Attn: Mark Phillips
Chief, Residence and Naturalization Division
U.S. Citizenship and Immigration Services (USCIS)
Office of Policy and Strategy, 20 Massachusetts Avenue NW
Washington, DC 20529

December 10, 2018
CIS No. 2499-10; DHS Docket No. USCIS-2010-0012

RE: Inadmissibility on Public Charge Grounds

To Whom It May Concern,

Muslim Advocates is a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. We write to express our serious concerns about the impact, legality, and spirit of the Proposed Rule[1] revising the test for public charge grounds of inadmissibility ("PCG").[2] The Proposed Rule would significantly expand the application of the PCG with respect to both immigrants and nonimmigrant visitors seeking a change in status, and would create what amounts to a presumption of inadmissibility for most noncitizens who have made use of a public benefit for themselves or their household.

We believe that the Proposed Rule is ill-advised and damaging. It would have a disproportionate impact on applicants from Asia, Latin American, and Africa, including Muslim, Arab, and South Asian immigrants, and chill important and legitimate uses of public benefits. For the reasons set forth in this comment, we urge you to reject the Proposed Rule.

I. Introduction

The Proposed Rule would modify the existing standard for PCG and would expand officer discretion in evaluating the applications of noncitizens applying for a change of status to become Legal Permanent Residents ("LPR") or to extend or change temporary visitor status. Under the current rule, an immigrant is a "public charge" if he or she is likely to be "primarily dependent"[3] on taxpayer funds through cash aids or institutionalization. The Proposed Rule seeks to dramatically lower the threshold for defining a "public charge" to include any immigrant who receives or is likely to receive even modest cash assistance or other forms of aid. While the Proposed Rule change purports to restrict entry of immigrants who would

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1 Inadmissibility on Public Charge Grounds, 8 C.F.R. 103, 212, 213, 214, 245 and 248 [CIS No. 2499-10; DEPARTMENT OF HOMELAND SECURITY ("DHS") Docket No. USCIS-2010-0012] (hereinafter "NPRM").

2 Section 212(a)(4), 8 U.S.C. 1182(a)(4) (hereinafter "Section 212(a)"); Section 213, 8 U.S.C. 1183; Amending 8 C.F.R. 103.6, Surety bonds; Amending 8 C.F.R. 103.7, adding fees for new Form I-945, Public Charge Bond, and Form I-356, Request for Cancellation of Public Charge Bond; Adding 8 C.F.R. 212.20, Applicability of public charge inadmissibility; Adding 212.21, Definitions; Adding 212.22, Public charge determination; Adding 212.23, Exemptions and waivers for the public charge ground of inadmissibility; Adding 212.24 Valuation of monetizable benefits; Amending 8 C.F.R. 213.1, Adjustment of status of aliens on submission of a public charge bond; Amending 8 C.F.R. 214.1, Requirements for admission, extension, and maintenance of status; Amending 8 C.F.R. 245.4 Documentary requirements; and Amending 8 C.F.R. 248.1, Change of nonimmigrant classification eligibility.

3 Public Charge, *How is it determined whether someone is likely to become a public charge for admission or adjustment purposes?*, U.S. Citizenship and Immigration Services, (updated Oct. 16, 2018), https://www.uscis.gov/greencard/public-charge (hereinafter "USCIS Public Charge FAQ").

substantially drain government funds, in practice it would permit arbitrary denial of entry or denial of legal immigration status based on the receipt of assistance from a broad set of critical benefit programs.

The Proposed Rule expands the PCG inquiry from a limited consideration of narrowly prescribed factors ("Enumerated Factors"),[4] to a sweeping examination of whether an applicant or their family members have received benefits under a substantial list of public services, many of which are routinely accessed by individuals who are not primarily dependent on taxpayer funds.[5] The expanded considerations and list of public services, which includes Medicaid, Medicare Part D, Section 8 voucher and rental support, and the Supplemental Nutrition Assistance Program ("SNAP"), are sufficiently broad that the majority of current green card holders would have triggered one or more factors.[6] As an example, under the Proposed Rule, an immigrant who has applied for a filing fee waiver through DHS may be denied a green card by DHS for having received it.[7] In addition, the expanded list of benefits includes a number of programs that are designed to promote children's health, putting immigrant families in the difficult position of foregoing assistance to obtain nutritious food or basic medical care.[8]

The negative consideration arising from receipt of the specified public benefits is offset only if an individual can demonstrate that his or her household income meets or exceeds 250 percent of the Federal Poverty Guidelines ("FPG") at the relevant household size (the "Threshold Income"). Migration Policy Institute estimates that 2.3 out of 4 million (or 57.5 percent) of legally present noncitizens who arrived since 2013 would not meet the Threshold Income.[9] The proposed Threshold Income is especially high when considering that it is unattainable by many full-time employees earning the minimum wage[10] and that Congress has repeatedly rejected attempts to require the sponsors of such applicants to demonstrate an income at the lower threshold of 200 percent of the poverty level.[11]

II. The Proposed Rule will cause lasting harm to communities, families, and U.S. citizens

a. The effects of the Proposed Rule will disproportionately impact minority communities.

