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Submitted via www.regulations.gov

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

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

Dear Chief Deshommes:

The Massachusetts Law Reform Institute (MLRI) welcomes the opportunity to comment on the proposed public charge regulation published in the Federal Register on October 10, 2018.

Established in 1968, MLRI is a statewide nonprofit poverty law and policy center. Our mission is to provide advocacy and leadership in advancing laws, policies, and practices that secure economic, racial, and social justice for low-income people and communities in Massachusetts. As a state-level legal services support center, MLRI also provides substantive expertise and technical assistance in several areas of poverty law to civil legal aid providers, policymakers, and a large number of organizations that work with and/or serve low income people and vulnerable populations in Massachusetts. Our comments draw upon the work and nationally-recognized expertise of MLRI lawyers and policy analysts in the areas of immigration law, health care, public benefits, housing, child welfare, family law/domestic violence and the cross-substantive racial justice lens with which MLRI approaches anti-poverty advocacy.

The proposed regulation is deeply problematic in a number of ways, which we detail at length in our comments. It is contrary to Congressional intent, which has historically prioritized family unity through immigration. Denying permanent residency based on a more stringent definition of public charge will exclude low- and moderate-income families whose contributions have historically been essential to the growth of the United States, and is contrary to values reflected in the historical pattern of immigration to this country. MLRI strongly objects to the chilling effect this proposed regulation will have, deterring millions of families from accessing critical services out of fear that their immigration status will be jeopardized, and the risk that family members may be denied residence resulting in removal from the country.

As a legal services and anti-poverty organization, MLRI recognizes the importance and interrelatedness of poverty reduction, racial equity, and access to justice not only as the

foundations of a fair and just society, but also as critical components for economic stability, mobility and opportunity for all. Our nation has spent several decades advancing policies and creating programs to alleviate poverty and diminish its devastating individual and societal impact; we continue to dismantle systemic injustices build on generations of racial inequity and discrimination that have devastated communities of color; and we continually fight to ensure equal justice under law and access to justice for all. Therefore, we are profoundly concerned that the proposed regulations will be a significant setback for the Commonwealth of Massachusetts and for our nation and will cause widespread harm and injustice on several levels.

- **The proposal will destabilize families and will increase poverty, adversely affecting the health, well-being, and life outcomes of immigrant families**: MLRI is deeply concerned about the negative impact the proposed regulation will have on the economic security of immigrant families. In Massachusetts, we have worked hard to promote policies that increase economic opportunity and civic inclusion of our state's immigrant communities. Access to health, nutrition and housing safety net programs is an absolutely critical foundation for economic mobility. This is especially important because, as we detail in our comments, many immigrants (particularly Latino and Black immigrants) struggle with poverty and economic insecurity largely because of decades of discrimination and institutional policies and practices that created significant barriers to opportunity. As a result, many hard-working immigrants are employed in low-wage jobs and are concentrated in low opportunity communities. A minimum wage is not a living wage, especially in states like Massachusetts with a high cost of living. SNAP, Medicaid and subsidized housing are essential economic lifelines for working immigrant families. One of the articulated goals of the proposed regulation is to "promote self-sufficiency" – however we have found that self-sufficiency cannot be achieved through draconian policies that create and increase barriers to meeting basic needs. The proposed regulation will lead to widespread economic destabilization and disenfranchisement of immigrant families in Massachusetts and across the nation, and will be particularly harmful to children. The outcome will be an increase in poverty, with all the negative human, public health and long-term societal costs associated with it. (Furthermore, as we detail in our comments, the proposed regulation will also have negative economic impacts on the state, on the health care system, and on particular sectors.)

- **The proposal will disproportionately impact immigrant communities of color, and will lead to greater racial disparities and economic inequity:** MLRI is deeply concerned that the proposed regulation will have a particularly negative impact on the state's immigrant communities of color and will increase racial disparities in several areas, including economic opportunity and health outcomes. Despite efforts and progress made in Massachusetts to advance racial equity and inclusion, profound disparities between white and minority communities remain. As noted above, laws, systems, policies, and practices of local, state, and federal governments and in the private sector, throughout decades, have created conditions of chronic economic instability and barriers to opportunity that have entrenched communities of color in poverty. In our comments below, we extensively address several aspects of the proposed regulation that will disproportionately harm immigrant communities of color. These include, *e.g.*, the new income thresholds to avoid a public charge finding that will be harder for immigrant families of color to satisfy due to income disparities, and these

same income disparities also contribute to other negative factors in the public charge test such as increased use of benefits and health disparities.

- **The proposal will undermine access to justice, including access to the Massachusetts courts, and will create barriers to administrative justice and create inefficient administrative processes:** MLRI is deeply concerned that the proposed regulations will create systemic barriers for low-income, Limited English Proficient individuals, seniors, persons with disabilities, and pro se litigants, to access basic services and benefits, as well as to exercise their legal rights to immigration processes, administrative agencies and fair and efficient administrative and court adjudications and participate in fair/efficient judicial and administrative processes. As detailed in our comments below, ascribing negative weight to the application for a fee waiver as well as the burdensome changes affecting forms and definitions will impede an immigrant's ability to access justice within the immigration system. In addition, in Massachusetts the proposed regulations will also impede access to justice in our state courts. The state's "Indigent Court Costs Act" requires courts to waive certain courts costs and fees; one of the automatic waiver eligibility categories is the receipt of certain identified means-tested public benefit program payments. A reduction in participation in these benefits based on the "chilling effect" will have a direct negative impact on the ability of courts in Massachusetts to grant fee waivers, which are essential to insure that the legal system is accessible to people with limited financial means.

For all these reasons and the reasons we detail below, MLRI strongly opposes the Department of Homeland Security's proposed regulation regarding public charge.

Sincerely,

Georgia Katsoulomitis
Executive Director
Massachusetts Law Reform Institute

§103.6-7 & §213.1 (public charge bonds)

The proposed rule establishes a public charge bond minimum of $10,000 and provides discretion to USCIS to set a bond even higher with no cap. The new regulations bar any appeal of the amount set. The rule stipulates that the penalty for *any* bond breach is the full bond amount and that *any* use of a specified public benefit while the bond remains in effect would constitute a breach.

We object to all these stringent conditions. They will act as a harsh deterrent to any noncitizen who feels the pressure to avoid family separation, and undermine the financial security of such families, given surety rates and conditions. A rigid, high bond threshold is unreasonable, given that the public charge determination is individualized and that virtually every immigrant will have supplied multiple forms of evidence to meet the test under the totality of the circumstances and thus the bond should be viewed as a supplement. Even if, in some instances, an individual's collective evidence fell short, it would be unfair to disregard the existence of all such evidence and set a harsh high bond, as if the individual had not supplied any evidence at all.

Years of reliance on monetary bonds in the criminal pretrial context has demonstrated the limitations of bonds as predictors and effective mitigators of risk.[1] Monetary bonds in the criminal pretrial context have been discredited as inefficient and unfair, lacking evidence that money motivates people to appear for court.[2] Moreover, public charge bonds would necessarily have a disparate negative impact on minorities, including U.S. citizens, as financially-based pretrial detention systems have had.[3]

The use of such bonds can be devastatingly destabilizing for low and moderate-income families. Studies show that bonds cause long-term hardship and increase the likelihood of financial instability.[4] Public charge bonds are even more likely to cause long-term hardship, given the indefinite life of the bond.[5] Families will face years of annual fees, non-refundable premiums, and liens on their homes and cars put up as collateral charged by for-profit surety

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[1] *See* Denise L. Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial immigration Detention*, 92 Ind. L.J. 157, 205 (2016) ("Loose the Bonds").
[2] *Id. at 198-205*.
[3] *See* Color Of Change and Am. Civil Liberties Union, *Selling Off Our Freedom: How insurance companies have taken over our bail system* (May 2017) ("Selling Off Our Freedom"); Maryland Office of the Public Defender, *The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions* at 12-13 (Nov. 2016) ("High Cost of Bail"), and Vera Institute of Justice, *Past Due: Examining the costs and consequences of charging for justice in New Orleans* (Jan. 2017) ("Past Due"); *see also* Loose the Bonds, note 1 *supra*, at 199.
[4] *See, e.g., Selling Off Our Freedom*, note 3 *supra*; *see also* Pretrial Justice Institute, *Pretrial Justice: What Does It Cost? Pretrial Justice: What Does It Cost?* (Jan. 2017).
[5] The proposed regulation eliminates the automatic cancellation of the public charge bond upon naturalization, death, or permanent departure. *See* 8 C.F.R. § 103.6(c)(1). Instead, DHS seeks to impose an affirmative obligation on the immigrant or obligor to request the cancellation of the bond, and sets forth a complicated "proof" structure in order to do so. The proposal is unduly burdensome, confusing, and ignores the reality that many LPRs are unable to naturalize at the five year mark for a variety of reasons.

companies and their agents.[6] Further, the consequences of not meeting the bond payment structure or the use of safety net programs, even of small amount or short duration, are too severe. The possibility of a breach of that bond could be economically catastrophic for a family. The principal would have to reimburse the bond company for the full amount. Setting up a system where vulnerable immigrant families must deal with an industry well-known to implement questionable consumer practices[7] undermines the value we place on family immigration. Moreover, the indefinite term and extremely broad and vague conditions governing breach only heighten the risk of exploitation by for-profit companies managing public charge bonds. Impoverishing immigrants and their families will make them more, not less, likely to need assistance.

During the last 20 years, posting a bond in situations where an applicant is required to assure the USCIS that he or she will not become a public charge has been rare. Proposing bonds as a tool for applicants who are borderline inadmissible on public charge grounds – those with no heavily weighted negative factors but who have other factors showing self-reliance – will encourage adjudicators to use them routinely to shore up other types of cases and threatens to make the assignment of bonds a new norm.[8] Bonds would rarely be necessary, by contrast, if the current public charge standards remained in place.

While DHS creates a new market segment for commercial bond companies, it will leave states and localities responsible for regulating bond insurers and bond agents--including those issuing immigration detention bonds--holding the bag for consumer protection. Many states already struggle to adequately regulate their current bond industries.[9] Expanding the market without any consideration of the increased burden imposes an unfunded mandate on state and local insurance and financial services regulators, in addition to undermining the public protection goals of states, like Massachusetts, that struggle to reduce consumer fraud.[10]

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[6] *See, e.g.*, *Selling Off Our Freedom*, note 3 *supra*; High Cost of Bail, note 3 *supra*; Past Due, note 3 *supra*; UCLA School of Law Criminal Justice Reform Clinic, *The Devil in the Details: Bail Bond Contracts in California* (May 2017) ("Devil in the Details"); *see also* Brooklyn Community Bail Fund, *License & Registration, Please...An examination of the practices and operations of the commercial bail bond industry in New York City*, (Jun. 2017) ("License & Registration") at 2.

[7] Michael E. Miller, *Firm accused of preying on detained immigrants faces widening investigations*, The Washington Post (April 21, 2018), https://www.washingtonpost.com/local/investigations-expand-into-company-accused-of-preying-on-detained-immigrants/2018/04/20/e31329d8-44a6-11e8-8569-26fda6b404c7_story.html?utm_term=.7dfb5d9179a9.

[8] TRAC, Syracuse University, *Three-fold Difference in Immigration Bond Amounts by Court Location* (July 2, 2018), http://trac.syr.edu/immigration/reports/519/ (example of how immigration release bond amounts have escalated).

[9] *See, e.g.*, Selling Off Our Freedom, note 3 *supra* at 34-37; Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. Times (Mar. 31, 2018), https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html?mabReward=CTM4&recid=12eCxx0XJ509HkP8Jk98Q8kEubA&recp=3&action=click&pgtype=Homepage&region=CColumn&module=Recommendation&src=rechp&WT.nav=RecEngine.

[10] Allison Schoenthal, *Insight: A Shift in Regulation From the CFPB to the States*, Bloomberg BNA (Aug. 24, 2018), https://www.bna.com/insight-shift-regulation-n73014482021/; Renae Merie & Tracy Jan, *Trump is systematically backing off consumer protections, to the delight of corporations*, Washington Post (Mar. 6, 2018),

§ 212.20 (public charge applicability) and § 212.23 (exemptions & waivers)

We are deeply concerned that the proposed rule will have a "chilling effect" on the use of benefits by immigrants who are not legally subject to, and should not be subjected to, public charge grounds of inadmissibility. Although proposed § 212.23 attempts to list the categories of immigrants in certain humanitarian statuses that are statutorily exempt from § 212(a)(4) of the Immigration Nationality Act ("INA") , including asylum, VAWA, special immigrant juvenile status, TPS, and status as a trafficking or crime victim, among others, the proposed rule would apply the public charge test to family-based adjustment of status and other applications for admission in a manner that is likely to harm exempt groups. This chilling effect is likely because of the confusion that will be produced by the manner in which the exemptions are described. For example, both the refugee and asylee exemptions at subparagraphs (a)((1) and (2) of proposed § 212.23 are described as operating at the time of admission or adjustment of status under INA §§ 207, 208, and 209, which suggests that refugees and asylees who may need to pursue family-based adjustment rather than INA § 209 adjustment will be penalized for benefits received while exempt. This confusion will be heightened by the fact that page 10 of the new draft Form I-944 instructions omits benefits received while in an exempt status from those that do not have to be reported on the form.

Virtually all the exempt categories are based on conditions beyond an individual immigrant's control that produce significant trauma – e.g., persecution, domestic violence, parental abuse or abandonment, crime, and earthquakes or other natural catastrophes that kill and harm loved ones in the home country. Without access to affordable health care and other benefits these immigrants may need, recovery is difficult if not impossible.[11] Congress plainly recognized this common-sense reality by creating the public charge exemptions for such victims in the first place. However, these immigrants are likely to forego the use of the proposed rule's expanded list of non-cash benefits,[12]even though they qualify for and need such benefits, out of fear that they will be subjected to the public charge rule should they ever need to seek permanent residence via a family-based adjustment of status or other non-exempt pathway – or should they leave the U.S. for more than six months following acquisition of LPR status.[13] Research shows that the "chilling effect" on the use of benefits is indiscriminate in deterring even those to whom the public charge rule will never apply.[14] For vulnerable immigrants in the statutorily exempt

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https://www.washingtonpost.com/business/economy/a-year-of-rolling-back-consumer-protections/2018/03/05/e11713ca-0d05-11e8-95a5-c396801049ef_story.html?noredirect=on&utm_term=.7e0fa2731e45.

[11] See, Sarah Al-Obaydi, Akiki Kamimura, Maziar M. Nourian, & Molly Pace, *Health Services for Refugees in the United States: Policies and Recommendations*, J. of Pub. Pol'y and Admin. Res. (2015) https://pdfs.semanticscholar.org/5ef2/8073e4264e4f169c9aaf22a0ff1798c8b4fc.pdf. See also, Nat'l Immigr. Law Ctr. (NILC), *The Consequences of Being Uninsured*, 3 (Aug. 2014) https://www.nilc.org/wp-content/uploads/2015/11/consequences-of-being-uninsured-2014-08.pdf

[12] See comments on proposed 212.21(b) *infra*.

[13] 8 U.S.C. § 1101(a)(13)(C)(ii). *See also*, Randy Capps, Mark Greenberg, Michael Fix, & Jie Zong, Migration Pol'y Inst., *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, 5 (Nov. 2018) https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration

[14] Jeanne Batalova, Michael Fix, & Mark Greenberg, Migration Pol'y Inst., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use* (June 2018)

categories, such an effect would perpetuate their traumas and undermine the ameliorative purposes of these exemptions that are supposed to ensure they can access benefits they need to recover without adverse immigration consequences.

This chilling effect would hit Latino and Black immigrants especially hard, since 93% of the 320,000 current TPS holders in the U.S. are from El Salvador, Honduras, and Haiti.[15] Since most of the Haitian diaspora is spread along the Eastern Seaboard states, this would adversely affect the Haitian population of Massachusetts, which is home to 4,735 Haitian TPS beneficiaries; as well, Massachusetts is home to a sizeable Central American community that includes over 6,000 TPS holders.[16]

§212.21 (a) (definition of "public charge") and § 212.21 (c) (definition of "likely at any time to become a public charge")

We strongly oppose the proposed definitional changes in this rule that would base the conclusion about whether an individual is "likely to become a public charge" exclusively on the prediction that s/he may receive some amount of a noncash benefit listed in subparagraph (b) of this section. These changes will have overwhelmingly disastrous consequences in a multitude of areas. They depart from the plain meaning of the phrase "likely to become a public charge" in the Immigration and Nationality Act; unnecessarily discard long-standing and well-developed interpretations that have improved agency decision-making by providing consistency and fairness; they rely on an inaccurate measure to predict whether an individual is likely to become a public charge and will eviscerate the totality of circumstances standard; they will lead to significant adjudications delays and increase their cost, to the detriment of both the agency and applicants for immigration benefits generally; they will negatively affect the economy, as those chilled from applying for adjustment of status are unable to access EADs on that basis, thus reducing the supply of authorized workers employers need in this time of labor shortages; and they will significantly reduce the number of U.S. families able to reunify through adjustment of status, upsetting the policy equilibrium between family, employment, and humanitarian criteria in the INA and also, consequently, cutting off a critical means of preventing poverty and correcting racial disparities that result in a disproportionately higher poverty rate and unequal access to wealth for people of color.

The phrase "likely to become a public charge" is a term of art in the INA; but language in the preamble at 83 Fed. Reg. 51114, 51158 disingenuously portends to define "public" and "charge" as separate words disconnected from each other or from the fact that the phrase also requires a likelihood that the person "become" a public charge, as opposed to a likelihood that

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https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families

[15] Nicole Prchal Svajlenka, Angie Bautista-Chavez, and Laura Muñoz Lopez, Ctr. for Am. Progress, *TPS Holders Are Integral Members of the U.S. Economy and Society* (Oct. 2017) https://www.americanprogress.org/issues/immigration/news/2017/10/20/440400/tps-holders-are-integral-members-of-the-u-s-economy-and-society/.

[16] Shannon Dooling, *Data Show More Than 12,000 Immigrants In Mass. Have Temporary Status*, WBUR, Nov. 9, 2017, at http://www.wbur.org/news/2017/11/09/temporary-status-data-update.

s/he will engage in a specific act, as other provisions of INA § 212(a) set forth.[17] This new compartmentalized approach to defining the phrase is contrary to its plain meaning, when considered as a whole.[18] Moreover, as legacy INS itself recognized in the preamble to the 1999 public charge rule:

> *The dictionary definition [of public charge] suggests a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support. Historically, individuals who became dependent on the Government were institutionalized in asylums or placed in ''almshouses'' for the poor long before the array of limited-purpose public benefits now available existed. This primary dependence model of public assistance was the backdrop against which the ''public charge'' concept in immigration law developed in the late 1800s.*[19]

The historical interpretation of the phrase has centered on a likelihood that an individual would become *dependent for support* on the government instead of supporting him/herself, as cases cited in the preamble make clear. E.g., cases such as *Matter of Martinez-Lopez* (cited at 83 Fed. Reg. 51114, 51125, 51158) and *Matter of Harutunian* (cited at 83 Fed. Reg. 51114, 51125, 51158-59, 51179) affirm the long-recognized difference between the likelihood of a person becoming a burden on the government *for support* versus the likelihood of simply receiving a benefit that costs the government some amount of money. The types of cash benefits that the 1999 INS Guidance recognized as sufficient to trigger such a governmental burden (TANF, SSI, and state equivalents of traditional "welfare" programs) were aimed at supporting recipients who cannot support themselves, thus rendering them dependent on the government within the meaning of the statute, as it has historically been interpreted.

Consolidating these standards as they had evolved through case law into the 1999 Guidance, legacy INS achieved well-needed improvements in the fairness of adjustment of status adjudications improvements that would be lost now, if the definitional changes in the proposed rule were to be adopted. Prior to 1999, MLRI's staff were frequently called upon[20] by legal services and other advocates across Massachusetts who were assisting desperate immigrants in responding to immigration examiners' benefits-focused demands – for example, that they terminate health insurance coverage, pay back benefits, and produce records about all programs

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[17] E.g. seeking to enter the U.S. "for the purpose of performing skilled or unskilled labor" under INA 212(a)(5) or "to engage in prostitution" under INA § 212(a)(2)(D).

[18] See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 523 (1993); *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990); *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 123-24 (1989); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989).

[19] Inadmissibility and Deportability on Public Charge Grounds, A Proposed Rule by the Immigration and Naturalization Service, May 26, 1999, 64 Federal Register 28676, 28677.

[20] In our role as the statewide legal services back-up center, MLRI regularly fields questions from hundreds of lawyers and advocates in benefits, health care, housing, family, education, and immigration law, many of whose immigrants clients faced these hurdles with legacy INS before the 1999 improvements. For more than 25 years, MLRI has provided an annual seminar on "Immigrants and Benefits" as part of its annual public benefits CLE series, to train lawyers, social workers, health care providers, nonprofit community agency staff, public officials, and others about the relationship between the receipt of benefits and immigration status. See, Massachusetts Continuing Legal Education, *MLRI Basic Public Benefits Advocacy Trainings* (last visited Dec. 12, 2018), https://www.mcle.org/main/MLRI. We are well-positioned therefore to evaluate the impact on low-income immigrants, and all who work with them, of this massive change in public charge doctrine.

in which they and their family members might have participated, as a condition of getting an adjustment of status application approved, regardless of individual circumstances or future employment opportunities. In our experience, these misguided and simplistic practices resulted from an exaggerated and hostile focus on the receipt of benefits as *the* determinant of public charge inadmissibility, to the exclusion of other factors that are part of a more complex totality of circumstances test which, if fairly applied, ought to give each applicant a meaningful opportunity to demonstrate his or her potential to become a member of our national community.

A return to pre-1999 agency practices, the inevitable result of the proposed rule's definitional change, which turns on the receipt of benefits as *the* determinant of public charge inadmissibility, will mean more Requests for Evidence (RFEs) focused on the receipt of benefits, including RFE's that have no bearing on the public charge determination under the proposed rule, but that must be listed on the new Form I-944.[21] Agency review of this form, and of the attendant records that must be supplied with it, along with issuance of more RFEs about past benefits use and time required to evaluate the RFE responses, will delay and increase the cost of adjustment of status adjudications.[22] Given the percentage of the U.S. population that must access some kind of benefit at some point due to individual circumstances, economic downturns, and growing inequality in America,[23]these costs are likely be significant. The resultant delays will have a negative downstream impact as well, slowing down the adjudication of unrelated immigration benefits, including employment authorization applications, the timely issuance and renewal of which many immigrants and their employers depend on.

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[21] We strongly oppose the new form's requirement that the applicant include benefits specifically excluded from public charge determinations, such as those received prior to the rule's effective date, and the fact that the form includes no questions aimed at ascertaining whether the past receipt of a benefit has *decreased* the likelihood that the applicant will become a public charge by improving his/her health, nutrition, and safety. See Form comments *infra.*

[22] Citizenship and Immigration Services, *Obudsman Annual Report 2016* (June 2016) https://www.dhs.gov/sites/default/files/publications/CISOMB%20Annual%20Report%202016.pdf

[23] Melissa Boteach, Shawn Fremstad, Katherine Gallagher Robbins, Heidi Schultheis, & Rachel West, Ctr. for Am. Progress, *Trump's Immigration Plan Imposes Radical New Income and Health Tests* (July 2018) https://www.americanprogress.org/issues/poverty/reports/2018/07/19/453174/trumps-immigration-plan-imposes-radical-new-income-health-tests/; Patrice Hill, *Spending on social welfare rose as economy tanked during recession*, The Washington Times (Nov. 27, 2013) https://www.washingtontimes.com/news/2013/nov/27/spending-on-social-welfare-rose-as-economy-tanked-/; Raheem Chaudry, Isaac Shapiro, & Danilo Trisi, Ctr. on Budget and Pol'y Priorities, *Poverty Reduction Programs Help Adults Lacking College Degrees the Most* (Feb. 2017) https://www.cbpp.org/research/poverty-and-inequality/poverty-reduction-programs-help-adults-lacking-college-degrees-the; Ctr. on Budget and Pol'y Priorities, *Chart Book: SNAP Helps Struggling Families Put Food on the Table* (Feb. 2018) https://www.cbpp.org/research/food-assistance/chart-book-snap-helps-struggling-families-put-food-on-the-table; Ajay Chaudry, Christopher Wimer, Suzanne Macartney, Lauren Frohlich, Colin Campbell, Kendall Swenson, Don Oellerich, & Susan Hauan, Off. of Hum. Services Pol'y, U.S. Dep't of Health and Hum. Services, *Poverty in the United States: 50-Year Trends and Safety Net Impacts* (Mar. 2016) https://aspe.hhs.gov/system/files/pdf/154286/50YearTrends.pdf; Arloc Sherman, Chad Stone, Roderick Taylor & Danilo Trisi, Ctr. on Budget and Pol'y Priorities, *A Guide to Statistics on Historical Trends in Income Inequality* (Aug. 2018) https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality

The application of this harsh new definition, which focuses solely and negatively[24] on the likelihood that an immigrant will receive a health, nutrition, or housing benefit, will deter eligible immigrants from pursuing expensive adjustment of status applications, if they fear their applications will only be denied.[25] Thus they would forfeit the corresponding employment authorization that permits access to better-paying jobs unavailable to unauthorized workers.[26] Such a result obviously thwarts the purported "self-sufficiency" goals of the proposed rule. [27]

Significantly more family-based adjustment of status applications are also likely to be denied as a result of this new benefits-determined definition, thus imperiling family-based immigration,[28]one of the three central pillars of U.S. immigration law – thus disturbing the policy balance the INA seeks to achieve between family-based, employment-based, and humanitarian admission.[29] Because status improvement (e.g. from undocumented to documented) leads to higher wage-earning opportunities and contributes to higher rates of home ownership,[30] it serves as an important means for immigrants to avoid poverty through improved

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[24] See comments *infra* concerning benefits-receipt as a negative factor in the totality of circumstances determination and concerning the Form I-944.

