



Submitted Electronically

December 3, 2018

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

RE: “Inadmissibility on Public Charge Grounds” Notice of Proposed Rulemaking; RIN 1615-AA22; DHS Docket No. 2010-0012.

Dear Ms. Deshommes,

The United States Conference of Catholic Bishops (“USCCB”) and Catholic Charities USA (“CCUSA”) appreciate the opportunity to provide public comment to the Department of Homeland Security’s (“DHS”) U.S. Citizenship and Immigration Services (“USCIS”) regarding the above-referenced Notice of Proposed Rulemaking (“NPRM” or “proposed rule”) concerning inadmissibility on public charge grounds under section 212(a)(4) the Immigration and Nationality Act (“INA”),¹ published in the Federal Register on October 10, 2018 (83 Fed. Reg. 51,114).² For the reasons below, we ask the proposed rule be withdrawn, or at least modified to remedy its many harmful effects.

The USCCB is a nonprofit corporation whose members are the active Catholic Bishops of the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in diverse areas of the nation’s life. USCCB’s Committee on Domestic Justice and Human Development assists the bishops in advancing the social mission of the Church, including its policy advocacy, education, and outreach in support of the Church’s antipoverty efforts. For decades, USCCB’s Committee on Migration has collaborated with the U.S. government to welcome, and to manage the provision of services, to unaccompanied immigrant children, U.S. and foreign-born victims of human trafficking, and refugees. USCCB/MRS advocates on behalf of these and other immigrant populations to advance the migration policy priorities of USCCB’s Committee on

¹ 8 USC § 1182 (a)(4).

² Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018).

Migration. The Catholic Church's work in assisting immigrants stems from the belief that every person is created in God's image and all are deserving of human dignity.

CCUSA is a national membership organization representing more than 167 diocesan Catholic Charities member agencies. These member agencies operate more than 2,600 service locations across 50 states, the District of Columbia, and five U.S. territories. The diverse array of social services offered by its member agencies reached more than 10 million individuals in need last year. These services include partnering with government agencies to deliver key safety net and community support programs. Catholic Charities focuses on reducing poverty in America and seeks to address symptoms of poverty including hunger and homelessness.

From the Old Testament to the teachings of Jesus as written in the Gospels, the Judeo-Christian tradition has emphasized care for the stranger and care for the poor as essential ways of knowing God,³ and living a good and holy life. For centuries, the experience of the Church in the United States through her charitable works and institutions has emphasized these critical elements of Christianity, famously captured in the parable of the Good Samaritan and the twenty-fifth chapter of St. Matthew's Gospel. As Pope Francis said in his address to the U.S. Congress:

In recent centuries, millions of people came to this land to pursue their dream of building a future in freedom. We, the people of this continent, are not fearful of foreigners, because most of us were once foreigners. I say this to you as the son of immigrants, knowing that so many of you are also descended from immigrants. . . when the stranger in our midst appeals to us, we must not repeat the sins and the errors of the past. We must resolve now to live as nobly and as justly as possible, as we educate new generations not to turn their back on our 'neighbors' and everything around us.⁴

Care for the hungry, the stranger, the sick, and the homeless are central components of how Christians have traditionally understood they will be judged by God at the conclusion of their lives, and are what Pope Francis has referred to as the "Great Criterion."⁵ The Church has taught that these obligations flow from the inalienable dignity of each human person, based on the image and likeness of God in which every man and woman is created. A good society, then, upholds this dignity of each person by promoting the "common good," a concept of Catholic social thought with ancient origins that requires society to support conditions that allow for the flourishing of its people. The "demands of the common good" include justice and peace, as well as "the provision of essential services to all, some of which are at the same time human rights: food, housing, work, education and access to culture, transportation, basic health care, the freedom of communication and expression, and the protection of religious freedom."⁶

³ See, e.g., Lv. 19:34 (" . . . you shall love the alien as yourself; for you too were once aliens in the land of Egypt"); Deut. 10:19 (same); Mt. 25: 35-40 ("For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me . . .").

⁴ Pope Francis, Address to U.S. Congress (Sept. 24, 2015).

⁵ See, *Gaudete et Exultate*, no. 95 (2018).

⁶ See, *Compendium of the Social Doctrine of the Church*, no. 165-166 (2004).

We are, therefore, deeply concerned with the proposed rule, which we believe is in tension with the dignity of the person and the common good that all of us are called to support. Under the proposed rule, certain families will likely have to choose between meeting basic needs, by using benefits for which they are eligible, and risking separation from loved ones. This rule is already chilling access to necessities that are otherwise available to persons and households that have undergone and are continuing on the long process of legal immigration.⁷ The proposed addition to the rule of programs covering nutrition, housing, and health care means, as the NPRM itself points out, that the health and wellbeing of many families – and many children, U.S. citizens – will be detrimentally impacted by these changes. The growing complexity of factors that would be coupled with virtually unfettered discretion given to immigration and consular officials would make it impossible to avoid arbitrariness when making a public charge determination.

In short, we are concerned that the rule:

- will threaten families, harm low-income and working-class migrants, cut off persons from services that provide for basic needs, diminish public health, and could even put lives in danger.
- proposes a definition of “public charge” and “public benefit” that is arbitrary and will make persons less “self-sufficient.”
- proposes a new arbitrary and capricious application of the public charge analysis for those seeking to extend or change their status.
- proposes an arbitrary scheme that is fundamentally inconsistent with the “totality of the circumstances” test.

Based on these facts, we believe this rule should be withdrawn from consideration; at the very least, it must be significantly altered with subsequent rulemaking to address these deficiencies.