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[4] Section 212(a)(4) IMMIGRATION AND NATIONALITY ACT ("INA") establishes "age, health, family status, assets, resources, financial status, education and skills" as the formative factors, and allows officers to also consider any affidavit of sponsorship.

[5] *See* Samantha Artiga, Rachel Garfield, and Anthony Damico, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid¸* HENRY J KAISER FAMILY FOUNDATION 4 (Oct. 2018).

[6] *See* Jeanne Batalova, Michael Fix, and Mark Greenberg, *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, MIGRATION POLICY INSTITUTE (Aug. 2018) https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule.

[7] *See* NPRM *supra* note 1 at 235, 428.

[8] The Proposed Rule would newly consider in-kind benefits that largely benefit children's health including SNAP and potentially Children's Health Insurance Program ("CHIP"), NPRM *supra* note 1 at 102.

[9] Jeanne Batalova, Michael Fix, and Mark Greenberg, *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, MIGRATION POLICY INSTITUTE (Aug, 2018) https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule

[10] For instance, an employee making $8.49 per hour (the median minimum wage for 2017, and well above the federal minimum of $7.25 matched in 17 states) in a full-time position (working 40 hours a week for 52 weeks) would earn approximately $17,659, which amounts to 58.6% of the Threshold Income for a single-person household for 2017 ($30,150). *See* 2017 *Federal Poverty Guidelines*, MARY WASHINGTON HEALTHCARE, http://www.marywashingtonhealthcare.com/images/Content-Images/2017-Federal-Poverty-Guidelines.png; Minimum Wage Increases 2017: A Complete Guide to New State and City Laws, WAGE ADVOCATES, http://wageadvocates.com/minimum-wage-increases-2017/.

[11] *See e.g.* 104 H.R. 2202 (Aug. 4, 1995); 108 H.R. 3522 (Nov. 19, 2003) Sec. 827; 111 H.R. 127 (Jan. 6, 2009) Sec. 1. *See also* 8 USCS 1183a(f)(1)(E) ("the means to maintain an annual income equal to at least 125 percent of the Federal poverty line."); Form I-864P, 2018 HHS Poverty Guidelines for Affidavit of Support, U.S. Citizenship and Immigration Services (last reviewed July 30, 2018) https://www.uscis.gov/i-864p (showing non-military sponsors' requisite income to be 125% of the FPG).

The Proposed Rule gauges PCG in a way that will disproportionately affect immigrants from Mexico, Central America, Africa, and Asia with a likely outcome of homogenization of the individuals achieving LPR status. For instance, DHS proposes to newly consider limited English language proficiency as an indicator of a likelihood to become a public charge in the future. As justification for the negative weight of this factor, DHS cites potential difficulty with employment.[12] The assessment for what would qualify as sufficient proficiency is left unexamined, and DHS does not consider ability to read and write in its discussion[13] However, many forms of employment do not require spoken English skills at the level that would satisfy a proficiency exam. Language proficiency has not historically been a factor in obtaining green card status but has been relevant only for naturalization, when an immigrant has had a reasonable amount of time to learn and practice the language. Consideration of English proficiency in the determination of PCG is inconsistent with the Supreme Court decision holding that discrimination on the basis of English proficiency is protected against by Title VI, 42 U.S.C. § 2000d of the Civil Rights Act.[14]

In addition, based on income rates, household structures, and current benefit use, the Proposed Rule would likely affect Mexican, Central American, African and Asian individuals at nearly twice the rate of European, Canadian, and Oceanian applicants.[15] .

b. The Proposed Rule will fracture families, forcing them to choose between being together or providing for their loved ones and achieving citizenship

The Proposed Rule will put pressure on family-based immigration because the size of noncitizen households could significantly negatively affect an applicant's PCG review. The Proposed Rule considers household size in two instances. First, it considers household size against household assets and resources under the "Family Status" Enumerated Factor, while drawing conclusions regarding an immigrant's likelihood to use non-cash benefits based on the household size.[16] Second, the Proposed Rule uses the size of the household to determine the Threshold Income for purposes of determining whether his or her income qualifies as a "heavily weighed positive" factor.[17]

This is a radical shift from existing immigration policy[18] and is not warranted by statistics regarding economic success of family-based immigrants.[19]

The negative inferences that may be drawn from the seven existing factors[20] pursuant to the Proposed Rule may be balanced by a Threshold Income of 250 percent of the FPG by household size as a

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12 *Id*.

