



Harvey Reiter
202.728.3016 **DIRECT**
202.572.9968 **DIRECT FAX**
harvey.reiter@stinson.com

December 10, 2018

Via Hand Delivery, First Class Mail, and Electronic Filing

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

**Re: Notice of Proposed Rulemaking
Inadmissibility on Public Charge Grounds – Comments in Opposition to Proposed Rule
DHS Docket No. USCIS-2010-00012**

Dear Ms. Deshommes:

For filing in the above-referenced docket, please find enclosed comments submitted on behalf of the Immigrant Law Center of Minnesota; City of Minneapolis, Minnesota; City of St. Paul, Minnesota; Maryland State Senator-Elect Jeff Waldstreicher; Montgomery County Executive Marc Elrich; SEIU Healthcare Minnesota; C.A.R.E. Clinic; Minnesota Association of Community Health Centers; Friends of Immigrants; the Jewish Council for Public Affairs; the Jewish Community Relations Council of Greater Washington; Tzedek DC; Benjamin Casper; and Stephen Meili; in opposition to the Department of Homeland Security's proposed rule regarding Inadmissibility on Public Charge Grounds. For the reasons set forth in the enclosed, this broad-based coalition of immigrant rights advocates, health organizations, faith-based institutions, local governments, and individuals strongly opposes the agency's proposed rule, and we urge that the agency withdraw the Notice of Proposed Rulemaking in its entirety.

Sincerely,

Stinson Leonard Street LLP

A handwritten signature in blue ink that reads "Harvey Reiter".

Harvey Reiter

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF HOMELAND SECURITY**

Inadmissibility on Public Charge Grounds

DHS Docket No. USCIS-2010-0012

**COMMENTS BY THE IMMIGRANT LAW CENTER OF MINNESOTA; CITY OF
MINNEAPOLIS, MINNESOTA; CITY OF ST. PAUL, MINNESOTA; MARYLAND
STATE SENATOR-ELECT JEFF WALDSTREICHER; MONTGOMERY COUNTY
EXECUTIVE MARC ELRICH; SEIU HEALTHCARE MINNESOTA; C.A.R.E. CLINIC;
MINNESOTA ASSOCIATION OF COMMUNITY HEALTH CENTERS; FRIENDS OF
IMMIGRANTS; JEWISH COUNCIL FOR PUBLIC AFFAIRS, JEWISH COMMUNITY
RELATIONS COUNCIL OF GREATER WASHINGTON, TZEDEK DC; BENJAMIN
CASPER; STEPHEN MEILI; AND ANA POTTRATZ ACOSTA IN OPPOSITION TO
THE PROPOSED RULE**

INTRODUCTION

The Immigration and Nationality Act ("INA") provides that, under certain circumstances, an alien is inadmissible if he or she is likely at any time to become a "public charge." *See* 8 U.S.C. § 1182(a)(4); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (Oct. 10, 2018) ("Public Charge NOPR" or "NOPR").¹ The Department of Homeland Security's ("DHS") NOPR proposes dramatic changes to the agency's long-standing practices with respect to application of this provision. Through the Public Charge NOPR, DHS proposes (1) to define the term public charge, (2) to enumerate and expand the types of benefits—including temporary benefits—that are considered in the public charge determination, (3) to apply the public charge statute to aliens that are seeking an extension of stay or change of status (as opposed to just an application for admission or visa, or an adjustment of status), and (4) to clarify when an alien seeking an adjustment of status may offer, and DHS may accept, a "public charge bond." *Id.* at 51114.

The Immigrant Law Center of Minnesota, et al., ("ILCM") a broad-based coalition of

¹ More specifically, section 212(a)(4) of the INA provides that an individual seeking admission to the United States or seeking to adjust status to permanent resident (obtaining a green card) is inadmissible if the individual "at the time of application for admission or adjustment of status, is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4).

immigrant rights advocates, health organizations, faith-based institutions, local governments, and individuals, strongly opposes the proposed rule. DHS states as the objective of its Public Charge NOPR "to better ensure that aliens subject to the public charge inadmissibility ground are self-sufficient, i.e., do not depend on public resources to meet their needs, but rather rely on their own capabilities, as well as the resources of family members, sponsors, and private organizations." *Id.* at 51116. But as ILCM's comments demonstrate below, the NOPR does the opposite. DHS acknowledges that a finding of public charge requires "more than a showing of a possibility that the alien will require public support;" it requires a showing "that the burden of supporting the alien is likely to be cast on the public." *Id.* at 51125 (quoting *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421–23 (BIA 1962)).

The Public Charge NOPR, unfortunately, is a solution in search of a problem. In fact, the Public Charge NOPR is a problem unto itself: with an aging population dependent on fewer wage earners to support existing entitlement programs, statistical data shows that the United States increasingly relies on immigrants to grow the workforce. Far from reducing the burden on the public, the agency's broader definition of public charge will increase the number of able-bodied immigrants who will be labeled "public charges," but who, if granted permanent legal status, would likely help to *reduce* the burden on taxpayers. DHS acknowledges that severe adverse impacts to the public health and welfare will result from its proposed rule, yet it does nothing to analyze those impacts, nor does it even claim that those impacts are outweighed by the new rule's purported minimal benefits in tax savings. Instead, DHS supports its rule through mere speculation, assuming without evidence that persons who receive benefits will depend on them for the long term.

DHS is dramatically changing existing and longstanding agency practice, frustrating decades of settled expectations, without any real explanation as to why. The agency is also

attempting to influence and create new policy in arenas that fall well outside the Public Charge statute's purview. It is apparent that DHS is trying to accomplish through a new rule what the Trump Administration could not achieve through Congress – drastic reductions to public benefits participation and family-based immigration, and the creation of a tiering system that strongly prefers wealthier immigrants.

COMMENTERS

- **Immigrant Law Center of Minnesota** – Immigrant Law Center of Minnesota provides immigration legal assistance to low-income immigrants and refugees in Minnesota, and works to educate Minnesota communities and professionals about immigration matters. ILCM also advocates for state and federal policies to promote respect for the universal human rights of immigrants.
 - John Keller
Executive Director
john.keller@ilcm.org
651-641-1011

LOCAL GOVERNMENTS

- **City of Minneapolis, Minnesota** – The City of Minneapolis is the largest city in the state of Minnesota, with a population of about 422,331, approximately 16% of whom are foreign-born. The City opposes the proposed rule because it needlessly expands the category of individuals who may be denied permanent residence (a green card) or other immigration status. It is facially discriminatory against children, the elderly and the disabled, and implicitly discriminatory against communities of color. The rule, if implemented, will likely deter immigrants and their families from obtaining benefits that they qualify to receive, resulting in significant negative impacts on the economic stability and health of city residents, including US citizen family members of immigrants.
 - Mayor Jacob Frey
Attn: Jaime Makepeace, Senior Policy Aid to Mayor Frey
jaime.makepeace@minneapolismn.gov
612-673-2100
- **City of St. Paul, Minnesota** – The City of St. Paul, MN is the second largest city in the state of Minnesota, with a population of about 306,000. Nearly 20% of the residents of St. Paul are foreign-born.

- ThaoMee Xiong
Director of Intergovernmental Affairs
ThaoMee.Xiong@ci.stpaul.mn.us
- **City of Gaithersburg, Maryland** – The City of Gaithersburg, MD is the fourth largest incorporated city in the state of Maryland, with a population of about 70,000, nearly 40% of whom are foreign-born.
 - City Council
301-258-6300

LOCAL GOVERNMENT OFFICIALS

- **Jeff Waldstreicher, Senator-Elect, Maryland State Senate District 18** – Senator-Elect Jeff Waldstreicher is currently a member of the Delegate Assembly of the State of Maryland representing District 18 and will begin serving as the State Senator for District 18 in January, 2019. District 18 is home to about 120,000 persons, about one third of whom are foreign born.
 - Delegate Jeff Waldstreicher
410-841-3130
- **Marc Elrich, Montgomery County Executive** – Marc Elrich is the County Executive for Montgomery County, Maryland. Montgomery County is the most populous county in the state of Maryland and is home to over one million people, nearly one third of whom are foreign-born.
 - Office of the Montgomery County Executive
240-777-0311

ORGANIZATIONS

- **SEIU MN State Council** – SEIU MN State Council coordinates the electoral, legislative, and outreach work of SEIU Locals in the State of Minnesota. The organization stands with other organizations in opposition to the change in definition of "public charge." This proposal ignores our values as Americans and will push immigrant working families to choose between going without needed healthcare, going hungry or becoming homeless in exchange for the opportunity to obtain legal immigration status one day.
 - Felipe Illescas
Director of Outreach and Policy Campaigns
fillescas@seiumn.org
- **SEIU Healthcare Minnesota** – SEIU Healthcare Minnesota is dedicated to ensuring the highest quality of care for every patient, attaining quality, affordable healthcare for every American, and improving the lives of healthcare workers, our families, and our

communities. SEIU Minnesota believes that DHS's proposed rule is an attack on all families and their right to healthcare, nutrition, housing and other vital services. DHS's proposed rule rips away the medical and other critical programs that help families survive.

- Jigme Ugen
Executive Vice President
Jigme.Ugen@seihcmn.org
612-812-5846
- **C.A.R.E. Clinic** – C.A.R.E. Clinic is a nonprofit free clinic that provides integrated healthcare to low-income individuals regardless of their ability to pay, and it operates thanks to over 200 volunteers and many community donors. The clinic is concerned with the proposed rule because it may undermine access to healthcare for many legal immigrants for fear of losing their legal immigration status. Sacrificing care would ultimately lead to sicker patients who then may end up using the emergency room and increasing the amount of uncompensated care. This is especially a concern for our small rural hospital system. If patients cannot seek comprehensive care in the traditional healthcare system, the clinic anticipates an increased demand for free care that does not receive any federal and extremely limited state funding to care for uninsured and/or low-income patients.
 - Michaela Read
Development Director
michaela@careclinicrw.com
651-388-1022
- **Minnesota Association of Community Health Centers** – The Minnesota Association of Community Health Centers represents patient-centered organizations whose mission is to provide high-quality, affordable health care to all medically underserved patients, so they can have the opportunity to thrive, contribute to their communities, and reach their full potential. The proposed rule will deter individuals from addressing their own health care needs and those of their families, ultimately leading to worse health outcomes, higher costs, and reduced productivity. These impacts are inconsistent with our mission, and therefore the association necessarily opposes the DHS's proposed changes.
 - Danny Ackert
Director of Public Policy
daniel.ackert@mnachc.org
616-901-7500
- **Friends of Immigrants** – Friends of Immigrants endeavors to put a human face on the immigrant experience while supporting the local immigrant community. The organization recognizes immigrants' economic, cultural, social, and individual importance in our community. Friends of Immigrants believes that there is no justifiable explanation for the proposed changes, which will serve to diminish the health, welfare, and overall wellbeing of our immigrant neighbors. The organization is concerned that the proposed changes will lead to a less healthy community of immigrants locally and nationally.