I. DHS Should Withdraw the Proposed Rule Due to Significant Public Policy Concerns.

The proposed rule presents myriad serious public policy concerns, including threats to: (i) family unity and stability; (ii) low-income and working-class migrants; (iii) social services providers; and (iv) life and public health. For all of these reasons, we urge DHS to withdraw or abandon this proposed rulemaking. Instead of pursuing this rule, which would have deleterious effects on children, families, social services providers, and the public, DHS should continue to utilize its existing interpretation of the public charge ground of inadmissibility.

A. The Proposed Rule Negatively Impacts Family Unity and Stability. This rule would undoubtedly undermine family unity and family stability. If implemented, the rule would deny many individuals a lawful means through which to reunify or remain with family in the U.S. Such effects would be felt not only by the noncitizen applicants, but also by their U.S. citizen and lawful permanent resident (LPR) family members. For example, recent research estimates that the rule

⁷ Bovell-Ammon, Allison, et al. *Trends in Food Insecurity and SNAP Participation among Immigrant Families of US Born Young Children*. 2018, <http://childrenshealthwatch.org/trendsinsnapandimmigrantfamilies/>. Presented at the American Public Health Association 2018 Annual Conference; November 12, 2018; San Diego, California.

could cause nearly 200,000 couples per year to be denied their marriage-based permanent residency applications.⁸ This in turn would force U.S. citizens and LPRs to choose between departing from the U.S. and living apart from their intended spouses.

Mixed-status families⁹ with noncitizen members lawfully present in the U.S. would also be forced to choose between their stability and unity. It is estimated that over 456,000 nonimmigrant individuals live in mixed-status households which would be indirectly affected by the proposed rule.¹⁰ Additionally, reports indicate that the proposed rule would have a chilling effect not only on noncitizen parents' use of benefits but also on enrollment of their U.S. citizen children due to fear and confusion over the impacts of the rule.¹¹ Such a chilling effect would negatively impact the growth and healthy development of these children.¹² With an estimated one in four children living in households with an immigrant parent nationally, and approximately 90 percent of these children (or 17.7 million) being U.S. citizens, the magnitude of this unintended impact must not be ignored.¹³

Even if noncitizen parents understand the requirements of the rule, they would still have to discern whether to utilize public benefits for which they are eligible – and which could help ensure their families' access to safe housing and sufficient nutrition – knowing that such use could prevent them from later adjusting status and could lead to their families' eventual separation. This is a choice no family should have to make. Making parents in mixed status families evaluate the use of benefits for themselves and possibly decline benefits does not advance the public policy goal of making such benefits available to further support the development of U.S. citizen children.

B. The Proposed Rule Harms Low-Income and Working-Class Migrants. As Pope Francis has stated, “[o]ur faith in Christ, who became poor, and was always close to the poor and the outcast, is the basis of our concern for the integral development of society’s most neglected members.”¹⁴ Rather than aid the poor in their quest for self-sufficiency, the proposed rule instead will result in myriad obstacles and hindrances to improved economic, health, and educational outcomes. These effects will not only be visited on the noncitizen immigrant community, but on U.S. citizens as well. The NPRM *itself* identifies a laundry-list of admitted negative consequences that will especially harm the poor, including:

⁸ *Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year*, BOUNDLESS (Sept. 24, 2018), available at <https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/>.

⁹ These are families comprised of members with different immigration statuses (e.g., both U.S. citizen and noncitizen members).

¹⁰ Kerwin, Donald et. al., *CMS Report: Proposed Public Charge Rule Would Significantly Reduce Legal Admissions and Adjustment to Lawful Permanent Resident Status of Working Class Persons*, (November 2018), available at <http://cmsny.org/wp-content/uploads/2018/11/Public-Charge-Report-FINAL.pdf>

¹¹ SAMANTHA ARTIGA, ET AL., HENRY J. KAISER FAMILY FOUNDATION, ESTIMATED IMPACTS OF THE PROPOSED PUBLIC CHARGE RULE ON IMMIGRANTS AND MEDICAID 1 (2018), available at <http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-the-Proposed-Public-Charge-Rule-on-Immigrants-and-Medicaid>.

¹² *Id.* at 7.

¹³ SAMANTHA ARTIGA & ANTHONY DAMICO, HENRY J. KAISER FAMILY FOUNDATION, NEARLY 20 MILLION CHILDREN LIVE IN IMMIGRANT FAMILIES THAT COULD BE AFFECTED BY EVOLVING IMMIGRATION POLICIES 1 (2018), available at <http://files.kff.org/attachment/Data-Note-Nearly-20-Million-Children-Live-in-Immigrant-Families-that-Could-Be-Affected-by-Evolving-Immigration-Policies>.

¹⁴ *Evangelii Gaudium*, no. 186.

- Worsened 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 emergency 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;
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment.¹⁵

These findings alone clearly illustrate the adverse impact this rule would have on vulnerable persons if finalized. The proposed rule concedes that it will increase poverty, decrease educational attainment and productivity, and lead to a series of public health crises. To be clear, such outcomes are the opposite of self-sufficiency – the rule’s purported goal.

The alarmingly low proposed thresholds for the new “public charge” category, would further exacerbate these bad outcomes. While the receipt of benefits by U.S. citizen children would not be a negative factor to their noncitizen parent’s application, the mere fact that the children are in the household would be a downward factor for determining overall household income. This threshold will easily be met in many poor families, and many children, including U.S. citizen children, will suffer as a result from lack of health care, nutrition, or adequate housing.