13 *Id*. at 199-200.

14 *Lau v. Nichols*, 414 U.S. 563 (1974)

15 *Public Charge and Legal Immigration: Additional Resources*, MIGRATION POLICY INSTITUTE (Sept. 12, 2018) available at https://www.migrationpolicy.org/sites/default/files/publications/PublicCharge-Commentary-QA-september2018-FINAL.pdf (note that this disparity is not due to any disparity in incoming numbers).

16 NPRM *supra* note 1 at 234 ("Among noncitizens in families with 3 or 4 people, about 20 percent received non-cash assistance, while about 30 percent of noncitizens in families of 5 or more received non-cash benefits.").

17 *Id*. at 235.

18 Since 1965, family-based immigration has been a dominant means of coming to the United States. Harriet Duleep, Ph.D, et al., *The Immigrant Success Story: How Family-Based Immigrants Thrive in America*, AMERICAN IMMIGRATION COUNCIL (June 11, 2018), https://www.americanimmigrationcouncil.org/research/immigrant-success-story; Zuzana Cepla, *Fact Sheet: Family-Based Immigration*, IMMIGRATION FORUM (Feb. 14, 2018) https://immigrationforum.org/article/fact-sheet-family-based-immigration/; *Public Charge and Legal Immigration, supra* note 15 (estimating that 68 percent of all new green card recipients came through family sponsorship).

19 Samantha Artiga, Rachel Garfield, and Anthony Damico, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid,* HENRY J KAISER FAMILY FOUNDATION 4 (Oct. 2018).

20 *See* NPRM *supra* note 1 at 239-42; Section 212(a)(4) IMMIGRATION AND NATIONALITY ACT ("INA") (establishing the "Enumerated Factors").

"heavily weighed positive" factor.[21] Statistically, individuals who enter through family-based immigration often go on to see a much greater rate of income growth than those who used an employment-based process, but they also show statistically lower rates of income upon first arrival.[22] In addition, because families are more likely to have negative factors associated with access to public benefits, such as SNAP and Medicaid, meeting the high Threshold Income will prove critical, and may not be achievable for families with dependents who are not yet income-earners. Thus, family-based immigration will likely be the most impacted category under the Proposed Rule.

As with many aspects of the Proposed Rule, these family and marital effects will have the greatest impact on applicants from Mexico and Central America (71 percent), Africa (69 percent), and Asia (52 percent)—regions that typically account for substantial numbers of Muslim immigrants. It would have substantially lower impact on European, Canadian and Oceanian applicants.[23]

In addition to the obvious moral implications, the family upheaval resulting from the Proposed Rule would have negative impacts on the development, learning, and overall potential of the children of the affected families. As a result, the Proposed Rule could have a lasting damaging effect on the well-being of those immigrants that remain and the communities in which they live.

c. The Proposed Rule will chill the use of government assistance to a communal detriment.

The Proposed Rule will discourage noncitizens from accessing public assistance programs that have been developed to benefit society as a whole and made available to noncitizens following appropriate legislative and administrative action. Discouraging access to such programs through immigration policies is contrary to established public policy. In addition, discouraging access to such programs through the Proposed Rule will negatively impact children, who constitute one of the most vulnerable segments of our society.

Congress has previously enacted legislation limiting the rights of noncitizens to participate in federal fund programs through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") (discussed below, *Section B*), and through institutional eligibility requirements.[24] It is evident that where noncitizens have been allowed access, Congress has made a judgment that the benefits are so essential or valuable—for example, emergency medical care, immunization, or food access for children—that they should not be denied to any members of our society. The Proposed Rule would go against that basic judgment.

The public benefits that are included in the Proposed Rule have the highest impact on the well-being of children. The California Health Care Foundation ("CHFC") has found that 4.8 million children in need of medical attention live in households with at least one noncitizen adult and were insured by Medicaid

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21 NPRM *supra* note 1 at 220.

22 Duleep, *supra* note 6.

23 *Id.* (estimating that 71 percent of Mexicans and Central Americans, 69 percent of Africans, and 52 percent of Asian immigrants would fail to meet the threshold). *Public Charge and Legal Immigration: Additional Resources*, MIGRATION POLICY INSTITUTE, Sept. 12, 2018 (MPI sites the telling example of Vietnamese immigration patterns – "while initially they came as refugees, more than 95 percent today receive green cards through family reunification.")