- Dr. E. Jane Lorentzen
lorentzen.e.jane@gmail.com
- **The Jewish Council for Public Affairs** – The Jewish Council for Public Affairs is the national hub for more than 125 local Jewish Community Relations Councils, and 16 national Jewish agencies. Its mandate is to advance the interests of the Jewish people to, among other things, promote a just American society. In this regard, and relevant to the Public Charge NOPR, it has adopted policies (1) to combat stereotypes about immigrants, (2) to maintain support for fair and generous legal immigration policies as an expression of our country’s core values of refugee protection, family reunification and economic opportunity and (3) to work to ensure that those entering the country legally with the intention to settle here permanently are afforded a reasonable, effective, and judicious process, and that a rational and timely mechanism be developed to establish immigrants’ status.
 - Tammy Gilden
Senior Policy Associate
tgilden@thejcpa.org
646-525-3609
- **The Jewish Community Relations Council of Greater Washington** – The Jewish Community Relations Council of Greater Washington represents over 100 constituent Jewish agencies, organizations and synagogues in the District of Columbia, Northern Virginia and suburban Maryland. The JCRC serves as the chief advocate for the DC area Jewish community to elected officials, government agencies, other faith and ethnic communities, and the media. Among its other work, the JCRC has a long history of advocacy and community engagement on public policy issues directly impacting local refugee and immigrant populations. As an outgrowth of American Jews’ history as an immigrant population fleeing devastating persecution and poverty, the Jewish community has consistently championed the rights of refugees and immigrants to be treated with fairness and compassion as they seek safety and security in the United States. Over the last two years JCRC has partnered with organizations such as HIAS, CASA, and VACALAO to: (1) support legislation that protects immigrant and refugee populations and the agencies that serve them; (2) mobilize Jewish lawyers to provide pro bono assistance to immigrants pursuing naturalization; and (3) sponsor programming highlighting our community’s moral commitment to the core American value of being a welcoming society for all.
 - Guila Franklin Siegel
Associate Director
gfsiegel@jcouncil.org
301-770-0881
- **Tzedek DC** – Tzedek DC provides pro bono legal assistance and advocacy services to safeguard the legal rights of low-income DC residents dealing with often unjust, abusive, and illegal debt collection practices, as well as other consumer protection

problems like credit reporting issues, identity theft, and predatory lending. Its interest in the Public Charge NOPR stems from its concern that the NOPR gives inappropriate weight to credit report information that is often inaccurate and unreliable.

- Ariel Levinson-Waldman
Founding President and Director-Counsel
alw@tzedekdc.org
202-274-5745

INDIVIDUALS

- **Benjamin Casper**
Director, James H. Binger Center for New Americans
University of Minnesota Law School*
caspe010@umn.edu
612-625-6484
- **Stephen Meili**
Associate Professor of Law
University of Minnesota Law School*
smelli@umn.edu
612-626-3972
- **Ana Pottratz Acosta**
Assistant Teaching Professor
Clinic Instructor – Health Law Clinic/Medical-Legal Partnership*
Mitchell Hamline School of Law*
Ana.PottratzAcosta@mitchellhamline.edu
651-290-8648

The Mitchell Hamline Health Law Clinic is a Medical Legal Partnership program where law students provide legal services to patients of a Federally Qualified Health Center (FQHC) in St. Paul MN. Approximately 30% of the patients served by our partner FQHC are foreign born and are likely to be adversely impacted by the rule. Examples of this impact include inability of patients/clients to adjust status to permanent resident and/or limitations or inability of patients/clients to sponsor relatives for permanent residence through a family based petition if the relative beneficiary is deemed inadmissible due to public charge.

As a faculty member of an academic institution with international students in F-1 student visa status, Professor Pottratz Acosta is also concerned about the application of this proposed rule to F-1 students and other nonimmigrant visa categories by consular posts abroad.

****Institutional affiliation for identification purposes only***

COMMENTS

I. THE PUBLIC CHARGE NOPR IS A SOLUTION IN SEARCH OF A PROBLEM.

a. Accepting DHS's Discretion to Define Public Charge, the Agency Nonetheless Has Given No Reason for the Change in its Policy.

While DHS will look to the totality of circumstances to determine whether an applicant is likely to become a public charge under both its current policy and the NOPR, the ultimate measure the applicant must meet under the NOPR is dramatically different. For nearly two decades the agency, and its predecessor INS – looking at a broad range of factors – has determined that it will not make a finding of "public charge" unless it finds that the applicant is likely to become *primarily* dependent on the government for subsistence in the form either of cash payments, income assistance, or long-term institutionalization. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed Reg. 28689, 28690 (May 26, 1999) ("1999 Proposed Rule").

Under the Public Charge NOPR, by contrast, an individual may be ruled ineligible for permanent resident status if the agency determines that the individual is likely, even for temporary periods, to receive either cash or non-cash medical care, housing, and food benefits programs comprising only "15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any period of 12 consecutive months" where the benefits can be monetized, or where the benefits cannot be monetized, the "benefits are received for more than 12 months in the aggregate within a 36-month period." Public Charge NOPR, 83 Fed. Reg. at 51158. DHS makes quite clear the dramatic nature of its proposed policy change. It "recognizes that individuals may receive public benefits in relatively small amounts to supplement their ability to meet their needs and the needs of their household without seriously calling into question their self-sufficiency." *Id.* at 51165. But DHS's NOPR goes much further. It now concludes that one is a public charge if that individual

receives more than a "*nominal* level of support" from the government in the form of cash or non-cash assistance. *Id.* (emphasis added)

While DHS states that section 212 of the INA does not "*require[]* an alien to be 'primarily' (50 percent or more) dependent on the government or rely only on cash assistance to be a public charge," *Id.* at 51164 (emphasis added), neither does it offer a reason why it should change that definition and now label as "public charges" anyone seeking permanent residence who is likely to receive anything more than "a *nominal* level of support." *Id.* at 51165 (emphasis added).² Rather, DHS simply asserts that it "no longer *believes* that primary dependence on the government for subsistence is the appropriate standard for public charge determination purposes." *Id.* at 51133 n.157 (emphasis added). "Given that neither the statute nor the case law prescribe the degree to which an alien must be dependent on public benefits to be considered a public charge," DHS states only that it "has determined that it is *permissible* and reasonable to propose a different approach." *Id.* at 51164 (emphasis added).

Put simply, DHS has not explained how the current approach to determining who is a public charge is unworkable or places any material burden on the government, nor does it explain that the rule is warranted by any change in circumstances. Instead, DHS is simply redefining who is a public charge based on an implicit policy judgment that the term should include more people. Even where the agency has been granted broad discretion to implement a statutory scheme, it must explain the reasons for its change in policy and must take into account how a significant change might affect the public reliant on its longstanding policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). This it has not done.

² For 2018 this nominal amount would be just \$1821 per year. In other words, anyone who is likely to receive less than \$2000 in annual nutrition assistance and/or housing subsidies would be considered a public charge – even if they held a full time job.

b. The Proposed Rule Arbitrarily Assumes that All Public Benefits Provided to Green Card Applicants or Their Sponsors Result in a Net Negative Impact to the Budget.

- i. DHS inconsistently assumes both that receipt of anything more than nominal assistance makes an immigrant a public charge and that even temporary reliance on limited support is likely to become permanent.*

DHS supports the inclusion of a number of benefits as proof that an applicant using them will be a public charge on the grounds that they represent significant government expenditures. But, DHS does not consider whether recipients of these benefits would eventually be able to overcome their reliance on them.

Under its proposed rule, DHS does not consider whether the provision of the temporary benefits an immigrant might receive actually results in a net positive impact to the budget or society. For example, the NOPR correctly concludes that it will not consider receipt of emergency care in determining whether an immigrant is likely to become a public charge, Public Charge NOPR, 83 Fed. Reg. at 51169, but disregards that providing those same individuals access to preventative medical care puts less strain on hospitals, particularly for emergency care. The proposed rule admits that, by law, a finding that an individual would be a public charge is a "prospective determination." *Id.* at 51178. But it states that current receipt of public benefits or even past receipt above the threshold (\$1821 for 2018) during the last year or over any 12-month period in the last 36 months is a "heavily weighed negative factor." *Id.* at 51198–99. Yet the NOPR contains no data showing that the temporary receipt of anything more than "nominal" assistance is likely to make an applicant a public charge in the future.³ Without data showing that past,

³ As ILCM et al. discuss *infra*, the arbitrary nature of the proposed rule is underscored by the fact that an immigrant employed *full time*, but making only the minimum wage would be deemed likely to become a public charge solely because that individual relied on SNAP or housing subsidies for which he/she may have been eligible to supplement his/her full time income.

temporary receipt of little more than nominal public assistance would make an applicant *likely* to become a public charge, there is no evidentiary basis to use past receipt of public benefits in connection with the proposed rule's prospective determination.