The dramatic increase in persons and families that would be swept up in the public charge category—including families who are working hard to earn more than the federal poverty guidelines in salary but may still require modest public benefits to meet basic needs—exacerbates many of the negative outcomes the government itself recognizes this rule will cause and undermines the rationale for public benefit usage as a means to help temporarily stabilize families while they are working to attain financial independence and self-sufficiency.

C. The Proposed Rule Will Increase Costs and Complexity for Social Service Charitable Organizations. The proposed rule will have a severe impact on the social safety net, requiring community-based organizations, churches, local nonprofits, and other charitable organizations to increase services to meet the projected increase in demand for assistance to meet basic needs. The impact of this rule is already being felt by local Catholic Charities organizations and other social service organizations, which are seeing an increase in demand for services due to individuals’ fear of the rule’s impact.

The NPRM projects that 2.5% of foreign born noncitizens would be likely to forego enrollment from public benefits because of the rule.¹⁶ If taken as accurate, this projected rate of disenrollment would lead to a projected \$2.27 billion reduction in government assistance for 324,438 individuals and 14,532 households across the public benefits programs.¹⁷ Over 53% of

¹⁵ See 83 Fed. Reg. at 51270.

¹⁶ 83 Fed. Reg. at 51, 361.

¹⁷ *Id.* at 15.

Catholic Charities are already reporting instances of migrants declining public benefits for being asked to disenroll because of fear of the Public Charge rule.¹⁸

This projected rate of disenrollment, however, is substantially lower than the likely rate of actual disenrollment and therefore fails to fully capture the downstream costs on health care, social service providers and other charitable institutions. As noted in the rule, the last time an effort to revise the public charge rule was undertaken in the 1990s, the real rate of reduction in enrollment in public benefits was between 21 to 54 percent.¹⁹ Therefore, if these rates mirror those experienced during previous changes to public charge, the real impact on the social safety net will likely be 18 to 52 percent higher than the rule projects. This is clearly a much larger number of households affected and as such, will lead to a devastating increase in demand for private social services to meet basic needs, greatly straining the limited resources of social service providers.

For example, Catholic Charities agencies serve approximately 1 in 9 people receiving food assistance in the United States and spend on average \$91.47 per person per year seeking food assistance. If disenrollment rates in SNAP reflect the rates seen in the previous public charge reforms, it will lead to an additional 2.3 million people seeking food assistance and a projected \$24 million per year impact on Catholic Charities agencies, alone, to meet the additional nutritional needs of people.²⁰ This measures only the “chilling effect” on SNAP enrollment and does not include the likely costs to Catholic Charities if similar rates of disenrollment are seen in housing, health, and other social welfare programs. The impact of this proposed change would be twofold not only will local charities be required to try to meet the dramatic increase in demand, but clients will be competing for assistance with a much larger pool of people in need without a corresponding increase in the number of existing charitable organizations.

Like social service providers, hospitals are also projected to see an increase cost for charitable care because of the rule. The proposed inclusion of Medicaid and CHIP in the proposed rule could lead to an estimated \$68 billion: \$26 billion for noncitizens and \$42 billion for citizen family members who forgo coverage out of fear of being declared a public charge.²¹ This means hospitals and all Americans would face increasing health care costs to cover the uncompensated care for these individuals. In addition, inclusion of Medicaid and CHIP could jeopardize progress in reducing the number of children living without insurance as an estimated 13.3 million adults and children could be impacted by the rule.²²

¹⁸ CCUSA Internal Survey (November 27, 2018).

¹⁹ *Id.* at 361 citing Genser, J. (1999). *Who is leaving the Food Stamps Program: An analysis of Caseload Changes from 1994 to 1997*. Washington, D.C.: U.S. Department of Agriculture, Food and Nutrition Service, Office of Analysis, Nutrition, and Evaluation, available at <https://www.fns.usda.gov/snap/who-leaving-food-stamp-program-analysis-caseload-changes-1994-1997>. (Accessed November 4, 2018).

²⁰ Internal analysis based on Catholic Charities USA 2017 Annual Survey, 2,385,000 (estimated number people needing food assistance as result of the rule) x .11 (percent of people needing food assistance served by Catholic Charities) = 262,350 (additional number of people Catholic Charities will need to provide food assistance to); 262,350 x 91.47 (average cost of food assistance for a Catholic Charities client) = \$23,997,154.5

²¹ Mann, Cindy et. al, *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, (November 2018), available at <https://www.chausa.org/docs/default-source/Immigration/medicaid-payments-at-risk-for-hospitals.pdf?sfvrsn=2>

²² *Id.*

In addition and in response to the request for comment related to the impact the rule will have on public benefit granting agencies, we are also deeply concerned that the complexity of the rule will make delivery of services to immigrant families increasingly difficult and potentially put social workers in the position of having to provide quasi-legal advice to clients needing basic assistance.²³ Because social service agencies often provide the front-line assistance in advising individuals interested in signing up for basic public assistance programs, the rule would require these providers to make a complicated and in-depth investigation into the immigration-related implications of accessing benefits for every client that comes to them looking for assistance. It would put them in the untenable position of advising clients of their ability to receive public benefits while at the same time potentially unintentionally jeopardizing the client's ability to adjust their status in the future. Front-line social service providers already have a greater demand for assistance than they can meet, and to add an additional and extremely difficult advisory role will further reduce their ability to meet these service demands and will put individuals at risk.