24 Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") Pub.L. 104–193; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub.L. 104–208, 110 Stat. 3009-546, (Sept. 30, 1996).

or Children's Health Insurance Program ("CHIP").[25] Approximately 951,000 of these children have at least one potentially life-threatening condition. The likely impact of this rule going into effect will be that between 700,000 and 1.7 million children will be disenrolled from these critical benefits programs, causing them to become uninsured and therefore reducing the likelihood that they will receive prompt and effective care when they need it.[26] Children's access to adequate nutrition will also likely be severely impacted, since the Proposed Rule includes the use of SNAP as a negative factor. Lack of access to adequate nutrition can affect not only the health of these children, but their ability to focus and learn in school and become productive citizens.

In fact, the effect of this Proposed Rule has been to create fear about the use of any government aid or public benefit whatsoever, even benefits not specifically mentioned in the Rule. Members of immigrant communities have already begun to express concern to service providers about whether they should remain enrolled in vital benefit programs.[27] While the Proposed Rule has limited its scope to certain federal public programs, the spirit of the rule and the enormity of its potential consequences has made people afraid to use support that help keep our families and communities safe and healthy. For instance, immunizations, which are not included in the proposed definition of "public benefits," may nevertheless be confused with the numerous in-kind medical benefits that are heavily disfavored by the Proposed Rule, chilling the rate at which immigrants and their families access crucial preemptive care. Failure to immunize may lead to increases in more serious medical costs and may jeopardize the health of the community. The Fiscal Policy Institute estimates that as many as 24 million people, including nine million under the age of 18, are likely to disenroll. Even very conservative studies estimate that 14 million will disenroll, including many U.S. citizens.[28] These numbers far exceed those contemplated by DHS's Proposed Rule.[29]

III. The proposed definition of a Material Public Benefit is arbitrary and capricious

The proposed definition of what constitutes a "public benefit" is arbitrary and capricious[30] because (1) the FPG is meant to measure only monetary benefits and not monetary and nonmonetary benefits, as is currently contemplated under the Proposed Rule; (2) even if the FPG is the proper metric, it is not properly

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[25] Issue Brief, *Changing Public Charge Immigration Rules: The Potential Impact on Children Who Need Care*, CALIFORNIA HEALTH CARE FOUNDATION (Oct. 2018), available at https://www.chcf.org/publication/changing-public-charge-immigration-rules/

[26] *Id*.

[27] *See e.g.*, *Only Wealthy Immigrants Need Apply*, Fiscal Policy Institute (Oct. 10, 2018) available at http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf ; Riham Feshir, *'Public Charge' Rule Blamed for 'Chilling Effect' Among Immigrants*, MPR NEWS (Oct. 23, 2018) https://www.mprnews.org/story/2018/10/23/public-charge-rule-blamed-for-chilling-effect-among-immigrants.

[28] *Only Wealthy Immigrants Need Apply*, Fiscal Policy Institute (Oct. 10, 2018) available at http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf; Note that even more conservative statistics estimate 14 million, including many U.S. citizens. *Public Charge Proposed Rule: Potentially Chilled Population*, manatt (Oct. 11, 2018) https://www.manatt.com/insights/articles/2018/public-charge-rule-potentially-chilled-population (looking conservatively at current levels of low-income families who are the most likely to forgo benefits due to the implications of an income below 125% of the FPG under the Proposed Rule; estimating this figure at nearly 14 million individuals, made up of 7.5 million noncitizens and their family members.)

[29] NPRM *supra* note 1 at 392; *see* D(i) *infra* for more discussion.

[30] The Administrative Procedure Act ("APA") grants agencies the power to promulgate detailed rules based on their relative expertise and also sets forth the applicable rulemaking procedures. This power is not unchecked, but rather, agency rulemaking is subject to judicial review, which review seeks to determine whether the applicable rule or rulemaking process was "arbitrary and capricious" or otherwise not in accordance with applicable law. Black's Law Dictionary defines "arbitrary and capricious" as "a willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." In instances where there is a sudden and unjustified departure from well-established agency practice, many courts have found the agency action at issue to be arbitrary and capricious, and as a result the rule has been struck down as unconstitutional. As elaborated upon further below, because the Proposed Rule not only fails to adequately consider the facts, but also includes standards which are both arbitrary and capricious, violates the APA and should be struck down as unconstitutional.