- ii. *The Proposed Rule arbitrarily ignores that immigrants are less likely than native born Americans to need long-term public assistance and that they will reduce, not increase the financial burden on the federal government.*

The Public Charge NOPR arbitrarily ignores critical demographic trends in the United States that will make it less, not more, likely that immigrant applicants will become public charges, even under the Public Charge NOPR's overly broad definition of "public charge." As an article in a recent edition of *The Economist*⁴ notes:

Last year, the total number of births in the United States fell to its lowest level in 30 years. The general fertility rate dropped to the lowest rate since the United States Centre for Disease Control started keeping records in 1909: to 60.3 births per 1,000 women aged between 15 and 44. The total fertility rate, meanwhile, which estimates the average number of children a woman could expect to have over her lifetime at current birth rates for each age, at 1.76 births per woman, is below the "replacement rate" for fertility. That is the level that keeps populations stable (about 2.1 children per woman). And it is a considerable drop from a decade earlier, when the rate was 2.12 births per woman.

These same observations are reflected in the Census Bureau's 2017 population projections.⁵ As the Census Bureau's report shows, the only reason we will see an increase in our population in coming years (necessary to support the aging population who will rely on social security, Medicare, Medicaid, etc.) is because of immigration:

The year 2030 marks a demographic turning point for the United States. Beginning that year, all baby boomers will be older than 65. This will expand the size of the older population so that one in every five Americans is projected to be retirement

⁴ C.K. *America's Fertility Rate Continues Its Deep Decline*, *The Economist* (Oct. 31, 2018), available at <https://www.economist.com/democracy-in-america/2018/10/31/americas-fertility-rate-continues-its-deep-decline>.

⁵ Jonathan Vespa et al., *Demographic Turning Points for the United States: Population Projections for 2020 to 2060*, P25-1144, U.S. Census Bureau (Mar. 2018), available at https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25_1144.pdf (hereinafter "2017 Census Bureau Report").

age. Later that decade, by 2035, we project that older adults will outnumber children for the first time in U.S. history. The year 2030 marks another demographic first for the United States. Beginning that year, because of population aging, immigration is projected to overtake natural increase (the excess of births over deaths) as the primary driver of population growth for the country. As the population ages, the number of deaths is projected to rise substantially, which will slow the country's natural growth. As a result, net international migration is projected to overtake natural increase, even as levels of migration are projected to remain relatively flat. These three demographic mile-stones are expected to make the 2030s a transformative decade for the U.S. population.

2017 Census Bureau Report at 1.

The birth rate among native born Americans (under two) is simply insufficient to maintain our current population. As the 2017 Census Bureau Report also notes: "Over the course of their life, foreign-born women have historically had slightly more children than native-born women (2.2 births compared with 1.9 births on average, respectively)." *Id.* at 3. These demographic changes suggest that the likelihood that able-bodied immigrants will become public charges is declining, not increasing. The 2017 Census Bureau Report reaches exactly that conclusion: because they are younger on average, the Report finds, "**the foreign born are *more likely to be in the labor force.***" *Id.* at 11 (emphasis added).

The 2017 Census Bureau Report observes that our projected net growth in population is fueled by immigration and that this distinguishes us from other economically stagnating developed nations who are seeing an overall decline in their populations.⁶ The higher percentage of older Americans will increase the burden on those working in the United States: "In coming decades, the United States is expected to shift from a youth-dependent population toward an elderly-dependent population." *Id.* at 5. Yet immigration policy changes by DHS are already reducing the level of legal immigration. David Bier of the Cato Institute writes that "newly released government

⁶ *Id.* at 12 ("This continued growth sets the United States apart from other developed countries, whose populations are expected to barely increase or actually contract in coming decades.").

data show that so far in 2018, the Trump Administration is denying applications submitted to the United States Citizenship and Immigration Services at a rate 37 percent higher than the Obama administration did in 2016."⁷ A Cato Institute study in fact shows that the DHS 11.3% rejection rate for "work permits, travel documents and status applications, based on family reunification, employment and other grounds . . . is the highest rate of denial on record."⁸ As Mr. Bier aptly observes: "This makes no sense: Depriving immigrants of legal immigration options works against the president's stated goal of increasing economic growth."⁹ Indeed, as he further notes: "This is happening at a time when there are more job openings than job seekers in the United States."¹⁰ Jay Powell, Chairman of the Federal Reserve, recently made a similar observation: In an August 29, 2018 letter to Nevada Senator Masto, he wrote that reducing the number of legal immigrants coming to the United States would retard economic growth by placing constraints on the ability of businesses to expand their operations.¹¹

Adopting a policy, the obvious consequence of which will be to reduce the number of immigrants who could qualify for permanent status, simply aggravates the problem. It will add to the burden on existing wage earners by artificially reducing the size of the workforce who could

⁷ David J. Bier, *America Is Rejecting More Legal Immigrants Than Ever Before*, New York Times (November 15, 2018), available at <https://www.nytimes.com/2018/11/15/opinion/trump-legal-immigrants-reject.html?ref=collection%2Fsectioncollection%2Fopinion&action=click&contentCollection=opinion®ion=rank&module=package&version=highlights&contentPlacement=4&pgtype=sectionfront> (citing *Data Set: All USCIS Application and Petition Form Types*, U.S. Citizenship & Immig. Servs., <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types> (last updated Oct. 30, 2018)).

⁸ *Id.* (citing David Bier, *Immigration Application Denial Rates Jump 37% Under Trump*, Cato Institute (Nov. 5, 2018), available at <https://www.cato.org/blog/immigration-application-denials-jump-37-percent-under-trump>).

⁹ *Id.*

¹⁰ *Id.* See also *Even in a Solid Economy, U.S. fertility rate is falling*, The Economist (Nov. 26, 2018), reprinted in the Minneapolis Star Tribune, <http://www.startribune.com/what-s-causing-the-baby-bust-in-the-u-s/501260312/>.

¹¹ Craig Torres, *Fed's Powell Says Reduced Immigration Could Slow U.S. Economy*, Bloomberg News (November 1, 2018), available at <https://www.bloomberg.com/news/articles/2018-11-01/fed-s-powell-says-reduced-immigration-could-slow-u-s-economy> ("Thus, from an economic growth standpoint, reduced immigration would result in lower population growth and thus, all else equal, slower trend economic growth.").

pay taxes to support our aging population. Thus, far from protecting the public from "public charges," the proposed rule would exacerbate the burden on taxpayers.

II. DHS HAS FAILED TO ADEQUATELY EXPLAIN SIGNIFICANT CHANGES IN AGENCY PRACTICE, AND IT HAS FRUSTRATED SETTLED EXPECTATIONS.

"An agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedence without discussion, it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Nor may an agency "undermine democratic transparency and upset the settled expectations of regulated parties" without providing a "reasoned explanation for the change." *Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 578 (7th Cir. 2012) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

Here, the proposed rule represents a stark departure from prior agency practice that has been memorialized for over two decades and has created settled expectations in aliens subject to the public charge determination and their sponsors. To be sure, DHS has acknowledged its change in course and has offered an explanation about why it has the *right* to do so. But entirely missing is any *justification* for the change. Indeed, many parts of the proposed rule adopt an approach that the INS directly cautioned against when it issued a proposed rule in 1999 to define "public charge" and set forth factors to consider in rendering a public charge determination. Although DHS acknowledges this departure, and also acknowledges that myriad negative impacts will result from the rule, DHS has failed altogether to explain why the changes are needed or to consider how any purported benefits from these changes will outweigh the impacts on applicants and their sponsors.

On May 26, 1999, INS issued a proposed rule to address "public confusion" surrounding

the "relationship between the receipt of federal, state, local public benefits and the meaning of 'public charge' under the immigration laws." See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28689 (May 20, 1999) ("1999 Proposed Rule"). The confusion resulted from the then-recent changes to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IRRIRA") and welfare reform laws. *Id.* Among other things, the IIRIRA amended the Public Charge Statute to codify the factors relevant to a public charge determination, requiring the immigration officer to consider, "at a minimum, the alien's age, health, family status, assets, resources, and financial status, and education and skills when making a public charge inadmissibility determination." *Id.* It also established the sponsors' affidavit of support as a legally enforceable obligation. *Id.*

To address this confusion, the proposed rule adopted a bright-line "primarily dependent" consideration to determine whether an alien was likely to become a public charge. Specifically, the 1999 Proposed Rule defined a "public charge" as an alien "who is likely to become (for admission/adjustment purposes) *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." *Id.* (emphasis added).¹² INS was also careful to note that only cash assistance for income maintenance was to be considered in making a public charge determination, stating immigration officers "should not place any weight on the receipt of non-cash benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds." *Id.*

The 1999 Proposed Rule explained why it was important that immigration officers consider

¹² Although the proposed rule was published for notice and comment, INS implemented this definition immediately on a going forward basis. *Id.*

the receipt of public cash assistance for income maintenance, but not other types of cash and non-cash assistance. With respect to cash assistance for purposes other than income maintenance, INS noted the adverse impact "on public health and the general welfare" caused by "confusion about the relationship between the receipt of public benefits and the concept of 'public charge'," which in turn "has deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive." *Id.* With respect to non-cash assistance, INS reasoned that "non-cash benefits (other than institutionalization for long-term care) are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family." *Id.* Accordingly, "by focusing on cash assistance for income maintenance, the Service can identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests." *Id.* INS also observed that receipt of public benefits does not necessarily indicate poverty or dependence on the government, because benefits "are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient." *Id.*

Lastly, the 1999 Proposed Rule also explained that immigration officers were prohibited from considering the receipt of public benefits by an alien's family members, except where the family as a whole relies on such benefits as its *sole* means of support. Specifically, the receipt of ". . . benefits by a member of the . . . applicant's family is not attributable to the applicant for purposes of determining the likelihood that the applicant will become a public charge. . . ." Public Charge NOPR, 83 Fed. Reg. at 28692. If, however, the family is "reliant on the . . . benefits as its sole means of support, the . . . applicant may be considered to have received public cash

assistance." *Id.* Thus, "[s]ervice officers should not attribute cash benefits received by U.S. citizen or alien children or other family members to alien applicants for purposes of determining whether the applicant is likely to become a public charge, absent evidence that the family is reliant on the family member's benefits as its *sole means of support*." *Id.* (emphasis added).