[25] Neeraj Kasushal and Robert Kaestner, Health Services Res., *Welfare Reform and Health Insurance of Immigrants* (June 2005) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361164/; Colleen M. Gorgan, Namratha R. Kandula, Diane S. Lauderdale, & Paul J. Rathouz, Health Services Res., *The Unintended Impact of Welfare Reform on the Medicaid Enrollment of Eligible Immigrants* (Oct. 2004) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361081/; Ithai Zvi Lurie, J. of Health Econ., *Welfare reform and the decline in the health-insurance coverage of children of non-permanent residents* (May 2008) https://ac.els-cdn.com/S0167629607000999/1-s2.0-S0167629607000999-main.pdf?_tid=2c79a787-5163-4f1f-a813-42a4d79056a9&acdnat=1543250009_c70f93b371679a08bb8c359e7660cbd6

[26] Tom Jawetz, Patrick O'Shea, Adrian Reyna, Ignacia Rodriguez, Greisa Martinez Rosas, Philip E. Wolgin, & Tom K. Wong, Ctr. for Am. Progress, *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes* (Oct. 2016) https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes/; Am. Immigr. Council, *An Immigration Stimulus: The Economic Benefits of a Legalization Program* (Apr. 2013) https://www.americanimmigrationcouncil.org/research/immigration-stimulus-economic-benefits-legalization-program; Lisa A. Keister, Jody Agius Vallejo & E. Paige Borelli, The Stanford Center on Poverty and Inequality, *Mexican American Mobility: An Exploration of Wealth Accumulation Trajectories* (Apr. 2013), https://inequality.stanford.edu/sites/default/files/media/_media/working_papers/keister_agius-vallejo_borelli_mexican-american-mobility.pdf.

[27] The primary benefit of the proposed rule would be to help ensure that aliens who apply for admission to the United States, seek extension of stay or change of status, or apply for adjustment of status are self-sufficient, i.e., do not depend on public resources to meet their needs, but rather rely on their own capabilities and resources of their family, sponsor, and private organizations. Preamble page 51118

[28] Jeanne Batalova, Michael Fix, & Mark Greenberg, Migration Pol'y Inst., *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule* (Aug. 2018) https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule

[29] See generally, Stephen Legomsky & Cristina Rodriguez, *Immigration and Refugee Law and Policy* (7th ed. 2018); Thomas Aleinikoff, David Martin, Hiroshi Motomura, & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* (8th ed. 2016).

[30] United States Department of Labor, *Effects of the Immigration Reform and Control Act: Characteristics and labor market behavior of the legalized population five years following legalization*, Bureau of International Labor Affairs, Division of Immigration and Policy Research (May 1996). *See also*, Jeanne Batalova, Sarah Hooker, and Randy Capps with James D. Bachmeier, Migration Pol'y Inst., *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action*, Washington, DC, (Aug. 2014), 1,

employment and asset-building capacity – strategies that have historically expanded economic opportunities for low-income people and that are critical to narrowing the racial wealth gap that keeps Latinos, Blacks, and other people of color unable to pass on wealth across generations to the same extent as white people.[31]

§ 212.21 (b) (definition of public benefit)

We strongly oppose the proposed definition of public benefit at § 212.21(b) to include non-cash nutrition, health and housing benefits or any other non-cash benefit beyond the current consideration of institutionalization for long-term care at government expense. We further strongly oppose the monetization and durational standards that the proposed definition of public benefit would substitute for the concept of being "primarily dependent" on government assistance.

Adding non-cash benefits and abandoning the concept of primary dependence on the government is inconsistent with the meaning of "public charge" as used in the statute and long understood by Congress, federal government agencies, and multiple public and private stakeholders, as discussed supra. Further, the complexity of the proposed rule makes it nearly impossible for immigrants, providers and other interested parties to offer or obtain reliable guidance on whether there will be adverse consequences for immigrants to participate in programs for which they are eligible, and this will exacerbate the chilling effect of the proposed definition.

DHS should not alter the concept of public charge from primary dependence on public benefits for subsistence to receipt of any public benefit

Under the proposed definition of public benefits, an individual who used even the smallest amount of benefits for a relatively short amount of time could be blocked from gaining lawful permanent residence in the United States. The proposal defines "public charge" to include anyone who uses "monetizable" public benefits in an amount that exceeds 15% of the federal poverty line (FPL)—just $5 a day. This absolute standard overlooks the extent to which the person is supporting herself. For example, an individual earning $18,210 annually in private income (150 per cent FPL) who receives just $5.00 per day in monetizable public benefits would

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http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action; Roberto G. Gonzales & Angie M. Bautista-Chavez, Am. Immigr. Council, *Two Years and Counting: Accessing the Growing Power of DACA* (June 2014) http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf.

[31] Angela Hanks, Danyelle Solomon, & Christian Weller, Ctr. for Am. Progress, *Systematic Inequality How America's Structural Racism Helped Create the Black-White Wealth Gap* (Feb. 2018) https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/; Tamara Draut, Catherine Ruetschlin, & Amy Traub, Inst. for Assets & Soc. Pol'y - Brandeis University, *The Racial Wealth Gap - Why Policy Matters* (2015) https://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf; Lisa J. Dettling, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, & Jeffrey P. Thompson, Fed. Res., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances* (Sept. 2017) https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm

be receiving only 10% of her income from a government program, meaning that she is 90% self-sufficient. Yet the rule would still consider the receipt of assistance as a heavily weighed negative factor in the public charge determination. This is completely at odds with the enduring meaning of public charge. As discussed elsewhere in these comments, the then INS acknowledged in its preamble to the 1999 proposed public charge rule that the plain meaning of "public charge" suggests a "complete" or "nearly complete" dependence on the government not just some lesser level of support.[32]

For "non-monetizable" public benefits, the proposed durational rule measuring 12 months of receipt of benefits in a 36 month period or any other arbitrary look back period has no place in the public charge rule. Inclusion of a retrospective test is fundamentally inconsistent with the forward-looking design of the public charge determination as mandated by law. Past use of a government-funded program is not necessarily predictive of future use; if the specific circumstances that led to the use of public benefits no longer apply, the previous use of benefits is irrelevant.[33]

Further, the rule proposes to add non-cash benefits that serve important public interests and are available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general health and nutrition, promoting education and employment and assisting working-poor families in the process of becoming self-sufficient. Receipt of such benefits is not indicative of indigence or dependence and should play no part in the public charge determination.[34]

In Massachusetts, only 9.4% of state residents participate in cash welfare programs that may now be considered evidence of public charge.[35] However, one-third of state residents (32.8%) receive at least one benefit if SNAP and Medicaid are considered in addition to cash welfare.[36] Further, of 16-64 year old working age individuals in families receiving cash or non-cash benefits, 58.9% of all such working age individuals are employed, and 66% of all such working age non-citizens are employed. See, Table 1. To characterize immigrants as public charges based on participation in public benefit programs that one in three Massachusetts residents receive and in which the majority of working age adults are employed is perverting the meaning of public charge.

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[32] Inadmissibility and Deportability on Public Charge Grounds, A Proposed Rule by the Immigration and Naturalization Service, May 26, 1999, 64 Federal Register 28676, 28677.
[33] Matter of A, 19 I&N Dec. 867 (Comm'r 1988).
[34] See, 1999 Proposed Rule, supra at 28678.
[35] Migration Pol'y Inst., *National and State-Level Estimates of Use of Means-Tested Public Benefits, by U.S. Citizenship Status* (2018), Retrieved from https://www.migrationpolicy.org/sites/default/files/datahub/PublicChargeStateEstimates.xlsx.
[36] *Id.*

Table 1. Citizenship status of individuals 16-64 in families with at least one family member receiving public benefits* in Massachusetts by work, (Pooled 2014-2016 ACS Data)

	Non-citizens	Citizens	Total
Individuals ages 16-64 in families receiving benefits	207,800	1,174,200	1,382,000
Workers ages 16-64 in families receiving benefits	137,200	677,400	814,600
As a percentage of individuals ages 16-64 in families receiving benefits	66.0%	57.7%	58.9%

* Cash welfare (TAFDC, EAEDC),SSI, MassHealth or SNAP

Source: Migration Policy Institute, "National and State-Level Estimates of Use of Means-Tested Public Benefits, by U.S. Citizenship Status" (Washington, DC: MPI, 2018) Massachusetts data. https://www.migrationpolicy.org/sites/default/files/datahub/PublicCharge-StateEstimates.xlsx

The "chilling effect" of the proposed definition of public charge is far-reaching

The proposal almost certainly would convince large numbers of immigrants here lawfully and their children, many of them U.S. citizens, to forgo benefits for which they are eligible. Because the rules for determining whether someone is a "public charge" are technical and the circumstances under which the authorities make a determination can be hard to understand, especially given the unpredictability of so many new and reintegrated factors in this rule, the number of low-income immigrant families that would choose not to receive benefits would likely exceed by a sizable amount the number that would ultimately be subject to a "public charge" determination. This "chilling effect" of the proposed rule is far reaching and would fall especially harshly on children, domestic violence victims, and other populations.[37]

Further, the scope of the "chilling effect" can also be expected to extend to non-cash benefits beyond those that are defined as public benefits in the rule. News accounts already report a drop in WIC, a program that is not included in the proposed definition, based on fears of

[37] Editorial, *Anti-immigrant plan threatens health care*, Boston Globe (Sept. 26, 2018), https://www.bostonglobe.com/opinion/editorials/2018/09/26/anti-immigrant-plan-threatens-health-care-massachusetts/hOkzaxm6P1Fh7Aqvx9ojuK/story.html.

adverse immigration consequences.[38] The broader the scope of the public benefits considered, the more difficult to contain the chilling effect.

Various researchers studied the use of public benefits following passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996 and found that use of benefits by immigrants *who were not made ineligible by the law* dropped sharply, suggesting that the impact of the public charge rule could similarly impact enrollment.[39] For example: While food stamp use in noncitizen families fell 43% between 1994 and 1998, it fell 60% among refugees even though PRWORA did not restrict their eligibility for food stamps. Another study covering the same period found that Medicaid use among refugees fell by 39%, compared to 17% among other noncitizens, even though refugees remained eligible for Medicaid after PRWORA.[40]

At the same time, widespread confusion and fear about how public charge rules could impact families' ability to adjust their status among immigrants with U.S. citizen children eligible for and in need of federal benefits such as SNAP and Medicaid resulted in many being deterred from applying for benefits. For example, in 1999, just 40% of eligible citizen children living in households with immigrants participated in SNAP, compared to 70% of all eligible children.[41] Concerned that eligible individuals in immigrant households were unable to access federal benefits, the Clinton and George W. Bush Administrations took actions to clarify public charge rules and to ensure that benefit program applications and outreach were designed to address the fear and confusion. Participation rates subsequently improved significantly for eligible children in immigrant families.[42]

If immigrants and their family members drop their coverage in key health, nutrition and housing programs, short and long-term effects are likely. In the preamble to the proposed rule, DHS itself acknowledges that the rule could decrease the disposable income and increase the poverty of families and children—including U.S. citizen children—and that immigrants forgoing

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[38] Zaidee Stavely, *Proposed 'public charge' rule change stirs confusion over green card eligibility*, Public Radio International (PRI) the World (Nov. 28, 2018), https://www.pri.org/stories/2018-11-28/proposed-public-charge-rule-change-stirs-confusion-over-green-card-eligibility.

[39] Research reviewed in Jeanne Batalova, Michael Fix, & Mark Greenberg, Migration Pol'y Inst., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use* (June 2018) https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families.

[40] Michael Fix & Jeffrey Passel, Urban Institute, *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform 1994-97* (Mar. 1999), https://www.urban.org/sites/default/files/publication/69781/408086-Trends-in-Noncitizens-and-Citizens-Use-of-Public-Benefits-Following-Welfare-Reform.pdf.

[41] Karen Cunningham, *Trends in Food Stamp Program Participation Rates: 1999 to 2002*, Table 6 (Sept. 2004). Cited in Sharon Parrott, et al., *Trump "Public Charge" Rule Would Prove Particularly Harsh for Pregnant Women and Children* (May 1, 2018), https://www.cbpp.org/research/poverty-and-inequality/trump-public-charge-rule-would-prove-particularly-harsh-for-pregnant#_ftn4.

[42] Esa Eslami, *Trends in USDA Supplemental Nutrition Assistance Program Participation Rates: Fiscal Year 2010 to Fiscal Year 2015*, prepared for the Food and Nutrition Service, U.S. Department of Agriculture (June 2016), https://www.fns.usda.gov/snap/trends-usda-supplemental-nutrition-assistance-program-participation-rates-fiscal-year-2010-fiscal.

benefits could experience lost productivity, adverse health effects, medical expenses due to delayed healthcare and increased disability claims.[43]

The chilling effect will negatively impact the Massachusetts economy

The "chilling effect" of the proposed rule will also have profound and negative effects on the entire Massachusetts economy. There are approximately 500,000 individuals in Massachusetts who live in households with at least one non-citizen family member and in which a family member is receiving one or more public benefits including cash welfare, SSI, Medicaid or SNAP including 130,000 US citizen children.[44] Based on past experience of enrollment declines among eligible citizen children after the passage of PRWORA, enrollment drop off may be in the range of 15-35%. Aside from the harm to families, such enrollment declines will harm the Massachusetts economy. See Table 2.

Table 2. Economic and Fiscal Impacts of Reduced Food and Medical Assistance in Massachusetts

15% Disenrollment			25% Disenrollment			35% Disenrollment		
Loss of Federal Funds (Millions)	**Potential Economic Ripple Effects (Millions)**	**Potential Jobs Lost**	**Loss of Federal Funds (Millions)**	**Potential Economic Ripple Effects (Millions)**	**Potential Jobs Lost**	**Loss of Federal Funds to (Millions)**	**Potential Economic Ripple Effects (Millions)**	**Potential Jobs Lost**
$237	$465	3,168	$395	$776	5,281	$554	$1,086	7,393

Source: Estimate of direct loss calculated by the Center on Budget and Policy Priorities; economic ripple effects and jobs lost estimated by the Economic Policy Institute. State data tables, http://fiscalpolicy.org/wp-content/uploads/2018/11/50-states-economic-impact-of-public-charge-1.pdf

People of color in Massachusetts will be disproportionately impacted

The proposed rule will have a disproportionate impact on people of color in Massachusetts. While people of color account for approximately 26% of the total Massachusetts population, of the 420,012 people who would be potentially chilled by the proposed rule, approximately 76% are people from communities of color. Table 3.The chilling effect will harm those living in a family with at least one non-citizen with income under 250% FPL,[45] who are both more likely to need support from non-cash benefits and to be financially eligible for such benefits, but for whom income is not a heavily weighted positive factor under the proposed rule.

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[43] 83 Fed. Reg. at 51234-35 & 51270

[44] Nancy Wagman, Mass. Budget and Pol'y Ctr., *A Chilly Reception: Proposed Immigration Rule Creates Chilling Effect for New Immigrants and Current Citizens* (Nov. 14, 2018), http://www.massbudget.org/report_window.php?loc=A-Chilly-Reception-Proposed-Immigration-Rule.html

[45] See, Table 3 at the 250% FPL threshold, infra.

Among people of color potentially chilled by the rule, an estimated 37.5% are Latino, 18.2% are Asian and 17.2 % are Black people.[46]

Latino Immigrants and Families

Latinos in Massachusetts, at 10.8% of the population, make up the largest ethnic group after White Non-Hispanics, and Latinos also make up the largest ethnic group potentially chilled by the proposed rule. See Table 3. The proposed rules will exacerbate existing disparities which already disadvantage Latinos in Massachusetts.

Latinos in Massachusetts participate in the labor market at high rates, but have significantly lower incomes than non-Latinos, and, as a result, participate more heavily in the kind of non-cash benefits that support low wage work such as Medicaid and SNAP.[47] For example, the poverty rate for Latinos in Massachusetts in 2016 is extremely high, 24% compared to non-Latinos, 8%. For children, the disparity is even larger with 31% of Latino children living in poverty compared to 9% of non-Latino children.[48] There is as well a severe income disparity between Latinos and non-Latinos. Statewide, Latino median household income, $55,417, is about two thirds of the non-Latino median household income, $82,673.[49]

This huge household income gap appears despite data that show a proportionally larger participation of Latinos in the labor market than non-Latinos, even considering different citizenship status. For example, naturalized Latino citizens 16 years or older have a higher labor force participation at 77% than US-born non-Latinos (67%), and non-citizen Latinos 16 years old or older have a higher rate of labor force participation, 76.4%, than their corresponding non-Latino counterparts, 64.7%.[50]

This disparity in income, despite high rates of employment, is one of the factors that explains why Latino families receive means-tested public benefits at higher rates than non-Latinos. A larger share of Latino families received public benefits compared to non-Latinos across all citizenship statuses in Massachusetts.[51]

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[46] See Table 3 which is based on 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 20122016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC) MABLE PUMA-County Crosswalk. Custom Tabulation by Manatt health, 9/30/2018. Found online at https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population.

[47] Gaston Institute, U. Mass. Boston, *The Effect of Proposed Trump Administration Changes in Federal Public Charge Policy on Latino US Citizen Children in Massachusetts* (Aug. 2018)("Gaston Institute), http://www.immigrationresearch-info.org/system/files/The percent20Effect percent20of percent20Proposed percent20Changes percent20in percent20Federal percent20Public percent20Charge percent20Policy percent20MA.pdf.

[48] U.S. Census Bureau, *Public Use Microdata Samples, 2016 American Community Survey 1-year estimates* (2018).

[49] Federal Reserve Bank of Boston, *The staggering wealth gap between minorities of color and white populations in the city of Boston is thoroughly documented* (Mar. 25, 2018), https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx,

[50] Gaston Institute, note 46 supra, Table 2.

[51] *Id*. Figure 2 and Table 3.

The disproportionate impact will be especially hard on US born Latino children living in families with at least one non-citizen who disenroll from MassHealth based on the chilling effect described elsewhere. A recent report estimated a potential drop in MassHealth coverage from the "chilling effect" that could increase the percentage of uninsured US-born Latino children in Massachusetts from 2.6% to 16-35%.[52]

For progress to continue in the Latino community and our nation, immigrants should have an opportunity to support the resilience and upward mobility of their families. The proposed changes fail in this respect as Latino immigrant families would be limited in their use of support programs that help families put food on the table, access health care, and afford a roof over their heads.

Black and Asian Immigrants & Families

In the aftermath of the 1996 Welfare Reform Acts, cuts to public benefits had lasting and devastating repercussions on Black people, including Black immigrants.[53] In the decade after these laws passed, extreme poverty doubled to 1.5 million.[54] The proposed public charge rule would have a similarly chilling effect on Black immigrants and their families. In addition, like all Black people in America, Black immigrants face employment discrimination. This means that, Black immigrant women and men also earn considerably lower wages than U.S.-born non-Hispanic white women and men.[55] This makes it more likely that they or their families would benefit from programs that support work by helping them access health care, nutritious food, and stable housing.

Asians today make up a larger share of immigrants due in no small part to changes in U.S. immigration law in the 1960s that finally repealed restrictions on Asian immigration dating back to the Chinese Exclusion Act of 1882. [56] Ironically, the original "public charge" exclusion was enacted in that same year of 1882, seeking to restrict Irish immigrants fleeing the potato famine.[57] Massachusetts was among the states seeking to exclude starving Irish immigrants in those dark days, but this is a legacy of which we want no part today.

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[52] *Id*. Figure 4 and Table 4.
[53] V. Clark, *Impact of the 1996 Welfare Reform and Illegal Immigration Reform and Immigrant Responsibility Acts on Caribbean Immigrants*. J. Of Immigrant & Refugee Services, *2*(3/4), 147-166 (2004).
[54] H. Luke Shaefer, University of Michigan and Kathryn Edin, Harvard University, *Rising Extreme Poverty in the United States and the Response of Federal Means-Tested Transfer Programs* (May 2013), http://npc.umich.edu/publications/u/2013-06-npc-working-paper.pdf.
[55] Randy Capps, Kristen McCabe, and Michael Fix, Migration Pol'y Inst., *Diverse Streams: African Migration to the United States*, 17 (Apr. 2012), https://www.migrationpolicy.org/research/CBI-african-migration-united-states.
[56] U.S. Census Bureau, *The Asian Population: 2010* (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf and U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2010* (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf.
[57] Green E. First, *They Excluded the Irish*, The Atlantic. (Feb. 2, 2017), https://www.theatlantic.com/politics/archive/2017/02/trump-poor-immigrants-public-charge/515397.

Children will be negatively impacted: The rule would pressure families to forego the health, nutrition and housing their children need for healthy growth and development or risk family separation.

The proposed public charge rule would have a particularly significant and harsh effect on children by creating significant obstacles to their access to the health, nutrition and housing they need for healthy growth and development as discussed further below. The rule would force families to choose between risking family separation and losing the opportunity to gain a stable immigration status. The proposed rule would put families under pressure to forgo the food, medical care, and housing they need for their children's health and well-being, thereby potentially putting them at risk of involvement in the child welfare system based on concerns that they are not adequately providing for their children. By forcing families to choose between their ability to become legal permanent residents and eventually U.S. citizens and thereby provide a lifetime of stability for their children, or to keep their children on Medicaid and/or CHIP, SNAP and Housing benefits, the public charge rule would harm children and place families with fit and loving parents at risk of child welfare system involvement and family separation. In addition to causing damaging and needless trauma to children and their families, these family separations would also impose additional costs on state governments who would have to pay for foster homes in which to place these children.

Domestic violence victims will be negatively impacted

Access to public benefits is particularly important to victims of domestic violence who can often only leave their abuser with assistance from public benefits. Just as many victims of domestic violence return to their batterers because of financial needs – this is even more of an issue for immigrant victims who have many fewer options available.[58] The chilling effect will harm both those victims who are exempt from public charge rules (see comments *supra* regarding § 212.20) as well as many immigrant victims who do not qualify for VAWA, T, U, or asylum status, such as those who have not sought protection from police or law enforcement. Immigrant victims of domestic violence frequently fear reprisals on family member in their home countries should they seek out legal recourse and fear the police themselves because of their own experience with police – or are too isolated by their abuser and language issues. Asylum, regrettably, has also been foreclosed from these victims owing to recent U.S. Department of Justice interpretations based on domestic violence as persecution – even where the victim has evidence that her home country cannot or will not provide protections.

Access to justice in Massachusetts will be impaired

Also important for Massachusetts is the impact of the proposed regulations on court fee waivers for litigants. The state's "Indigent Court Costs Act" requires courts to waive certain courts costs and fees; one of the automatic waiver eligibility categories is the receipt of certain

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[58] Shaina Goodman, Nat'l Resource Ctr. on Domestic Violence (NRCDV), *The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims' Economic Security* (Jan. 2018), https://vawnet.org/material/difference-between-surviving-and-not-surviving-public-benefits-programs-and-domestic-and.

identified means-tested public benefit program payments including Medicaid. Mass. Gen L. Ch. 261, §§ 27A-G. To the extent that the chilling effect of the proposed regulations will deter immigrant families from participating in Medicaid and other means-tested programs, it will have a direct negative impact on the ability of courts in Massachusetts to grant fee waivers, which are essential to insure that the legal system is accessible to people with limited financial means.

For these reasons and those additional reason set out below, we strongly oppose the addition of any of the non-cash benefits that the rule proposes to add to the definition of public benefit: SNAP, Section 8 Housing Assistance, Section 8 Project-Based Assistance, Federal Public (Subsidized) Housing, Medicaid, and the Medicare Part D Low-Income Subsidy and we oppose the arbitrary monetization and duration standards proposed to replace the concept of primary dependence.

MEDICAID should not be added to the public charge test

a. The role of government assistance in health care coverage at all income levels

In the United States, only a tiny minority are self-sufficient when it comes to the costs of health coverage. Medicaid is an essential part of the largely government-assisted system of coverage that most Americans rely on to help pay for the high costs of health coverage. Government assistance extends to those with employer-sponsored insurance, private insurance subsidized through premium tax credits and Medicare as well as those covered by Medicaid or CHIP:

- In 2017, 56% of individuals were insured in employment-sponsored plans.[59] The compensation employees receive in the form of employer-paid premium contributions is not subject to taxation. The employer-sponsored insurance exclusion costs the federal government an estimated $260 billion in income and payroll taxes in 2017 making it the federal government's single largest tax expenditure.[60]
- 16% of the insured directly purchase coverage.[61] Those who directly purchase coverage include 9,229,769 individuals with income up to 400% of the poverty level who received premium tax credits under the Affordable Care Act.[62]

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[59] Edward R. Berchick, et al., *Health Insurance Coverage in the United States: 2017, Current Population Survey Report*s, Table 1 (Sept. 2018) (estimates not mutually exclusive), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-264.pdf,

[60] Tax Policy Center, *Key Elements of the U.S. Tax System, How does the tax exclusion for employer sponsored health insurance work?* (last visited Dec. 6, 2018), https://www.taxpolicycenter.org/briefing-book/how-does-tax-exclusion-employer-sponsored-health-insurance-work.

[61] *Health Insurance Coverage*, 2017, note 59 supra.