applied in the Proposed Rule; and (3) the 15 percent of FPG limit included in the Proposed Rule is not only unsupported by the facts, but is an inappropriate proxy for dependency. Further, the proposed definition is a significant departure from current practice, as the U.S. Citizenship and Immigration Services ("USCIS") currently limits the benefits considered for purposes of the "public benefit" analysis to cash assistance for income maintenance or institutionalization for long-term care at government expense. [31] In this shift from long-established immigration law, DHS aims to expand the benefits considered in the PCG inquiry to include numerous in-kind benefit programs – notably Medicaid, Section 8 Rental Assistance and Housing Choice Voucher Program, Public Housing, and SNAP. [32] The specific programs have purportedly been chosen as a means of determining which individuals will be self-sufficient, ignoring the fact that these programs are often temporary assistance that actually help families achieve self-sufficiency.[33] Use of these programs will be viewed as a "Heavily Weighed Negative" against an applicant,[34] as will a determination that such applicant may use any such a program in the future, a prospective conjecture that may have enormous implications but is essentially left to the discretion of the reviewing officer.

Beyond the expanded scope of the types of benefits to be considered, the Department has formulated a completely new test for those individuals who are currently receiving, or have received in the past 36 months, an amount of support that DHS has decided is material.[35] Like the category above, this test would look at both cash income supplements and the designated in-kind benefits. Unlike the discretion-based factor test, this test creates a hard line at which such individuals would be presumed a public charge, seemingly regardless of sponsorship or income level.[36]

a. The Federal Poverty Guideline (FPG) is the wrong metric to apply to any non-cash aid

Under the Proposed Rule, all relevant benefits would be split into two categories, monetizable and nonmonetizable, creating different lenses applicable to assessment of material benefits that are easily assigned a dollar figure and in-kind benefits that are harder to quantify. Monetizable aid, under the Proposed Rule, will include SNAP, Section 8 rental and voucher assistance, and other housing programs in addition to SSI, TANF, and general cash aid. Nonmonetizable aid, such as Medicaid care, if used in any 12 months over a consecutive 36 month period, would be considered an indicator that the recipient is a public charge (a "Material Public Benefit"). While the DHS has specifically requested comment on the 36-month period, the decision to use three years as the relevant measurement is unsupported and arbitrary. Monetizable aid would be considered a Material Public Benefit when such aid amount exceeds 15 percent of the FPG for a one-person household within a period of 12 consecutive months.[37] However, the FPG scale is meant only to measure income supplement amounts, and therefore utilization of FPG under the Proposed Rule is arbitrary and capricious.[38] While the 15 percent threshold has also been expressly opened for comment, it is only one of several reasons that this measurement is irresponsible and unacceptable.

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[31] NPRM *supra* note 1 at 94; USCIS Public Charge FAQ, *What publicly funded benefits may be considered for public charge purposes?*; these factors have been around for hundreds of years and reflect concerns about individuals who arrived in a completely dependent condition, either financially or institutionally.

[32] NPRM *supra* note 1 at 18. The "four main means-tested public benefits" included here are "(1) Federal, state, and local public cash assistance, including TANF and GA; (2) SSI; (3) SNAP; (4) Medicaid and CHIP."

[33] NPRM *supra* note 1 at 116 – DHS quotes TANF's statement "provides monthly income assistance payments to low-income families and is intended to foster self-sufficiency, economic security, and stability for families with children".

[34] NPRM *supra* note 1 at 208-12.

[35] *Id.* at 115.

[36] "DHS believes that a person should be considered a public charge based on the receipt of financial support from the general public through government funding (i.e. public benefits)" – NPRM *supra* note 1 at 93.

[37] NPRM *supra* note 1 at 94.

[38] NPRM *supra* note 1 at 104.

The use of the FPG to judge the materiality of the proposed list of public benefits is inappropriate. While the scope of aid considered under the Proposed Rule would expand to include in-kind, noncash benefits, the FPG metric does not reflect such items. The FPG is a number produced by the Department of Health and Human Services ("HHS") as a "simplification of the poverty thresholds[, which are updated annually by the Census Bureau for detailed statistical use,] for use for administrative purposes – for instance, determining financial eligibility for certain federal programs."[39] The FPG does not consider the use of government benefits, nor is it meant to measure them; it is meant to be a measure of taxable income by which each agency may determine the need for assistance. Importantly, many of these agencies place their threshold at some multiple of the FPG, meaning an income under 125 percent, 185 percent or more of the number assessed by HHS would result in benefit eligibility. This indicates that administrators of these benefit programs recognize that very often there is a need for some government assistance even when technically above the FPG. In fact, the programs identified by the Proposed Rule all use the FPG to determine need specifically because that level of income is not a livable wage for many individuals.[40] FPGs have not been, nor should they be, used for purposes of determining whether an individual is a burden on the state or for denying eligibility to something as fundamental as immigration status. Compounding the problem, under the Proposed Rule as written, the FPG to be applied is the one in effect at the time of the inquiry, even when the inquiry itself is prospective.