The State Department amended its Foreign Affairs Manual in 1999 to incorporate the above considerations set forth in the 1999 Proposed Rule. The manual provides that a public charge is one who "is likely, at any time after admission, to become primarily dependent on the U.S. Government (Federal, state, or local) for subsistence." 9 FAM 302.8(a)(1). Whether one would be "primarily dependent" on the government would be shown through the "[r]eceipt of public cash assistance for more than income maintenance" or "[i]nstitutionalization for long-term care at U.S. Government expense." *Id.* The pertinent cash assistance was defined to include only (1) supplemental security income; (2) Temporary Assistance for Needy Families (TANF) (but not including supplemental cash benefits or any non-cash benefits provided under TANF); and (3) state and local cash assistance programs that provide for income maintenance (i.e., general assistance). *Id.* 302.8(b). The Foreign Affairs Manual explains that the receipt of benefits that "are of a non-cash and/or supplemental nature" should not be considered as benefits under the statute, but may still "be considered as part of the totality of the applicant's circumstances in determining whether an applicant is likely to become a public charge." *Id.* 302.8(d)(1). Lastly, the manual expressly prohibited officials from considering, among other benefits, the receipt of SNAP, Medicaid, CHIP, and other nutrition and food assistance programs. *Id.* 302.8(d)(3).

DHS's proposed rule departs from this agency practice. First, casting aside the "primarily dependent" definition, DHS proposes to define a public charge as an individual who is "likely at any time in the future to receive one or more public benefits" at or above very low thresholds.

More specifically, an alien will be considered likely to become a public charge if he or she is likely to receive "cash aid and noncash medical care, housing, and food benefit programs where either (1) the cumulative value of one or more such benefits that can be monetized . . . exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within a period of 12 consecutive months . . . or (2) for benefits that cannot be monetized, the benefits are received for more than 12 months in the aggregate within a 36-month period." 83 Fed. Reg. at 51158. This new threshold – roughly \$1800 over a year – will drastically increase the scope of who can be considered a public charge to include not just people who receive benefits as their main source of support, but also people who use basic needs programs to supplement their earnings from low-wage work and people who rely *temporarily* on public assistance due to unforeseen circumstances.

The Public Charge NOPR also adds the following monetizable benefits to the public charge calculus, which INS had previously expressly decided not to include when issuing its proposed rule in 1999: (1) TANF – by definition *temporary* assistance – in all forms (no longer making an exception for supplemental or non-cash benefits); (2) Supplemental Nutrition Assistance Program benefits (SNAP or food stamps); (3) Section 8 housing vouchers; and (4) Section 8 rental assistance. *Id.* at 51159. Non-cash benefits to be added to the calculus are: (1) nonemergency Medicaid; (2) premium and cost sharing subsidies for Medicare Part D; (3) SNAP; and (4) housing programs. *Id.*

Although DHS admits that these changes depart from agency practice as reflected in the 1999 Proposed Rule, it does nothing to explain why these changes are warranted. It never explains *why* the "primarily dependent" standard is no longer workable, or why a change to that standard is desirable. Instead, DHS states, in conclusory fashion and without evidentiary basis, that individuals who receive public benefits above these thresholds are "neither self-sufficient nor on

the road to achieving self-sufficiency" and that receipt of benefits at or above these thresholds "exceeds what could reasonably be defined as a nominal level of support that merely supplements an alien's independent ability to meet his or her basic living needs." *Id.* at 51165.

The speculative nature of these assertions is evident from the text of the Public Charge NOPR. "[A]lthough a 50 percent threshold creates a bright line that may be useful for certain purposes," DHS asserts, "it is *possible and likely probable* that individuals below such threshold will lack self-sufficiency and be dependent on the public for support." *Id.* at 51164 (emphasis added). But section 212(a)(4) of the (INA) bases public charge status on the agency's determination whether the individual "at the time of application for admission or adjustment of status, is *likely* at any time to become a public charge." 8 U.S.C. § 1182(1)(4) (emphasis added). Saying that an outcome is "possible" without ascribing any probability to it or worse, without any data upon which to base the prediction, does not satisfy DHS's obligation to engage in reasoned decision-making. And saying that the outcome is "likely probable" is no more probative. On the contrary, "likely" and "probable" are synonyms; saying that something is "likely probable" merely underscores the agency's uncertainty. It suggests that something is *less* than likely or *less* than probable. While the predictive judgments of agencies are entitled to deference, their "assumptions about economic impact [must still be] based on the evidence currently available." *People of State of Cal. v. FCC*, 75 F.3d 1350, 1359 (9th Cir. 1996). DHS must make "a conscientious effort to take into account what is known as to past experience and what is reasonably predictable about the future." *Am. Pub. Gas Ass'n v. FPC*, 567 F.2d 1016, 1037 (D.C.Cir.1977), *cert. denied*, 435 U.S. 907, 98 (1978). The proposed rule fails this test.

In contrast to its lack of rationale for predicting – or more accurately speculating – that someone receiving more than nominal public benefits, even temporarily, is *likely* to become a

public charge, DHS does provide a general explanation for why it expanded the public benefits to be considered under the public charge calculus. Benefits "directed toward food, housing, and healthcare," it reasons, "are directly relevant to public charge inadmissibility determinations" because these "are basic necessities of life." Public Charge NOPR, 83 Fed. Reg. at 51159. "Cash aid and non-cash benefits directed toward food, housing, and healthcare," it adds, "account for significant federal expenditure on low-income individuals and bear directly on self-sufficiency." *Id.* at 51160. Yet the agency fails to evaluate whether INS's rationale for excluding the consideration of these benefits from its 1999 Proposed Rule is still valid. As INS recognized in 1999, there are two important reasons to exclude all non-cash benefits from the public charge determination. First, doing so lessens confusion about the relationship between the receipt of public benefits and the concept of public charge, which historically has deterred persons from seeking benefits for which they are eligible, leading to significant adverse impacts on the public health and welfare. 1999 Proposed Rule, 64 Fed. Reg. at 28692. Second, non-cash benefits serve important public interests unrelated to the specific recipient's financial status. *Id.* Indeed, DHS acknowledges that "when eligibility rules change for public benefits programs there is evidence of a 'chilling effect' that discourages immigrants from using public benefits programs for which they are still eligible." Public Charge NOPR, 83 Fed. Reg. at 51266.

Consistent with its existing policy, DHS states that it will not consider whether an alien's family members receive public benefits when making a public charge determination. But the Public Charge NOPR does away with the existing requirement that receipt of such benefits can only be considered when the household relies on them for their sole means of support. Instead, if an alien's household as a whole receives public assistance, a portion of that assistance would be attributed to the alien pro rata. *Id.* at 51218. And DHS will consider the alien's household size,

concluding that individuals are more likely to receive public benefits if their household size is larger. *Id.* at 51186 ("In light of the above data on the relationship between family size and receipt of public benefits, DHS proposes that in evaluating family status for purposes of the public charge inadmissibility determination, DHS would consider the number of people in a household . . .").

DHS does not explain how this proposed practice is consistent with its promise not to consider the receipt of public assistance by the alien's family members. Notably, if a person signs up for many of the new benefits that will be considered under the proposed rule, such as SNAP and Section 8 housing, that person cannot disenroll from those benefits without taking them away from his or her household as well. Thus, individuals will be faced with the dilemma of having to choose between adjusting their immigration status (and thereby increasing economic opportunities for themselves and their families), and ensuring that their families remain eligible for food, housing, and healthcare related assistance that DHS acknowledges support the "basic necessities of life." Public Charge NOPR, 83 Fed. Reg. at 51159.

The proposed rule's new definition of "public charge" is also not consistent with any prior definition proposed by Congress or the courts. The term has always been interpreted to mean someone who *depends* on government for assistance *for an extended period of time*, not simply someone who will receive a slightly-more-than-nominal amount of assistance for a limited time period. More specifically, congressional statements and agency decisions reflect that one should not be considered a public charge where he or she is able to *overcome a dependence* on government assistance, eventually becoming self-reliant. Indeed, the Public Charge NOPR expressly acknowledges that prior public charge decisions required the alien to "show a capacity to *overcome* their dependence on public support" in order to avoid a public charge finding. Public Charge NOPR, 83 Fed. Reg. at 51158 (emphasis added) (citing *Matter of Vindman*, 16 I&N Dec.

131 (Reg'l Comm'r 1977); *Matter of Perez*, 15 I&N Dec. 136 (BIA 1974); *Matter of Harutunian*, 14 I&N Dec. 583 (Reg'l Comm'r 1974)). These decisions also acknowledged that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency." *Matter of Martinez-Lopez*, 10 I&N 409, 421–22 (AG Jan. 6, 1964). Of course, unforeseen circumstances may cause a "healthy person in the prime of life" to rely on a small amount of public benefits for a limited period of time. Yet the thresholds created under the rule are so low that even this person would be considered a public charge, notwithstanding his or her clear ability to quickly overcome any reliance on those benefits.

DHS does not explain why it believes that the public charge determination no longer needs to take into consideration whether an alien subject to the determination will be able to overcome his or her dependence on public benefits. Also missing from DHS's analysis is any consideration of the fact that the benefits it proposes to count as evidence of dependence include rental assistance payments to those employed full time but who live in high-cost areas. It similarly fails to consider the implications of that fact, namely that taxpaying citizens receiving such housing subsidies would be thought of as public charges, too. Nor, critically, has the agency engaged in any statistical analysis showing that immigrants who receive, or in the past have received, public assistance beyond even the Public Charge NOPR's nominal public assistance thresholds, are likely to remain dependent on that level of assistance in the future. This deficiency is not for lack of available data, as discussed in Section III, *infra*.

Instead, the low thresholds created under the proposed rule will penalize aliens who, by the agency's own description, receive anything more than "nominal" amounts of public assistance.

Certainly, in many instances an alien who receives public benefits above the thresholds established by the proposed rule will eventually, and in many cases expeditiously, become self-sufficient and overcome any reliance on public benefits. Indeed, DHS's policy choice to not consider the alien's capacity to overcome his or her dependence on public benefits means that fewer aliens will receive green cards or attain other immigration statuses that would help in finding work or accessing other resources to help become self-sufficient. This in turn will lead to more aliens relying on public assistance, which is contrary to one of the proposed rule's stated purposes.

