based on sampled data where individuals self-assessed their own language ability. USCIS' Survey of Income and Program Participation (SIPP) also used a small sample size and acknowledged in the table that the more than half of the estimates are "considered unreliable due to a high relative standard error."²⁰² The data also does not make any distinctions among the group of noncitizens so may not reflect the usage of public benefits who are LPRs or those exempt from the public charge test. For example, lawful permanent residents who have not left the country for 6 months, refugees, asylees, and others who have obtained status based on humanitarian grounds. A more reliable data set must be required in order for DHS to justify the inclusion of this factor that has clear repercussions on so many lives.

DHS finally claims to have "numerous studies" that correlate" English language proficiency or ability to acquire English proficiency with a newcomer's economic assimilation into the United States. However, three out of the four studies cited use data derived from Europe, and the fourth relies on Current Population Survey data that is nearly 30 years. Thus, contrary to DHS' claim, these studies do not provide justification for imposing this requirement.

Finally, by proposing to include use of housing assistance, Medicaid, and SNAP in public charge determinations, DHS is likely making it more difficult for people who are not proficient in English to improve their skills through English language classes. The prospect of decreased

¹⁹⁹ U.S. Dep't of Labor, *Findings from the National Agricultural Workers Survey 2013-2014 (NAWS)*, at 10, Dec. 2016, https://www.doleta.gov/agworker/pdf/NAWS_Research_Report_12_Final_508_Compliant.pdf.

²⁰⁰ *Id.* at 13.

²⁰¹ *Id.* at 29.

²⁰² 83 Fed. Reg. at 51,196.

health care access, increased hunger, and home instability may cause affected populations to have little time or ability to improve their skills and to de-prioritize skills development.²⁰³

4. The English proficiency factor is vague and not administrable.

The proposed rule provides only vague guidance about any proficiency standard and fails to provide proper guidance on how to assess “proficiency” or levels of proficiency, how individuals can demonstrate that ability, or how staff will verify the appropriate level. It does not make clear how immigration officials will apply this new factor, which will result in arbitrary decisions at best and will likely lead to abuses of discretion and discriminatory conduct. The proposed rule states that English language proficiency is relevant, but does not explain how the DHS or immigration officials will make this determination. Without any standard or uniform way to assess that language proficiency, it will be left to the subjective judgment of any low-level immigration official who may make that assessment in a discriminatory manner.

The rule also uses different terms when referring to this factor, which causes greater confusion and vagueness. For example, in Table 33: “Totality of Circumstances Framework for Public Charge Determinations,” under the examples of positive factors, it uses the following: an immigrant is “sufficiently proficient in English or additional languages to enter the U.S. job market.” However, under the negative factors, it does not refer to proficiency but to “not familiar with the English language sufficient to enter the job market.” Not only would it be very difficult to determine whether the immigrant’s “proficiency in English” or “familiarity with English” should be positively or negatively weighted, the positive proficiency standard appears harder to meet than the negative “familiarity with English” standard.

5. The English proficiency factor disproportionately impacts Asian and women immigrants.

The proposed regulation disproportionately harms populations with high levels of immigrants who do not speak English very well, such as Asian immigrants. As noted in Section II (B), the proposed rule would disproportionately impact Asian immigrants, where 71% of our population speaks languages other than English and 32% do not speak English very well.²⁰⁴ The proposed rule incorrectly assumes without strong evidence that “not being familiar with the English language” prevents a person from becoming a strong part of the workforce and self-sufficient. Moreover, incorporating English proficiency in a public charge assessment would also have a greater negative impact on women. Among LEP individuals, women with limited English proficiency are much less likely to participate in the labor force than men (49 % vs. 75 %).²⁰⁵ Further, LEP women who have jobs are more than twice as likely to work in low-wage service occupations (45 % vs. 20 %) than are women with English proficiency.²⁰⁶ Thus, the rule will

²⁰³ Ludden, Jennifer, *Barriers Abound for Immigrants Learning English*, Nat’l Public Radio, Sept. 11, 2007, <https://www.npr.org/templates/story/story.php?storyId=14330106>.

²⁰⁴ Asian Am. Ctr. for Advancing Justice, *supra* note 30.

²⁰⁵ Migration Policy Inst., *The Limited English Proficient Population in the United States*, July 8, 2015, <https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.

²⁰⁶ *Id.*

also have a disproportionate impact on women if language proficiency continues to be considered.

The proposed rule goes against American ideals of welcoming anyone who is willing to work hard and contribute to this nation by only allowing the select few who live in English-speaking countries or have limited access to opportunities in their home countries to learn English. History has shown us that most immigrants who have come to this country, regardless of their English skills, have contributed to the vibrant and rich landscape that makes up America.

J. Lack of education and employment history as negative factors disproportionately impact AAPIs and women and are unrelated to self-sufficiency.