b. *Even if the FPG is a reasonable baseline, its proposed application is illogical and leads to overly restrictive results.*

Furthermore, the DHS proposes to use the FPG figure for a one-person household while many benefits are assessed on a household-basis (which household may include far more than one person), including SNAP, Section 8 housing, and Temporary Assistance for Needy Families ("TANF"). This creates a false assessment of the comparative burden of each individual on the state and raises the possibility that benefits are being counted multiple times against each immigrant or nonimmigrant resident in each part of the inquiry. This same disparity is at play in the determination of the positively viewed Threshold Income.[41] Notably, the Proposed Rule uses FBG differently in the context of benefits as compared to Threshold Income – both to the detriment of the applicant. The FPG is based on a one-person household for purposes of determining if benefits received by the immigrant's household create a presumption of public charge status, whereas the Threshold Income is based on the immigrant's household number for purposes of determining if his or her income is high enough to outweigh negative determinations under the Enumerated Factors. Households of numerous adults and children may be denied access to green cards or other immigration benefits based on the use of a benefit accepted for the good of children who do not and cannot contribute income to the household.

c. *Regardless of the poverty metric employed, the proposed 15 percent materiality limit is unsupported and unconscionable as a proxy for dependency.*

Fundamental to the problem with the Proposed Rule is its elimination of the current standard that a public charge be "primarily dependent" on public means. For purposes of determining inadmissibility, USCIS currently defines a public charge as "an individual who is likely to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense."[42] Field guidance further solidified this standard as of 1999, and the base concept of "primarily dependent" is consistent through all

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39 https://aspe.hhs.gov/poverty-guidelines (emphasis removed)

40 *What Programs Use the Poverty Guidelines?*, U.S. CIS (last updated Oct. 10, 2018), https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty ""

41 NPRM *supra* note 1 at 155-56.

42 https://www.uscis.gov/greencard/public-charge "What is a public charge and when does it apply?"

administrative and judicial treatment of the inquiry.[43] Common sense would tell us that "primarily" means some majority of a figure. Current definitions of dependency by related agencies has agreed with common sense down the line, as DHS admits.[44] Current use and discussion of the PCG has interpreted the phrase to mean that the "receipt of one or more of these benefits alone would not establish that he or she is likely at any time in the future to become a public charge."[45] This concept is repeated in the Proposed Rule,[46] but DHS seeks an end-run around the administrative and judicial history by proposing that the receipt of one or more public benefits (as newly defined) would be a "heavily weighted negative factor" in assessing an individual's inadmissibility. For those who cannot meet the Threshold Income, that is a distinction without a difference. Again, the impact of this workaround is compounded by the prospective nature of the inquiry, allowing an officer to consider as a heavily weighted factor the potential that an individual may at some point receive benefits at or exceeding this very modest amount.[47]

The Proposed Rule places a floor for "dependency" at 15 percent of the FPG. Although DHS has opened the floor for comment as to whether this is the right threshold, or whether a lower threshold should also be given some (albeit diminished) weight, they have only addressed the disparity between 15 percent and 50 percent with the bold and unfounded assertion that it is enough to show an inability to self-sustain. This assessment goes against common sense, administrative and judicial context, and a sense of justice. Whether or not DHS can justify its use of the FPG as a measurement tool, aid in the amount of 15 percent of an income level ascribed to a single-person-household at poverty level cannot reasonably be understood to make a person "primarily dependent" on government funds.

IV. DHS has not adequately considered the costs and benefits of the Proposed Rule

a. The NPRM gives inappropriate consideration to the expenditure of government programs in choosing which should be indicative of dependency.

Fundamental to the purpose of a notice of proposed rulemaking ("NPRM") is an explanation of the purpose of the proposed rule and the analysis of costs and benefits ("CBA") that will result. However, it is imperative that the CBA does not become the purpose for the proposal. In selecting the additional public benefit programs to be included in the scope of PCG review by virtue of each program's relative portion of the total federal expenditures for low-income, DHS has placed too much weight on the presumed benefit, and neglected the stated purpose of the Proposed Rule.[48] Although the amount of money spent on the aid may represent the importance of such assistance in the eyes of taxpayers, or the communal good that the program can achieve, it cannot alone support the conclusion that those who accept such aid are "neither self-sufficient nor on the road to achieving self-sufficiency."[49]

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[43] *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* [64 FR 28689] [FR 27-99] available at https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html (hereinafter "1*999 Field Guidance*").