[62] Kaiser Family Foundation, *State Health Facts, Estimated Total Premium Tax Credits Received by Marketplace Enrollees* (Feb. 2018), https://www.kff.org/health-reform/state-indicator/average-monthly-advance-premium-tax-credit-aptc/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

- In 2017, 17.2% of individuals were insured through Medicare. [63] General federal revenues were the largest single source of Medicare financing — 43% of Medicare's income came from general revenue funds in 2018, up from 25% in 1970.[64] Payroll taxes, premiums, and other receipts covered only 57% of Medicare's costs in 2018.
- 19.2% of individual are insured through Medicaid, a cooperative federal-state program in which states bear at least 50% of the cost and, within federal parameters, determine eligibility standards and spending.
- An additional 8.8% of US residents were uninsured.

b. The role of Medicaid and CHIP in Massachusetts' successful health reform

The proposed rule would frustrate State policies that have chosen to extend Medicaid eligibility as broadly as possible as specifically authorized by Congress. In Massachusetts, the expansion of Medicaid and CHIP is part of a larger state policy goal of providing near universal coverage that the State has pursued since 2006. Massachusetts health reform has been a success: Uninsurance is down, access to health care is up, self-reported health has improved, unemployment has not increased.[65] Expanded health coverage in Massachusetts reduced the amount of debt past due, improved credit scores, reduced personal bankruptcies and reduced third-part collections.[66] However, these achievements will be jeopardized by the proposed rule's expanded definition of public benefits.

Under a Massachusetts state health reform enacted in 2006 and later modified under the Affordable Care Act, Massachusetts has aimed to create a system of coverage for almost all state residents. [67] A variety of subsidized programs build on employer sponsored insurance and Medicare to accommodate different family circumstances and enable families to retain coverage when their circumstances change. Medicaid and CHIP have been an integral part of the system of coverage. To the extent families drop coverage to avoid an adverse public charge determination or based on the "chilling effect" it will reverse twelve years of progress in Massachusetts in building a system of coverage.

Under its 2006 health reform law, Massachusetts reduced its rate of the uninsured from 10.3% in 2006 to 3.7% in 2013.[68] Since implementation of the Affordable Care Act in 2014,

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[63] *Health Insurance Coverage* 2017, note 59 supra.
[64] Peter G. Peterson Foundation, *Budget Explainer: Medicare* (July 10, 2018), https://www.pgpf.org/budget-basics/budget-explainer-medicare
[65] Geoffrey T. Sanzenbacher, *What We Know About Health Reform in Massachusetts*, Ctr. for Retirement Res. at Boston College, No. 14-9 (May 2014), http://crr.bc.edu/wp-content/uploads/2014/05/IB_14-9-508.pdf.
[66] Bhashkar Mazumder and Sarah Miller, *The Effects of the Massachusetts Health Reform on Household Financial Distress*, Am. Econ. J.: Econ. Pol'y, (8(3): 284-313 (Aug. 2016), https://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.20150045.
[67] Chapter 58 of the Mass. Acts of 2006.
[68] Carmen DeNava-Walt et al., *Income, Poverty and Health Insurance Coverage in the United States: 2006,* Table 8, Current Population Survey Reports (Aug. 2007) (3 year average 2004-2006 rate in MA was 10.3% compared to US rate of 15.3 %) and Jessica C. Smith, et al., *Health Insurance Coverage in the United States: 2013, Current Population Survey Reports*, Table A-1 (Sept. 16, 2014) (MA lowest rate of uninsured at 3.7% compared to US rate of 14.5%).

including the expansion of Medicaid in 33 States and D.C, and creation of new subsidized private insurance, the overall rate of the uninsured in the U.S. dropped from 14.5% in 2013 to 8.7% in 2017. [69] With the head start from its 2006 health reform, Massachusetts today has the highest rate of health care coverage of any state in the nation. There have been many individual and community benefits to such broad-based coverage. These gains will be imperiled by the proposed rule if non-citizens forego medical benefits as intended by the proposed rule and if the rule has the broader chilling effect that the research tells us is likely.[70]

Eligible non-citizens who enroll in the Massachusetts Medicaid and CHIP program, known as MassHealth, are simply participating in a mainstream programs in which a large segment of the population rely. MassHealth provides coverage to more than one in four states residents.[71] It provides health coverage to 42% of all children in Massachusetts and pays for 39% of all births. MassHealth covers 66% of people in families earning no more than 133% FPL and 51% of all people with disabilities.[72] Indeed, in Massachusetts, which has had an individual mandate since 2007, failing to enroll in affordable coverage such as MassHealth, is subject to a state tax penalty.[73]

The costs of MassHealth are shared between the state and federal government, and federal law gives the state considerable flexibility in the scope of both Medicaid and CHIP. The broad reach of the MassHealth program is the direct result of public policy decisions made by Congress and the Massachusetts legislature for the benefit of state residents and the community as a whole.

Massachusetts has also elected to take advantage of every option available to it under federal law to extend Medicaid and CHIP to immigrants. Since PRWORA, the eligibility rules for immigrants to qualify for non-emergency Medicaid have been strict: Most legal permanent residents (LPRs) are not eligible until they have had their status for at least five years. Even after five years, State Medicaid agencies may choose not to extend eligibility to all LPRs. Massachusetts has elected to extend eligibility to all qualified immigrants no longer subject to the five-year bar.

In 2009, Congress changed the eligibility rules to give States the option to cover pregnant women and children who are "lawfully residing" in the U.S. States that elected the option could extend Medicaid and CHIP to pregnant women and children LPRs with no 5-year bar as well as to certain intending immigrants and certain non-immigrants. The CHIPRA statute specifically provided that if state's elected this option, a child or pregnant woman's sponsor

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[69] Edward R. Berchick, et al., *Health Insurance Coverage in the United States: 2017, Current Population Survey Report*s, Table 6 (Sept. 2018) (Only 2.8% of Massachusetts residents were uninsured in 2017 compared to the national rate of 8.7%). https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-264.pdf.
[70] *See* Samantha Artiga et al., Kaiser Family Foundation, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid* (Oct. 2018), http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-the-Proposed-Public-Charge-Rule-on-Immigrantsand-Medicaid.
[71] Ctr. for Health Law and Econ., U. Mass. Medical School, *MassHealth: The Basics, Facts and Trends* (Sept. 2017) https://bluecrossmafoundation.org/publication/updated-masshealth-basics-september-2017.
[72] *Id.*
[73] Mass. Gen. Law Ch. 111M.

would *not* be liable to repay the costs of Medicaid or CHIP benefits which were not to be considered unreimbursed costs. [74] Massachusetts elected the CHIPRA option to extend eligibility to legally residing pregnant women and children soon after it became available.

Ironically, it is primarily the pregnant women and children who benefit from CHIPRA who are most likely to be subject to the public charge test, and most likely to disenroll from the health benefits that Congress and electing States have expressly chosen to extend to them. Most "qualified" immigrants under PRWORA have been legal permanent residents for five years or more or are refugees and other groups exempt from public charge. It is only among the "lawfully residing" immigrants under the CHIPRA option that beneficiaries may include intending immigrants such as those with an approved immediate relative petition and a pending application for adjustment as well as certain non-immigrants who may be seeking to extend or change their non-immigrant status.

The proposed rule will be frustrating the will of Congress in creating the CHIPRA option by deliberately incentivizing eligible pregnant women and children to drop Medicaid. Medicaid coverage not only helps ensure access to coverage for children but it can also promote positive long term health, educational and earnings outcomes that will be lost if children forego coverage for fear of public charge.[75] Similarly, by discouraging immigrant mothers of future US citizens from seeking prenatal care the proposed rule will likely increase the percentage of their children who are born prematurely and/or at a low birth weight (LBW). According to 2009 data from the March of Dimes, during the first year of life a premature/LBW infant incurred over $50,000 more in medical bills on average than an infant born at full gestation and/or weight[76]. The increased costs of these US citizen children will often be borne by Medicaid or CHIP. In addition, LBW babies have a higher risk of physical and mental disabilities, including blindness, chronic lung disease and cerebral palsy.[77] These disabilities will result in higher taxpayer costs throughout the children's lifetimes, in the form of higher medical costs, increased education costs, and Social Security disability payments; they may also reduce the children's chances of becoming self-sufficient as adults.

c. The importance of Medicaid to working families in Massachusetts

MassHealth is an important support for working families based on financial eligibility rules that exceed the poverty level and policies that explicitly support working families.[78]

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[74] Children's Health Insurance Reauthorization Act of 2009 (CHIPRA), Pub.L. 111-3, Section 214, 42 U.S.C. 1396b(v)(4)(B) ("In the case of a State that has elected to provide medical assistance to a category of aliens under subparagraph (A), no debt shall accrue under an affidavit of support against any sponsor of such an alien on the basis of provision of assistance to such category and the cost of such assistance shall not be considered as an unreimbursed cost.")

[75] *See* Paradise, *infra*; Wagnerman et al., *infra*; Andrew Goodman-Bacon, Nat'l Bureau of Econ. Res., *The Long-Run Effects of Childhood Insurance Coverage: Medicaid Implementation, Adult Health, and Labor Market Outcomes*, Working Paper 22899 (Dec. 2016), https://www.nber.org/papers/w22899.pdf.

[76] March of Dimes, *Premature Babies Cost Employers $12.7 Billion Annually* (Feb. 7, 2014), https://www.marchofdimes.org/news/premature-babies-cost-employers-127-billion-annually.aspx.

[77] Nat'l Conference of State Legislatures, *Low Birthweight Births* (Nov. 2011), http://www.ncsl.org/research/health/low-birthweight-births.aspx.

[78] MassHealth: The Basics, note 71 *supra*.

Pursuant to options available to States under Medicaid, MassHealth provides coverage without regard to asset ownership for individuals under age 65 and not in need of nursing facility care. Upper income limits are set at 133% FPL for most adults under age 65, but higher for pregnant women (200% FPL) and certain others. For children, the upper income limits for the Medicaid program are 200% FPL for infants, and 150% FPL for other children and youth under age 21. The CHIP program extends eligibility to children in families with income up to 300% FPL and charges a sliding scale premium based on income for those from 150-300% FPL. A work incentive program for low income parents called "Transitional Medical Assistance" provides 12-months of continued MassHealth coverage after a change in earnings increase income above 133% FPL. A MassHealth Premium Assistance program requires eligible families with access to employer-sponsored insurance to enroll and reimburses them for some or all of the added premium cost based on family income.

MassHealth programs for disabled individuals charge a sliding scale premium instead of imposing any upper income limit for children and working disabled adults. The working disabled program enables individuals with disabilities to work without risking loss of the medical benefits and supports that make work possible. Indeed, Medicaid is a particularly important for children and individuals with disabilities many of whom have Medicaid as secondary to employer sponsored coverage or Medicare. For children, the Early and Periodic Screening Diagnosis and Treatment Program ensures coverage for developmental assessments for infants and young children, well-child visits, and vision, dental and hearing services that may not be covered by commercial insurance. Medicaid also provides a range of long term services and supports that enable individuals with disabilities to live in the community rather than in an institutional setting that are not available in Medicare or commercial insurance. In sum, MassHealth is an essential part of the government-assisted continuum of health care coverage for people up and down the income scale including those with employer-sponsored insurance.

d. Negative impact on health care providers and the larger community - exacerbating the shortage of direct care workers

If the likelihood of receipt of non-cash benefits that support low wage work is the basis of a public charge determination as proposed, it will not only harm hard-working immigrants, it will harm the many industries in Massachusetts that rely on an immigrant workforce. In the health care field, it will exacerbate the shortage of direct care workers at great cost to elderly and disabled Americans and state budgets.

Immigrants make up significant share of workforce in Massachusetts especially among health care workers. Foreign born workers make up 29% of employees in hospitals, 47% of employees in nursing homes and 53% of employees in home health in the greater Boston area.[79]

The Bureau of Labor Statistics projects that employment of home health aides and personal care aides is projected to grow 41% from 2016-2026 as the baby-boom population ages

[79] Paul Osterman et al., JVS Center for Economic Opportunity, *Boston's Immigrants: An Essential Component of a Strong Economy* (May 2017) (Calculations based on 2014 and 2015 American Community Survey data for adults 24-65 in Suffolk and Middlesex counties and parts of Plymouth and Norfolk counties), https://www.jvs-boston.org/wp-content/uploads/2017/11/Osterman-Report-Final.pdf.

and the elderly population grows.[80] In Massachusetts, older adults are the fastest growing segment of the population especially among those aged 85 and over who are also those most likely to have complex health care needs. The older population is also becoming increasingly diverse in terms of race, ethnicity and language.[81]

Today in Massachusetts, almost one in four state residents are age 65 or older or under 65 with a disability,[82] and there is already a shortage of certified nursing assistants and direct care workers. One in seven positions for certified nursing assistants in nursing homes are vacant, and industry leaders say a further loss of immigrant workers would be "devastating.[83] According to the state's Office of Elder Affairs,

> "Currently, the rate of workers leaving the direct care workforce outpaces the rate of those entering. Direct care jobs often involve low pay, limited or no benefits, inadequate supervision, and unpredictable/unstable hours. Nearly 50% of this workforce receives some type of public assistance. …This has led to the current crisis: home care organizations are unable to find enough workers to meet the demand."[84]

In Massachusetts, the median pay for home health aides in 2017 was $14.78 per hour, and for personal care attendants, $13.85 per hour.[85] An individual working full time at this rate of pay in a household of three would not be financially eligible for any cash assistance benefit but would be financially eligible for the Massachusetts Medicaid program, SNAP and federal subsidized housing. It would be almost impossible to make ends meet on low wage work in a high cost state like Massachusetts without the support of at least one of these public benefits. If direct care worker forego such supports to avoid a public charge determination, their own health and well-being may be compromised.

This dynamic is not unique to Massachusetts. Nationally, one in four direct care workers are immigrants, and 42% of both immigrants and US-born direct care workers receive public benefits.[86] While the demand for home health aide jobs will grow by 48% between 2012 and 2022, the population of native-born workers who typically take such positions is projected to

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[80] Bureau of Labor Statistics, *Occupational Outlook Handbook, Home Health Aides and Personal Care Aides*, (last visited Nov. 7, 2018), https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm.
[81] Commonwealth of Massachusetts, Executive Office of Elder Affairs, *State Plan on Aging, 2018-2021* (Oct. 2017), https://www.mass.gov/files/documents/2018/06/14/MA%20State%20Plan%20on%20Aging%202018-2021%20Approved.pdf.
[82] US Census, *QuickFacts Massachusetts*, (last visited Nov. 8, 2018)(16.2% of population age 65 and over, 7.9% under age 65 and disabled), www.census.gov/quickfacts/ma.
[83] Melissa Bailey, *As Trump Targets Immigrants, Elderly Brace To Lose Caregivers*, Kaiser Health News (Mar. 26, 2018), https://khn.org/news/trump-immigration-policies-put-immigrant-caregivers-and-elderly-patients-at-risk/.
[84] *State Plan on Aging*, supra.
[85] Bureau of Labor Statistics, *Occupational Employment Statistics* (last visited Nov. 7, 2018), https://www.bls.gov/oes/current/oes311011.htm#st and https://www.bls.gov/oes/current/oes399021.htm#st.
[86] Robert Espinoza, *Immigrants and the Direct Care Workforce*, PHI (Sept. 7, 2018), https://phinational.org/resource/immigrants-and-the-direct-care-workforce-2018/.

shrink.[87] A majority of home health care administrators surveyed identified "caregiver shortages" as one of the top threats to growing their business.[88]

A shortage of direct care workers will predictably lead to adverse consequences for elderly and disabled Americans, and increased costs for all levels of government. The cost-benefit analysis fails to address these predictable costs of the proposed public charge rule:

- More elderly and disabled Americans going without home care services will likely lead to worse health outcomes and increased medical costs for Medicare and Medicaid

- More family members may forego or reduce employment to provide care for elderly or disabled family members resulting in lower income, lower tax revenues and reduced consumer spending.

- If wages rise to address the shortage, it will increase costs to the state Medicaid programs and state agencies that primarily pay for these services.

Immigrants are also a significant percentage of the high skilled health care workforce. One in four physicians in Massachusetts was educated abroad and 13% of nurses are foreign born.[89] Physicians and other high skilled professionals may have no problems with the public charge test themselves or may already be legal permanent residents or naturalized US citizens. However, the proposed rule indicates that the sponsor's ability to support an intending immigrant is just one positive factor which is unlikely to offset the many negative factors or heavily weighted negative factors that the proposed rule associates with an elderly or disabled family member. Professionals who have a spouse or child with a disability or who may want to sponsor an aging parent may choose not to bring their skills to a country that will not welcome their family members.

e. Negative Impact on Hospitals, Health Centers and School Districts

- **Hospitals:** Hospitals provide care for all community residents and are important sources of employment and economic growth. Medicaid makes up a significant share of hospital revenue. Expanded health coverage in Massachusetts was associated with a 26% decrease in hospital bad debt.[90] The incentive to drop Medicaid coverage intended by the proposed rule coupled with the chilling effect will reduce the ability of hospitals to meet community health needs. Among 95 hospitals in Massachusetts, up to $457 million in

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[87] New American Economy, *A Helping Hand: How Immigrants Can Fill Home Health Aide Shortages in America's Rural Communities (*Sept. 2016), http://www.newamericaneconomy.org/wp-content/uploads/2017/04/NAE_HHA_V4.pdf.
[88] *Id.*
[89] New American Economy, *Immigrants and the economy in: Massachusetts* (last visited Dec. 6, 2018), https://www.newamericaneconomy.org/locations/massachusetts/.
[90] Alejandro Arrieta, *INQUIRY: The Impact of the Massachusetts Health Care Reform on Unpaid Medical Bills*, The J. of Health Care Org., Provision and Financing, Vol. 50(3): 165-176 (March 2014), https://journals.sagepub.com/doi/abs/10.1177/0046958013516580.

annual Medicaid payments are put at risk by the proposed rule including $250 million in payments for non-citizens and $207 million for payments to their US citizen family members.[91] While individuals who forego Medicaid in fear of public charge will likely forego routine and preventive care, some will require emergency or acute care and hospitals will likely see uncompensated care costs rise. In areas with large immigrant populations, the destabilizing impact of the rule could threaten the hospital's ability to meet community needs.

- **Community Health Centers:** Like Hospitals, Health Centers provide care for all community residents, and Medicaid is the largest source of health center funding.[92] As health centers begin to feel the impact of the chilling effect on patients who forego Medicaid coverage, they will lose patient revenue and the ability to continue providing the same level of service in the community. Assuming that somewhere between 50% of non-citizen patients and 25% of their family members drop coverage, Massachusetts health centers can expect to see a loss in Medicaid revenue from $32.4 million to $44.4 million, a loss of patients from 23,251 to 31,787 and a loss in medical staff of 335 to 458.[93] Massachusetts would be one of four states with the largest adverse impact on its community health centers from the chilling effect of the proposed rule.

- **School Districts:** Massachusetts also has a robust school-based Medicaid program which returns over $100 million to local school districts to reimburse them for health-related costs incurred for Medicaid enrolled children while in school.[94] The public benefit definition in the proposed rule purports to exclude school-based Medicaid services and Medicaid-paid services required under IDEA. See, §§ 212.21(b)(2)(i)(B) and (C). However, schools can only bill for school-based medical services if a child is enrolled in Medicaid. If families drop Medicaid for their children either to avoid the heavily weighted negative factor for a non-citizen child who may be subject to the public charge test or out of fear or confusion about adverse immigration consequences related to any family member's receipt of Medicaid, school districts will bear the full costs of school-based medical care.

f. Evidence That Medicaid Enhances Self-Sufficiency

Medicaid and CHIP play a key role in keeping both children and adults healthy and in addressing the needs of people with disabilities and chronic illnesses. Adult enrollees report substantially better access to care for almost every measure analyzed compared to similarly-

[91] Cindy Mann, et al., Mannatt Health, *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, Exhibit 6 (Nov. 2018), https://www.manatt.com/Insights/White-Papers/2018/Medicaid-Payments-at-Risk-for-Hospitals-Under-Publ.
[92] Leighton Ku, et al., Geiger Gibson/RCHN Community Health Foundation Research Collaborative, *How Could the Public Charge Proposed Rule Affects Community Health Centers?* (Nov. 2018), https://publichealth.gwu.edu/sites/default/files/downloads/GGRCHN/Public%20Charge%20Brief.pdf.
[93] *Id.* at Table 1.
[94] Massachusetts Office of Medicaid.

situated uninsured individuals.[95] Individuals with a usual source of care are less likely to use emergency department services.[96] By promoting access to primary care, preventive services and chronic disease management, Medicaid supports beneficiaries' ability to work and can help lift families above the poverty threshold.[97] State Medicaid programs are focused on promoting primary care and providing care management through delivery system and payment reform, not only to improve health outcomes but also to reduce costly and avoidable care.[98]

Over the past 15 years, through federal, state and local efforts, the uninsured rate among children in this country has dropped below 5%, with the improvements achieved largely through Medicaid and CHIP coverage.[99] The decision to forgo health care could have serious negative consequences. In particular, the children may lose access to benefits that, in their later years, could mean better health, higher educational achievement, more work, and greater earnings.[100] Children who are eligible for Medicaid do better in school, on average, and miss fewer school days due to illness or injury. They are also likelier to finish high school, attend college, and graduate from college.[101]

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[95] MACPAC, *Access and Quality/Key Findings on Access to Care*, (last visited Dec. 6, 2018), https://www.macpac.gov/subtopic/measuring-and-monitoring-access/.

[96] Winston Liaw et al., *The Impact of Insurance and a Usual Source of Care on Emergency Department Use in the United States*, Int. J. Family Med. (Feb. 9, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3941574/pdf/IJFM2014-842847.pdf; Tina Hernandez-Boussard et al., *The Affordable Care Act Reduces Emergency Department Use By Young Adults: Evidence From Three States*, 33 Health Affairs 1648 (Sept. 2014), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2014.0103.

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

[98] *See, e.g.*, Kathleen Gifford et al., Kaiser Family Foundation, *States Focus on Quality and Outcomes Amid Waiver Changes: Results from a 50-State Medicaid Budget Survey for State Fiscal Years 2018 and 2019* (Oct. 2018), https://www.kff.org/medicaid/report/states-focus-on-quality-and-outcomes-amid-waiver-changes-results-from-a-50-state-medicaid-budget-survey-for-state-fiscalyears-2018-and-2019; National Association of Medicaid Directors, State Medicaid Operations Survey: *Sixth Annual Survey of Medicaid Directors, FY 2017* (Sept. 2018), http://medicaiddirectors.org/wp-content/uploads/2018/09/NAMD-Survey-Report_General_FINAL.pdf.

[99] Jennifer Haley et al., Urban Institute, *Uninsurance and Medicaid/CHIP Participation Among Children and Parents: Variation in 2016 and Recent Trends* (Sept. 2018), https://www.urban.org/sites/default/files/publication/99058/uninsurance_and_medicaidchip_participation_among_children_and_parents_updated_1.pdf.

[100] See, for example, Georgetown University Health Policy Institute, Center for Children and Families, Medicaid Provides Needed Access to Care for Children and Families, (Mar. 2017), https://ccf.georgetown.edu/wp-content/uploads/2017/03/Medicaid-provides-needed-access-to-care.pdf; Michel Boudreaux, Ezra Golberstein, and Donna McAlpine, *The long-term impacts of Medicaid exposure in early childhood: Evidence from the program's origin*, J. of Health Econ. (Jan. 2016), https://www.sciencedirect.com/science/article/abs/pii/S0167629615001216.

[101] Sarah Cohodes *et al.*, *The Effect of Child Health Insurance Access on Schooling: Evidence From Public Insurance Expansions*, NBER Working Paper No. 20178 (May 2014), http://www.nber.org/papers/w20178.pdf.

MEDICARE - Premium and Cost Sharing Subsidies For Medicare Part D should not be added to the public charge test

The Medicare Part D Low Income Subsidy (LIS) reduces the costs of drug coverage for certain Medicare beneficiaries. Like the other non-cash programs that DHS proposes to consider for public charge purposes, the LIS program has higher financial eligibility rules than cash welfare programs and is available to more than the indigent making it a bad indicator of dependence on the government. Individuals with income up to 150% FPL, and countable assets of $14,100 for an individual or $28,150 for a couple qualify for LIS in 2018.[102] Further, the scope of benefits is limited to assistance with the costs of drugs which is hardly an indicia of dependence on government assistance for subsistence. Deterring individuals from participating in LIS, like deterring participation in the Medicaid, SNAP, and federally housing programs, will serve no useful purpose and will have profound negative impacts.

Most non-citizen Medicare enrollees are Legal Permanent Residents (LPR), although individuals who are "lawfully present" and have sufficient work history or have end-stage renal disease (ESRD) may also be eligible (e.g., immigrants with Temporary Protected Status).[103] LIS is only available to Medicare enrollees and does not have additional citizenship or residency requirements. The impact of the proposed inclusion of the LIS in the definition of public benefits will have the greatest impact on elderly individuals with a 10-year work history (40 quarters of coverage) who are either legal permanent residents subject to the admissions test when they return to the US after an absence of 6 months or more or intending immigrants who may have accumulated their work history while lawfully present in the US with a status such as TPS. It is difficult to see any purpose to a rule that would deny admission to long term elderly residents who have worked and paid taxes for 10 or more years for using a benefit as modest as LIS. If the rule operates as intended and causes such immigrants to forego LIS, it will also likely lead to worse health outcomes for Medicare enrollees and higher costs for Medicare non-drug spending.

Enrollment in Medicare Part D is voluntary. In 2018, 43 million Medicare beneficiaries are enrolled in Medicare Part D plans, including an estimated 13 million who receive the LIS.[104] Yet 12% of people with Medicare are estimated to lack creditable drug coverage.[105] The predictable consequence of the proposed rule is that more Medicare enrollees will either forego drug coverage altogether, or face greater difficulty affording medications through an unsubsidized Part D plan. Increased medication use and adherence achieved through expanded drug coverage for seniors have been associated with decreased spending for nondrug medical care[106] and reduced hospitalization rates among Medicare enrollees.[107] Thus, the effect of the

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[102] Kaiser Family Foundation, *Medicare Part D: An Overview of the Medicare Part D Prescription Drug Benefit* (Oct. 12, 2018), https://www.kff.org/medicare/fact-sheet/an-overview-of-the-medicare-part-d-prescription-drug-benefit/.