By redefining the term "public charge" and increasing the benefits to be considered under the public charge calculus, the proposed rule departs significantly from prior agency practice. Both applicants and those contemplating serving as sponsors have developed settled expectations in prior practice, given the length of time the existing policy has been in effect. Aliens and their sponsors have relied on case law establishing that decades-long past receipt of cash benefits did not result in a public charge finding. And for almost two decades, U.S. immigration officials have explicitly reassured immigrant families that participation in programs like Medicaid and SNAP would not affect their ability to become lawful permanent residents. During that time, immigrant families have relied on that reassurance. As explained *infra*, although Congress has had several opportunities to amend the public charge law by expanding the benefits to be considered when rendering a public charge determination, it has not done so and instead has increased immigrant eligibility for the same types of benefits that the Public Charge NOPR now seeks to limit. The Public Charge NOPR does not give reasoned consideration to any of these factors.

III. DHS IS IMPROPERLY CREATING POLICY IN ARENAS RESERVED TO CONGRESS AND DELEGATED TO OTHER AGENCIES CHARGED WITH ADMINISTERING PUBLIC BENEFITS PROGRAMS.

An agency's authority is limited to that delegated to it by Congress, and an agency cannot

engage in policy-making in arenas outside that delegated authority. Instead, the authority to make major policy decisions, if not delegated to the agency, remains with Congress. *See, e.g., Chamber of Comm. of U.S. v. N.L.R.B.*, 856 F. Supp. 2d 778, 791–92 (D.S.C. 2012); *see also ATF v. FLRA*, 464 U.S. 89, 97 (1983) ("[W]hile reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, they must not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.") (citations and internal quotation marks omitted)). Nor can an agency ask for deference in a given area if the agency is seeking to make major policy decisions that Congress did not entrust them to make. *See Nat'l Fed'n. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

The Public Charge Statute delegates to DHS and other immigration officials the authority to determine whether applicants for admission or adjustment of status are likely to become public charges, and to deny admission or adjustment on that basis. The statute does not entrust DHS to develop policies that impact the administration of public benefits, nor does the INA reflect a preference for one class of immigrant over another based on personal wealth. But that is exactly what DHS seeks to accomplish here. Specifically, DHS is attempting to, among other things, (1) deter aliens from seeking public benefits that Congress has determined they are entitled to receive; (2) favor wealthy immigrants over less wealthy immigrants; and (3) reduce family-based migration. In doing so, the proposed rule, if implemented, will frustrate decades of congressional policy that favors immigrant access to public benefits and promotes family-based immigration.

a. The Proposed Rule Unlawfully Deters Aliens from Seeking Public Benefits to Which They Are Entitled, Contrary to Congressional and Agency Intent.

It is clear that the proposed rule is unlawfully designed to deter aliens from seeking public benefits that Congress has determined those aliens are entitled to receive. As DHS expressly

acknowledges, individuals "may choose to disenroll from or forego enrollment in a public benefits program . . . due to concern about the consequences to that person receiving public benefits and being found to be likely to become a public charge for purposes outlined under section 212(a)(4) of the Act, even if such individuals are otherwise eligible to receive benefits." Public Charge NOPR, 83 Fed. Reg. at 51117. The proposed rule even includes a 60-day grace period to allow "aliens an opportunity to stop receiving public benefits and obtain other means of support before filing for immigration benefits." *Id.* at 51210. DHS estimates that this disenrollment will result in an approximately \$2.27 billion annual reduction in federal transfer payments. *Id.* at 51117.

By expanding the types of benefits considered under the public charge calculus, DHS is acting contrary to at least two decades of congressional policy regarding the administration of benefits to immigrants in this country. DHS correctly observes that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") limited alien eligibility for many types of federal, state, and local benefits. *Id.* at 51126. But the PRWORA did nothing to change the types of benefits that should be considered in the public charge determination. Indeed, the PRWORA did not address the public charge statute at all. Instead, in 1996, the same year in which the PRWORA was enacted, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which amended the public charge statute to its current version and codified prior case law and agency decisions regarding what it means to be a public charge. If Congress intended to expand the scope of benefits to be considered under the public charge calculus, it clearly would have done so at that time, but did not.

Instead, since enactment of the PRWORA and IIRIA, Congress has indicated a clear policy of increasing immigrant access to public benefits. For example, Section 4401 of the 2002 Farm Bill expanded SNAP benefits for immigrant children, immigrants receiving disability benefits, and

any qualified alien living in the United States for more than five years. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 333. And Section 214 of the 2009 CHIP Reauthorization Act gave states the option to cover, with federal matching dollars, lawfully residing children and pregnant women on Medicaid during their first five years in the United States. *See* Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 56. These congressional actions indicate an intent to remove barriers to immigrant access to public benefits like SNAP and Medicaid, which DHS now plans to include in the public charge calculus. This is directly contrary to congressional intent, and it represents impermissible policymaking in arenas over which DHS does not have authority.

Any claim by DHS that it is not attempting to impact public benefits policy is belied by its frequent use of federal expenditure levels to justify the proposed rule. For example, DHS admits that one reason it seeks to include cash aid and non-cash benefits directed toward food, housing, and healthcare in the new rule is because these benefits "account for significant federal expenditure on low-income individuals" Public Charge NOPR, 83 Fed. Reg. at 51160. Whether there is a large government expenditure associated with a particular benefits program, however, is irrelevant to the question of whether the individual who receives that benefit is likely to become a public charge, and is therefore a question that falls outside DHS's delegated purview.

DHS's claim that there "is no tension between the availability of public benefits to some aliens as set forth in PRWORA and Congress's intent to deny visa issuance, admission, and adjustment of status to aliens who are likely to become a public charge is simply not credible. *See id.* at 51132. Indeed it cannot be reconciled with the NOPR's statement advising immigrant applicants that they can reduce the risk of a "public charge" finding by foregoing SNAP benefits. Put another way, the NOPR advises applicants that they should simply eat less often. As noted

earlier, the proposed rule even includes a 60-day effective period to allow "aliens an opportunity to stop receiving public benefits and obtain other means of support before filing for immigration benefits." *Id.* at 51210. The obvious tension between the NOPR and PRWORA's public benefit provisions is further underscored by this statement in the NOPR: "[A]lthough an alien may obtain public benefits for which he or she is eligible, the receipt of those benefits may be considered for future public charge inadmissibility determination purposes." *Id.* at 51133. DHS likewise ignores other congressional actions that occurred in conjunction with the PWROWA, as well as subsequent legislation passed by Congress, all of which reveal a clear congressional intent to expand the provision of certain public benefits, such as SNAP and Medicaid, to aliens.

The proposed rule is also contrary to guidance provided by agencies that are delegated authority over the public benefits programs that DHS seeks to include in the proposed rule. DHS acknowledges that when INS developed its proposed rule in 1999, INS "consulted with Federal benefit-granting agencies such as the Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA)," which "advised that the best evidence of whether an individual is relying primarily on the government for subsistence is either the receipt of public cash benefits for income maintenance purposes or institutionalization for long-term care at government expense." Public Charge NOPR, 83 Fed. Reg. at 51133. These letters supported the approach taken by INS in 1999; namely that the public charge calculus should require a showing that the alien is likely to become primarily dependent on public benefits, and that it should not consider the receipt of food stamps or other assistance provided for reasons other than income maintenance. *Id.* There is nothing in the NOPR to indicate that DHS engaged in a similar consultation process when amending the "primary dependence" definition of public charge or in expanding the benefits to be considered under the new rule. Instead, the NOPR simply notes

that the agency letters from 1999 "did not foreclose the agency adopting a different definition consistent with statutory authority," and that "DHS does not believe that the views expressed in those interagency consultations remain fully relevant." *Id.* at 51133 & n.157. When an agency changes its policy, *even where the change is within its authority*, and it has relied on facts to support the original policy, it "cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *FCC v. Fox Television, supra*, 556 U.S. at 537 (Kennedy, J., concurring).¹³

The proposed rule constitutes impermissible policymaking that is both in an area outside DHS's delegated authority and contrary to the intent of Congress and other agencies charged with administering the public benefits programs to be included under the new rule.

b. The Proposed Rule Prefers Certain Classes of Immigrants Over Others, Rather than Simply Asking Whether the Immigrant Subject to the Determination is Likely to Become a Public Charge.

Rather than simply asking whether the alien is likely to become a public charge, DHS is using the Public Charge Statute to prefer certain types of immigrants over others. For example, the rule clearly favors wealthy immigrants. The proposed rule introduces an income test, stating that it is a "heavily weighed" positive factor if the alien either has assets, resources and/or support greater than or equal to 250% of the federal poverty line, or the alien is authorized to work and is currently employed with income greater than or equal to 250% of the federal poverty line. Public Charge NOPR, 83 Fed. Reg. at 51204. Although the public charge statute requires DHS to consider, among other factors, the alien's "financial status," the apparent purpose of this requirement is to determine only whether the alien is likely to become a public charge, not *how* wealthy the alien is above and beyond that threshold. Notably, this 250% figure is twice as much

¹³ See also Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures That Govern Agency Decisionmaking in an Era of Rollbacks*, 37 Energy L.J. 269, 282 (2017) and cases cited therein.

as the 125% number currently required of persons sponsoring immigrants through an affidavit of support. *See* 8 C.F.R. § 213a.2(c)(2)(ii). It is also approximately \$63,000 for a family of four,¹⁴ which is more than the \$61,372 median household income in the U.S. for 2017.¹⁵ The existing Public Charge Statute does not create a tiered system wherein wealthier aliens are preferred. This preference toward wealthier immigrants will also disproportionately impact persons of color.