[44] *See* NPRM *supra* note 1 at 106-07 (In 2018, HHS defined welfare dependence as "the proportion of individuals who receive more than half of their total family income in one year from the Temporary Assistance for Needy Families (TANF) program, the Supplemental Nutrition Assistance Program (SNAP) and/or the Supplemental Security Income (SSI) program"; the IRS defines a qualifying dependent child and a qualifying dependent relative as "one who cannot have provided more than half of his or her own support for the year.").

[45] NPRM *supra* note 1 at 104.

[46] *See e.g*. NPRM *supra* note 1 at 104 ("While an alien's receipt of one or more of these benefits alone would not establish that he or she is likely at any time in the future to become a public charge. . . ").

[47] NPRM *supra* note 1 at 105 ("[R]eceipt of such benefits would be determined on a prospective basis, *i.e.* likely at any time to receive benefits above the proposed thresholds."). *See contra*, *In Matter of Martinez-Lopez* (wherein the Attorney General opined that the statute "require[d] more than a showing of possibility that the alien will require public support").

[48] NPRM *supra* note 1 at 117-21.

[49] NPRM *supra* note 1 at 110.

b. The NPRM does not adequately consider the economic and employment costs of imposing the Proposed Rule.

DHS also does not fully consider the economic costs of the Proposed Rule because it dismisses without justification the relevant data from similar history, and does not adequately explain the estimates it foresees. As evidenced by the decline in enrollment that followed PRWORA[50] and by the various studies detailed below, DHS's estimate of 2.5 percent disenrollment is arbitrary and not reasonably based on the facts available.

Disenrollment in public programs would have a staggering negative economic impact. For example, a study by the Center on Budget and Policy Priorities and the Economic Policy Institute on the economic impacts of reduced food and medical assistance found that a 15 percent disenrollment of current noncitizen benefit recipients could create an economic ripple effect of $14.491 million, and over 98,000 jobs lost; at 25 percent disenrollment, the ripple effect would be $24.151 million, and over 164,000 jobs lost; and at the plausible extreme of 35 percent disenrollment, the economic ripple effect could add up to $33.811 million, and over 230,000 jobs lost, all in food and medical sectors alone.[51]

The Proposed Rule also fails to consider the impact on businesses that employ immigrants and temporary visa holders. Although immigrants made up approximately 13 percent of the U.S. population in 2016, they comprised 17 percent of the workforce.[52] The uncertainty and fear that the Proposed Rule would bring would make it far harder to predict the status of an employee hoping to change his or her status to that of an LPR, or to keep employees who find that the new rule prevents their families from joining them. Businesses will suffer, and immigrants looking to achieve the self-sufficiency that DHS purports to value will likely have a harder time convincing employers of their eligibility.

The economic ripple effects will be felt in other areas as well. Mostly notably in the medical, agricultural and grocery employment fields, there will be job losses and business failures where noncitizen residents make up a large portion of the revenue. For instance, in asserting that SNAP is one of the largest drains on federal funds provided to low-income families, DHS has overlooked the economic impact of that government investment. As reported by the Center on Budget and Policy Priorities, every $5 in SNAP benefits generates $9 in overall economic activity.[53] Notably, DHS has recognized these impacts, but failed to quantify them, which has left them underrepresented in the cost and benefit examination.[54]

Effects in the healthcare field may be even more critical. A study by the Geiger Gibson Program in Community Health Policy has estimated that of the 13.3 million Medicaid beneficiaries served by health centers in 2017, approximately 5.3 percent (or 709,000 individuals) were likely immigrants who are not yet citizens, putting them in a category likely to disenroll based on a change in the public charge grounds.[55] If even half of those known immigrants disenroll due to the Proposed Rule, 354,000 individuals will be left without healthcare, and health centers will lose approximately $346 million dollars in Medicaid revenue

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50 *Id.* at 361 (noting a 54 percent decline in food stamp participation by legal immigrants following the passage of PRWORA).

51 *Economic and Fiscal Impacts of Reduced Food and Medical Assistance: Three Scenarios*, FISCAL POLICY INSTITUTE (Oct. 10, 2018), available at http://fiscalpolicy.org/wp-content/uploads/2018/11/50-states-economic-impact-of-public-charge-1.pdf (see chart for a more detailed breakdown by state).

52 Pew Charitable Trusts, Route Fifty, *Politics: Immigrants in the Workforce, State by State and Industry by Industry*, The Atlantic (Jan. 7, 2016), https://www.theatlantic.com/politics/archive/2016/01/immigrants-in-the-workforce-state-by-state-and-industry-by-industry/458775/

53 *SNAP is Effective and Efficient,* CENTER ON BUDGET AND POLICY PRIORITIES (updated Mar. 11, 2013), https://www.cbpp.org/research/snap-is-effective-and-efficient.