[103] For purposes of Social Security and Medicare, "lawful presence" is defined at 8 C.F.R. § 1.3. SSA, Program Operations Manual System (POMS) RS 00204.00.

[104] Medicare Part D Overview, *supra*.

[105] Medicare Part D Overview, *supra*.

[106] J. Michael McWilliams et al., *Implementation of Medicare Part D and Nondrug Medical Spending for Elderly Adults With Limited Prior Drug Coverage* , JAMA, Vol 306, No. 4, 402-409 (July 27, 2011), https://jamanetwork.com/journals/jama/fullarticle/1104150.

proposed rule may to *increase* the costs paid for under Medicare Part A and B or C. This is one of many costs of the proposed rule that DHS fails to consider. This will adversely affect Massachusetts where 74% of Medicare enrollees in Massachusetts were enrolled in Part D plans, [108] and 35% of Part D recipients also receive the Low Income Subsidy. [109]

Further, as discussed earlier in the section on Medicaid, almost all Americans rely on government assistance of one kind or another to afford the high costs of health care. Non-citizen Medicare LIS beneficiaries are among those whose tax dollars supported programs like Medicare during the 10 or more years during which they accumulated the required quarters of coverage. The Medicare Part D LIS may be more heavily supported by general revenues, but funding for the entire Part D program comes mostly from general revenues; premiums cover about one-quarter of all costs.[110] For 2019, Medicare's actuaries estimate that Part D plans will receive direct subsidy payments averaging $296 per enrollee overall and $2,337 for enrollees receiving the LIS; employers are expected to receive, on average, $553 for retirees in employer-subsidy plans.[111] Thus, the average LIS beneficiary is receiving added government assisted benefits of only $1784 per year compared to retirees in employer plans, less than 15% FPL if this were a "monetized" benefit under the arbitrary criteria proposed by the rule.

The negative health consequences of the proposed rule's inclusion of Medicaid and the Medicare Part D LIS are compounded by the inclusion of non-cash nutrition and housing benefits. Adequate nutrition and safe housing are both important social determinants of health.[112]

HOUSING ASSISTANCE should not be added to the public charge test

a) The proposed rule will undermine rather than promote self-sufficiency among noncitizens who leave or don't apply to housing programs in fear of being branded as public charges.

DHS asserts that the primary rationale for this proposed rule is to promote "self-sufficiency" among noncitizens.[113]

But if the chilling effect described earlier in these comments causes families, even those who may not be subject to the rule, to leave their housing programs, the result will be the

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[107] Christopher C Afendulis, et al., *The Impact of Medicare Part D on Hospitalization Rates*, Health Serv Res., 46(4): 1022–1038 (Aug. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3165176/.
[108] Jack Hoadley, et al, Kaiser Family Foundation, *Medicare Part D in 2016 and Trends over Time*, Exhibit 1.2 (Sept. 16, 2016), https://www.kff.org/report-section/medicare-part-d-in-2016-and-trends-over-time-section-4-the-low-income-subsidy-program/.
[109] *Id.* at Exhibit 4.3
[110] Medicare Part D Overview, *supra*.
[111] Medicare Part D Overview, *supra*.
[112] Lauren E. Taylor, et al., Blue Cross Blue Shield Foundation of Massachusetts, *Leveraging the Social Determinants of Health: What Works? (*June 2015), https://bluecrossmafoundation.org/sites/default/files/download/publication/Social_Equity_Report_Final.pdf.
[113] *See* Preamble at 5118.

opposite of DHS' stated goal. Pushing noncitizens out of affordable housing will discourage, not advance, their progress toward self-sufficiency.

DHS' mistaken notion that receipt of housing assistance will discourage self-sufficiency is not grounded in the real world of housing programs and market economics. For example, Massachusetts is the sixth most expensive rental market in the country.[114] In many areas of the state rents are so expensive and supply so limited that even relatively higher income, largely "self-sufficient" families can't afford private market rents (see comments infra). The upper income limit for federal housing programs is 80% of area median income –far higher than any standard limited to those who are indigent.

Stable, affordable housing, rather than encouraging excessive reliance, is a demonstrated platform for increased self-sufficiency and greater economic stability.[115] Growing up in public housing provides higher likelihood of employment, higher earnings, and lower rates of welfare use later in life.[116] Affordable housing correlates with a 12% decrease in Medicaid expenditures and leads to a higher probability of employment.[117] Families receiving housing assistance are less likely to be uninsured than other low-income families.[118] For children, housing subsidies promote improved physical and mental outcomes, educational achievement, and lower risk of incarceration as adults.[119] Housing assistance lifts about a million children out of poverty each year.[120] And of households currently receiving rental assistance, nearly 40% include children.[121]

Understanding the critical role of affordable housing in improving outcomes for low-income families, and to help families on the path to self-sufficiency, HUD develops and implements self-work and training programs within its federal housing programs. Indeed, in its most recent 2018 issue of *Evidence Matters*, HUD explains that "the agency has a special

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[114] National Low Income Housing Coalition, *Out of Reach 2018: Massachusetts* (2018), https://nlihc.org/oor/massachusetts#.

[115] MaryBeth Shinn, et al., *Predictors of Homelessness Among Families in New York City: From Shelter Request to Housing Stability*, 88 Am. J. Pub. Health 1651, 1654 (1998), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1508577/pdf/amjph00023-0057.pdf; Heintze, *infra*.

[116] Sandra J. Newman & Joseph A. Harkness, *The Long-Term Effects of Public Housing on Self-Sufficiency*, 21(1) J. Pol'y Analysis and Mgmt. 21, 34 (2002).

[117] Ctr. for Outcomes Res. and Educ., *Health in Housing: Exploring the Intersection Between Housing and Health Care* 7 (2016), https://www.enterprisecommunity.org/download?fid=5703&nid=4247 and Theresa C. Heintze, et al., *Housing Assistance and Employment: How Far-Reaching Are the Effects of Rental Subsidies?* 80 Soc. Serv. Rev. 635, 663 (2006).

[118] Alan E. Simon, et al., *HUD Housing Assistance Associated With Lower Uninsurance Rates And Unmet Medical Need*, 36 Health Aff. 1016, 1023 (2017).

[119] Priya Shankar, Richard Sheward, John T. Cook, et al., *The Positive Health Effects of Affordable Homes*, Child. HealthWatch 2 (2017), http://childrenshealthwatch.org/wp-content/uploads/CHW-SHA-Action-Report-for-web.pdf.; Maya Brennan, Patrick Reed, & Lisa A. Sturtevant, *The Impacts of Affordable Housing on Education: A Research Summary*, Ctr. for Housing Pol'y 1 (2014), http://media.wix.com/ugd/19cfbe_c1919d4c2bdf40929852291a57e5246f.pdf; Fredrik Andersson, et al., *Childhood Housing and Adult Earnings: Between-Siblings Analysis of Housing Vouchers and Public Housing* 32, (Nat'l Bureau of Econ. Research, Working Paper No. 22721 (2018), https://www.nber.org/papers/w22721.

[120] Trudi Renwick & Liana Fox, *The Supplemental Poverty Measure: 2016*, United States Census Bureau, (Sept. 2017), https://www.census.gov/content/dam/Census/library/publications/2017/demo/p60-261.pdf.

[121] Ctr. on Budget and Pol'y Priorities, *National and State Housing Fact Sheets & Data* (Aug. 2017), https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data

opportunity to deliver employment opportunities and work-force development for individuals who live in HUD-assisted housing."[122]

Examples of HUD employment and training programs include:

- HUD Secretary Ben Carson's recently unveiled Envision Centers ("The EnVision Center demonstration will offer HUD-assisted families access to support services that can help them achieve self-sufficiency . . .") [123]
- HUD's Jobs Plus program "…which consists of employment services, financial incentives and community supports is associated with increased annual earnings for nondisabled, working-age residents of public housing." [124]
- HUD's Family Self Sufficiency Program[125]
- HUD's Section 3 program [126]
- HUD's Family Investment Centers [127]

Because of the chilling effect of public charge rules, even families who may not be subject to them at all may feel pressured to leave or not apply to housing programs – and will lose opportunities for advancement and improved life outcomes created by these federally-funded housing programs that are meant to accomplish precisely what DHS claims to promote with this proposed rule.

This chilling effect may well leave families homeless and on the streets or in emergency shelters. They may end up without housing and far away from their home communities, thus making it difficult if not impossible to get to work, school, and other venues in which "self-sufficiency" could be achieved. The well-documented deleterious effects of homelessness will likely set back any progress these families have or might have achieved. For example, in the Boston area, the earnings of families who were homeless for even a short time were below two-thirds of the poverty threshold and these families had a higher likelihood of losing their jobs.[128] If the chilling effect forces families from stable housing, they will be less, rather than more self-

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[122] U.S. Dept. of Housing and Urban Dev., *Evidence Matters* (Summer/Fall 2018), https://www.huduser.gov/portal/sites/default/files/pdf/EM-Newsletter-summer-fall-2018.pdf.
[123] U.S. Dept. of Housing and Urban Dev., *Envision Centers* (last visited Dec. 6, 2018), https://www.hud.gov/envisioncenters.
[124] U.S. Dept. of Housing and Urban Dev., *JPI Jobs Plus Initiative Program* (last visited Dec. 6, 2018), https://www.hud.gov/program_offices/public_indian_housing/jpi and U.S. Dept. of Housing and Urban Dev., *Evidence Matters* (Summer/Fall 2018), https://www.huduser.gov/portal/sites/default/files/pdf/EM-Newsletter-summer-fall-2018.pdf.
[125] U.S. Dept. of Housing and Urban Dev., *Family Self-Sufficiency (FSS) Program Fact Sheet* (Feb. 2016), https://www.hud.gov/sites/documents/FSSFACTSHEET_FEB2016.PDF.
[126] U.S. Dept. of Housing and Urban Dev., *Section 3 Brochure* (last visited Dec. 6, 2018), https://www.hud.gov/program_offices/fair_housing_equal_opp/section3/section3brochure.
[127] U.S. Dept. of Housing and Urban Dev., *Public Housing and Family Investment Centers* (last visited Dec. 6, 2018), https://www.hud.gov/sites/documents/NAHA515.TXT.
[128] Office of Policy Dev. and Research, U.S. Dep't of Hous. and Urban Dev., *Family Options Study: 3-Year Impacts of Housing and Services Interventions for Homeless Families* 125 (2016), https://www.huduser.gov/portal/sites/default/files/pdf/Family-Options-Study-Full-Report.pdf; Matthew Desmond and Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 Soc. Programs 46, 59 (2016).

sufficient and DHS will have undermined rather than promoted the supposed overarching goal of this proposed rule.

b) There will be no reduction in federal housing payments if noncitizens leave housing programs as a result of this rule.

The preamble to the proposed rule attempts to estimate the number of immigrants who would leave or forego the HUD housing programs DHS deems as public benefits and the resulting savings in federal payments.[129] As DHS concedes, families will likely fear what will happen to them if they live in subsidized housing – even if they are exempt from the complex public charge rule and even if the subsidized housing they live in isn't one of the programs included in this rule. This chilling effect will cause people who are fully eligible for housing, and who may be almost entirely self-sufficient, and even who may not actually be receiving housing assistance, to leave their affordable housing or not apply.

DHS posits that the chilling effect will likely prompt 8,801 households to leave their housing programs. Based on that estimated drop in participation DHS predicts a reduction in federal housing expenditures of $71 million. [130] However, the rule won't produce any federal savings in the three HUD housing programs. No matter how many families who fear being branded as a public charge move out of their assisted housing, the units or vouchers will go to the next family on the list. The federal subsidy stream will continue generally unchanged. Program participation will remain the same and no savings will be realized.

Moreover, as DHS concedes, noncitizens participate in these housing programs at much lower rates than citizens. Although federal housing assistance for eligible family members of "mixed families" [131] is minimal, DHS nevertheless seeks to include housing in this proposed rule merely because the *total* federal expenditures for the programs are significant.

DHS recognizes that these programs do not involve the same level of expenditure as the other programs listed in this proposed rule, and that noncitizen participation in these programs is currently relatively low. *DHS nonetheless proposes to consider these programs as part of public charge determinations, for the above-stated reasons and because the total Federal expenditure for the programs overall remains significant* (emphasis supplied). [132]

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[129] "Moreover, the proposed rule would also result in a reduction in transfer payments from the federal government to individuals who may choose to disenroll from or forego enrollment in a public benefits program. Individuals may make such a choice due to concern about the consequences to that person receiving public benefits and being found to be likely to become a public charge . . . even if such individuals are otherwise eligible to receive benefits." Preamble page 51117.

[130] This figure in Table 52 shows average annual benefits per household of $8,121.16; the estimated reduction in transfer payments of $1 billion in federal rental assistance shown contains an obvious typographical error, 8,801 X $8,121 equals $71,472,921.00..

[131] See generally HUD regulation at 24 C.F.R 5.500 et seq. A mixed family is one whose members include those with citizenship or eligible immigration status, and those without citizenship or eligible immigration status. A family is eligible for the housing programs if at least one member is a citizen or has eligible immigration status. Family members who do not have eligible immigration status will pay market rent and no HUD dollars are used to subsidize them and a mixed family is eligible for prorated rental assistance.

[132] Preamble page 51167.

As explained above, there is no support for this rationale. It makes no difference if the total cost of these housing programs is "significant" since this rule will produce no savings in total federal housing expenditures.

In sum, although the unwarranted fears created by this rule will drive families out of their federal housing programs, it will do nothing to further DHS' stated goals of self-sufficiency and reductions in federal payments.

c) The proposed rigid thresholds for determining when a noncitizen receives or likely will receive public housing assistance are arbitrary, not based on evidence, and inapplicable to use of housing assistance.

A**s** explained in more detail elsewhere in these comments the proposed rule establishes very low thresholds to determine receipt of monetizable and non-monetizable public benefits. Use of monetizable public benefits in an annual amount greater than 15% of the Federal Poverty Guidelines for a household of one, or of non-monetizable benefits for twelve months or more in the preceding three years are strongly-weighted, most likely determinative, negative factors to assess the likelihood of becoming public charge. These amounts are so minimal that, for example, the 15% threshold for monetizable public benefits could mean five dollars per day per person – an absurdly minimal amount of housing assistance that might result in denial of a green card, admission to this country, extension of stay or change of status.[133]

DHS insists that a noncitizen who receives public benefits above these thresholds "is neither self-sufficient nor on the road to achieving self-sufficiency."[134] But this assertion fails to take into account the reality of housing markets and unaffordable rents which make use of housing assistance a useless measure to assess self-sufficiency.

The proposed rule cavalierly ignores the impact of affordable housing scarcity – especially in areas with hyper-inflated rents and rapid gentrification such as greater Boston. In many of these regions, families who qualify for housing assistance may nevertheless be largely self-sufficient and receive only a minimal amount of housing subsidy. Given skyrocketing rents in many communities and the HUD income limits for the three selected housing programs, many working class and middle income families still may need a small amount of housing assistance to bridge the affordability gap.

In Massachusetts, for example, the HUD determined statewide fair-market rent for a modest 2-bedroom apartment is $1,489 and a family would need an annual income of $59,571 to afford such a unit. In the Greater Boston area, the HUD fair-market rent for a 2 bedroom unit is even higher and a family would need $69,600 per year to rent a unit at the fair market rent of $1,740. Even a family earning $30/hour in greater Boston most likely couldn't afford a 2 BR unit

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

[134] Preamble page 51165.

at these rents. [135] Because the rents in the Boston metro area are so high - a cost of living factor that no individual family can control – HUD has determined that a family of four can earn up to $81,000 annually and still be eligible for federal housing assistance.[136] If that family uses no other public benefits but receives, or may in the future receive some small amount of housing assistance that crosses the thresholds established in this proposed rule, they will be deemed a public charge.

In Massachusetts there are only 63 affordable and available rental units per 100 families living at or below 50% of area median income.[137] The proposed rule fails to recognize that it is this scarcity of affordable housing, not a lack of individual self-reliance, that causes a significant portion of families to seek housing assistance. Rather than promoting self-sufficiency, the rule would sanction families for the housing markets in which they live and work.

Given the proposed low dollar thresholds and durational factors in the proposed rule, just about every family with a noncitizen member, including those that are "on the road to self-sufficiency" that receives, or might at some time in the future need housing assistance, would likely be branded as public charges.

d) Federally funded housing agencies and multifamily owners will face significant burdens and challenges if residents who remain in their housing developments lack nutrition and health benefits for fear of being branded as public charges.

DHS provides examples of possible harrowing and cruel consequences if immigrants "disenroll" or do not apply for benefit programs as a result of the chilling effect created by the rule.[138] The explicit harm to families who opt out of medical care and nutrition assistance is addressed in other sections of these comments. But in the housing arena, there are also consequences for the federally funded housing agencies and multifamily owners who will have to expend scarce resources and staff time to assist families who remain in their housing but may withdraw from health and nutrition programs.

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[135] National Low Income Housing Coalition, *Out of Reach 2018: Massachusetts* (2018), https://nlihc.org/oor/massachusetts#.
[136] HUD User, *FY 2018 Income Limits Documentation System* (last visited Dec. 6, 2018), https://www.huduser.gov/portal/datasets/il/il2018/2018summary.odn.
[137] National Low Income Housing Coalition, *Gap Report: Massachusetts* (2016), https://nlihc.org/gap/2016/ma.
[138] "Number of consequences that could occur because of follow-on effects of the reduction in transfer payments identified in the proposed rule. DHS is providing a listing of the primary non-monetized potential consequences of the proposed rule below. Disenrollment or foregoing enrollment in public benefits program by aliens otherwise eligible for these programs could lead to:

- Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment.
- Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated;
- Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient , and
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment". Preamble page 51270.

These agencies and owners are already reporting that families are fearful about the proposed rule even though they may not even be subject to its provisions. The chilling effect is a clear and present danger right now, indiscriminately instilling fear in *all* noncitizens – not just those subject to the rule itself. We recently spoke to a client living in public housing who was frightened about what this rule meant to her and her family. She is a US Citizen (naturalized years ago) and her 2 children are citizens as well. Her mother is a Legal Permanent Resident who is now afraid to leave the country for a planned trip to visit family abroad. W reassured her that no one in her family was subject to this rule and asked why she was so worried; it was what she had heard that made her concerned. She said: "I have been watching the internet, I saw news about it, they keep saying they are going to stop people from coming, and I was worried that if I used benefits I would get arrested or other bad stuff like that." These are the sorts of fears that housing agencies and owners will have to learn about and take time to advise their residents.

Examples of challenges that will be faced by housing agencies and owners whose residents may stay in their housing, but give up other necessary benefits include:

- Public housing agencies and HUD-assisted multifamily owners/managers are already working with insufficient federal funding and resources to keep their developments in decent shape and give the best services for their residents. If families and individuals in the housing feel compelled to go without health or nutrition services, these agencies and owners will be forced to manage problems and provide help and referrals for residents who may become sick, lack necessary medication or dental care and suffer from hunger or malnutrition. As DHS notes, management staff might have to handle outbreaks of communicable diseases among residents due to untreated illnesses.

- Many housing agencies and federally-funded owners, as required by federal law, employ residents, including eligible immigrants. These jobs, along with their stable and affordable housing, contribute to the residents' self-sufficiency efforts. If, however, these individuals or families give up Medicaid and SNAP assistance, it is likely that their job performance and attendance will suffer as they struggle to find medical care, medications and food for their families. A precarious workforce coping with these issues leaves housing agencies and owners with employment problems.

- Residents who are employed either by the housing agency or elsewhere will have to take time off and risk possible dismissal to meet the challenges caused by nutrition and health problems which are no longer addressed with SNAP and Medicaid. As a result, if a family's earned income is reduced as it tries to cope with the problems created by this rule, HUD would have to pay a higher subsidy to the housing agency or multifamily owner (see #2 above). If residents of assisted housing lose income due to this rule, it will cost the federal government more - defeating any notion of self-sufficiency and federal cost-savings.

  If residents participating in the federal Family Self-Sufficiency program and other similar federal housing training and employment programs can't keep up with their

required obligations because they will have to spend hours at food pantries and health clinics or stay home with sick, untreated children or other family members, they will lose the chance to earn more or further their education and training – undermining self-sufficiency opportunities created by the federal government. (See #1 above for examples of self-sufficiency programs).

- Moreover, DHS' draft public charge forms will require overworked, understaffed and under-resourced federal housing agencies and multifamily owners to provide extensive documentation and information verifying details of the housing benefits received by an applicant for adjustment of status. See, for example, draft Instructions for Form I-944 Declaration of Self-Sufficiency. These agencies lack the time and staff for this work.

- If families leave their housing to avoid this rule, each unit turnover will require time and money (painting, repairs, interviewing new families, voluminous paperwork, etc.).

The proposed rule does not provide or suggest additional funding from the federal government for housing agencies and multifamily owners who will be forced to cope with the extra work and expense required by this rule.

e) This rule will have a profound and far reaching chilling effect on immigrants and mixed families in the listed housing programs even if they are not subject to its provisions.

As detailed above, as with the other programs that DHS proposes as public benefits, the chilling effect of adding housing assistance will cause immigrant families to move out or not apply. This chilling effect will be especially pronounced on US citizen children who make up a significant share of "mixed status families."[139] Noncitizens in "mixed households" who do not claim eligible immigration status may sign a statement acknowledging their ineligibility for housing assistance and they will not receive a federal housing subsidy. The federal rental assistance is reduced (pro-rated) by the number of ineligible noncitizens and the family share of the rent increases.[140] Because of the chilling effect, however, these mixed status families are likely to move out or not apply for housing at all, even though their US children are eligible and no ineligible immigrants in the household may receive housing assistance, and even if no one in the household is subject to the rule. As DHS correctly observes in the preamble to the proposed rule, but neglects to make clear in the text of the rule itself, noncitizens in "mixed-status families" who are ineligible for and do not request or receive any financial housing assistance are *not* receiving a public benefit. [141] This inconsistency between the text of the rule and preamble

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[139] Randy Capps, Michael Fix, & Jie Zong, Migration Pol'y Inst., *A Profile of U.S. Children with Unauthorized Immigrant Parents* (Jan. 2016) https://www.migrationpolicy.org/research/profile-us-children-unauthorized-immigrant-parents.

[140] See HUD regulation at 24 C.F.R Part 5, Subpart E - Restrictions on Assistance to Noncitizens.

[141] "Specific to aliens, DHS notes that Section 214 of the HCD Act of 1980 requires that HUD may not make financial assistance available for the benefit of any alien, notwithstanding any other provision of law, unless that alien is a resident of the United States and fits into one of the clearly enumerated 7 categories." Preamble page

concerning assistance to noncitizens in mixed households who do not request eligible status will cause great confusion.

SNAP - The Supplemental Nutrition Assistance Program should not be added to the public charge test

The federal Supplemental Nutrition Assistance Program (SNAP), formerly known as Food Stamps, is well established as the nations' first line of defense against hunger. With the passage of the Food Stamp Act of 1964, the program received bi-partisan support to both provide a foundation for U.S. agriculture and "*safe-guard the health and well-being of the Nation's population and raise levels of nutrition among low-income households*,"[142] Recognizing the significant barriers households faced accessing and using benefits, a bi-partisan Congress modernized the Food Stamp Program in 1977, declaring that *"the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households*."[143] To this day, SNAP has remained the nation's core nutrition program that ensures low income households have the resources to purchase healthy food.

Among those individuals participating in SNAP across the nation, most are children, elderly persons, or severely disabled. In Massachusetts, SNAP currently serves 771,791 low income residents which includes 157,358 older adults, 269,706 individuals who are severely disabled and 273,616 children under age 18.[144] For able-bodied adults under age 50 without children in Massachusetts, SNAP is currently limited to a three-month time limit within a three-year period,[145] significantly restricting access for childless unemployed adults. Further, roughly 75% of working households not headed by an elder or severely disabled adult typically receive SNAP benefits for less than one year.[146] Indeed, as intended, SNAP serves its critical function as a temporary or transitional benefit that supplements the low wages of households while providing critical ongoing nutritional support for our elder and severely disabled residents.

51167; " . . . This methodology ensures that for benefits which are provided on the basis of a household and not the individual, USCIS would only take into consideration the portion of the benefit that is attributable to the alien. *However, in circumstances where the alien is not eligible for a given benefit but is part of a household that receives the benefit (such as by living in a household that receives a housing benefit by virtue of other household members' eligibility), such benefit based on the eligibility and receipt of such benefit(s) by his/her household members, USCIS would not consider such use for purpose of a public charge inadmissibility determination."* (Italics supplied). Preamble page 51218.

[142] Food Stamp Act of 1964, Pub.L. No. 88-525 (Aug. 31, 1964), Declaration of Policy, § 2

[143] Food Stamp Act of 1977, Pub. L. No. 108–269 (July 2, 2004), Declaration of Policy, § 2011

[144] Dept. of Transitional Assistance, *Performance Scorecard SNAP Enrollment* (Nov. 2018) (Scorecard data may include SNAP recipients in two categories, such as severely disabled children), https://www.mass.gov/lists/department-of-transitional-assistance-performance-scorecards.

[145] 106 Code of Mass. Regulations §362.320, policy limiting SNAP to three-month time limit unless exempt. See also, https://www.mass.gov/service-details/able-bodied-adults-without-dependents-abawd-work-program-rules.

[146] Brynne Keith-Jennings and Vincent Palacios, *SNAP Helps Millions of Low Wage Workers* (May 10, 2017), https://www.cbpp.org/working-poor-much-likelier-to-be-eligible-for-snap-for-short-periods-rather-than-all-year; See also Mark Prell, Constance Newman, & Erik Scherpf, USDA Economic Research Service, *Annual and Monthly SNAP Participation Rates* (Aug. 2015), https://www.ers.usda.gov/webdocs/publications/45412/53599_err192_summary.pdf?v=42272.