This concern is not illusory but is an issue which is already impacting local Catholic Charities agencies. Already over 53% of local Catholic Charities agencies have reported individuals disenrolling or forgoing public assistance.²⁴ Many of these agencies have already seen requests by legal immigrants to disenroll or forgo enrollment in public benefit programs out of fear that it will jeopardize their legal status. While some of the individuals making these requests are impacted by the proposed rule, many are legal immigrants who would not be subject to the rule but are opting out of public benefit programs for which they and their families are eligible out of fear or an abundance of caution.

The rule therefore fails to adequately account for the real downstream costs to social service organizations and would put service providers in an untenable position of trying to advise clients of their options.

D. The Proposed Rule Presents Life and Public Health Concerns. As Pope Francis has stated, health “is not a consumer good, but rather a universal right, and therefore access to healthcare services cannot be a privilege.”²⁵ Given Catholic teaching, and the proposed changes related to access to healthcare, we are deeply disturbed by the serious life and public health consequences of this rule. As discussed in Subsection B, *supra*, by DHS's own admission in the proposed rule, as written, the new public charge policy will lead to worse health outcomes; greater prevalence of obesity and malnutrition (especially for pregnant or breastfeeding women, infants, and children); increased reliance on emergency rooms for primary care; increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated; and increased instances where health care is not paid for by insurance or the patient.²⁶

Specific policies in the proposed rule contribute to these unacceptable and societally undesirable outcomes. For example, by newly categorizing *any* receipt of Medicaid or any previous long-term institutionalization as grounds for a person to be deemed a public charge,

²³ 83 Fed. Reg. 51,142.

²⁴ Internal Catholic Charities information.

²⁵ Pope Francis, “Health is a universal right, and access to healthcare services cannot be a privilege, says the Pope to the members of Doctors with Africa (CUAMM),” Holy See Press Office Daily Bulletin (July 5, 2016).

²⁶ See 83 Fed. Reg. at 51,270.

otherwise eligible persons will likely choose to forego medical treatment.²⁷ The potential inclusion of CHIP similarly sets up a tortuous choice for many parents of whether to insure their children and risk possible future separation due to noncompliance with public charge, or risk facing a child's illness without insurance. An immediate consequence is that parents and children without insurance will likely go without health care. The costs of this policy will redound not only to parents and children, but to hospitals and the general public, who will be forced to absorb the costs of more emergency room visits from uninsured families.

For many pregnant women, the decision could be even more dangerous. The proposed rule would put expecting mothers in the untenable situation of choosing to sign up for Medicaid or CHIP to cover prenatal, birth and after birth care or choosing to forego health coverage and pay \$10 to \$30 thousand, and potentially higher, in potential pre- and post-natal medical care.²⁸ A public policy that forces women to choose between healthcare for themselves and their unborn child, and jeopardizing their immigration status and opportunity to be a mother for that child, is unconscionable. The rule will also therefore create perverse incentives for abortion for parents facing this situation. Therefore, we strongly oppose inclusion of CHIP and Medicaid in any final proposed rule.

Further, the proposed public charge rule would on its face, disadvantage larger families as DHS proposes to consider the size of the applicant's family when determining whether that individual is likely to become a public charge.²⁹ It is the position of the Church that creating a penalty for caring for children or caring for the elderly is deeply troubling.³⁰ Protecting and defending human life is sacrosanct and caring for family members is an imperative demanded by God, as stated in the Fourth Commandment. DHS notes that the larger the family, the more likely the applicant is to receive public benefits.³¹ The unintended consequences of such an analysis, however, will likely be grave, in that families with more children are seen as more likely to be a future public charge and will be denied admission. DHS's proposal therefore essentially punishes applicants who choose to have larger families – thus creating another disincentive for individuals to have children or to care for aging parents.

II. At a Minimum, DHS Must Revise the Proposed Rule to Avoid Arbitrary, Unjust, and Inhumane Results.

While we strongly urge DHS to withdraw the rule altogether, at a minimum, it must structurally revise the proposed rule to avoid arbitrary and capricious results that are unjust and inhumane. If DHS decides to continue to pursue these rules, we would encourage separate rulemaking to better consider the rule's impact. Specifically, we object to DHS's: (i) proposed definition of "public charge"; (ii) expansion of the public charge ground of inadmissibility to

²⁷ Mann, Cindy et. al, *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, (November 2018), available at <https://www.chausa.org/docs/default-source/Immigration/medicaid-payments-at-risk-for-hospitals.pdf?sfvrsn=2>

²⁸ *2015 Comparative Price Report Variation in Medical and Hospital Prices by Country*. International Federation of Health Plans, 2015, available at <https://fortunedotcom.files.wordpress.com/2018/04/66c7d-2015comparativepricereport09-09-16.pdf>.

²⁹ 83 Fed. Reg. 51,184.

³⁰ John Paul II, Apostolic Exhortation *Familiaris Consortio*, 46: AAS 74 (1982), 45-47.

³¹ *Id.*

applicants for extension of stay or change of status; and (iii) proposed weighted scheme for administering the totality of the circumstances test.