In addition to this unprecedented income test, the proposed rule weighs negatively many factors that have never before been relevant to the public charge calculus. For example, immigration officials will be able to negatively weigh applicants who are children or seniors, have limited English proficiency, have limited education yet are still fully capable of employment, have a large family, or have a treatable medical condition. Public Charge NOPR, 83 Fed. Reg. at 51180–204. Considering the enormous discretion provided to immigration officials in making public charge determinations, including such a broad range of factors will allow officials to make an adverse public charge finding based on any number of circumstances, or just a single one, which in turn will allow for the preferential treatment of certain types of immigrants over others. The Public Charge statute was not intended to create such a preference system. Instead, it simply directs those officials to determine whether a particular alien that is subject to the determination is likely to become a public charge. Thus, by creating a preference system, DHS is supplanting Congressional policy-making authority.

c. The Proposed Rule Seeks to Significantly Deter Family-Based Immigration.

Congress has long-endorsed family-based immigration. Indeed, "[f]amily reunification has

¹⁴ *See* Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018).

¹⁵ *See Income & Poverty in the United States: 2017*, U.S. Census Bur. (Sept. 12, 2018), <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

been a key principle underlying U.S. immigration policy."¹⁶ A long part of United States immigration policy, the practice was codified with the passage of the INA in 1952.¹⁷ Family-based migration currently makes up two-thirds of all legal permanent immigration.¹⁸ Of the 1,182,505 foreign nationals admitted to the United States in FY2016 as lawful permanent residents, 70% were admitted as immediate relatives of U.S. citizens.¹⁹ Nearly half of new arrivals in FY2017 were immediate relatives of U.S. citizens, and another 38% were other family-sponsored immigrants.²⁰ Further, nearly half of all aliens seeking an adjustment of status were family-based immigrants.²¹ In contrast, 12 percent of all new lawful permanent residents in FY2017 were employment-based immigrants.²²

The proposed rule promotes employment-based immigration at the expense of family-based immigration. This is because immigrants who arrive in the United States on employment-based visas are typically well-educated, can speak English proficiently, have sufficient assets, and have solid employment prospects.²³ The Public Charge NOPR directs immigration officials to positively weigh these factors. In contrast, family-based immigrants tend to have lower levels of

¹⁶ William A. Kanel, *U.S. Family-Based Immigration Policy*, Congressional Res. Serv. (Feb. 9, 2018), available at <https://fas.org/sgp/crs/homesecc/R43145.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use* at 13, Migration Policy Institute (June 2018), available at <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

²¹ *Id.*

²² *Id.* at 14.

²³ *Id.* at 30.

education and English proficiency.²⁴ Existing immigration law already contains provisions to accommodate highly-skilled workers such as the H-1B visa program. There may well be reasons to increase the number of highly-trained and skilled workers admitted to our country. And ILCM et. al. would be supportive of legislation that would make it easier for more highly-skilled immigrants to come to the United States to work and to live permanently. But that is a policy decision for Congress, not DHS, to make. Although the Public Charge NOPR does not by its express terms favor highly skilled individuals over other immigrants, that is its plain effect. And it violates a long-settled principle: "That which cannot be accomplished directly cannot be accomplished indirectly." *Home Ins. Co. v. New York*, 134 US 594, 594 (1890).

The Trump Administration's disdain for family based immigration is no secret. The administration failed to garner the necessary support for the RAISE Act,²⁵ which would have significantly reduced family-based immigration by limiting visa sponsorship to spouses and minor children. The legislation also would have also created a points system that, like the effect of the Public Charge NOPR, would have favored immigrants of a certain wealth class, English proficiency, age, education, and other characteristics.²⁶ The administration is now turning to DHS to accomplish through agency action what it could not in Congress. When coupled with the significant discretion granted to immigration officers in rendering a public charge determination, and the personal and implicit biases introduced through such a broad test, the administration could easily utilize this rule to significantly decrease the number of persons arriving or adjusting their status based on family connections and heavily favor employment-based immigration, and in turn

²⁴ *Id.* at 6.

²⁵ See Reforming American Immigration for a Strong Economy Act, S. 354, 115th Congres. (1st Sess. 2017).

²⁶ See Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment-Based System* (Aug. 2017), <https://www.migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-so-employment-based-system>.

upend over a half century of bedrock immigration policy in the United States. Congress did not delegate DHS the authority to implement such sweeping reform of our immigration laws.

IV. EVEN ASSUMING DHS HAS AUTHORITY TO BROADEN THE DEFINITION OF PUBLIC CHARGE, THE PROPOSED RULE BOTH LACKS SUBSTANTIAL EVIDENCE TO SUPPORT IT AND THE AGENCY FAILS TO CONSIDER RELEVANT FACTORS.

a. The Proposed Rule Arbitrarily Assumes Without Evidence that the Receipt of Public Assistance Means the Recipient Is or Will Become Dependent on the Government.

The proposed rule also assumes that an alien who receives public benefits at or above the threshold to be established under the rule is necessarily dependent on those benefits, and is not on the road to self-sufficiency. DHS claims, again without any evidence, that individuals who receive public benefits above these thresholds are "neither self-sufficient nor on the road to achieving self-sufficiency" and that receipt of benefits at or above these thresholds "exceeds what could reasonably be defined as a nominal level of support that merely supplements an alien's independent ability to meet his or her basic living needs." Public Charge NOPR, 83 Fed. Reg. at 51165. This reasoning, however, is contrary to INS's acknowledgment in its 1999 proposed rule that in many cases one who receives public benefits may actually not need them to get by. Instead, "certain federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition" and "promoting education." 1999 Proposed Rule, 64 Fed. Reg. at 28692. "Thus, participation in such non-cash programs is not evidence of poverty or dependence." *Id.* DHS does nothing to address this important distinction between the use of public benefits program to lift a person out of poverty and the use of such programs to promote policy goals deemed important by federal and state governments.

DHS's assumption that the receipt of public benefits implies dependence is even challenged

by the HHS studies that the agency cites in the Public Charge NOPR. The agency references a 2004 study and report undertaken on behalf of HHS, regarding the rates of families "cycling" on and off welfare – i.e., returning to welfare in three or more discrete spells over the course of four years.²⁷ DHS correctly observes that the study "suggests" that people who leave welfare "may come back to receive additional public benefits." *Id.* (emphasis added). While true, the report also concluded that these welfare "cyclers" made up "a relatively small portion of the welfare caseload" that was sampled, namely 8.5 percent.²⁸ Further, 47 percent of the sample members became only short-term recipients, with only one or two spells of welfare receipt of a total of up to 24 months during the four-year period.²⁹ Moreover, the study also noted that most leavers "do not return to welfare." *Id.* And there is a further gap in the DHS analysis. It fails to collect or analyze data on the extent to which immigrants as a class, or immigrants on temporary status, who take public benefits once are likely to become long-term recipients.

Other studies reveal that persons who receive public benefits do not tend to rely on them for the long term. For example, according to one study, even though "65 percent of Americans will use welfare by age 65, only 15.9 percent will do so for five or more consecutive years."³⁰ According to a 2015 report from the Census Bureau, 56 percent of participants in means tested welfare programs such as Medicaid or SNAP from 2009 to 2012 stopped participating in such

²⁷ See 83 Fed. Reg. at 5119 (citing Lashawn Richburg-Haynes & Stephen Freedman, *A Profile of Families Cycling On and Off Welfare* (Apr. 2004), available at <https://aspe.hhs.gov/system/files/pdf/73451/report.pdf>).

²⁸ Richburg-Haynes & Freedman, *supra* note 27 at ES-2.

²⁹ *Id.* at ES-1, ES-2.

³⁰ Mark R. Rank & Thomas A. Hirschl, *Welfare Use as a Life Course Event: Toward a New Understanding of the U.S. Safety Net*, *Social Work*, Volume 47, Issue 3, 1 July 2002, pages 237-248, available at <https://doi.org/10.1093/sw/47.3.237>.

benefits programs within 36 months.³¹ "Nearly one-third quit receiving benefits within one year."³² People who use assistance for long periods of time typically also face multiple significant challenges, including various combinations of mental illness, chronic incapacitating illness, impaired IQs or learning disabilities, domestic violence, or children with significant health problems or disabilities.

A study from George Washington University's Milken Institute School of Public Health challenges DHS's assumption that immigrants who have been poor or have used benefits in the past will continue to be poor and use benefits in the future, noting that, on average, an immigrant's income increases at a faster rate over time than the income of a person born in the U.S.³³ Further, "low-income non-citizen immigrants are less likely to use public benefits like Medicaid and SNAP than similar low-income U.S.-born citizens."³⁴ DHS has the burden to support, with substantial evidence, that the receipt of public benefits makes the recipient likely to become reliant on those benefits in the future, i.e., to become a public charge. Rather than meet this burden, DHS simply substitutes stereotypes and speculation for actual evidence.

³¹ See Shelley K. Irving & Tracy A. Loveless, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009-2012: Who Gets Assistance?*, U.S. Census Bureau (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>; see also Arthur Delaney, *How Long Do People Stay on Public Benefits?*, Huffington Post (May 29, 2015), https://www.huffingtonpost.com/2015/05/29/public-benefits-safety-net_n_7470060.html.

³² Arthur Delaney, *How Long Do People Stay on Public Benefits?*, Huffington Post (May 29, 2015), https://www.huffingtonpost.com/2015/05/29/public-benefits-safety-net_n_7470060.html.

³³ See Leighton Ku & Drishti Pillai, *The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities* at 3-4, Milken Institute School of Public Health, George Washington Univ. (Nov. 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285546&download=yes.

³⁴ *Id.* at 2; see also Cristobal Ramon & Tim O'Shea *Immigrants and Public Benefits: What Does the Research Say?*, Bipartisan Policy Center (Nov. 2018), available at <https://bipartisanpolicy.org/wp-content/uploads/2018/12/Immigrants-and-Public-Benefits-What-Does-the-Research-Say.pdf> ("[T]he majority of research reviewed shows that individual immigrants use public benefits at lower rates and at lower portions than native-born Americans.").

b. DHS Acknowledges, But Does Not Address, the Proposed Rule's Chilling Effect and the Significant Negative Impact It Will Have on Public Health.