Massachusetts SNAP households are diverse with regards to race-ethnicity, most non-elder and disabled recipients have variable amounts of earned income, and the vast majority of households with children do not receive cash welfare benefits.[147] The Massachusetts' SNAP caseload is 2.1% of the national caseload (FFY16 data), yet the state's non-citizen SNAP caseload is 1.7% of the national foreign-born SNAP caseload, with the bulk of SNAP-eligible foreign-born recipients being naturalized U.S. citizens.[148] Further, many non-citizens tend to work at lower-paid food service, health care and manufacturing and manual labor jobs which often pay minimum wages, earnings that would otherwise qualify these households for supplemental benefits.[149] Indeed, of the 1,053,6500 Massachusetts residents born abroad, these residents are 17.5% more likely to work than native born residents; they make up nearly 56% of building service workers, 40% of workers in private households (maids and housekeepers), and 44% of chefs and head cooks.[150] Yet, out of fear and confusion about the rules, exacerbated by recent press on the proposed public charge policies, hundreds of otherwise eligible low-income immigrants are increasingly reluctant to seek SNAP benefits and other income supports.

a) The proposed rule conflicts directly with long standing Congressional intent to provide federal food assistance to raise nutrition levels and reduce malnutrition among low-income U.S. citizens and otherwise eligible "qualified aliens".

As DHS is aware, certain federal means-tested benefits including SNAP are only available to U.S. citizens and non-citizens who meet the rigid "qualified alien" non-citizenship rules.[151] Undocumented non-citizens have never been eligible to participate in the Food Stamp or SNAP program. The 1996 "Welfare Reform Act," severely restricted legal immigrant eligibility for federal benefits by narrowly defining which legal immigrants would be "qualified aliens" in order to access certain federal means-tested benefits and imposing a 5-year time limit.[152]

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[147] .S. Dept. of Agric., *USDA Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2016* (Jan. 17, 2018), https://www.fns.usda.gov/snap/characteristics-supplemental-nutrition-assistance-program-households-fiscal-year-2016 *See* Table B-6, Participating Households by Countable Income Sources (6.1% of MA SNAP households receive TAFDC); Table B-8, Earnings Related Characteristics (21.7% with earned income); Table B-10 Distribution by Race and Hispanic Status (for Massachusetts: 52 % White/non-Hispanic; 15.7% African American/non-Hispanic, 18.2% Hispanic, 4.8 % Other/on-Hispanic, 9.3% Unknown).

[148] *Id.* at Table B-16, Distribution of participation by citizenship status (Of the 762K recipients in FFY16, 645K are U.S. born citizens, 67K are naturalized citizens, 5K refugees and 45K "other non-citizens."); Table B-17, Distribution of non-citizen participation by age (of the 50K legally-eligible non-citizens, 40.5% are elderly, 15.9% are children, 43.6% non- elder adults).

[149] Robert Espinoza, PHI, *Immigrants and the Direct Care Workforce* (June 20, 2017) (25% of direct care workers in the U.S. are immigrants, totaling more than 1 million workers), https://phinational.org/resource/immigrants-and-the-direct-care-workforce-2018/ ; *See also*, American Immigration Council analysis of US Census 2015 American Community Survey analysis of data by state. https://www.americanimmigrationcouncil.org/research/immigrants-in-massachusetts.

[150] The New American Economy, *The Contributions of New Americans in Massachusetts* (Aug. 2016), https://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf; *See also*, Marcia Hohn, EdD., James C. Witte, PhD, Justin P. Lowry, PhD and José Ramón Fernández-Pena, MD, *Immigrants in Health Care: Keeping Americans Healthy Through Care and Innovation* (June 2016), https://www.immigrationresearch-info.org/system/files/health_care_report_FINAL_20160607.pdf.

[151] 8 U.S.C. § 1611.

[152] Personal Responsibility and Work Opportunity Act of 1996, Pub. Law 104-193, §§ 400-451.

National studies following implementation of the 1996 welfare law found high levels of food insecurity among low-income immigrant families and children.[153] As a result, in 2002, Congress abolished the 5-year SNAP time limit for "qualified alien" children and severely disabled adults.[154] To the extent that DHS instructs immigration officials to consider the current, past or potential future use of SNAP benefits in any public charge determination for adjustment of status, DHS is directly undermining Congressional intent to protect and nourish otherwise eligible legally present children and adults.

According to USDA FFY16 data, the Massachusetts SNAP caseload includes approximately 31,000 U.S. citizen children living with a non-citizen head of household.[155] This represents less than 1% of the nation's SNAP caseload of citizen children with a non-citizen parent. Yet, as discussed in more details in our comments, the "chilling effect" of the proposed DHS rules has had and will continue to have a serious negative impact on eligible children accessing key nutrition benefits.

Further, the proposed rules abandon long standing DHS policy that participation in programs that provide "supplemental" assistance to households in need would not impact an immigrant's ability to adjust to legal permanent residency, including SNAP.[156] Indeed, SNAP benefits can only be used for the purchase of food or seeds to grow food.[157] Further, for every $3.00 in countable household income, the monthly SNAP benefit is reduced by $1.00. SNAP benefits cannot be used to pay rent, utilities, paper goods, cleaning supplies and severe penalties exist for households attempting to do so.[158] SNAP benefits truly operate as a "supplement" to the income a low-income household relies on to meet day to day basic living expenses. To the extent low-income households are dissuaded from accessing SNAP benefits because such receipt could potentially impact the ability of a family member to adjust status or for the legal permanent resident to reenter the U.S., DHS is essentially forcing low wage non-citizens to "choose" between paying for shelter costs, health care and food – an unconscionable choice for any parent of a minor child, any spouse or caregiver of an elder or disabled relative.

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[153] Capps, Randolph, Urban Institute, *Hardship Among Children of Immigrants: Findings From the 1999 National Survey of American Families* (Feb. 2001) (1999 survey found that 37% of children in immigrant households lived with food affordability problems, compared with 27% of children in native citizen households), http://webarchive.urban.org/publications/310096.html. *See also*, J Kasper, S K Gupta, P Tran, J T Cook, and A F Meyers, *Hunger in Legal Immigrants in California, Texas, and Illinois* (Oct. 2000) (2002 study showing relatively high levels of food insecurity among low-income immigrant families with children), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446382/#.

[154] Farm Security and Rural Investment Act of 2002, Pub. L. No. 191-171 § 4401.

[155] USDA Characteristics, *supra*, Table B-16.

[156] Indeed through the 2008 Food, Conservation and Energy Act Farm Bill, Pub. L. 110-234 (Section 4001) Congress renamed the Food Stamp Program to the "Supplemental Nutrition Assistance Program" with the goal of de-stigmatizing use of the nutrition benefits among low income households and recognizing the modernized electronic benefits transfer delivery of benefits versus the original "stamps" or food coupon process.

[157] 7 U.S.C. § 2012(K) (*Federal restrictions on what constitutes "food" for SNAP EBT purposes.)*

[158] 7 U.S.C. § 2024 *(Federal prohibition and penalties against sale or trade of SNAP for cash (e.g. trafficking).*

b) The proposed rule will increase food insecurity, poor health and poverty among legally present immigrants as well as U.S. citizens.

It is undisputed that when adults or children lack the necessary resources for consistent access to healthy food and other critical services, they are at risk of poor health outcomes, increased hospitalizations, loss of employment, increased rates of poverty and housing instability as well as reduced productivity and education attainment - outcomes even DHS acknowledges in its issuance of the public rule charge changes.[159] Research lead by the Massachusetts General Hospital found that SNAP participation was associated with lower health care expenditures by approximately $1,400 year.[160] Research conducted by John Hopkins University confirmed that access to federal nutrition benefits including SNAP reduces the incidence of hospitalization and long term care costs among low-income older adults.[161] A Massachusetts study looking at the impact of the 13.6% SNAP boost in benefits between 2009 and 2013 as a result of the 2009 Americans Recovery and Reinvestment Act, found a meaningful decline in Medicaid costs and reduction in hospitalizations at Boston Medical Center, especially for individuals with chronic illnesses [162]

As the largest federal assistance program serving children, the SNAP is also the first line of defense against child food insecurity.[163] Extensive medical research confirms that children who lack access to nutrition benefits have an increased incidence of malnutrition and other adverse health, educational, and developmental consequences.[164] Beyond its role in fighting food insecurity, SNAP benefits lifted 1.5 million children out of poverty in 2017 alone,[165] and low-

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[159] 83 Fed. Reg. 51270.

[160] Seth A. Berkowitz, MD, MPH; Hilary K. Seligman, MD, MA; Joseph Rigdon, PhD; et al, *Supplemental Nutrition Assistance Program (SNAP) Participation and Health Care Expenditures Among Low-Income Adults* (Nov. 2017), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2653910.

[161] Sarah Szanton, R. Cahill, R. James, and J.Wolff, Johns Hopkins University, *Access to Public Benefits to Reduce Risk for Nursing Home Entry Among Maryland's Dual Eligible Older Adults* (2015), https://nutritionandaging.org/access-to-public-benefi-ts-among-ddual-eligible-seniors-reduces-risk-of-nursing-home-and-hospital-admission-and-cuts-costs/#wbounce-modal.

[162] Rajan Sonik, *Massachusetts Inpatient Medicaid Cost Response to Increased Supplemental Nutrition Assistance*, Am. J. Public Health, (Mar. 2016), https://www.ncbi.nlm.nih.gov/pubmed/26794167.

[163] USDA Office of Policy Support, *Measuring the Effect of Supplemental Nutrition Assistance Program (SNAP) Participation on Food Security (Summary)* (2013), https://fns-prod.azureedge.net/sites/default/files/Measuring2013Sum.pdf.

[164] Child Trends, *Food Insecurity* (2018), https://www.childtrends.org/indicators/food-insecurity; Deborah Frank, M.D., S. Ettinger de Cuba, M.Sandel, and M. Black, SNAP cuts will harm children in the USA, The Lancet, vol 382, no. 9899 (2013), http://childrenshealthwatch.org/snap-cuts-will-harm-children-in-the-usa/; *See also*, Heather Hartline-Grafton, *SNAP and Public Health: The Role of The Supplemental Nutrition Assistance Program in Improving the Health and Well Being of Americans (2013)*, http://www.rootcausecoalition.org/research_asset/snap-public-health/.

[165] Liana Fox, U.S. Census Bureau, *The Supplemental Poverty Measure: 2017*, (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-265.pdf.

income children who participate in SNAP have better long-term health and educational outcomes.[166]

Not only do children remain more susceptible to food insecurity than the general population, the risk is even higher for children of immigrants.[167] If parents lose access to the program, the whole family will have less to eat. Though research shows that food-insecure parents seek to shield their children from hunger by "rationing" their own food intake, this puts additional stress on the household and keeps parents from accessing the food they need to be productive and healthy enough to provide for their families.[168]

c) The proposed rule will adversely impact participation in other nutrition programs beyond SNAP.

Although other federal nutrition benefits are not being considered in the pool of federal programs that may be considered as a negative factor for public charge, Massachusetts advocates have already heard from community organizations across the state that immigrant-headed households are withdrawing or declining to enroll in the Women Infant and Children (WIC) Program as well as seeking to dis-enroll their children in the National School Lunch Program (NSLP) for free and reduce price meals.

Not only is there rampant fear and confusion among immigrant families, a family's disenrollment in SNAP directly impacts their eligibility for other nutrition programs and increases administrative costs on local and state agencies. With respect to free meal status, children who qualify for SNAP, or live with a child who receives SNAP, area automatically qualified for free meals under the NSLP "direct certification" process.[169] When a family dis-enrolls a child from the SNAP benefits, the school district may be unable to "directly certify" that child or his/her siblings for free meal status. To access free meal status, the parents must file a paper NSLP application, adding not only administrative burdens on the family and school district but also impacting the number of "directly certified" students the district needs to qualify for universal fee meals under the federal "community eligibility option."[170] Thousands of additional students could be impacted with the disenrollment from SNAP, shifting greater costs and administrative burden onto high poverty local school districts.

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[166] Steven Carlson, Brynne Keith-Jennings, Center on Budget and Policy Priorities, *SNAP is Linked with Improved Nutritional Outcomes and Lower Health Care Costs* (Jan. 2018), https://www.cbpp.org/research/food-assistance/snap-is-linked-with-improved-nutritional-outcomes-and-lower-health-care.

[167] Mariana Chilton, Maureen M. Black, et. al, *Food Insecurity and Risk of Poor Health Among US-Born Children of Immigrants*, Vol. 99,3 Am. J. Public Health, 556 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661461/.

[168] Chloe N. East, *The Effect of Food Stamps on Children's Health: Evidence from Immigrants' Changing Eligibility*, Journal of Human Resources (2017), http://jhr.uwpress.org/content/early/2018/09/04/jhr.55.3.0916-8197R2.abstract.

[169] 42 U.S.C. § 1758(b)12) (Statute authorizing direct certification of children for free school meals based on receipt of SNAP).

[170] 7 C.F.R § 245.9(f) USDA regulations governing the Community Eligibility Provision (CEP).

Similarly, receipt of SNAP by a family allows a pregnant woman or family with young children to qualify as income-eligible in the initial WIC certification process, [171] eliminating a significant administrative burden on WIC providers and WIC applicants. This policy removes an important barrier to be able to assure the pregnant or breastfeeding woman and/or her infant and toddler expeditiously receive the WIC food package and health counseling they need as early in the pregnancy or child development stages as possible. In Massachusetts, USDA data from August of 2018 confirms nearly 109K Massachusetts participants in the WIC program including 9,232 pregnant women, 23,688 infants and 60,671 children under the age of 5.[172] Any drop in WIC participation driven by fear or confusion around eligibility rules as well verification burdens triggered by a family declining SNAP benefits, can have serious and long term consequences for the infants and children who rely on WIC benefits as well as uncompensated administrative costs for WIC program administrators. Over forty years of national and state research on the WIC program confirms that if pregnant women forgo nutrition assistance and nutrition supports after birth, their babies will lose an important services that lower their risk of low birth-weight, adult obesity, and lower academic achievement.[173]

§ 212.21 (d) definition of "household"

We object to the expansion of the meaning of "household" under the proposed regulations, for the following three reasons:

First, expanding the definition of who in the household will be counted in order for the applicant or sponsor to meet their income level threshold will penalize people for living in larger households and caring for family members or others they are not legally bound to support. Changing from the current rules which do not require inclusion of certain relatives residing with the sponsor *unless* they have income that is needed to satisfy the 125% of poverty requirement will unfairly penalize large households. An immigrant in a larger household will have to show greater income or assets — so that all members of the household can be supported at least at the requisite FPL level.

Viewing large households as more likely to be a public charge, coupled with expanding who is considered as part of the household, places larger families and extended families at a greater risk of being found to be a public charge. The regulations put forth three assessments of household income – income and resources, liabilities such as serious health issues and financial liabilities and past credit factors – any one of which if viewed as negative, will likely result in a negative public charge finding for larger households.

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[171] 42 U.S.C. § 1786(d)(2)(A) Statute authorizing WIC program.
[172] U.S. Dept. of Agric., *WIC Program Monthly Data – State Level Participation by Category and Program Costs*, (Aug. 2018), https://www.fns.usda.gov/pd/wic-program.
[173] Steve Carlson, Zoe Neuberger, Center for Budget and Policy Priorities, *WIC Works: Addressing the Nutrition and Health Needs of Low-Income Families for 40 Years (*March 2017*)* https://www.cbpp.org/research/food-assistance/wic-works-addressing-the-nutrition-and-health-needs-of-low-income-families

Under current standards, most applicants in family-based petitions meet the income and assets standard, and the U.S. petitioner can meet the 125% FPG income standard by his/her self by serving as a mandatory Form I-864 sponsor. The change to the proposed regulations evaluating "household income." will penalize an applicant who lives with a sponsor who would rely on a joint sponsor in the household in order to meet the income requirements. Under the new regulations, essentially any applicant who would otherwise need a joint sponsor will have a difficult time meeting the proposed standard of supporting the entire household.

Also, the proposed regulations, when evaluating assets to cover any gap between a sponsor's income and the FPG, do not provide a more generous standard for U.S. Citizen sponsors as under current law. A U.S. Citizen sponsor of a spouse and child need only show three times the difference from income to FPG, rather than five times, which is currently applied to all other sponsors. Deleting the more generous standard to immediate relative spouses and children is contrary to the priority which U.S. immigration law places on "immediate" family. The more generous standard should be preserved. Further, the use of the general terms "assets" and "resources", which can be shown to make up for income shortfall, are vague as to what the difference is between an asset and a resource.

Secondly, defining household members by whether they contribute 50% to an applicant or sponsor's support is vague and too expansive. As explained in the comments to §212.22 (b) (3**),** *infra*, on family, many families live in extended family and close friend housing situations for a variety of reasons. Especially in households that share housing costs as well as various costs of utilities and transportation and food, assessing whether someone is being supported at a level of 50% is open to difficult mis-calculations. Expansively defining the members of a household unfairly burdens the applicant or sponsor who can otherwise meet an income support level or asset support level that will avoid them becoming a public charge.

Lastly, we object to broadening the definition of household to include any dependent residing in a home of an intending immigrant or sponsor, regardless of whether legally required to provide that support. Penalizing an applicant or sponsor who provides support to others to whom they are not legally obligated will automatically harm larger households who must show larger incomes or resources to support the larger number being counted, regardless of the reality of the financial benefits such a household may be providing or the social desirability of encouraging voluntary support of those less fortunate. This expansion is especially harmful to immigrant families who often care for extended family members in cases of emergency or need without being legally obligated to do so. Those cases, such as an aunt caring for a nephew who is displaced during a natural disaster or family emergency, or a grandmother caring for a grandchild while a son or daughter geographically relocates for work temporarily, would be negatively impacted by counting that extra, and sometimes temporary, family member. Such an effect could dissuade a family from caring for extended family members – an undesirable social outcome.

§ 212.22 (a) (prospective nature of test)

Proposed § 212.22(a) correctly recodifies the prospective nature of the public charge ground of inadmissibility determination that must be made "in the totality of circumstances" and the requirement that all factors be weighed to determine whether they make an immigrant "more

or less likely" to become a public charge. However, as discussed above in earlier comments, equating what it means to be become a public charge with mere potential future use of a benefit, instead of dependency on the government for support, is a radical departure from the plain meaning of the statute and its settled historical interpretations that eviscerates the "totality of circumstances" standard.

The benefits-centric nature of the definition is fundamentally incompatible with a "totality of circumstances" standard[174] and should be abandoned. Additionally, the factors that are required to be considered in the totality of circumstances, as described in proposed § 212.22(b), employ interpretations that are contrary to social science research in multiple disciplines, unfairly and unwisely discriminate against certain groups of immigrants, and will produce economic and other harms contrary to the purported self-sufficiency goals of the proposed rule. As a group, the negative factors overwhelmingly outweigh the positive ones, and the combination of misinterpreted factors, omission of countervailing positive factors, or express recognition that factors such as benefits receipt can make an immigrant *less* likely to become a public charge,[175] and the overall weight to be accorded to certain factors versus others will encourage denial of admission on public charge grounds rather than neutral inquiry into the individual circumstances of each immigrant.

While all applications adjudicated on a case-by-case basis in the discretion of an official carry some amount of uncertainty, this proposed rule heightens that uncertainty, and will likely increase the inconsistencies in adjudication by introducing many new factors[176], in the guise of interpreting the statutorily required factors, beyond those that have historically determined eligibility. The definition's focus on an adjudicator to foretell the future likelihood of a *specific benefits receipt* adds an especially unpredictable element to the consideration of more reliable measures of whether a person is likely to become financially dependent for support on the government.

§ 212.22 (b) (minimum factors to consider) *(*generally)

The proposed rule correctly identifies the minimum factors that INA § 212(a)(4)(B) requires the agency to consider in determining whether a noncitizen is likely to become a public charge. These factors long predate the current version of INA § 212(a)(4)(B) that Congress enacted in 1996, when it codified them as part of the IIRAIRA.[177] They were derived from public charge interpretations going back to at least the early 1900s, as discussed in the benchmark decision, *Matter of Harutunian,*[178] cited in the preamble to this rule.

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[174] See generally, *United States v. Cortez*, 449 U.S. 411, 417 (1981); *Illinois v. Gates*, 462 U.S. 213, 234 (1983); *Johnson v. De Grandy, 512 U.S. 997, 1018 (1994)*; *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018)

[175] See comments, *supra*, on family sufficiency and related programs provided to federal housing tenants, for example.

[176] For example, whether the immigrant has English proficiency, has obtained or applied for an immigration fee waiver, or was found inadmissible during some prior visit to the U.S. as a visitor.

[177] *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (Sept. 30, 1996).

[178] 14 I&N Dec. 583 (R.C. 1974); see also, pre-1996 versions of the State Department Foreign Affairs Manual public charge provisions at 9 FAM 40.41 and notes thereto that described each of the factors.

The new interpretation of most of the factors in the proposed rule, however, distorts their meanings in a negative manner that is in many instances counter to reason and social science research, discriminates against people of color, and tilts unfairly toward adverse public charge determinations rather than positive, as discussed below. Some factors, as further discussed, are packed with multiple components, which is tantamount to adding new factors neither authorized by Congress nor part of the administrative practice that it codified in 212(a)(4)(B) – and these components are predominantly negative, unreasonably eroding the positive aspects of the particular factor and further hewing toward an adverse public charge determination. As further discussed, the rigid assignment of a "heavily negative" weight to several financial status and health factors and the assignment of countervailing "heavily positive" weight to one financial factor, and one that only a minority of people can meet, adds to the unfair distortion of negative and positive in the balance that the statute demands. Additionally, although subsection (a) correctly notes that all factors must be evaluated in terms of whether they make an immigrant "more or less likely" to become a public charge, and this requirement is reiterated throughout subsection (b) in relation to the specific factors, some factors, notably past receipt of a benefit, seem arbitrarily predetermined to be exclusively negative, despite their potential to make immigrants healthier and more productive individuals *unlikely* to become public charges. See discussion *infra.* Cumulatively, all these aspects of the proposed rule will only ensure that a substantial number of noncitizens fail the new public charge test[179] and will increase poverty and racial inequality, among other societal harms.

§212.22 (b) (1) age

DHS proposes to consider whether the intending immigrant is between the age of 18 and the minimum "early retirement age" for Social Security as set forth in 42 U.S.C. 416 (l)(2). These ages, under 18 (generally, the minimum age of full-time employment) and over 61 (with 62 being the "early retirement" age when an individual may begin collecting Social Security benefits) will be considered only relative to ability to work, presumably in the negative. Creating a blanket negative view on these age groups, our young and our elderly, is contrary to the cultural values of U.S. society and policies implemented to reflect them. Children are almost universally viewed as beacons of our future, and persons nearing the age of early retirement are relied upon as stalwarts of society. This narrow, negative emphasis on cherished segments of our society is at odds with most societal viewpoints and policies.

Children are recognized in public policy, public opinion and scientific studies as inherently valuable

Throughout the civilized world, governments, institutions, and the general public view children as vital components of society and prioritize their upbringing as a matter of great importance. U.S. law and policy, American public opinion, and scientific research reflect the value placed on positive environments during the crucial development stages of childhood and adolescence. To the extent that the proposed rule is biased against children as a detriment to

[179] See, for example, Randy Capps, Mark Greenberg, Michael Fix, & Jie Zong, Migration Pol'y Inst., *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, Appendix B, 15 (Nov. 2018) https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration

families and society, this rule contradicts established U.S policies and public opinion which prioritize children.

For example 90% of Americans support providing tax breaks to low-income parents to help them care for their children; 80% of Americans support providing free pre-kindergarten services to all children in their state; and nearly nine in ten Americans agree that children whose families cannot afford health insurance should receive coverage through the government.[180]

Deeming children a pubic charge simply because they are not old enough to work now would make a mockery of the public charge determination when their unrealized potential depends on their becoming adults later on. The data DHS offers regarding higher levels of public benefits use by children then adults only proves that children are not likely to use them as adults.