A. The Proposed Definition of “Public Charge” is Arbitrary and Would Undermine Long-Term Self-Sufficiency (8 CFR § 212.21). DHS’s NPRM proposes a significant departure from the long-standing interpretation of the public charge ground of inadmissibility. For years, DHS has defined “public charge” as one who receives over 50 percent of his or her income or support from cash assistance or long-term institutionalization at the government’s expense.³² DHS is proposing to alter this definition drastically. Under the proposed rule, “public charge” is defined as an individual who “receives one or more public benefit, as defined in paragraph (b) of this section.”³³ Paragraph (b) goes on to define public benefit as: (i) specified monetized benefits if the cumulative value received exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any period of 12 consecutive months; (ii) specified non-monetized benefits if received for more than 12 months in the aggregate during a 36-month period; and (iii) a combination of specified monetized and non-monetized benefits, when the non-monetized benefits are received for more than 9 months in the aggregate during a 36-month period.³⁴ As discussed below, this proposed definition is based on flawed statutory interpretation, is arbitrary and capricious, and presents serious public policy concerns because it would undermine families’ long-term self-sufficiency.

i. DHS’s Interpretation of “Public Charge” Is Flawed.

While, DHS correctly notes that the INA does not define the term “public charge,”³⁵ the agency’s purported statutory interpretation of this term is flawed. DHS asserts that its proposed definition is supported by dictionary definitions of “public charge.”³⁶ It notes, for example, that the Merriam-Webster Dictionary defines public charge as “one that is *supported* at the public expense;” and it cites to similar definitions found in Black’s Law Dictionary.³⁷ DHS states that its proposed rule is “consistent” with these definitions.³⁸ This assertion rings hollow for two reasons.

First, DHS’s interpretation is incomplete, as it fails to define a key term – “support.” Looking to the Merriam-Webster Dictionary, which is the dictionary favored by the Supreme Court,³⁹ “support” is defined as “pay[ing] the cost of” or “provid[ing] a basis for the existence or subsistence of.”⁴⁰ Under that definition, one who is “supported” is one who is taken care of entirely or nearly entirely.⁴¹ In turn, one who is “supported at the public expense” must be having needs met entirely or at least nearly entirely by the government. Yet, DHS has provided no justification

³² See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

³³ 83 Fed. Reg. at 51,289.

³⁴ *Id.* at 51,289-90.

³⁵ See 8 U.S.C. § 1182(a)(4).

³⁶ 83 Fed. Reg. at 51,158.

³⁷ *Id.* (emphasis added).

³⁸ *Id.*

³⁹ Phillip A. Rubin, *War of the Words, How Courts Can Use Dictionaries in Accordance with Textualist Principles* 60 DUKE LAW JOURNAL 166, 187 (2010).

⁴⁰ Support, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/supported> (last visited Nov. 1, 2018).

⁴¹ *Id.*

for how its proposal – with its low thresholds for benefit use – comports with that definition. Rather, DHS’s proposal is structured in such a way that an applicant who derives nearly 95 percent of his or her support from his or her own income, could still be considered a public charge.⁴² Can allowing such an individual just \$4.98 of assistance per day⁴³ reasonably be seen as providing for their entire or nearly entire existence or subsistence? We think not.

Second, DHS’s proposed statutory interpretation appears at odds with how it justifies its new thresholds for benefit use just pages later within the proposed rule. When analyzing the dictionary definitions of “public charge,” DHS states that the definitions suggest that an individual “who receives public benefits for a *substantial component* of their support and care can be reasonably viewed as being a public charge.”⁴⁴ Yet, when subsequently discussing its thresholds for use, DHS states that it “believes that receipt of such benefits, *even in a relatively small amount or for a relatively short duration* would in many cases be sufficient to render a person a public charge.”⁴⁵ Thus, DHS’s discussion of its public benefit usage thresholds contradicts DHS’s own statutory analysis – a use of a “small amount” of benefits is not the same as receiving a “substantial component” of one’s support from the government.

Given this flawed statutory interpretation and inconsistencies within the NRPM, DHS should abandon this proposed definition of “public charge.”

ii. DHS’s Proposed Definition Would Undermine Its Stated Goal of Self-Sufficiency.

Furthermore, if implemented, DHS’s proposed definition would undermine its stated goal. DHS notes in its discussion of the rule that “[t]he 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”⁴⁶ Throughout the proposed rule, DHS ignores the fact that the very purpose of these assistance programs is to promote self-sufficiency. The U.S. Department of Agriculture, for example, notes that SNAP “helps participants become financially stable and provides needed support as they transition to self-sufficiency.”⁴⁷ Research has also shown that access to public benefits can increase long-term self-sufficiency.⁴⁸ The Food Research & Action Center notes, for example, that SNAP “is the most effective government program in lifting children

⁴² David Bier, *New Rule to Deny Status to Immigrants Up to 95% Self-Sufficient*, CATO INSTITUTE (Sept. 24, 2018), available at <https://www.cato.org/blog/new-rule-deny-status-immigrants-95-self-sufficient>.

⁴³ The Federal Poverty Guidelines show the 2018 poverty line for a household of one being \$12,140. Thus, 15 percent of this divided by daily receipt over a year would be \$4.98 ($\$12,140 \times .15 = \$1,821$; $\$1,821 / 365 = \4.98). See *Poverty Guidelines*, DEP’T OF HEALTH AND HUMAN SERVICES, <https://aspe.hhs.gov/poverty-guidelines> (last visited Nov. 1, 2018).

⁴⁴ 83 Fed. Reg. at 51,158 (emphasis added).

⁴⁵ *Id.* at 51,164 (emphasis added).

⁴⁶ *Id.* at 51,118.

⁴⁷ U.S. Dep’t of Agriculture, *The Benefits of SNAP*, available at https://fns-prod.azureedge.net/sites/default/files/SNAP_ComChan_SNAPBenefits.pdf (last visited Nov. 2, 2018).