It is also widely understood that the proposed rule will result, and already has resulted, in aliens choosing to forego benefits that they and their dependents are otherwise eligible to receive, based on the (often mistaken) belief that the receipt of those benefits will result in an adverse public charge determination. This chilling effect is all the more likely to occur in this context, given the technical and complicated nature of the public charge calculus, which DHS only seeks to make more complicated under the proposed rule. And DHS acknowledges prior research which "shows that when eligibility rules change for public benefits programs there is evidence of a 'chilling effect' that discourages immigrants from using public benefits programs for which they are still eligible." Public Charge NOPR, 83 Fed. Reg. at 51266. Drastic reductions in public benefits occurred following PRWORA, such as a 5.9 million person drop in food stamp enrollment from 1994 to 1997. *Id.*

DHS does not dispute that its proposed rule will have this chilling effect. On the contrary, DHS embraces it. DHS purports to quantify the chilling effect, estimating that "the total annual reduction in transfer payments paid by the federal government to individuals who may choose to disenroll from or forego enrollment in public benefits programs is approximately \$1.51 billion for an estimated 324,439 individuals and 14,532 households across the public benefits programs examined." *Id.* at 51267. And DHS even admits that its numbers underestimate this chilling effect. Its estimates, DHS acknowledges, do not include additional reductions in transfer payments from states to individuals who disenroll or forego enrollment in public benefits programs. *Id.* at 51268.

When INS promulgated its proposed rule in 1999, it specifically chose not to include cash assistance for purposes other than income maintenance due to the likely adverse impact "on public health and the general welfare" caused by "confusion about the relationship between the receipt of

public benefits and the concept of public charge," which in turn "deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive." 1999 Proposed Rule, 64 Fed. Reg. at 28692. DHS recognizes this in its current NOPR, observing that the purposes of the distinctions made in INS's 1999 proposed rule were to (1) "reduce negative public health and nutrition consequences generated by the confusion" caused by the public charge rule, to "address the public's concerns about immigrants' fears of accepting public benefits for which they remained eligible, specifically in regards to medical care, children's immunizations, basic nutrition and treatment of medical conditions that may jeopardize public health," and (3) to "stem the fears that were causing noncitizens to refuse limited public benefits, such as transportation vouchers and child care assistance, so that they would be better able to obtain and retain employment and establish self-sufficiency." Public Charge NOPR, 83 Fed. Reg. at 51133. Yet remarkably, DHS does nothing to explain how the expansion of the types of public benefits to be considered under its proposed rule will not also lead to similar adverse impacts. Instead, DHS admits that the following adverse consequences "could occur" as a result of the proposed rule's chilling effect:

- a. Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- b. Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment;
- c. Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated;
- d. Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient; and
- e. Reduced productivity and educational attainment.

Public Charge NOPR, 83 Fed. Reg. at 51270. And this list does not include "various other unanticipated consequences and indirect costs." *Id.* Despite acknowledging these concerns, DHS inexplicably proposes no measures to mitigate these adverse consequences, nor does it attempt to argue that the changes to be implemented under the proposed rule are still warranted notwithstanding these adverse impacts.

The proposed rule will result in dramatic changes to healthcare enrollment, including decreased participation in Medicaid and other health programs. According to the Kaiser Family Foundation, an estimated 2.1 to 4.9 million Medicaid/CHIP enrollees living in a family with at least one noncitizen could disenroll from the program.³⁵ Approximately 25.9 million people nationwide could experience chilling impacts under the proposed rule.³⁶ The natural consequence of disenrollment in healthcare-related and other benefits as a result of the rule will also lead to adverse health impacts. As noted by the Food Research & Action Center, by directly targeting SNAP, the proposed rule will also increase food insecurity, which is "at the heart of many of our nation's worst and costly health problems, including diabetes, heart disease, obesity, hypertension, chronic kidney disease, and depression."³⁷ DHS's failure to give reasoned consideration to mitigation of the acknowledged adverse health effects of its proposed rule does not reflect reasoned decisionmaking and is a fatal defect in the proposed rule.

c. The Proposed Rule is Arbitrary Because, If Applied to Citizens, It Would Amount to Characterizing Wide Swaths of the Population as Public Charges.

The new thresholds to be applied under the proposed rule would result in the inclusion of

³⁵ See Samantha Artiga et. al, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid* (Washington, DC. Kaiser Family Foundation, 2018), available at <http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-the-Proposed-Public-Charge-Rule-on-Immigrants-and-Medicaid>.

³⁶ *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>.

³⁷ *The Hunger Impact of the Proposed Public Charge Rule*, Food Research & Action Center (Sept. 2018), available at <http://frac.org/wp-content/uploads/hunger-impact-proposed-public-charge-rule.pdf>.

wide swaths of American citizens, if they were applied to them. A large number of U.S. citizens earn only poverty wages and receive public benefits in excess of these new thresholds. For example, the Economic Policy Institute estimates that in 2016 approximately 24% of workers in the United States earned poverty level wages.³⁸ Further, according to a 2016 report "[n]early one in every three workers nationwide earns under \$12 an hour, for a total of 41.7 million workers."³⁹ And "two-thirds of Americans between the ages of 20 and 65 will at some point reside in a household that receives benefits from a means-tested welfare program (food stamps, Medicaid, Supplemental Security Income, Aid to Families with Dependent Children, or other cash welfare)."⁴⁰ Looking at 2013 data, the Public Charge NOPR itself notes that "the rate of receipt for either cash or non-cash public benefits was approximately 20 percent among the native-born and foreign-born, including noncitizens, . . . with receipt of non-cash benefits dominating the overall rate." Public Charge NOPR, 83 Fed. Reg. at 51161. It adds that more than 16% of citizens – and a similar percentage of non-citizens – rely on Medicaid, *Id.*, and that over 10 percent of the population (somewhat less for non-citizens) relies on SNAP. *Id.*

Further, receipt of a little more than \$1800 a year in public benefits – a rough approximation of the new thresholds to be established under the proposed rule – is only possible when someone has other income, usually earned income. This is particularly true for SNAP, where a substantial number of working age adults combine their SNAP benefits and earnings. Such a

³⁸ *Poverty-Level Wages, State of Working America Data Library*, Economic Policy Institute, <https://www.epi.org/data/#!/subject=powvwage> (last updated Feb. 13, 2017).

³⁹ *Few Rewards: An Agenda to Give America's Working Poor a Raise* at 5, Economic Policy Institute & Oxfam America (2016), available at https://www.oxfamamerica.org/static/media/files/Few_Rewards_Report_2016_web.pdf

⁴⁰ Mark R. Rank & Thomas A. Hirschl, *Welfare Use as a Life Course Event: Toward a New Understanding of the U.S. Safety Net*, Social Work, Volume 47, Issue 3, 1 July 2002, pages 237-248, available at <https://doi.org/10.1093/sw/47.3.237>.

low threshold means that a huge swath of low wage workers would be considered public charges.⁴¹

The above individuals cannot legitimately be characterized as public charges. Yet such a characterization is the logical result of the Public Charge NOPR. Congress clearly could not have intended the term to cover such a broad range of people, simply because they receive public benefits at or above a very low threshold. Under the tax code, for example, a dependent is a person who depends on the taxpayer for more than half of his/her support. *See* 26 U.S.C. § 152. Accepting some ambiguity in the statutory term "public charge," it is nonetheless unreasonable to interpret the term in a way that would characterize a broad swath of the U.S. population as public charges.

d. The Proposed Rule Does Not Consider An Alien's Long-Term and/or Net Impact, or the Proposed Rule's Net Impact to Society.

The proposed rule is also arbitrary in that it fails to consider the net impact of aliens who receive public benefits at or above the new thresholds. This means that an alien who at one time received public benefits at the absolute minimum of the new threshold or who might reasonably be expected to rely on such benefits a single time can be refused admission or adjustment of status, even though that alien may go on to make a significant positive contribution to society.⁴² And DHS arbitrarily ignores the fact that some states impose work requirements on recipients of public benefits to be considered under the rule, such as SNAP, counting only the receipt of such benefits

⁴¹ By way of example, a full-time employee earning the minimum wage in Minnesota would make \$20,072 a year. *See Minimum Wage in Minnesota*, Minn. Dep't of Labor and Indus., <https://www.dli.mn.gov/business/employment-practices/minimum-wage-minnesota> (last visited Dec. 10, 2018). That is approximately the same as the \$20,780 federal poverty limit for a family of three. *See Annual Update of the HHS Poverty Guidelines*, 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018).

⁴² A recent study observes that the proposed rule "ignores the economic reality of the immigrant experience in the U.S. and the ability of immigrants to improve their circumstances and contribute to the nation when they are able to stay in the U.S. for a longer time." Leighton Ku & Drishti Pillai, *The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities* at 2, Milken Inst. Sch. of Pub. Health, George Wash. Univ. (Nov. 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285546s&download=yes.

as a negative.⁴³

The public benefits to be considered under the expanded rule are enormously effective at lifting persons out of poverty, which in turn increases those persons' positive contributions to society. The proposed rule fails to account for the common sense fact that the receipt of public benefits can provide someone with the economic security needed to place a person on the road to self-sufficiency. For example, "SNAP removed 8.4 million people out of poverty in 2015, reducing the poverty rate from 15.4 percent to 12.8 percent (a reduction of 17 percent)."⁴⁴ Children with access to SNAP are more likely to be in good health, be food secure, live in a stable home, and live in families who are better able to afford prescriptions and medical care.⁴⁵ And housing assistance "makes more household resources available to pay for health care and healthy food, which leads to better health outcomes."⁴⁶

DHS has also failed to consider whether the proposed rule's purported benefits to society outweigh its recognized negative impacts. DHS admits that reductions in federal benefits under the proposed rule could have significant adverse impacts to local economies:

[R]eductions in federal and state transfers under federal benefit programs may have downstream and upstream impacts on state and local economies, large and small businesses, and individuals. For example, the rule might result in reduced revenues for healthcare

⁴³ See Amy Goldstein, *An Experiment Requiring Work for Food Stamps is a Trump Administration Model*, Washington Post (Nov. 29, 2018), available at https://www.washingtonpost.com/national/health-science/an-experiment-requiring-work-for-food-stamps-is-a-trump-administration-model/2018/11/29/edeaf5c4-db83-11e8-b732-3c72cbf131f2_story.html?utm_term=.ba6b9bc0137c.