Adults age 62 and above are important members of family, society and the workforce

As the world's population is getting older due to improvements in healthcare, nutrition and technology, this regulation seeks to count 62 and older as a negative – by presuming these older people too old to work. We object to this unfounded assumption that *eligibility to retire* is commensurate with *inability to work*. Under U.S. law, age is a protected class in employment, and as advances in health technology have minimized the demands of heavy manual labor while at the same time increasing the vigor of aging persons, aging baby boomers enjoy medical advances that allow them to work longer and in roles that require less physical demands and more brain power. [181] In contrast to other countries in which people start getting locked out of the labor market as they age, U.S. seniors face less age discrimination and have an easier time getting the education and skills to remain competent members of the workforce, which allows them to be active and self-sufficient.[182] Western societies have historically revered the experience associated with age — the average retirement age of U.S. Supreme Court Justices is 69 and two justices have served until age 90[183] and the average age for U.S. Presidents has been over 55, with the most recent President, Donald Trump, taking office at 70, a year older than Ronald Regan at age 69.[184]

Limiting the age of workers, further has been shown to have a negative economic impact on society. For example, modelling by accounting firms have shown that Australia's gross domestic product would increase by almost 5% a year if people were supported to work

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[180] Daniel Cox & Robert P. Jones, *Attitudes on Child and Family Wellbeing: National and Southeast/Southwest Perspectives*, PRRI (Sept. 17, 2017), https://www.prri.org/research/poll-child-welfare-poverty-race-relations-government-trust-policy/.
[181] Max Fisher, *These are the best and worst countries to be elderly*, Washington Post (Oct. 3, 2013), https://www.washingtonpost.com/.
[182] In fact, education and employment opportunities for elderly Americans are second best in the world, behind only Norway according to a report which explains: "Older people value their capacity to work" because they "wish to maintain social contacts and self-worth" as well as remain self-sufficient.
[183] Rachel Wellford, *More than 2 centuries of Supreme Court Justices in 18 numbers*, PBS News (Jul. 9, 2018), https://www.pbs.org/newshour/nation/more-than-2-centuries-of-supreme-court-justices-in-18-numbers.
[184] Niall McCarthy, *Trump is set to Become the Oldest President in History*, Forbes (Jan. 6, 2017), https://www.forbes.com/sites/niallmccarthy/2017/01/06/trump-is-set-to-become-the-oldest-president-in-u-s-history-infographic/#454308b522ae.

longer.[185] Recent studies of seniors U.S. of whom 10,000 reach age 65 every day, report that they feel younger than their years and believe their best years are to come. Negative stereotypes of aging are diminishing as prominent figures are publicly working well into their 70's and 80's.[186] Coupled with definitive research which shows that disability among older people has declined substantially in the U.S. for decades, the use of age 62 and older as a negative factor is contrary to the trend in self-sufficiency, optimism and usefulness in this population

Devaluing the positive components of age in the public charge test would also inject cultural biases into these adjudications. In many cultures, elder persons are typically accorded particular respect and deference and are considered experts who can inform the next generation about important systems and traditions as well as form deeper bonds in family structures that are critical to the fabric of society. For example, in East Asian cultures and Confucian traditions, high value is placed on respect of elders and filial piety. Similarly, Mediterranean and Middle Eastern cultures, where multigenerational families live together in the same house, elderly members are often valued and respected. Elderly parents in Muslim families are respected on account of their life experiences and their hierarchic position within the family unit, where the "opportunity to attend to the needs of one's parents in their later years is viewed as a gift from Allah."[187] Anthropologists value the communal history passed down from elders as vital to societal adhesion.[188]

§ 212.22 (b) (2) health

While health is a factor that must be considered in the public charge determination, under the proposed rule essentially the same health status is counted as two negative factors and also as a heavily weighted negative factor for individuals with disabilities-- once as a negative health factor under § 212.22(b)(2) and again as a negative assets, resources and financial status factor under § 212.22(b)(4), and finally as a heavily weighted negative factor if the non-citizen is uninsured under § 212.22(c)(1)(iv). Under the proposed rule, DHS will consider whether a person's health makes them more or less likely to become a public charge, including whether they have been "diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with their ability to provide for and care for

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[185] Bridget Laging, Amanda Kenny& Rhonda Nay, *Will the #AgedCareRC help us value the elderly*, Independent Australia (Sept. 26, 2018), https://independentaustralia.net/life/life-display/will-the-agedcarerc-help-us-value-the-elderly,11935.

[186] David Bernard, *How Society Misunderstands the Elderly*, U.S. News and World Report (Nov. 26, 2012), https://money.usnews.com/money/blogs/on-retirement/2012/11/26/how-society-misunderstands-the-elderly. See also, David Bernard, *Are you Just Existing and Calling it a Life?* (2012) (citing prominent elderly men such as TV correspondent Mike Wallace and commentator Andy Rooney who continued to work on *60 Minutes* into their late eighties, Kurt Vonnegut published *A Man Without a Country* at age 82, and Dr. Michael DeBakey, inventor of the artificial heart, performed his final surgery at age 90 and went on to concentrate on laboratory work until his death at 98).

[187] Aziz Sheikh & Abdul Rashid Gatrad, *The Muslim family predicament and promise*, Western Journal of Medicine (Nov. 2000) (article adapted from *Caring for Muslim Patients*, Radcliffe Medical Press, Oxford).

[188] Some societies, such as the Huaorani people of Ecuador, even believe that the elderly shamans, who they call *mengatoi*, are endowed with magical powers, and elderly healers sit with the infirm to channel their animal spirits to cure disease. See Marlee Townsend, Institute for Human Rights, University of Alabama at Birmingham, *Old Habits Die Hard: The Self-Perpetuating Cycle of Ageism* (Apr. 2, 2018) https://cas.uab.edu/humanrights/2018/04/02/old-habits-die-hard-the-self-perpetuating-cycle-of-ageism/.

themselves, to attend school, or to work." See §§ 212.22(b)(2); 212.22(b)(4)(i)(B), and 212.22(c)(1)(iv).

Whether someone's health is considered likely to make them a public charge will be decided by DHS predicting outcomes of what a person can and will do based on their diagnosis and other information submitted to DHS, such as an attestation from their treating physician regarding whether a medical condition impacts the ability to work or go to school. See § 212.22(b)(2)(ii). The proposed standards and related evidence for the health factor explicitly single out people with disabilities and chronic health conditions and perpetuate the false assumption that a medical diagnosis is solely determinative of an individual's current abilities and future prospects.

While DHS in the preamble claims that its weighing of health as a factor will not discriminate on the basis of disability (at 51183-4) , and that it takes account of Congress's determination that schools and places of employment must make necessary accommodation for people with disabilities, the proposed rule reflects no such considerations. Instead it purports to rely only on medical evidence of a diagnosis which may interfere with certain significant life activities which is the definition of a disability.[189] Thus, most people with disabilities will have the health factor weigh against them in the public charge determination.

Proposed § 212.22(b)(4)(i) (B) additionally considers the exact same health factor as a negative if the individual does not have sufficient assets and resources to cover foreseeable medical costs. In the evidence section in subpara-graph (ii)(I), it looks to evidence of whether the noncitizen has private insurance or the financial resources to pay for related medical costs. As discussed earlier in our comments on the proposed definition of public benefits to include Medicaid, virtually no one in America pays the full cost for their medical care, much less individuals with disabilities. However, even an individual who has private insurance may not have insurance to cover the range of services required to enable individuals with disabilities to work. It is for this very reason that Congress enacted the Ticket to Work Act and other work incentive programs to enable individuals with disabilities to retain Medicaid while working. However, under the proposed rule, even a working disabled individual with private insurance, if it is supplemented by Medicaid, has accumulated three separate negative factors.

Finally, the proposed rule ascribes a heavily weighted negative factor for an individual with a disability who is uninsured with no prospect of obtaining private insurance or having the means to pay for medical costs out of pocket. See § 212.22(c)(1)(iv). The availability of private insurance at reasonable cost or indeed at any cost for people with disabilities is largely a function of state and federal laws which may or may not allow private insurance to exclude pre-existing conditions or charge higher rates based on health status. Were the current protections in the Affordable Care Act to be overturned, people with disabilities would have few options for affordable coverage other than Medicare or Medicaid.

Even though the proposed rule states that a person's disability will not be the only basis for a public charge inadmissibility finding, the factors and heavily weighed negative factors

[189] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq.

make it clear it will be very difficult, if not impossible, for a person with a significant disability to avoid being considered a public charge.

We also object to using the standard of whether a health condition "interferes with work or school" as too broad, vague and biased against people of color who will be prejudiced by this generic standard. Studies clearly indicate that social determinants of health are one of the main inequalities between whites and persons of color. Statistics show that "black Americans are sicker than white Americans, and they are dying at a significantly higher rate."[190]

Further, the studies indicate that the "social determinants of health are the social, economic, political and legal forces under which people live ….includ[ing] wealth/income, education, criminal justice, physical environment, health care, housing, employment, stress, and racism/discrimination.[191] Thus, counting health issues that are minor or serious enough to 'interfere" with work or school will disproportionately burden minorities.

Even when income is controlled for in studies, the results show that black communities have higher exposure to toxic materials and unhealthy substances – pollution, lead paint, alcohol and tobacco outlets, fast food outlets – coupled with a lack of access to grocery stores with fresh foods.[192] Health status disparities are linked to overall institutional discrimination, such as cancer caused by environmental disparities, and is directly linked to access to health care and the quality of care. Modern challenges to improving minority healthcare indicate de facto segregation still survives and is statistically significant. For example, "in Medicare, roughly 20% of U.S. hospitals treat 80% of all African American heart attack patients and 40% of hospitals have no African-American heart attack patients. One study estimates that over half of the overall racial disparity in survival after heart attacks may be attributed to the lower performance of minority-serving hospitals."[193] A multitude of studies show similar negative health outcomes for chronic medical issues like asthma, and as serious as increased maternal deaths for minority women in childbirth.[194]

§ 212.22 (b) (3) family status

DHS will consider household size in making its public charge inadmissibility determination evaluating whether the individual being a dependent or having dependents makes the individual more or less likely to become a public charge. The preamble suggests that a larger family size is a negative factor and more indicative that the household will receive public

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[190] American Bar Association, *Inequality in Health Care Is Killing African Americans* (Mar. 7, 2012), https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/fall2009/inequality_in_health_care_is_killing_african_americans/.
[191] *Id*.
[192] *Id*.
[193] Amitabh Chandra,Michael Frakes & Anup Malani, *Challenges to Reducing Discrimination and Health Inequity Through Existing Civil Rights Laws*, Health Aff. (2017); R.A Hahn, B.I. Truman & D.R. Williams, *Civil rights as determinants of public health and racial and ethnic health equity: Health care, education, employment, and housing in the United States*, SSM - Population Health (2018); Sara Rosenbaum, Rafael Serrano, Michele Magar, & Gillian Stern, *Civil Rights In A Changing Health Care System*, Health Aff. (1997).
[194] Linda Villarosa, *Why America's Black Mothers and Babies Are in a Life-or-Death Crisis*, NY Times (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html.

benefits. An immigrant in a larger household will have to show greater income or assets — so all members of the household can be supported at the requisite income level.

Contrary to being a negative, an extended family structure offers many advantages, including stability, coherence, and physical and psychological support, particularly in times of need. The family unit in most cultures, and in American culture, as well as in most areas of our public policy, is regarded as the cornerstone of a healthy and balanced society. Moreover, family size is a very personal decision; there is no rule to follow and there should be no perceived negative as to whether to have a large family or a small one.

A strong emphasis on family and kinship varies across different cultures, but many are similar to the American emphasis on family. Some people have large families because of religious reasons or cultural reasons, while some people just have an individual desire for children and large families. Data for Americans show that the general interest in having children has remained constant and high for the past few decades. More than half of Americans between the ages of 18 and 40 have children, and another 40% do not currently, but hope to have children someday.[195] Only 6% of Americans aged 18 to 40 do not have, and do not want to have, children, and these views are essentially unchanged from 2003, when 94% of Americans between the ages of 18 and 40 either had children or wanted to have children someday.[196]

Many American families base their view on the importance of creating a family structure and having children in their Judeo or Judeo-Christian heritage, relying on scriptural beliefs that teach that children are an important part of the family unit, labeling them a "reward" or a "heritage".[197] Penalizing families that create large families, especially those based on faith-based belief systems, is objectionable.

Further, there are a multitude of "collectivist cultures" in the U.S. which adhere to an extended family model in which it is common to establish multi-generational households which tend to be larger than nuclear families. In these cultures, such as American Indian, Asian, Hispanic, African, and Middle Eastern, individuals rely heavily on an extended network of reciprocal relationships with parents, siblings, grandparents, aunts and uncles, cousins, and many others.[198] Some unrelated close family friends, such as godparents in Hispanic families, and tribal leaders in American Indian families also play critical roles in the family.

In many multi-generational households, there are at least three generations living together; the grandparents are expected to live under the same roof as their adult children and grandchildren. The Latino culture for example places a high emphasis on large extended families as a way of establishing a strong unified family and providing practical living situations that

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[195] Frank Newport & Joy Wilke, *Desire for Children Still Norm in U.S.*, Gallup (Sept. 25, 2013), https://news.gallup.com/poll/164618/desire-children-norm.aspx.
[196] *Id.*
[197] Some American Christians ascribe even more strictly to being "quiverfull", the term used to leaving childbearing completely to a higher God, with no prevention or assistance, and citing to scripture Psalm 127:3-5 describing children as 'arrows" and happiness has having a "quiver full" of them.
[198] Marcia Carteret, M.Ed., *Cultural Differences in Family Dynamics* (Nov. 2, 2010).

strengthen the economic and social viability of the family. [199]Practical living situations of extended families strengthen the whole family especially when it comes to school and work, both endeavors which increase prosperity for families and have positive, not negative impacts. Latinos view family as "the major source of one's identity and protection against the hardships of life", using the term "familismo" to describe a collective loyalty to extended family.[200]

The extended family model usually includes grandparents, aunts, cousins, and even close family friends. "Financial support of the family by the individual and vice versa is important and expected", and major decisions are made in consultation with family members.[201] Latino families even have a dedicated word for kindness expected within family: "simpatia". [202] A multitude of economic benefits are found in a larger family, from the savings found in having family members stay at home for childcare and house work, which often enables often family members to work outside the home earning income or attend school, which in turn elevates income potential. For example, an elderly family member at home may be able to send children to school or prepare dinner in the evening, while young adults and middle age members of the family are able to work outside the home and earn money to support the family and build family wealth, all the while saving money on childcare costs. Older children sometimes function as caretakers for younger children. Similarly, if an adult son or daughter can care for an aged parent, that saves the family from relying on outside medical care or nursing home facility costs. Working children add to the family income, and provide a private type of "pension plan" for elderly family members will rely on them to care for them in old age. Similarly, Muslim societies attach a high importance attached to family, and the traditional Muslim family is extended, often spanning 3 or more generations.[203] In Muslim culture, akin to other traditional cultures, respect and esteem increase with age and so elderly parents often live within the family household and being able to care for one's parents in later years is considered a gift from Allah.[204]

Further, apart from economic benefits, research strongly indicates that parenting role models are the single greatest influence on a child's development and contributes to their emotional, physical, social and intellectual development so that children can become responsible and happy adults. Placing a negative value on households that have larger numbers of children and parental role models in the home is contrary to the data indicating the positives in these familial arrangements.

Contrary to being a negative, an extended family structure offers many advantages, including stability, coherence, and physical and psychological support, particularly in times of need. The family unit in most cultures, and in American culture, as well as in most areas of our public policy, is regarded as the cornerstone of a healthy and balanced society. In fact, our immigration system is specifically based on family priority, reflecting clear Congressional intent

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[199] Marcia Carteret, M.Ed., *Cultural Values of Latino Patients and Families* (Mar. 15, 2010).
[200] *Id*.
[201] *Id*.
[202] *Id*.
[203] See *supra* note 187.
[204] *Id*.

to build families and keep families together. Moreover, family size is a very personal decision; there is no rule to follow and there should be no perceived negative as to whether you have a large family or a small one.

§ 212.22 (b) (4) assets/resources/financial status: income

We strongly oppose the proposed rule's requirement raising the threshold household income level to 125% in order for such income to be considered sufficient proof that an immigrant is not likely to become a public charge. To begin with, long-standing public charge cases have never applied a strictly bright-line rule to the amount of income an immigrant must earn in order to avert an adverse public charge determination. See, for example, *Matter of S-C-*, 7 I&N Dec. 76 (BIA 1956), in which an immigrant in a traditionally low-wage occupation satisfied the public charge criteria.[205] There is no simply no administrative precedent in the long history of public charge interpretations for imposing this new income requirement; to the contrary, such policy and practice history as does exist has permitted an income above the ordinary Federal Poverty Level to suffice.[206] Congress, moreover, has never set such a standard, despite setting one for sponsors who file mandatory affidavits of support in those cases where INA § 213A requires them.[207] The omission of such a requirement in INA § 212(a)(4)(B)(IV)'s "assets, resources, and financial status" factor was therefore intentional.[208] Significantly, even for sponsors, 125% income threshold was not imposed for those affidavits or support ("I-134") that continued to be used in cases exempt from INA § 213A after 1996.[209]

This new 125% threshold would have a deleterious effect on the substantial percentage of immigrants who work in high-demand occupations upon which the economy depends. Low-wage jobs represent a growing share of the U.S. labor market, with nearly one in three workers earning under $12 an hour, and six of the 20 largest occupations – retail salespeople, cashiers, food preparation, hospitality service, stock clerks, and personal care attendants – have median wages closer to the 100% FPL than the 125%.[210]

Imposing the new income threshold would also have a disproportionately harmful impact on Blacks and Latinos, because they more often face employment discrimination and thus earn considerably less than their non-Hispanic white counterparts,[211] despite a higher overall labor

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[205] See also, *Ex parte Sakaguchi* , 277 F.913 (9th Cir. 1922).
[206] See 9 FAM 40.41 N 3.4 (1993)
[207] INA § 213A(f)(1)(E). Thus, the statement in the preamble to the rule, to the effect that this 125% threshold has served as a "touchpoint" for public charge inadmissibility is misleading.
[208] See *supra* note 18.
[209] See DHS Form I-134 Instructions, reprinted at 9 Imm. Law & Procedure, App. A-398.17, and U.S. Dept. of State Cable No. 98-State-112,510, reprinted at 3 Bender's Immig. Bull. 755 (July 15, 1998) (Q. #5: "DO PERSONS WHO ARE IN IMMIGRANT VISA CATEGORIES THAT DO NOT REQUITE THE I-864 AFFIDAVIT OF SUPPORT NEED TO CONFORM WITH THE INCOME AND DOCUMENTARY REQUIREMENT? A: NO…)
[210] Economic Policy Institute and Oxfam America, *Few Rewards: An Agenda to Give America's Working Poor a Raise* (2016), https://www.oxfamamerica.org/static/media/files/Few_Rewards_Report_2016_web.pdf; Brynne Keith-Jennings and Vincent Palacios, Center on Budget and Policy Priorities, SNAP Helps Millions of Low-Wage Workers (May 2017), http://www.cbpp.org/research/food-assistance/snap-helps-millions-of-low-wage-workers.
[211] Randy Capps, Kristen McCabe, and Michael Fix, Migration Pol'y Inst., *Diverse Streams: African Migration to the United States*, 17 (Apr. 2012), https://www.migrationpolicy.org/research/CBI-african-migration-united-states; Marie T. Mora & Alberto Dávila, Economic Policy Institute, *The Hispanic–white wage gap has remained wide and*

force participation among Latino and Black immigrants.[212] In Massachusetts, many of these immigrants are concentrated in the above-described low-wage occupations that pay near the 100% FPL threshold.[213] The inflexibility of the 125% income threshold would arbitrarily deprive adjudicators of the discretion to consider the structural barriers to success for people of color, among other circumstances, in assessing whether they can support themselves and their families, as they have for generations, despite earning so little.[214]

Finally, setting an inflexible minimum income that is higher than the FPL level contributes to the overall distortion of public charge doctrine, through this and the other similarly re-interpreted factors in this rule, from an individualized case-by-case, totality of the circumstances evaluation that fairly permits each immigrant to show s/he is capable of achieving the American Dream into a new wealth litmus test as a condition of admission to the U.S.[215]

§ 212.22 (b) (4) assets/resources/financial status: assets

We strongly oppose the significant undervaluing of homeownership in the proposed rule's restrictions at § 212.22(b)(4)(ii)(E) on when assets can be considered evidence of the "assets, resources, and financial status" factor required by INA § 212(a)(4)(B)(IV). By limiting consideration to those assets that can be converted into cash within 12 months minus the sum of

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relatively steady (July, 2018), https://www.epi.org/publication/the-hispanic-white-wage-gap-has-remained-wide-and-relatively-steady-examining-hispanic-white-gaps-in-wages-unemployment-labor-force-participation-and-education-by-gender-immigrant/. Due to persisting racial economic disparities and discrimination in hiring practices, average hourly wages for Black and Latino workers are substantially lower than their white counterparts. Eileen Patten, *Racial, gender wage gaps persist in U.S. despite some progress*, Pew Research Center, 2016, http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/

[212] Bureau of Labor Statistics, *Employment status of the foreign-born and native-born populations by selected characteristics, 2016-2017 annual averages*, Economic News Release, Table 1 (last modified May 17, 2018), https://www.bls.gov/news.release/forbrn.t01.htm.

[213] *Nursing facilities, and their residents, will feel impact if Haitians' status ends*, Boston Globe (Dec. 04, 2017), https://www.bostonglobe.com/opinion/letters/2017/12/04/nursing-facilities-and-their-residents-will-feel-impact-haitians-status-ends/K9WM260olXPEIPlAzuQtcO/story.html; *A blow to Salvadorans — and the Massachusetts economy*, Boston Globe (Jan. 10, 2018), https://www.bostonglobe.com/opinion/editorials/2018/01/10/blow-salvadorans-and-mass-economy/gELgYVBxoBL1SoEIa5kXcP/story.html; CAP Immigration Team, Ctr. For Am. Progress, *TPS Holders in Massachusetts* (Oct. 2017), https://cdn.americanprogress.org/content/uploads/2017/10/19130146/101717_TPSFactsheet-MA.pdf.

[214] See Matter of A, 19 I&N Dec. 867 (BIA 1988) (taking scarcity of employment into account; Joanne Samuel Goldblum, *Stop judging poor moms. Bad policies hurt their kids -- not bad parenting*, The Washington Post (May 8, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/08/stop-judging-poor-moms-bad-policies-hurt-their-kids-not-bad-parenting/?noredirect=on&utm_term=.82b0aeb1df5a; Edward Trevelyan, Christine Gambino, Thomas Gryn, Luke Larsen, Yesenia Acosta, Elizabeth Grieco, Darryl Harris, & Nathan Walters, U.S. Census Bureau, *Characteristics of the U.S. Population by Generational Status: 2013*, P23-214 (Nov. 2016) (showing how children of immigrants succeed at higher rates than their parents), https://www.census.gov/content/dam/Census/library/publications/2016/demo/P23-214.pdf.

[215] Melissa Boteach, Shawn Fremstad, Katherine Gallagher Robbins, Heidi Schultheis, & Rachel West, Ctr. for Am. Progress, *Trump's Immigration Plan Imposes Radical New Income and Health Tests* (July 2018) https://www.americanprogress.org/issues/poverty/reports/2018/07/19/453174/trumps-immigration-plan-imposes-radical-new-income-health-tests/; Shawn Fremstad, Ctr. For Am. Progress, *Trump's 'Public Charge' Rule Would Radically Change Legal Immigration* (Nov. 2018), https://www.americanprogress.org/issues/poverty/reports/2018/11/27/461461/trumps-public-charge-rule-radically-change-legal-immigration/. See also comments *infra* on proposed §212.22 (c) (2) (250% factor.)

all loans secured by a mortgage or other lien, the rule unfairly ignores the appreciation value of this asset over time[216] and fails to reasonably apply the prospective determination that the INA requires. Additionally, this asset evidence rule arbitrarily disregards the effect of homeownership on the ostensible "self-sufficiency" goals of the proposed rule. Home ownership is highly correlated with many significant indicia of future financial self-sufficiency, including educational performance by children, improved health care outcomes, and lower welfare dependency.[217] Given the extraordinary emphasis of the proposed new definition of "public charge" on future benefits receipt, the proposed rule's complete disregard of home ownership's positive effects on welfare dependency is particularly ill-reasoned. Finally, in addition to averting welfare dependency, homeownership also helps to reduce racial disparities in access to wealth[218] that were produced by the cumulative legacy of governmental discrimination policies directed against people of color in the U.S.[219] Devaluing this critical asset-building strategy in the public charge context will therefore disproportionately harm immigrants of color and their children.

§ 212.22 (b) (4) assets/resources/financial status: credit history & score

We oppose the use of past credit history and credit scores in proposed § 212.22(b)(4)(ii)(H) to determine the likelihood of becoming a public charge. Such reports and scores were not designed to provide information about whether the person was likely to become dependent on the government for support in the future, as set forth in current public charge standards, or likely to receive a public benefit, under the proposed rule's new standard.[220] As with the immigration fee waiver factor discussed below, considering such evidence will result in unfairly double-counting some of the evidence upon which such reports and scores are based and would already factor into the public charge determination. Additionally, the proposed rule provides no rational basis for making a low credit score a predictor of the future self-sufficiency the rule aims to assure, particularly in view of ample evidence that negative credit scores frequently result from prior events beyond an individual's control, such as job losses occasioned

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[216] Christopher E. Herbert, Daniel T. McCue, & Rocio Sanchez-Moyano, Joint Center for Housing Studies Harvard University, *Is Homeownership Still an Effective Means of Building Wealth for Low-income and Minority Households? (Was it Ever?)* (2013) http://www.jchs.harvard.edu/sites/default/files/hbtl-06.pdf.

[217] Urb. Land Inst. Minn., *Impact 2020 four-year strategic plan to double Habitat homeownership opportunities in the Twin Cities* (Dec. 2017) https://minnesota.uli.org/wp-content/uploads/sites/31/2017/12/TCHFH-Impact-2020.pdf; Athens Area Habitat for Human., *Surprising Stats on Habitat Homeowners* (Mar. 2017) https://www.athenshabitat.com/homeowner-statistics-2016/.

[218] Tatjana Meschede, Sam Osoro, & Thomas Shapiro, Inst. on Assets and Soc. Pol'y, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, (Feb. 2013), https://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf

[219] Meizhu Lui, Barbara Robles, Betsy Leondar-Wright, Rose Brewer, & Rebecca Adamson, *The Color of Wealth: The Story Behind the U.S. Racial Wealth Divide* (2006); Ana Patricia Muñoz, Marlene Kim, Mariko Chang, Regine O. Jackson, Darrick Hamilton, & William A. Darity Jr., *The Color of Wealth in Boston, A joint publication prepared by the Federal Reserve Bank of Boston, the New School, and the Samuel DuBois Cook Center on Social Equity at Duke University* (2015).