⁴⁸ See, e.g., Danilo Trisi, *One-Third of U.S. Born Citizens Would Struggle to Meet Standard of Extreme Trump Rule for Immigrants*, CENTER ON BUDGET AND POLICY PRIORITIES (Sept. 27, 2018), available at <https://www.cbpp.org/blog/one-third-of-us-born-citizens-would-struggle-to-meet-standard-of-extreme-trump-rule-for>.

out of poverty.”⁴⁹ Additionally, children who have received Medicaid collect less money from the government through the Earned Income Tax Credit, have decreased rates of mortality, and have increased rates of college attendance.⁵⁰ And, women who have received Medicaid have higher rates of income by age 28.⁵¹ DHS’s justification for the rule also overlooks recent studies showing that, on average, immigrants contribute \$150,000 more in taxes than they receive in public benefits over their lifetime.⁵² The incompatibility between the proposed effort to limit public benefits use as a means to achieve the stated goal by DHS of “self-sufficiency” and the existing promotion and use of public benefits programs as a means to promote the same stated goal of public benefit programs such as SNAP by the Department of Agriculture illustrate the incongruities of the proposed rule.

DHS’s proposal, which would hamper its and other government departments’ stated goal of promoting self-sufficiency, is arbitrary and should be abandoned.

iii. DHS Must, at a Minimum, Revise Its Proposed Thresholds.

While DHS should abandon its proposed revisions to the long-standing public charge definition, at a bare minimum DHS must revise its suggested thresholds for defining “public benefit.” The thresholds proposed for monetized and non-monetized benefits, as well as for a combination of these benefits, are far too low.⁵³

As an initial matter, the Federal Poverty Guidelines, which serve as the basis for DHS’s thresholds, have long been criticized for being inadequate and low – failing to take into account, for example, of geographical variances in cost of living, as well as expenses that are necessary to hold a job and to earn income (e.g., child care and transportation costs).⁵⁴ In fact, at the direction of Congress, the National Academy of Sciences (NAS) published a study in 1995 that assessed the FPG, and “[b]ased on its assessment of the weaknesses of the current poverty measure, this NAS panel of experts recommended having a measure that better reflects contemporary social and economic realities and government policy.”⁵⁵ As a result, the Supplemental Poverty Measure was developed, in part by the U.S. Census Bureau.⁵⁶ Given these well documented and critical flaws with the FPG, DHS’s proposed thresholds are particularly egregious.

The inadequacy of DHS’s proposed thresholds is particularly evident when one considers that, under the proposed rule, a noncitizen parent with stable employment could be deemed a public charge if an immigration officer believes her likely to receive just \$4.98 per day in nutrition assistance. Suggesting that such an individual is “neither self-sufficient nor on the road to

⁴⁹ FOOD RESEARCH & ACTION CENTER, SNAP BENEFITS NEED TO BE MADE ADEQUATE, NOT RESTRICTED 1 (2018), available at <http://frac.org/wp-content/uploads/snap-food-choice.pdf>.

⁵⁰ DAVID BROWN, ET AL., NATIONAL BUREAU OF ECONOMIC RESEARCH, MEDICAID AS AN INVESTMENT IN CHILDREN: WHAT IS THE LONG-TERM IMPACT ON TAX RECIPIENTS? 32 (2015), available at <https://www.nber.org/papers/w20835.pdf>.

⁵¹ *Id.*

⁵² David Bier, *supra* note 26.

⁵³ KATHLEEN SHORT, U.S. CENSUS BUREAU, THE RESEARCH SUPPLEMENTAL POVERTY MEASURE: 2011, 60 (2012), available at http://www.nber.org/cps/pov/Short_ResearchSPM2011.pdf.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 61.

achieving self-sufficiency”⁵⁷ is untenable. Further, under DHS’s proposal, an individual could be deemed a public charge if found likely to receive under \$1 of nutrition assistance per day, when combined with use of subsidized housing, Medicare part D, and Medicaid for any period over three months. This is because the rule proposes a standard that would aggregate use of benefits. Thus, using three different kinds of non-monetizable benefits in a single month would count as three months’ worth of benefits under the rule.⁵⁸ Such a standard is arbitrary, unjust, and illogical. The proposal simply does not provide an adequate exception for hardworking individuals who are generally self-sufficient but who need assistance for a short period of time. Consequently, if DHS refuses to abandon its flawed proposal, we urge it to, at the very least, substantially increase these thresholds that define public benefit use.

In addition, DHS notes that it is specifically seeking comments on whether it should consider benefit use below its proposed thresholds as a negative factor in the totality of the circumstances test.⁵⁹ Given the flaws with DHS’s statutory interpretation, the likelihood that such a consideration would further exacerbate the chilling effects of the rule, and the ways in which individual’s disenrollment from benefit programs would harm their long-term self-sufficiency, we strongly recommend that DHS not consider benefits use under the threshold levels during the totality of circumstances test.

iv. Conclusion.

Given that DHS’s proposed definition of “public charge” is based on flawed statutory interpretation and would undermine its stated goal of ensuring self-sufficiency, the proposal should be abandoned, and DHS should return to its current and longstanding interpretation of “public charge.” At a minimum, however, DHS must revise its proposed thresholds for defining “public benefit” as they are both arbitrary and highly unjust.