⁴⁴ Laura Wheaton & Victoria Tram, *The Antipoverty Effects of the Supplemental Nutrition Assistance Program* (Urban Institute Feb. 15, 2018), available at <https://www.urban.org/research/publication/antipoverty-effects-supplemental-nutrition-assistance-program>.

⁴⁵ *Report Card on Food Security & Immigration at 2*, Children's HealthWatch (Feb. 2018), available at <http://childrenshealthwatch.org/wp-content/uploads/Report-Card-on-Food-Insecurity-and-Immigration-Helping-Our-Youngest-First-Generation-Americans-to-Thrive.pdf>.

⁴⁶ Nabihaha Maqbool et. al., *The Impacts of Affordable Housing on Health: A Research Summary at 1*, Center for Housing Policy (Apr. 2015), available at <https://www.rupco.org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf>.

providers participating in Medicaid, pharmacies that provide prescriptions to participants in the Medicare Part D Low Income Subsidy (LIS) program, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.

Public Charge NOPR, 83 Fed. Reg. at 51118. Yet incredibly, DHS does nothing to quantify the corresponding financial benefit of the proposed rule to society in general. Instead, DHS simply observes that the "primary benefit of the proposed rule would be to help ensure that aliens who are admitted to the United States, seek extension of stay or change of status, or apply for adjustment of status are not likely to receive public benefits and will be self-sufficient, i.e., individuals will rely on their own financial resources, as well as the financial resources of the family, sponsors, and private organizations." *Id.* at 51274.⁴⁷ In other words, DHS acknowledges that the proposed rule will have significant and quantifiable adverse impacts to the public, yet the only purported benefit of the rule is that aliens who are admitted to the United States, or who apply for adjustment of status, or who seek an extension of stay or change of status, will not receive public benefits in the future. Of course, DHS altogether ignores the fact that, by receiving public benefits, those aliens are more able to become positive contributors to society.

V. THE PROPOSED RULE IS FLAWED BECAUSE IT PLACES UNJUSTIFIED WEIGHT ON CREDIT SCORES AND REPORTS TO DETERMINE LIKELIHOOD OF BECOMING A PUBLIC CHARGE.

For the reasons detailed in the comments filed by Tzedek DC on December 10, 2018 in

⁴⁷ By definition, a rule that is aimed at making it easier to find that an immigrant is a "public charge" will mean that fewer individuals will qualify for permanent immigrant status and therefore fewer immigrants will be eligible for public benefits. But the statutory test is not whether the proposed rule will make it likely that fewer immigrants will rely on public benefits – denying them benefit eligibility outright would do that – but whether those immigrants are likely to become public charges.

opposition to the proposed rule,⁴⁸ credit scores are not determinative of whether someone who has immigrated to the United States is likely to become a public charge. As those comments explain, credit scores are designed to measure the likelihood that a borrower will make a payment ninety or more days late on a credit obligation for the following two years as compared to other consumers; a credit score or report does not predict long-term ability to make timely payments for credit obligations or otherwise maintain financial stability. Immigrants may experience difficulty building credit. Further, as the comments and the sources cited in them detail, credit scores and reports may be inaccurate. Credit scores and reports frequently contain inaccurate information. For example, according to a Federal Trade Commission study, twenty-six percent of participants noted at least one potentially material error on at least one of their three credit reports.⁴⁹ Thirteen percent of the consumers' credit scores increased as a result of modifying an error.⁵⁰ Errors in credit reports might be due to mismatched records, balance errors, data management errors, and incorrect reporting of account status, among others.⁵¹ In addition, identity theft might inaccurately and inappropriately affect an individual's credit score. Finally, as those comments detail, consideration of credit scores and reports disparately affects marginalized communities, including women, people of color, and people with disabilities.

VI. THE PROPOSED RULE MAY HAVE A DISPARATE IMPACT IN MINNESOTA.

As explained, the proposed rule fails to recognize that many state governments distribute

⁴⁸ Comments of Tzedek DC, DHS Docket No. USCIS-2010-0012, RIN 1615-AA22 (filed Dec. 10, 2018).

⁴⁹ Federal Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003(Dec. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf>.

⁵⁰ *Id.*

⁵¹ *What are Common Credit Report Errors That I Should Look for on My Credit Report?*, Consumer Fin. Prot. Bureau(June 8, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-are-common-credit-report-errors-that-i-should-look-for-on-my-credit-report-en-313/>.

public benefits to persons that otherwise would not need them to survive, in order to fulfill important policy objectives. Some states are more generous than others in their distribution of these benefits. Yet the proposed rule applies the same threshold to all aliens. This means that aliens who reside in states with more generous benefit policies are more likely to receive benefits pushing them above the newly established thresholds. In some circumstances, persons residing in Minnesota are eligible to receive more benefits than similarly situated persons in other states. For example, Minnesota provides more in TANF grants – implemented through the Minnesota Family Investment Program – than some other states, and provides for the maximum 60-month eligibility period.⁵² Minnesota also provides an additional Housing Assistance Grant of \$110 for most MFIP participants.⁵³ Further, Minnesota provides more in public cash assistance than other states, and has expanded Medicaid. These benefits would all be considered under the revised public charge rule. Accordingly, persons in Minnesota may be more likely to be considered public charges than similarly situated persons in some other states. This is arbitrary. "[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-

⁵² See *60-Month Lifetime Limit*, Minnesota Department of Human Services, MHCP Provider Combined Manual § 11.30 (July 2018), available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=cm_001130&RevisionSelectionMethod=LatestReleased. By way of example, a parent with a household size of three, who works thirty hours a week at a minimum wage job in Minnesota would earn \$1,244.85 a month, and would be eligible for a combined cash and food MFIP grant of \$493 a month. See *DHS Reissues "Work Will Always Pay . . . With MFIP"* at 5, Bulletin No. 18-11-01, Minn. Dep't of Human Servs. (Jan. 1, 2018), available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_FILE&RevisionSelectionMethod=LatestReleased&Rendition=Primary&allowInterrupt=1&noSaveAs=1&dDocName=dhs-297591. In December 2016, 24,036 adults and 62,064 children received MFIP assistance in Minnesota, and 44 percent of MFIP recipients were working. The median monthly income for working MFIP parents at that same time was \$1,289. See *Minnesota Family Investment Program and Diversionary Work Program: Characteristics of Cases and People* at 4, Minn. Dep't of Human Servs. (Dec. 2016), available at <https://edocs.dhs.state.mn.us/lfsrver/Public/DHS-4219S-ENG>. Thirty percent of SNAP cases in Minnesota in December 2016 also reported income from work. At that time, 222,891 adults were enrolled in SNAP in Minnesota. See *Characteristics of People and Cases on the Supplemental Nutrition Assistance Program* at 5, Minn. Dep't of Human Servs. (Dec. 2016), available at <https://edocs.dhs.state.mn.us/lfsrver/Public/DHS-5182K-ENG>.

⁵³ *MFIP Housing Assistance Grant*, Minnesota Department of Human Services, MHCP Provider Combined Manual § 13.03.09 (Jan. 2017), available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=cm_00130309.

capricious standard." *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D. C. Cir. 1986).

Immigrants also make significant positive contributions to Minnesota. For example, in 2014, "the state's foreign-born households were able to contribute about one in every 14 dollars paid by Minnesota residents in state and local tax revenues, payments that support important public services such as public schools and police."⁵⁴ During that same year, "Minnesota's immigrants were 23.7 percent more likely to be actively employed than the state's native-born residents—a reality driven largely by the fact that a larger than average share of the native-born population had already reached retirement age."⁵⁵ Immigrants work in vital sectors of the state's economy, from health care to manufacturing.⁵⁶ And immigration will be needed to counter increasingly tight labor markets and growing worker scarcity, which are "recognized as two of Minnesota's most significant barriers to sustained economic growth."⁵⁷ The Public Charge NOPR will drastically impact the well-being of immigrants in Minnesota and deter immigration, to the state's detriment.

CONCLUSION

There is simply no rational justification and no evidence that support the issuance of the Public Charge NOPR. DHS itself has offered no explanation for this significant change in its interpretation of the "public charge" provision. By seeking to deter aliens from receiving benefits to which they are lawfully entitled, the NOPR is also fundamentally in conflict with congressional intent and longstanding agency interpretation and practice. For all of these reasons, and the reasons

⁵⁴ *The Contributions of New Americans in Minnesota* at 5, New American Economy (Aug. 2016), available at <https://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-mn-report.pdf>.

⁵⁵ *Id.* at 7-8.

⁵⁶ *See Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds*, Minnesota Department of Human Services, DHS Docket No. USCIS-2010-0012, RIN 1615-AA22 (filed Dec. 5, 2018).

⁵⁷ Steve Hine & Cameron Macht, *Immigrants and the Economy* at 1, Minnesota Economic Trends (Dec. 2017), available at https://mn.gov/deed/assets/immigrants%20and%20economy_tcm1045-323029.pdf

stated above, ILCM et al. respectfully submit that the DHS's Public Charge NOPR should not be adopted or promulgated in its current form.

Respectfully submitted, on behalf of the Immigrant Law Center of Minnesota; City of Minneapolis, Minnesota; City of St. Paul, Minnesota; Maryland State Senator-Elect Jeff Waldstreicher; Montgomery County Executive Marc Elrich; SEIU Healthcare Minnesota; C.A.R.E. Clinic; Minnesota Association of Community Health Centers; Friends of Immigrants; the Jewish Council for Public Affairs; the Jewish Community Relations Council of Greater Washington; Tzedek DC; Mitchell Hamline School of Law – Health Law Clinic/Medical-Legal Partnership; Benjamin Casper; Stephen Meili; and Ana Pottratz Acosta.

Dated: December 10, 2018

STINSON LEONARD STREET LLP

/s/ Harvey Reiter

Harvey Reiter
1775 Pennsylvania Ave. NW, Suite 800
Washington, DC 20006
Telephone: (202) 785-9100
harvey.reiter@stinson.com

Andrew Davis
Thomas Burman
50 South Sixth Street, Suite 2600
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500
Facsimile: (612) 335-1657
andrew.davis@stinson.com
thomas.burman@stinson.com