The rule gives negative weight for lack of a high school diploma and lack of employment history. This affects a significant portion of women from Asian countries who are adjusting their status including 26% of women from China, 39% from Vietnam, 27% from Bangladesh, and 27% from Pakistan,²⁰⁷ where access to formal education for women is limited. This limited focus on formal education fails to take into account how generations improve their economic contributions over time. Immigrants' children—the second generation—are among the strongest economic and fiscal contributors in the population.²⁰⁸

Immigrants from developing nations initially earn less than comparably educated U.S. born, but their earnings rise more rapidly overtime.²⁰⁹ Regardless of the characteristics of their parents, children of immigrants tend to attain educational outcomes that are like those of natives, but with higher rates of college and postgraduate attainment than observed for children of natives.²¹⁰ In addition, immigrants covered by private health insurance and their employers contributed nearly \$25 billion more in premiums in 2014 than was spent on their care.²¹¹ In addition, those without legal status contributed nearly \$8 billion toward the surplus.²¹² In contrast, U.S.-born enrollees spent nearly \$25 billion more than they paid for in premiums.²¹³ The assumption that immigrants who may enter the country with limited education cannot become self-sufficient and are a fiscal burden is wrong and harmful.

²⁰⁷ Randy Capps et al., *supra* note 3.

²⁰⁸ Nat'l Acad. of Scis., Eng'g, & Med., *The Economic and Fiscal Consequences of Immigration* (2017).

²⁰⁹ Harriet Orcutt Duleep & Daniel J. Dowhan, *Research on Immigrant Earnings*, Social Security Bulletin (rev. 2008).

²¹⁰ Ryan Nunn et al., Brookings Institution, *A Dozen Facts about Immigration* (rev. Oct. 2018).

²¹¹ Leah Zallman et al., *Immigrants Pay More In Private Insurance Premiums Than They Receive In Benefits*, Health Affairs, October 2018, <https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2018.0309>.

²¹² *Id.*

²¹³ *Id.*

V. Conclusion

Discouraging families from receiving health, nutrition, housing, or educational supports for their children will only make it harder for them to achieve economic security in the future. In addition, denying them permanent visas threatens the upward mobility that is documented among second-generation immigrants.²¹⁴

The negative factors outlined in the rule ignore the impact of access to public benefits and family support as positive factors in empowering future self-sufficiency. The rule does not recognize that receipt of benefits that help to heal a health condition or provide people with the opportunity to complete education and training are highly significant positive factors that contribute to future economic self-sufficiency. There is a large body of research evidence on the positive long-term effects of receipt of many of the benefits that are included in the public charge determination, including SNAP and Medicaid.²¹⁵

By listing multiple correlated experiences (e.g. low income, lack of employment, and poor credit scores) as separate factors, the rule places undue weight on each of them and pretends scientific objectivity while actually putting a thumb on the scales. This is contrary to the statutory “totality of circumstances” test, the balancing of all factors, and that no one factor is dispositive of the public charge determination.

The rule discounts that over the long term, a new immigrant is generally a net gain for federal and state government revenue combined.²¹⁶ “[U]nder the CBO Long-term Budget Outlook scenario, the total fiscal impact of a new immigrant who most resembles recent immigrants in terms of average age and education creates a positive fiscal balance flow to all levels of government with an NPV [net present value] of \$259,000 over 75 years, including \$173,000 from the immigrant themselves and \$85,000 from their descendants”.²¹⁷

The rule appears to be motivated by a desire to change America’s system of family-based immigration to grant preference to the wealthy, in ways that the Administration has proposed through legislation but that Congress has rejected. The rule would create a multitude of ways for individuals to fail the public charge test, and very few ways to overcome it. It is also part of the Administration’s attack on people of color, as it disproportionately affects immigrants of color.

²¹⁴ Papdemetriou Demetrios et al., *supra* note 108.

²¹⁵ Marianne Page, Univ. of Cal. Davis, *Safety Net Programs Have Long-Term Benefits for Children in Poor Households* (2017) https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-health_and_nutrition_program_brief-page_0.pdf; Katherine Baicker et al., *The Oregon Experiment - Effects of Medicaid on Clinical Outcomes*, *New England J. of Med.* (May 2013), at 1713–22; Heidi Allen et al., *Early Medicaid Expansion Associated with Reduction Payday Borrowing in California*, *Health Affairs* (October 2017), at 1769–76; Maya Venkataramani et al., *Spillover Effects of Adult Medicaid Expansions on Children’s Use of Preventive Services*, *Am. Acad. of Pediatrics* (November 2017).

²¹⁶ Nat’l Acad. of Scis., Eng’g, & Med., *supra* note 208.

²¹⁷ *Id.*

The rule ultimately indicates a preference for immigrants who speak English, which would mark a fundamental change from our nation's historic commitment to welcoming and integrating immigrants. Because this rule targets family-based immigration as well as low and moderate wage earners, it will also have a disproportionate impact on people of color. All of these changes amount to a sea change in American policy towards immigration, counting wealth and income as the primary of a person's future contribution.

For these reasons, the Department should immediately withdraw its current proposal in its entirety, and dedicate its efforts to advancing policies that strengthen—rather than undermine—the ability of immigrants to support themselves and their families in the future. If we want our communities to thrive, everyone in those communities must be able to stay together and get the care, services and support they need to remain healthy and productive.

Please read the materials cited and linked in this comment. We have included many of the source materials cited in our comments and intend that all of the cited materials are to be part of administrative record.

Thank you for the opportunity to submit comments on the proposed rulemaking. Please do not hesitate to contact me to provide further information.



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