B. The Inclusion of Individuals Seeking to Extend or Change Their Immigration Status in the Proposed Public Charge Analysis Is Not Supported by Statute and Therefore Arbitrary and Capricious (8 CFR § 214.1). Beyond modifying the definition of “public charge” for applicants of admission and adjustment of status, the proposed rule takes the unprecedented position of extending the public charge analysis to nonimmigrant applicants for extension of stay or change of status. However, as DHS itself concedes in the proposed rule, “. . . section 212(a)(4) of the Act by its terms only applies to applicants for visas, admission, and adjustment of status, and thus does not, by its terms, render aliens who are likely to become a public charge ineligible for the extension of stay or change of status . . .”⁶⁰

The plain language of the INA poses the public charge test “at the time of application for a visa” or “at the time of application for admission or adjustment of status.”⁶¹ This specific and direct language from Congress does not support—and in fact precludes—the expansion of this test for the first time to entirely new categories of persons. The category of nonimmigrants seeking

⁵⁷ 83 Fed. Reg. at 51,165.

⁵⁸ *Id.*

⁵⁹ *Id.* at 51,165-66.

⁶⁰ 83 Fed. Reg. at 51135.

⁶¹ 8 U.S.C. § 1182 (a)(4)(A).

extension or change in status is distinct from the plain language’s invocation of the initial “time of application,” which refers to the process of admission, or the “adjustment of status,” which refers to the process of becoming a legal permanent resident.⁶² Furthermore, Congress expressly excluded deportation on public charge grounds if the cause for becoming a public charge can be “shown to have arisen after entry.”⁶³ The statute here is governed by the maxim of statutory construction *expressio unius est exclusio alterius*.⁶⁴ By naming the specific categories to which the public charge test applies, Congress demonstrated that it knew how to apply the test to specific categories, and it chose to exclude the other categories such as extension of stay or change of status. DHS’s bald assertion that it generally has discretion to apply the test to new categories cannot overcome clear and unambiguous language from Congress to the contrary, thus there is no deference due to DHS’s view on this issue.⁶⁵

The change proposed by DHS is so sweeping and overbroad that it requires a ten-page, four-column table to explain the myriad nonimmigrant category combinations that would suddenly now be subject to the public charge inquiry.⁶⁶ It goes without saying that this change alone will create confusion and an administrative nightmare for persons who are trying to follow the law while present in this country.

Because it is forbidden by the statutory language adopted by Congress, new categories of applicants, such as those nonimmigrants seeking to extend or change status, must not be subject to a public charge consideration.

C. The New “Totality of the Circumstances” Test Is Arbitrary and Does Not Advance the Goals of the INA or DHS (8 CFR § 212.22). The proposed rule requires a consular or DHS official to engage in a “totality of the circumstances” test to determine admissibility of immigrants and nonimmigrants, but it does so in a manner that will cause confusion and arbitrary decisions, will undercut the INA and DHS’s stated policy goals, and will cause deleterious effects on the health and wellbeing of scores of American families. As stated above, the proposed definitions of public charge and public benefit are arbitrary and capricious. The rule should be revised to correct this deficiency in the “totality of the circumstances” test.

i. The Test Is Arbitrary Because It Creates Grounds to Deny Virtually Every Immigration Application.

Research shows that 94% of immigrant applicants would have at least one negative factor under the new test.⁶⁷ The INA encourages self-sufficiency, but it would be an absurdity to interpret

⁶² See, e.g., “Adjustment of Status,” U.S. Citizenship and Immigration Services, <https://www.uscis.gov/greencard/adjustment-of-status> (last accessed Nov 2, 2018) (“Adjustment of status is the process that you can use to apply for lawful permanent resident status (also known as applying for a Green Card) when you are present in the United States.”)

⁶³ 8 U.S.C. § 1227 (a)(5).

⁶⁴ See, e.g., *Sprague v. State*, 590 P.2d 410, 415 (Alaska 1979).

⁶⁵ See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”).

⁶⁶ See 83 Fed. Reg. 51,137- 51,146 (Table 4).

⁶⁷ Artiga, Samantha, “Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid,” *Kaiser Family Foundation* (Oct. 11, 2018).

the public charge bar in a way that would create grounds to deny all but 6% of immigrants. That simply cannot be the intention of Congress, and nothing in the plain language of the statute would support such an extreme outcome. Moreover, because there are no guidelines in the proposed rule on how to weigh competing factors, the decision to admit or deny virtually all immigrant applicants is left entirely in the discretion of consular or DHS officials.

As one example of the absurdity of this scheme, it appears that immigration applications could be influenced more by geography than the substance of the public charge inquiry. As stated above, the proposed rule relies on a bright line income threshold as part of the self-sufficiency determination. The income threshold, however, is set in American dollars and makes no adjustment for the local median income of the applicant or economic circumstances from which they apply. The median household incomes from immigrant families varies greatly based on region of origin.⁶⁸ Having a single income threshold for all applicants means that an applicant who has a household income that is above the poverty line for their country of origin could be deemed not to be self-sufficient, while another applicant from a region with a higher median income could have an income at a lower percentile for his or her respective country but nevertheless be deemed self-sufficient simply because of local economic circumstances. A medical professional or engineer will likely be deemed more self-sufficient coming from Europe than from Africa simply because of the higher median incomes in that region. Similarly, a fluctuation in currency exchange rates could be the difference in deeming an immigrant with identical work history self-sufficient in one country versus another. With no guidance on how the various factors weigh against each other, there is nothing in the rule to prevent this arbitrary outcome.