54 NPRM *supra* note 1 at

55 Ku et al., Health Centers and Medicaid, NATIONAL ASSOCIATION OF COMMUNITY HEALTH CENTERS, available at http://www.nachc.org/wp-content/uploads/2018/05/Medicaid_FS_5.15.18.pdf

over a one-year period while continuing to bear the duty of furnishing care to remaining patients.[56] To mitigate the loss, centers will be forced to reduce patient capacity, hours, staff, and services, negatively affecting not only the immigrant communities, but all those who benefit from Medicaid. The study notes that these numbers are likely an underestimate of the problem; additional family members are likely to also fear use due to the implications, and conceivably twice as many people may disenroll, causing substantially more loss in funds and employment for these health centers.

Thus, DHS has failed to consider the full economic impact of this Proposed Rule, which, based on all available evidence, is likely to be staggering.

c. The Proposed Rule fails to adequately consider costs and benefits because it does not justify the need for a more restrictive rule

Finally, the overall integrity of the CBA is faulty because the rule fails to identify a change in circumstances or a result of the current interpretation that would justify this significant shift. The ability to assess an immigrant's burden on the taxpayers of America has already been congressionally established and is supported by years of consistent guidance and administrative opinion. Section 212(a)(4) of the INA establishes the PCG, calling for the consideration of seven factors: age, health, family status, assets, resources, financial status, education and skills, along with discretionary consideration of any affidavit of support (which is required in most cases). The public charge determination is currently made by looking at a totality of the circumstances,[57] and is guided by the Interim Field Guide of 1999.[58]

Far from being a drain on America's resources, many immigrants thrive and give back to their communities regardless of the financial state in which they arrive. In fact, "nearly 44 percent of America's Fortune 500 companies were founded by an immigrant or a child of an immigrant."[59] The current totality of the circumstances test is meant to account for this human potential, not reduce an applicant's chances to a handful of arbitrary and daunting numbers before he even has his feet at the starting line.

DHS asserts that the 447 page Proposed Rule merely interprets the minimum statutory factors and "establish[es] a clear framework under which DHS would evaluate those factors."[60] In reality, it is a drastic departure from years of agency interpretation and practice with respect to the PCG – considerably expanding the number of people who would be subjected to the test,[61] the benefits that would be

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[56] *Id*.

[57] USCIS Public Charge FAQ, *How is it determined whether someone is likely to become a public charge for admission or adjustment purposes?*; the Proposed Rule acknowledges this history as well, "a series of administrative decisions after passage of the Act clarified that a totality of the circumstances review was the proper framework for making public charge determinations. . . " NPRM *supra* note 1 at 32.

[58] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, IMMIGRATION AND NATURALIZATION SERVICE, JUSTICE, [64 FR 28689] [FR 27-99] (May 26,1999) (hereinafter "IFG").

[59] *Economic Impact of Proposed Rule Change: Inadmissibility on Public Charge Grounds*, NEW AMERICAN ECONOMY (Oct. 31, 2018), https://research.newamericaneconomy.org/report/economic-impact-of-proposed-rule-change-inadmissibility-on-public-charge-grounds/

[60] NPRM *supra* note 1 at 55.

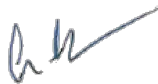
[61] NPRM *supra* note 1 at 60 (proposing to expand the inquiry into current or potential future receipt of public benefits to those applying for an extension of stay or change of status, despite the fact that Section 212(a)(4) of the Act applies only to applicants for visas, admission, and adjustment of status); Jeanne Batalova, Michael Fix, and Mark Greenberg, *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, MIGRATION POLICY INSTITUTE (June, 2018), https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families ("noncitizens who could face a public-charge based determination based on benefits use would increase more than 15-fold – from 3 percent under current policy to 47 percent under the terms of the rule").

considered,[62] and the potentially severe consequences of even minor acceptance of aid[63] – without offering a change in circumstances or other reason for which this stark departure might be necessary to protect a fundamental value or correct an injustice.

V. Conclusion

This Proposed Rule is a dramatic departure from more than a century of legislative, administrative, and judicial agreement on the standards by which public charge grounds for inadmissibility should be considered. The Proposed Rule is arbitrary and capricious, unreasonable on the merits, and will have a disproportionate negative impact on communities of Latin American, Asian, and African origin. We strongly urge you to reject this rule.

Respectfully submitted,



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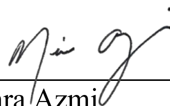

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62 NPRM *supra* note 1 at [page, summary of expansion of the benefits to be included]

63 NPRM *supra* note 1 at [page, summary of the weight of a laundry list of negative indicia and a fairly single heavily weighted positive]