[220] Consumer Financial Protection Bureau, *Data Point: Credit Invisibles* 7 (May 2015) http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf (most credit scoring models built to predict likelihood relative to other borrowers that consumer will become 90 or more days past due in the following two years).

by the 2008 financial crisis, runaway medical costs and a dysfunctional healthcare payment system that produces the majority of the debts underlying negative credit ratings, [221] or an illness from which a person will recover.[222] Credit scores are a poor basis to evaluate even the past ability to pay bills, since scores do not consider rent payments that frequently represent a household's largest recurring expenditure – particularly in urban areas such as Boston, where the cost of housing has escalated dramatically in recent years.[223] Finally, using credit scores is unfair since immigrant credit scores are artificially low relative to actual performance.[224]

Credit reports are also frequently inaccurate, and correcting the errors they contain is a difficult job. As reported by Demos, Inc., data from the Federal Trade Commission shows that 21% of consumers had an error on a report from at least one reporting agency and 13% had errors that actually changed their score.[225] Correcting these errors "can be a time-consuming, nearly impossible three-party negotiation between the credit bureau, the creditor and the individual."[226]

Especially when they are combined with incorrect information, credit reports as screening tools have perpetuated a history of discrimination against people of color. Past discrimination in housing, lending, and employment has contributed to the large and growing racial wealth gap that makes people of color more vulnerable to predatory lenders, foreclosure, and default.[227] Using credit reports for the additional purpose of determining the likelihood that a person may use non-cash public benefits to supplement low wage work further punishes those individuals whose communities have been targets of past discrimination.

§ 212.22 (b) (4) assets/resources/financial status: receipt of fee waiver

We oppose using the past receipt of an immigration benefit fee waiver, or the prior application for one, in determining an immigrant likely to become a public charge. Fee waivers are based on financial information that is already part of the public charge determination.[228] Considering the mere fact that the immigrant has received such a waiver, in addition to the underlying financial basis for the waiver, would unfairly double-count the same financial status evidence twice. It would also arbitrarily allow adjudicators to disregard an immigrant's

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[221] Donald R. Haurin & Stuart S. Rosenthal, Dept. of Housing and Urb. Dev., *Sustainability of Homeownership: Factors Affecting the Duration of Homeownership and Rental Spells* (Dec. 2004) https://www.huduser.gov/Publications/pdf/homeownsustainability.pdf .

[222] *See generally*, Chi Chi Wu, Nat'l Consumer Law Ctr., *Solving the Credit Conundrum: Helping Consumers' Credit Records Impaired by the Foreclosure Crisis and Great Recession* 9-12 (Dec. 2013) www.nclc.org/images/pdf/credit_reports/report-credit-conundrum-2013.pdf.

[223] Bhargavi Ganesh, Sarah Strochak, & Sheryl Pardo, *Boston's housing market, in three charts,* Urban Institute (June 5, 2018), https://www.urban.org/urban-wire/bostons-housing-market-three-charts.

[224] Bd. of Governors of the Fed. Res. System, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* at S-2 (Aug. 2007) ("Evidence also shows that recent immigrants have somewhat lower credit scores than would be implied by their performance").

[225] Amy Traub, *Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job*, Demos, 10 (Feb. 2013), http://www.demos.org/discredited-how-employment-credit-checks-keep-qualified-workers-out-job.

[226] *Id.*

[227] *Id.*

[228] See Instructions to USCIS Form I-912 directing applicants to supply, *inter alia,* evidence about the receipt of means-tested benefits, income and employment status, and other financial hardship.

prospective income, a central consideration, in favor of a minor past event that has limited, if any, probative value; the fact that a person merely applied for a fee waiver has even less value.

An inability to pay a specific immigration fee on a one-time basis is a small part of a person's overall financial situation even for the point in time in the past in which the waiver was sought. The preamble offers no data to explain the assumption that mere fee waiver receipt is an accurate predictor of future ability to self-support, especially in view of the unusually high fees imposed in immigration matters.[229] Fee waivers for certain application fees, such as EAD fees, moreover, improve an immigrant's financial status rather than weaken it, since the ability to work legally rather than in the underground economy increases wage earning potential.[230] Receipt of fee waivers for such applications should therefore be viewed as a *positive* factor if considered at all in the public charge analysis.

USCIS fee waivers are predicated on the agency's determination that "an inability to pay is consistent with the status or benefit sought." 8 C.F.R. § 103.7(c)(ii). Penalizing that inability later, in the context of a public charge determination for adjustment of status or other admission decision, amounts to treating the same conduct inconsistently, which is counter to fairness principles embodied in the administrative consistency doctrine.[231] Reliance on receipt of fee waivers previously obtained while in a humanitarian status to which public charge rules do not apply, such as TPS, would also contravene the underlying humanitarian purposes served by such relief, if the immigrants can't afford to apply for the corresponding employment authorization, for example. Because of the large percentage of Haitian and Salvadoran TPS holders in Massachusetts,[232] this harm would fall disproportionately on immigrants of color.

Neither the text of the rule nor the preamble define what is meant by "an immigration benefit" for purposes of this provision, or whether a "benefit" specifically encompasses fee waivers requested under 8 C.F.R. § 1003.24 and § 1003.8 in removal proceedings. Where an individual in removal proceedings has sought or obtained a fee waiver in order to obtain relief from removal and therefore defend against removal before an Immigration Judge or the BIA on appeal, or on a motion to reopen/reconsider, penalizing such receipt would raise serious due process concerns under the INA, agency regulations, and the Fifth Amendment. Access to justice principles also caution against penalizing the receipt of fee waivers obtained in conjunction with administrative appeals from USCIS decisions; these principles encompass financial accessibility to rights and remedies in order to equalize the ability of people of modest means to litigate their rights on a par with the rest of the population.[233]

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[229] Julia Gelatt & Margie McHugh, Migration Pol'y Inst., *Immigration Fee Increases in Context* (Feb. 2007) https://www.migrationpolicy.org/research/immigration-fee-increases-context.
[230] Articles cited in comments, *supra*, concerning § 212.21(a).
[231] Luna v INS, 709 F. 2d 126 (1st Cir. 1983)
[232] See note 16 *supra.*
[233] For example, state civil indigency waiver laws have come to cover many fees and costs that contribute to the financing of the civil justice system (Conference of State Court Administrators, *2011-2012 Policy Paper: Courts Are Not Revenue Centers* at https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf) and fee-shifting statutes like the federal Equal Access to Justice Act contain net worth limitations that level of playing field among litigants.

There is no reasoned justification for introducing this new factor into public charge determinations. The preamble to the proposed rule mentions certain Senate statements during the 2017 DHS appropriations process regarding the increased cost of fee waivers. However, Congress did not enact any fee waiver eligibility restrictions in that year's appropriations bill, and the committee report merely directed USCIS to report back to Congress, within a set deadline, about fee waiver data and policies, as the report did with other agency cost issues. This evinces Congress' intent to address the fee waiver issue itself, if warranted by data, rather than an intent that DHS begin cutting off fee waiver use indirectly via an aberrant use of public charge rules. DHS' reliance on the report indicates that the agency's purpose here is to cut its own runaway costs by deterring fee waiver access rather than to vindicate Congressional intent behind the public charge provisions. Far more appropriate means of cost-cutting exist that would promote agency efficiency without distorting public charge interpretations. (E.g., issuing documents for longer validity periods and thereby obviating the need to re-adjudicate the same benefit request over and over, an issue the same appropriations committee directed DHS to report on to Congress.)

§ 212.22 (b) (5) (education & skills, including English proficiency)

We strongly oppose the insertion of an English proficiency requirement into the public charge determination. INA § 212(a)(4) does not include English language proficiency as one of the public charge factors and thus the plain meaning of the statute does not countenance this requirement. Elsewhere in the INA, Congress did explicitly adopt an English language requirement, e.g., in the general naturalization provisions and IRCA.[234] The fact that Congress did not do so in INA § 212(a)(4), nor anywhere else in INA§212(a), demonstrates that Congress did not intend to require English language proficiency as a condition of admission to the U.S.[235] Importing such a requirement here, as proposed in this rule, would also unreasonably narrow the diversity of admissions under the INA with a bias toward those from the English-speaking world – a result that would be wholly incompatible with Congress' actions over the last fifty years to *broaden* the geographical diversity of admissions by eliminating the vestiges of the old national origins quotas in 1965, eliminating ideological and geographical discrimination against refugees and asylees in 1980, and adding the diversity visa lottery for countries with lower admission rates in 1990.[236] Finally, because so many immigrants from the non-English-speaking world are

[234] INA § 312(a)(1) and Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986)(codified at 8 U.S.C. § 1255a(b)(1)(D). Notably, however, even there, Congress carved out exceptions. INA § 312(b)(1)-(2). This detailed treatment of the English language requirement within these provisions shows the calculated balance Congress sought to achieve in imposing and waiving requirements related to English language proficiency for citizenship – a balance that would be wholly absent from the proposed rule's abrupt importation of this significant new requirement into the admissibility grounds without legislative authority.

[235] When Congress includes language in one section of a statute but omits it in another, the presumption is that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

[236] *Immigration and Nationality Act Amendments of 1965*, Pub.L. No. 89–236, 79 Stat. 911 (June 30, 1968) (codified in scattered sections of 8 U.S.C.); *Refugee Act of 1980*, Pub. L. No. 96-212, 94 Stat. 102 (Mar. 17, 1980) (codified in scattered sections of 8 U.S.C.); *Immigration Act of 1990*, Pub. L. No. 101-649, §301, 104 Stat. 4978 (Nov. 29, 1990) (codified in scattered sections of 8 U.S.C.).

people of color,[237] this requirement would introduce a racially discriminatory bias into the law of public charge, tainting it with the same racial animus that has led federal courts to enjoin other recent policies.[238]

We are also concerned that the "skills" component of the education and skills factor is undervalued by the proposed rule, given that the preamble justifies its interpretation primarily on education and not on skills, except insofar as related to the positive effects of *professional* licensure (Tables 20 and 21, 83 Fed. Reg. 51193). An emphasis on "professional" skills or those that are evidenced by certification program completion is not fair for the same reasons as the emphasis on English-speaking skills. This narrow view of skilled work will have a particularly harmful impact on immigrants who staff many vital occupations for which certification procedures don't exist but on which the rest of us depend. Some of the fastest-growing occupations for the coming decade, for example, will be healthcare support occupations (expected growth rate of 23.6%) and personal care and service occupations (expected growth rate of 19.1%), areas in which immigrants have high levels of labor participation.[239] Here in Massachusetts, these sectors deeply depend on immigrants with TPS,[240] for example, who are disproportionately Black and Latino, as discussed in earlier comments, and other immigrants of color who would be harmed by an excess emphasis on professional or quasi-professional licensing and certification preferences. Finally, we are concerned that as interpreted, this factor would negatively impact domestic violence victims. As is well-known, the hall mark of domestic violence is the power and control by the abuser of the victim. For immigrant victims, this often manifests in isolating the victim and preventing her from working outside of the home, and even, in many cases, from learning English.

The education factor also fails to take into account the range of educational services offered by state, municipal and non-profit entities that can help immigrants increase their educational levels and skills but do not necessarily equate with the kind of documentation listed in the proposed rule (i.e., high school degree, certifications, and licenses). For example,

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[237] Jie Zong, Jeanne Batalova, & Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Pol'y Inst (Feb. 8, 2018), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states.

[238] Ramos, et. al.v. Nielsen, et al., No. 3:18-cv-01554 (N.D. Cal. Oct. 3, 2018) (order granting plaintiff's motion for preliminary injunction - TPS); Regents of the University of California, et al. v. Department of Homeland Security, et al., No. 3: 17-cv-05211(N.D. Cal. Jan. 9, 2018) (order granting plaintiff's motion for preliminary injunction - DACA); Batalla Vidal, et al. v. Nielsen, et al., and State of New York, et al. v. Trump, et al., No. 1:16-cv-04756 (E.D.N.Y. Feb. 13, 2018) (order granting plaintiff's motion for preliminary injunction - DACA); NAACP v. Trump, et al., and Trustees of Princeton, et al. v. United States of America, et al., No. 1:17-cv-02325 (D.D.C. Aug. 3, 2018) (ordering a complete restoration of DACA); Darweesh et al. v. Trump, et al., No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017) (order granting plaintiff's motion for preliminary injunction – travel ban); State of Washington, et el. v. Trump et al., No. 2:17-cv-00141 (W.D. Wash Feb. 03, 2017) (order granting temporary restraining order); State of Hawai'I & Ismail Elshikh v. Trump, et al., No. 1:17-cv-00050 (D. Haw. Mar. 15, 2017) (order granting temporary restraining order- travel ban); Int'l Refugee Assistance Project v. Trump, et al., 8:17-cv-00361 (D. Md. Mar. 16, 2017) (order granting plaintiff's motion for preliminary injunction); State of Hawai'I & Ismail Elshikh v. Trump, et al., No. 1:17-cv-00050 (D. Haw. Oct. 17, 2017) (order granting temporary restraining order – travel ban); Int'l Refugee Assistance Project v. Trump, et al., No. 8:17-cv-02921 (D. Md. Oct. 17, 2017) (order granting plaintiff's motion for preliminary injunction – travel ban).

[239] Bureau of Labor Statistics, *Employment Projections: 2016-26 Summary*, Economic News Release, (last modified Jan. 30, 2018), https://www.bls.gov/news.release/ecopro.nr0.htm.

[240] See *supra* note 213.

Massachusetts has for many years funded a program for basic education services, including ESOL, and in this fiscal year will spend $33,350,000 for that program.[241] The state has also funded a program through its office for refugees and immigrants to provide ESOL and civics classes for persons within three years of citizenship eligibility.[242] Many municipal libraries offer literacy, ESOL and citizenship programs,[243] as do nonprofits.[244] These opportunities for additional education, training and skills-development are as probative of an immigrant's economic potential as the level of education or skills certification evinced by the listed documents. [245]

Lastly, we are concerned that the preferred evidence the rule requires USCIS to consider under the education and skills factor is largely retrospective – *past* education, employment, and certifications/licenses – and therefore undervalues the ability of immigrants to prove they are likely to obtain employment because they have a *prospective* job offer, as has long been permitted in the public charge administrative practice,[246] or by virtue of their character as people who are willing to work hard and responsibly to better themselves, their families, and their communities.

§ 212.22 (b) (7) (affidavit of support)

The proposed rule would treat statutorily-required affidavits of support as one of several factors to be considered in determining whether an individual is inadmissible as a public charge, without regard to the statutory requirement in INA § 213A(a)(1) that such an affidavit may *overcome* an otherwise adverse inadmissibility finding. The inadmissibility finding must be predicated on the same minimum five factors that apply to individuals who are not required to file an affidavit of support by INA § 213A, because even an immigrant subject to the mandatory affidavit of support requirement is permitted by INA § 212(a)(4) to establish that s/he is not a public charge on the basis of those factors.

To the extent that the proposed rule would prevent an immigrant subject to the mandatory affidavit of support requirement from using the affidavit in this curative manner, we oppose such an interpretation as contrary to the plain meaning of the statute and unfair to both the intending immigrant, for whom the affidavit is the only means of overcoming the unforgiving public charge test, as reinterpreted by this proposed rule, and for sponsors who assume some risk in signing an affidavit and are denied the benefits of doing so. We are also concerned that the proposed rule's assignment of weight to certain factors the statute does not so value or devalue, as discussed in our comments *infra*, will also erode immigrants' ability to take advantage of the curative effect the statute confers on mandatory affidavits of support, because the negatively weighted factors could potentially always outweigh an affidavit of support.

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[241] St. 2018, c. 154, § 2, item 7035-0002.
[242] St. 2018, c. 154, § 2, item 4003-0122.
[243] The state Board of Library Commissioners maintains a database of such programs searchable by zip code. https://libraries.state.ma.us/literacy/esol
[244] For example, Literacy Volunteers of Massachusetts provides two hours per week of free, confidential tutoring in basic literacy or ESOL. http://www.lvm.org.
[245] See Matter of T, 3 I&N Dec.641 (BIA, 1949) (training for future employment as a tailor.)
[246] See, e.g. Matter of S-C-, 7 I&N Dec. 76 (BIA 1956).

Finally, the proposed rule makes no mention of the possibility of affidavits of support other than those prescribed by INA § 213A, although ordinary affidavits of support have historically always been considered in public charge determinations[247]and continued to be after Congress enacted 213A in 1996 – with respect to those individuals, such as widows/widowers and nonimmigrants, who were exempted from the new requirement.[248] To the extent that the proposed rule would abrogate this longstanding practice, we oppose it, since Congress plainly did not legislate away the use of the former type of affidavit when it exempted certain groups from the 213A requirement or intend to leave them worse off by denying them recourse to either type of affidavit.

§ 212.22 (c) (heavily weighted factors) (generally)

We object to the proposed rule's selective assignment of enhanced negative and positive weights to certain factors and to the uneven distribution of enhanced weight among them. As discussed in our comments to proposed § 212.22(b) above, Congress codified the mandatory statutory factors that had evolved in the public charge case law and administrative practice into the list that currently appears in INA § 212(a)(4)(B). Unlike other parts of the INA that delegate discretion without specifying how it should be exercised, this provision specifically ordains the five minimum factors that "shall" be considered, without preferring one over another. The proposed rule would selectively accord an enhanced negative weight to certain components of two of these statutory factors (health and assets/resources/financial status), and to a separate new factor (a prior adverse public charge finding), and would accord an enhanced positive weight to certain components of one statutory factor (assets/resources/financial status); this arbitrary and unfair assignment of weight is not countenanced by the statute's even-handed list of minimum factors. Under the proposed scheme, a statutory factor such as education/skills, which the preamble to the rule proclaims as important to promote self-sufficiency yet is accorded no enhanced weight here, would earn lower consideration than those that are enhanced – an unjustifiable outcome. Similarly unfair is the unbalanced negative-to-positive allocation of weight in this subsection, with four components of the health and assets/resources/financial status factors deemed heavily negative and only income or assets over 250% above FPL deemed highly positive.

We also object to certain specific weight allocations for other reasons discussed below.

§ 212.22 (c) (ii) and (iii) (heavily weighted negative: receipt of benefits or application for them)

Proposed § 212.22(b)(4)(C) requires consideration of whether the past receipt of benefits, as further defined and qualified by the rule, makes the immigrant "more or less likely" to become a public charge. Despite the ostensibly neutral "more or less" language, the rule's very definition of public charge as equated exclusively with benefits receipt renders this factor a negative one. This is especially so when coupled with the extensive negative discussion and examples in the

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[247] Nat'l Immigr. Law Ctr. (NILC), *Sponsored Immigrants & Benefits*, 1 (Aug. 2009) https://www.nilc.org/wp-content/uploads/2016/05/sponsoredimmsbens-na-2009-08.pdf.

[248] U.S. Dept. of State, Cable No. 97 – State-228, 862 (Dec.6, 1997), reprinted at 3 Bender's Immig. Bull. 45 at 51 (July 15, 1998).

preamble about the receipt of benefits,[249] and the fact that the new form, as discussed *infra*, asks no questions at all about how the receipt of benefits may have *helped* the individual to prevent becoming a public charge in the future, thus foreclosing the use of this factor as a positive one defies the ample social science evidence that providing people with better nutrition, health care, and housing improves social outcomes that prevent and reduce poverty as well as certain racial disparities that contribute to it. See research cited in our comments to the public benefit definition, *supra*, concerning all these positive impacts. We strongly object to interpreting benefits receipt as an inevitably negative factor.

We also object to the rule's inclusion, at § 212.22(b)(4)(i)(C) and (b)(4)(ii)(F)(1) and (2), of evidence that a noncitizen has "applied for" or been "certified or approved to receive" the defined public benefits. Ascribing a negative consideration to the mere application for a defined public benefit or being certified or approved to receive a defined public benefit –even if one has never received such a benefit—is unreasonable and out of step with common practices among benefit programs generally. It is common for programs that will be funded by one source to require that an individual apply and be found ineligible for a program funded by another source. For example, under the Affordable Care Act (ACA) in order to qualify for federal premium tax credits to reduce the cost of purchasing private insurance through healthcare.gov or a state-based marketplace like the Massachusetts Health Connector, an individual must be ineligible for the cooperative federal-state Medicaid program. For this reason the ACA requires a common application for all insurance affordability programs. Similarly, in order to qualify for CHIP, for which states are reimbursed at a higher rate than Medicaid, a child must be screened for Medicaid. 42 U.S.C. § 1397bb (b)(3). Massachusetts has an entirely state-based program of primary and preventive care for children that require that the child has been first found ineligible for Medicaid. Mass. Gen. L. c. 118E.

Further, it is more cost effective for states and more convenient for its residents, if there is one common application for multiple programs. This enables states to gather information and verify such information only once instead of multiple times. An individual seeking a benefit not considered for public charge purposes may not be able to obtain it without first submitting an application for a benefit that may be considered for public charge purposes. An application alone should not be considered evidence of anything. Even being found eligible, or being certified or approved for a benefit is irrelevant if no benefit is received. To ascribe heavily weighted negative factor to certification or approval for a benefit in the 36 months preceding the non-citizens application for admission as proposed is particularly unreasonable.

As we discuss in our comments concerning the burden of the rule on those subject to it and their advocates as well as on state benefit-granting agencies, requiring individuals to list the defined benefits for which they applied or were found eligible, even if they never received such a benefit will create tremendous administrative burdens.

Finally, the past receipt of a public benefit as a negative factor under § 212.22(b)(4) appears to have no time limit. This is patently unreasonable. For example, if we were 10 years out from the effective date of a final rule corresponding to the NPR, receipt of a SNAP benefits

[249] 83 Fed. Reg. 51211-17.

exceeding $1800 in 2018 would still be considered a negative factor in 2028. This lack of time frame also creates a tremendous burden on applicants and on state agencies who will be asked to verify past history of public benefit application, certification or use.

§ 212.22(c)(1)(i) (heavily weighed negative: nonemployment)

We object to the negative weight assigned to this factor in all circumstances, given that many other immigrants besides those who are unauthorized should not be expected to work, such as children, who are prohibited from most employment by child labor laws, and their parents or caregivers, for whom there are strong policy reasons to encourage the caregiving role,[250] as well as domestic violence victims, whose abusers often prevent them from working[251].

§ 212.22 (c) (1) (v) (heavily weighed negative: prior inadmissibility)

We object to the proposed rule's reliance on the mere fact of a previous adverse public charge determination as a heavily weighted negative factor. This reliance would improperly overweigh retrospective facts over prospective ones that the statute's plain meaning requires the adjudicator to assess in relation to all statutory factors. Moreover, since a prior determination that a person was *not* determined inadmissible as a public charge is accorded no comparable weight by the proposed rule, using this factor would be arbitrary and unfair. In addition, because the only heavily weighted positive factor that could counterbalance this one is income or assets above 250% of the FPL, reliance on such a factor would arbitrarily impose a more difficult *evidentiary* hurdle for immigrants below that level than for immigrants above it without rational justification, as well as disproportionately harm immigrants of color, who are less likely to earn above that level, as described *infra* in our comments on the 250% criteria.

§ 212.22 (c) (2) (heavily weighed positive: 250% above FDL)

We strongly object to the 250% threshold for income and assets to be weighted positively, particularly in view of the complete absence of any other positively weighted factors – giving unusually high income and assets an unreasonably unbalanced weight relative to all other factors indicating that an immigrant is not likely to become a public charge.[252] The insertion of this FPL level into the public charge determination would thus essentially impose a wealth litmus test on family-based immigration, an attempt to achieve by regulation a change that the Administration has sought but that requires Congressional action.[253]

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[250] *See Matter of A*, 19 I&N Dec. 867, 870 (BIA 1988) ("A mother's absence from the workforce to care for her children is not by itself sufficient basis to find the mother likely to become a public charge."

[251] Financial abuse, such as controlling whether and when someone can work and in what job, occurs in 99% of domestic violence cases, and is often the first sign of dating violence and domestic abuse. National Network to End Domestic Violence (NNEDV), *About Financial Abuse (2017)*, https://nnedv.org/content/about-financial-abuse*); See also* Sherri Gordon, *How to Identify Financial Abuse in a Relationship*, VeryWellMind (Oct. 27, 2018).

[252] See comments, *supra*, concerning the skewed treatment of the statutory factors generally in this rule.

[253] See RAISE Act, S.354, 115th Cong., 1st Sess. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/354; The White House, *President Donald J. Trump Backs RAISE Act*, (Aug. 2, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backsraise-act/.

There is no basis in the INA for establishing this admissibility standard, which would require nearly $63,000 a year for a family of four to meet – more than the median household income in the U.S, [254] and a standard that 61% of recently admitted lawful permanent residents could not satisfy.[255] The rule provides no justification for the 250 % threshold. And even DHS admits, at footnote 583 of the preamble, that differences in the receipt of non-cash benefits between noncitizens living below 125% of FPG and those living either between 125 and 250% of the FPG or between 250 and 400% of the FPG are not statistically significant.

Establishing this threshold would have a disproportionate impact on people of color, who are significantly less likely to have that level of wealth. Among people in Massachusetts potentially chilled by the proposed rule with income too low to benefit from the heavily weighted criteria, 23.6% are White and 75.4% are people of color. See Table 3.

Table 3. Potentially "chilled" population in Massachusetts by race or ethnicity

	All individuals		Individuals in a family with at least one non-citizen			
	All income levels		Income under 250% FPL		Income over 250% FPL	
All races/ethnicities	6,742,143	100.0%	420,012	100%	446,544	100%
White non-Hispanic	4,997,932	74.1%	98,919	23.6%	173,369	38.8%
Black non-Hispanic	480,920	7.1%	72,376	17.2%	64,740	14.5%
Asian non-Hispanic	439,668	6.5%	76,376	18.2%	123,012	27.5%
Hispanic/Latino	725,804	10.8%	157,677	37.5%	73,794	16.5%

Source: 2012-16 pooled 5-Year American Community Survey data, Calculations by Manatt. www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population ("Other" not shown)

[254] Kayla Fontenot, Jessica Semega & Melissa Kollar, U.S. Census Bureau, *Income and Poverty in the United States: 2017* (Sept. 2018), https://www.census.gov/library/publications/2018/demo/p60-263.html.
[255] Randy Capps, Mark Greenberg, Michael Fix, Jie Zong, "Gauging the Impact of DHS' Proposed Public Charge Rule on U.S. Immigration" (Migration Policy Institute, Nov. 2018). the Department provides no justification for why this threshold is appropriate.

§ 212.24 (valuation of monetized benefit)

This regulation states that it will calculate the value of the benefit attributable to the alien in proportion to the total number of people covered by the benefit with respect to SNAP, Section 8 Housing Assistance and Section 8 Project Based Rental Assistance as well as any cash benefit received on a household basis. Under the eligibility rules applicable to SNAP, Section 8 and presumably cash benefits paid on a household basis, most "intending immigrants" or non-immigrants are ineligible for assistance. As DHS correctly observes in the preamble to the proposed rule, but neglects to make clear in the text of the rule itself, noncitizens in "mixed-status families" who are ineligible for and do not request or receive SNAP, federal housing assistance or cash paid on a household basis are not receiving a public benefit, and therefore can have no portion of a public benefit attributed to them.

§ 214.1 and 248.1 (nonimmigrant provisions)

We oppose the absolute bar proposed in §§ 214.1 and 248.1 on nonimmigrant changes and extensions of status based on prior, current, or likely receipt of a public benefit. This bar imposes an interpretation of INA § 212(a)(4) even more restrictive than that of proposed § 212.20-24 on two statutory procedures that are not admissions and therefore not subject to the public charge test. Most nonimmigrants have already been found admissible upon meeting the general public charge test at both a consular post abroad and at a port of entry, and many nonimmigrants who are issued multiple-entry visas have met the test numerous times. Imposing this extra quasi-public charge test at the change or extension of status stages unfairly punishes them for conduct that was neither a basis for inadmissibility nor for post-admission deportability.

Imposing this new bar would also significantly deplete agency resources, given the more than half a million nonimmigrants who seek a change or extension of nonimmigrant status every year[256] and who would now be required to respond to USCIS inquiries about past or potential receipt of public benefits and/or to submit the new Form I-944 and any evidence related thereto. This will inevitably complicate otherwise straightforward change of status and extension of status procedures, both of which should be quick adjudications in view of the temporary nature of most nonimmigrant classifications. It will also have negative downstream effects on other USCIS adjudications that will consequently be delayed too.[257]

Additionally, the proposed bar would unjustifiably harm those nonimmigrants who encounter unforeseen circumstances while in the U.S., such as illness, if they access critical health care benefits to address these conditions and are denied a change or extension of status as a result. Family separations would also follow where the individuals are derivative spouses or children of a principle nonimmigrant visa holder. These harms would also negatively impact schools, employers, and other institutions that rely on nonimmigrant visa holders and on ensuring that they can and will remain because their spouses and children can be with them.

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[256] 83 Fed. Reg. 51114, 51237-244.

[257] See, for example, Teo Armus, *Under Trump, there's a growing wait to become a U.S. citizen*, The Washington Post (Aug. 2017), https://www.washingtonpost.com/local/immigration/under-trump-a-growing-wait-to-become-a-us-citizen/2018/08/16/ed364786-9bec-11e8-843b-36e177f3081c_story.html?utm_term=.ef6e5d6beadd.

Comments on draft forms

§ 245.4 (requirement of self-sufficiency form)

We object to the new Form I-944 ("Declaration of Self-Sufficiency") in substance and form. The I-944 is objectionable in form because the 15-page form requests overly broad detailed information that is outside the scope of the assessment of public charge making it contrary to the regulations as proposed and unduly burdensome and confusing. Finally, the proposed new evaluation of self-sufficiency and new form will substantially increase the time it will take to properly assess a case and advise immigrant families or provide form assistance, and the new framework of evaluating all household members and providing documentation regarding them multiplies the effort and time to produce the work product.

We object to the question instructing an applicant to list every benefit they have ever applied for or received. The word "**EVER**" is written in capital letters and bold. This question is contrary to the proposed regulations that specifically state that benefits received up to 60 days after the rules go into effect will not be considered. The question is also highly confusing because it conflates the negative consideration of non-monetizable benefits if received for more than 2 months in the aggregate within a 36 month period. Providing specificity in the instructions as to any time limits falls far short of explaining which benefits are relevant to the adjudication to the ordinary person. The burden on an applicant to produce such vast information, and supporting documentation will increase the burden on applicants and agencies and is wasteful, repetitive and costly.

Further, the form lacks any questions seeking to elicit factors that would provide a basis for a positive finding that an applicant will not become a public charge as a result of receiving benefits. We object to the format of the form's questions which slant toward negative findings instead of providing applicant – pointed inquiries that would support a finding of no public charge.

We also object to the gross underestimation of time for the new Form I-944. The suggested estimate associated with filing Form I–944 and certified documents of 4 hours and 30 minutes, "including the time for reviewing instructions, gathering the required documentation and information, completing the declaration, preparing statements, attaching necessary documentation, and submitting the declaration" ignores the practicalities of gathering such detailed information and the time and effort needed to obtain documentation regarding all those details.

Gathering and calculating the information to generate the information needed to fill in the form and check the correct boxes will require much more than the four hours estimated by DHS. Including "gathering required documentation" into the calculation ignores the large effort and the time needed to collect documentation regarding education, benefits, prior immigration filings, such as fee waivers, and the like. For example, the sections on education and language instruction alone will take a considerable amount of time in order to be accurate, and obtaining external verification of enrollment via transcripts or copies of certificates and diplomas increases the time and cost burden even more.

Other USCIS forms which request similar information, such as the I-912 fee waiver, which requests a detailed listing of benefits by name, agency, and date, estimates an hour for completion, but practice has proven that it takes much longer than that. The supporting documentation takes hours to gather and compile for the filing. Similarly, the I-589 form which requests detailed information of all schooling with dates attended and certificates and degrees granted, requires a significant amount of time to complete for just that section. Based on our experience as practitioners and as support for the statewide legal service agencies who do the bulk of immigration forms for low-income clients in Massachusetts, we are certain this new form will take much longer than the estimate given, especially if that estimate includes the time for accessing, gathering, and compiling corroborating documentation.

Part 2 and part 3, documenting family status and household, and assets, are as burdensome. Requiring a sponsoring relative or intending immigrant to provide details of every member of a household and their 3 years of taxes and tax transcript is overly onerous. Similarly, requiring an applicant to fill out a chart estimating whether a member of a household is providing 50% of financial support, especially given the difficult of quantifying shared costs such as housing and food and transportation, is unreasonable.

The sections requesting detailed information of every application for receipt of public benefit or fee waiver, are similarly burdensome in requiring verification documents for each benefit listed. For example, in the case of an intending immigrant who has renewed an Employment Authorization Application annually, as is often required, and may have accessed a fee waiver for various applications over many years, it will be difficult, if not impossible, to accurately record that information on the form as asked, with the details of the date of receipt of such application, and the various application numbers assigned by various service centers. Documentation from USCIS is not easy to obtain or even available, and FOIA requests to obtain such information place an additional burden of yet another form on the applicant, requiring costs and lengthy wait times. Moreover, USCIS already has access to these records.

Likewise, seeking verification from local benefit granting agencies and housing offices of the date of every benefit ever applied for – even if not awarded or proof of termination of such benefits, is time consuming and requires information that is not typically kept by individuals and not readily by those offices. To the extent that local and state agencies will set up systems by which applicants can request such information and provide those records, obtaining the needed records will require time and travel to the offices to meet with a caseworker and obtain the documents. The time for an applicant to wait at their local benefits office to meet with a worker and wait the response of their caseworker to provide such information could easily fill the 4 hours estimated to be the total time to complete the form, not to mention the review, organization and submission tasks.

The proposed rule also imposes additional burdens for those seeking extension of stay or change of status by filing Form I-129 (Petition for a Nonimmigrant Worker), Form I-129CW (Petition for a CNMI-Only Nonimmigrant Transitional Worker), or Form I-539 (Application to Extend/Change Nonimmigrant Status), as applicable. DHS notes these applicants will incur additional costs because they must demonstrate that they have not received, are not currently receiving, and are not likely in the future to receive, public benefits as described, and the burden and costs will be higher if DHS determines that they must submit Form I-944 in support of their

applications for extension of stay or change of status. As outlined above, the I-944 Declaration of Self-Sufficiency (15 page form) is highly burdensome.

Further, the proposed rule introduces two additional forms associated with the changes to the public charge bond process: Form I-945 (Public Charge Bond) and Form I-356 (Request for Cancellation of Public Charge Bond). The estimated time for Form I-945, Public Charge Bond form, is one hour. However, given the complicated nature of the bond and the consequences of failing any part of the repayment of the bond, as well as the financial considerations that must be calculated when proceeding with the bond, the time is a gross underestimation of how long it will take an applicant or a sponsor to wade through the enormity of the forms regarding bond.

Comments on specific questions from the Department in the proposed rule

In the proposal, the Department explicitly poses a number of questions with regard to specific elements of the rule. We are responding to them in order to ensure that our voice is heard, and that the rule is not made even more punitive and harmful, but our response to them should in no way be interpreted to indicate that the rule would be acceptable in its current form.

At FR 51173, the Department asks about unenumerated benefits -- both whether additional programs should explicitly be counted, and whether use of other benefits should be counted in the totality of circumstances.

We strongly oppose adding any additional programs to the list of counted programs, or in any way considering the use of non-listed programs in the totality of circumstances test. No additional programs should be considered in the public charge determination. The programs enumerated in the proposed rule already go far beyond what is reasonable to consider and will harm millions of immigrant families, as discussed extensively in our comments in chief. The addition of any more programs would only multiply the harm to individuals, families and communities.

At FR 51174, the Department specifically requests comment on whether the Children's Health Insurance Program (CHIP) should be included in a public charge determination.

For many of the same reasons that we oppose the inclusion of Medicaid, we adamantly oppose the inclusion of CHIP.

The State Children's Health Insurance Program (CHIP) is a joint federal-state program established to provide coverage to uninsured children in families whose incomes are too high to qualify for Medicaid.[258] Making the receipt of CHIP a negative factor in the public charge assessment, or including it in the "public charge" definition, would exacerbate the problems with this rule by extending its reach to moderate income working families. In Massachusetts, CHIP is available to uninsured children with income up to 300% of the federal poverty level, with families earning over 150% FPL charged a monthly premium on an income-based sliding scale.

[258] The Medicaid and CHIP Payment and Access Commission (MACPAC), *CHIP*, https://www.macpac.gov/topics/chip/.

Including CHIP in a public charge determination would likely lead to many eligible children foregoing health care benefits, both because of the direct inclusion in the public charge determination as well as the chilling effect detailed elsewhere in these comments. Due to the chilling effect of the rule, many eligible citizen children likely would forego CHIP—and health care services altogether—if their parents think they will be subject to a public charge determination.

In 1997 when CHIP was enacted, 10 million children were without health insurance, many of whom were in working families with incomes just above states' Medicaid eligibility levels. By 2012, the percentage of children lacking health insurance has been halved with more children enrolled in Medicaid and CHIP in no small part based on the associated marketing and outreach efforts that Congress required states to undertake in their CHIP plans to enroll eligible but uninsured children. [259]

In addition to the great harm that would be caused by the inclusion of CHIP, this would be counter to Congress' explicit intent in expanding coverage to lawfully present children and pregnant women. Section 214 of the 2009 Children's Health Insurance Program Reauthorization Act (CHIPRA) gave states a new option to cover, with federal matching dollars, lawfully residing children and pregnant women under Medicaid and CHIP during their first five years in the U.S. This was enacted because Congress recognized the public health, economic, and social benefits of ensuring that these populations have access to care.

Since its inception in 1997, CHIP has enjoyed broad, bipartisan support based on the recognition that children need access to health care services to ensure their healthy development. A 2018 survey of the existing research noted that the availability of "CHIP coverage for children has led to improvements in access to health care and to improvements in health over both the short-run and the long-run."[260]

As noted by the Kaiser Family Foundation, CHIP can have a positive impact on health outcomes, including reductions in avoidable hospitalizations and child mortality. Improved health which translates into educational gains, with potentially positive implications for both individual economic well-being and overall economic productivity.[261]

Continuous, consistent coverage without disruptions is especially critical for young children, as experts recommend 16 well-child visits before age six, more heavily concentrated in the first two years, to monitor their development and address any concerns or delays as early as possible.[262] As noted by the Center for Children and Families: A child's experiences and

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[259] MACPAC, supra. *See*, 42 U.S.C. § 1397bb (b)(3) requiring that uninsured children be screened for Medicaid eligibility and (c) requiring outreach efforts to find and enroll uninsured children in Medicaid or CHIP.
[260] Lara Shore-Sheppard, Econofact, *Medicaid and CHIP: Filling in the Gap of Children's Health Insurance Coverage* (Jan. 22, 2018), https://econofact.org/filling-in-the-gap-of-childrens-health-insurance-coverage-medicaid-and-chip.
[261] Kaiser Family Foundation, *The Impact of the Children's Health Insurance Program (CHIP): What Does the Research Tell Us?* (Jul. 2014), https://www.kff.org/medicaid/issue-brief/the-impact-of-the-childrens-health-insurance-program-chip-what-does-the-research-tell-us/.
[262] Elisabeth Wright Burak, Georgetown Center for Children and Families, *Promoting Young Children's Healthy Development in Medicaid and the Children's Health Insurance Program (CHIP)* (Oct. 2018), https://ccf.georgetown.edu/wp-content/uploads/2018/10/Promoting-Healthy-Development-v5-1.pdf.

environments early in life have a lasting impact on his or her development and life trajectory. The first months and years of a child's life are marked by rapid growth and brain development.[263]

We are also concerned that DHS notes that the reason it does not include CHIP in the proposed rule is that CHIP does not involve the same level of expenditures as other programs that it proposes to consider in a public charge determination and that noncitizen participation is relatively low.[264] The question of which programs to include should not at all consider government expenditures. Whether or not there is a large government expenditure on a particular program is irrelevant to the assessment of whether a particular individual may become a public charge. A public charge determination must be an individualized assessment, as required by the Immigration and Nationality Act, and not a backdoor way to try to reduce government expenditures on programs duly enacted by Congress.

However, even if reducing Federal expenditures were a legitimate consideration, Federal CHIP funding is capped. States have two years to spend the State's annual allotment after which unspent funds are redistributed to other States.[265] Thus, reduced spending in States with larger immigrant populations will not reduce overall federal spending. It will simply disadvantage those States relative to States with a smaller immigrant population.

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

At FR 51174, the Department asks about public charge determinations for non-citizen children under age 18 who receive one or more public benefit programs.

We strongly believe that receipt of benefits as a child should not be taken into account in the public benefits determination as it provides little information on their future likelihood of receiving benefits. If anything, receipt of benefits that allow children to live in stable families, be healthy and succeed in school will contribute to the future integration and contribution to society of kids who grow up, develop, learn and complete their education and training in the United States. The value of access to public benefits in childhood has been documented repeatedly. Safety net programs such SNAP and Medicaid have short and long-term health benefits and are crucial levers to reducing the intergenerational transmission of poverty.[266]

Investing in children is the most important investment we can make in our country's future. It is not only cruel, but counterproductive to penalize a child for being a child. Moreover, negatively weighing a child's enrollment in health and nutrition programs would be counter to

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[263] *Id*.
[264] 83 Fed. Reg. at 51174.
[265] Medicaid and CHIP Payment and Access Commission, *CHIP Financing* (last visited Dec. 6, 2018), https://www.macpac.gov/subtopic/financing/.
[266] Marianne Page, University of California Davis, Safety Net Programs Have Long-Term Benefits for Children in Poor Households, Policy Brief (2017), https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-health_and_nutrition_program_brief-page_0.pdf.

Congressional intent under both the 2009 CHIPRA and section 4401 of the Farm Security and Rural Investment Act of 2002, which restored access to what was then called Food Stamps (now the Supplemental Nutrition Assistance Program, SNAP) to immigrant children.

At FR 51165, the Department seeks input on whether to consider the receipt of designated monetizable public benefits at or below the 15% threshold.

The proposed rule would penalize people who are, by definition, nearly self-sufficient. If an individual used even the smallest amount of benefits for a relatively short amount of time, they could be blocked from gaining lawful permanent residence in the United States. The proposal defines "public charge" to include anyone who uses more than 15% of the poverty line for a household of one in public benefits—just $5 a day regardless of family size. This absolute standard overlooks the extent to which the person is supporting themselves. Yet the rule would still consider the receipt of assistance as a heavily weighed negative factor in the public charge determination. The 15% threshold is arbitrary and not in keeping with the well-settled meaning of public charge as we discussed in the section of these comments on the proposed definition of public benefits.

The Department proposes to treat income below 125% of the federal poverty guidelines (FPG, often referred to as the federal poverty level or FPL) for the applicable household size as a negative factor. Conversely, the Department proposes that income above 250% of the FPG be required to be counted as a heavily weighed positive factor. At FR 51187, the Department invites comments on the 125% of FPG threshold.

We strongly oppose the use of both these arbitrary and unreasonable thresholds, for all the reasons previously discussed in our comments, *supra*, on those specific factors in the proposed rule.

At FR 51174, the Department asks about whether the effective date of the rule should be delayed in order to help "public benefit granting agencies" adjust systems.

Implementation of the proposed rule would create new challenges and impose a tremendous burden on state and local agencies that administer public benefit programs. The proposal should not be implemented at all, but if it is, implementation should be delayed for as long as possible, not only for these agencies but for the entire legal services community and ethnic community-based organizations, who would bear the brunt of dealing with immigrants fearful about how the new requirements will affect them and their families.

- *For the state and local agencies the Department asks about, responding to requests for documentation immigrants would need in order to complete Form I-944, Declaration of Self-Sufficiency will be particularly burdensome.* The draft form I-944, Declaration of Self-Sufficiency instructions direct individuals to provide documentation if they have ever applied for or received the listed public benefits in the form of "a letter, notice, certification, or other agency documents" that contain information about the exact amount and dates of benefits received.[267] This type of information is not typically

[267] Department of Homeland Security, U.S. Citizenship and Immigration Services, *Proposed Form I-944*, https://www.regulations.gov/document?D=USCIS-2010-0012-0047.

included in the standardized eligibility notices that benefit agencies routinely produce, instead it will require agencies to develop procedures and assign staff to research and document a history of past benefit receipt. Further the lack of any time parameters in the instruction and form make this an even more burdensome process. In the case of Medicaid, the instructions to draft form I-944 require additional documentation from the agency to be submitted to prove that the medical benefits received were for an emergency medical condition or represented another kind of medical expenditure not included in the definition of Medicaid as a public benefit. It will generate a huge workload for agencies, and in many cases may require access to information that has been archived from no longer functional eligibility systems that have been replaced. Also, because the proposed rule would even consider as a negative factor the immigrant's application for a determination of eligibility for a benefit that he or she never received, many individuals who must complete Form I-944 but never received public benefits may well seek documentation from the agency to be certain they have not unwittingly applied for a program like Medicaid while seeking some other type of benefit. As discussed in our comments on the public charge determination, many programs use a common application for multiple programs. The likelihood of confusion is further compounded by the many different names that programs use. For example, in Massachusetts, Medicaid, including emergency Medicaid, CHIP and certain state-funded programs, are all known as MassHealth. Further, most MassHealth beneficiaries are also enrolled in managed care plans and may not understand the relationship between their managed care plan and Medicaid. Further, it is not clear if responding to such requests, which are not directly related to the administration of the benefit program, will be considered a permissible administrative expense eligible for federal reimbursement or must be separately accounted for and funded by state agencies.

- *Responding to consumer inquiries related to the new rule will also increase these burdens. S*tate and local agencies will have to prepare to answer consumer questions about the new rule. They will experience increased call volume and traffic from consumers concerned about the new policies. Advising a family on whether they would be subject to a public charge determination and how receipt of various benefits might play out can require technical knowledge of immigration statuses. Yet, state and local agencies will be put in an impossible position when answering questions if they simply tell all consumers that they must speak to an immigration attorney to get their questions answered about the impact of access benefits on their immigration status. And such advice would likely deter eligible people from enrolling in programs, including many who would never be subject to a public charge determination. Moreover, people who seek public benefits are also unlikely to be able to afford to seek legal counsel to see if getting services will jeopardize their family's immigration goals. The described burdens on states will also require increased training of external stakeholders. For example, the ACA required states to provide training for certified application counselors to assist individuals to apply for and enroll in Medicaid, CHIP and Qualified Health Plans with Premium Tax Credits. Not only must the state address the difficulty of how its own employees and vendors will explain the new public charge rule, but it must also address the stakeholders with whom it has a direct relationship, such as certified application counselors, as well as communicating with the public at large.

- *Increased "churn" among the caseload.* As consumers learn about the new rule, some families will terminate their participation in programs as already seen in response to draft public charge-related proposed rule changes that were leaked to the media.[268] But, because these programs meet vital needs for families, some of these families would likely return to the caseload, resulting in duplicative work for agencies that will experience a new kind of churn in their caseloads. Some families may return if they come to understand that they are not subject to a public charge determination, for example, if they have refugee status. Others may reapply when circumstances become even more dire, for example a child may be withdrawn from Medicaid coverage, but without treatment—such as asthma medication—the child's condition may worsen, and the family will re-enroll the child even though they are fearful the act may jeopardize a family member's chance to become a lawful permanent resident. This on again off again approach to benefit enrollment—often referred to as churn—not only yields negative results for families, it also results in duplicative work for state and local agencies. Churn is expensive for state, in one study of SNAP-related churn, the costs averaged $80 for each instance of churn that requires a new application.[269]

- *Increased cost and burden of modifying existing communications and forms related to public charge.* For almost twenty years, agencies have worked under the consistent and clear rules about when a consumer's use of benefits could result in a negative finding in their public charge determination. Agencies have incorporated these messages on a variety of consumer communications including application, application instructions, website, posters used in lobbies, in notices and in scripts and trainings for staff. All of these consumer communications will have to be identified and taken down and as noted above, the new rules would be so far reaching and complicated, that states will be hard-pressed to replace them effectively with messages that don't inappropriately deter eligible people.

- *Undermining adjunctive eligibility for WIC.* Congress permitted WIC to presume any individual on Medicaid, SNAP, or TANF to be income-eligible for WIC, thus reducing the paperwork burden during WIC certification. In 2016, 74.9% of WIC participants were eligible for WIC due to eligibility for another program. A National WIC Association survey estimated significant increases in administrative expenditures on the certification process if adjunctive eligibility was undermined. Due to WIC's funding formula, increased administrative expenditures will also result in decreased funding for WIC's nutrition education, breastfeeding support, and client services. WIC complements the work of Medicaid and SNAP to ensure healthy families with adequate access to nutritious foods. Congress has recognized that connection by authorizing adjunctive eligibility, which has helped to reduce paperwork burdens on both clinics and participants, freeing

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[268] Emily Baumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Services*, New York Times, (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/us/politics/trump-immigrants-public-nutrition-services.html.

[269] Mills, Gregory, Tracy Vericker, Heather Koball, Kye Lippold, Laura Wheaton & Sam Elkin, Urban Institute for the US Department of Agriculture, Food and Nutrition Service, *Understanding the Rates, Causes, and Costs of Churning in the Supplemental Nutrition Assistance Program (SNAP) - Final Report* (Nov. 2014), https://fns-prod.azureedge.net/sites/default/files/ops/SNAPChurning.pdf.

up WIC funding to be used for nutrition education and breastfeeding support. The inclusion of Medicaid or SNAP in public charge review would undercut WIC's efforts to improve efficiency, streamline certification processes, and focus WIC services on its core public health mission.

- *Undermining enrollment streamlining progress.* The inclusion of Medicaid and SNAP in public charge review will undermine state efforts to streamline enrollment processes between different public assistance programs. Certain states have explored universal online applications that permit an individual to apply for or be pre-screened for eligibility for multiple public assistance programs at one time.[270] The proposed rule would permit immigration officials to review an individual's attempt to simply *apply* for Medicaid or SNAP benefits.[271] This provision will discourage states from continuing with efforts to develop innovative enrollment processes, and likewise discourage individuals from using uniform or joint applications or pre-screening tools where an implicated program is listed.

At FR 51189, the Department invites comments on how to use credit scores.

Credit scores should not be used in the public charge determination, for all of the reasons described in our comments, *supra*, regarding that factor.

At FR 51200, the Department asks whether 36 months is the right lookback period for considering previous use of public benefits and whether a shorter or longer timeframe would be better.

We strongly oppose any arbitrary lookback period for use of public benefit programs. Inclusion of a retrospective test is fundamentally inconsistent with the forward-looking design of the public charge determination as mandated by law, as discussed in our comments concerning the rule's definition of "public charge" and the "totality of circumstances" standard. Moreover, numerous studies point to the positive long-term effects of receipt of health, nutrition and housing programs and the value of these programs in providing work supports that empower future self-sufficiency, as also discussed amply in our comments concerning the rule's public benefits definition and elsewhere.

At FR 51210, the Department asks whether receipt of benefits previously considered (cash and long term institutionalization) should be considered in "some other way" than as a negative factor in the totality of the circumstances test.

The agency's proposal to heavily weigh the receipt of benefits as negative – including of benefits previously considered – is inconsistent with the plain meaning of the statute and deeply problematic in numerous ways previously discussed throughout our comments *supra*.

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

[271] Dep't of Homeland Security, *Proposed Rule: Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114, 51291 (Oct. 10, 2018) (to be codified in 8 C.F.R. § 212.22(b)(4)(i)(F)(i)).

At FR 21220, the Department invites comments about the public bond process in general.

For all the reasons described in our comments, *supra*, concerning the proposed new public charge provisions, the use of public charge bonds is impractical and would place an impossible and unfair burden on immigrant families.