Thus, among the proposed rule's flaws is the fact that it fails to address several outstanding questions, including:

- Will DHS promulgate specific and direct guidelines on how officials should weigh competing positive and negative factors in making public charge determinations?
- How will DHS income thresholds account for fluctuating currency exchange rates between the American dollar and an applicant's country of origin?
- How will DHS weigh applicants from different nations, where their income and work history are similar, but one applicant has higher income and wealth simply because the median incomes in that country are higher in all occupations?
- Will DHS consider and measure self-sufficiency relative to the population of the country of origin rather than relative to the American population?
- How will DHS ensure that the totality of the circumstances test does not lead to arbitrary outcomes if 94% of applicants will have some grounds for denial?

ii. The Test Is Arbitrary Because It Will Likely Undermine An Applicant's Self-Sufficiency.

The proposed rule on multiple occasions points to the INA's policy goal and rule's purpose of making immigrants more "self-sufficient." However, this rule will likely detract from self-

⁶⁸ "Median Family Income of Recent Immigrant Arrivals," Pew Research Center (Sept. 23, 2015) available at http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/ph_2015-09-28_immigration-through-2065-37/

sufficiency, as explained in Section II(A)(ii), *supra*, and potentially lead to dangerous public health outcomes, some of which could be life-threatening. Causing both immigrants and U.S. citizens in mixed status families to forgo preventative health care and rely on emergency rooms, with the inevitable deleterious health effects, will in turn cause people to perform badly in the workplace and at school, and possibly require them drop out of the workforce entirely. The new penalties on the poor for receiving the most basic health care they can afford is directly opposed to the stated policy goal of self-sufficiency. It creates bad incentives that could cause immigrants to choose to forego basic preventative health care for themselves and their children, which, in the long run, will make their families less self-sufficient.

iii. The Test Is Arbitrary Because It Seeks to Remove Public Benefits as an “Incentive for Immigration”⁶⁹ When Empirical Data Show That Immigrants Help the American Economy.

The test creates significant negative factors for any immigrants who have received a lengthy list of possible public benefits recently in order to encourage immigrants to be more self-sufficient. However, empirical data shows that immigrants consume public benefits at a lower rate than native born Americans—and when immigrants do consume public benefits, they do so at a lower dollar value, resulting in lower per capita cost to provide public benefits to immigrants than to native born Americans.⁷⁰ Even among the poor, poor immigrants use public benefits less than poor native-born Americans.⁷¹ In fact, first- and second-generation immigrants consume public benefits an average of 33 percent less than third-and-higher-generation Americans.⁷²

Research further indicates that immigrants aid the economy in the long run. The evidence shows that immigrants expand the economy’s productive capacity by prompting investment and increased specialization, which leads to gains in efficiency and higher income per worker.⁷³ Evidence further supports the conclusion that immigration increases labor demand and wages for U.S. native workers.⁷⁴

As discussed in Section II(A)(iii), *supra*, the thresholds for defining public benefit use are set arbitrarily low. In addition, although immigrants typically earn lower wages upon first arriving in the United States, that gap closes within two decades.⁷⁵ The proposed test arbitrarily considers a snap-shot at entry, when the evidence shows that over the course of their lifetime, the average

⁶⁹ See *supra*, 2 at 10.

⁷⁰ See Nowrasteh, Alex, et al., *Immigration and the Welfare State: Immigrant and Native Us eRates and Benefit Levels for Means-Tested Welfare and Entitlement Programs*, (CATO Institute, Immigration Research and Policy Brief No. 6, May 10, 2018).

⁷¹ Leighton Ku, et al., *Poor Immigrants Use Public Benefits at a Lower Rate than Poor Native-Born Citizens*, (CATO Institute, Economic Development Bulletin No. 17, March 4, 2013).

⁷² Nowrasteh, Alex, et al., *Immigrants and Their Children Use Less Welfare than Third-and-Higher Generation Americans*, CATO Institute: CATO at Liberty (June 4, 2018), available at <https://www.cato.org/blog/immigrants-their-children-use-less-welfare-third-higher-generation-americans>

⁷³ Peri, Giovanni, *The Effect of Immigrants on U.S. Employment and Productivity*, (Federal Reserve Bank of San Francisco: Economic Letter, Aug. 30, 2010).

⁷⁴ Giovanni Peri, *Immigrants’ Complementarities and Native Wages: Evidence from California*, (National Bureau of Economic Research, Working Paper No. 12956, March 2007).

⁷⁵ Forrester, Andrew, et al., *Immigrant Wages Converge with Those of Native-Born Americans*, (CATO Institute, Immigration Research and Policy Brief No. 9, Oct. 4, 2018).

first-generation immigrant pays hundreds of thousands more in taxes than he or she uses in public benefits, and average second-generation families pay more in taxes than their parents or the rest of the native-born population.⁷⁶

In order to avoid an arbitrary omission of relevant data, the DHS should include the positive effects of immigration in “circumstances” under consideration. It can begin by answering the following:

- How will DHS account for predicted lower consumption than native-born Americans of public benefits in the future under the totality of the circumstances test?
- How will DHS account for the increase for immigrant wages that matches the native-born population in twenty years?
- Will DHS include the positive factor that average immigrants pay hundreds of thousands more in taxes than they consume in public benefits over their lifetime, and their children pay more in taxes than the rest of the native-born population?
- Will DHS include the positive factor that immigrants will expand the economy through consumption of consumer goods, increase labor demand, and thus will increase average wages?

As DHS has sought comment on alternative calculations for self-sufficiency rather than receipt of monetizable and non-monetizable benefits,⁷⁷ DHS should include consideration of the various benefits of average immigrants, including an expanded economy, greater labor demand, higher average wages for native-born Americans, and significant net increases in tax revenues over multiple generations.

iv. The Test Is Arbitrary Because It Penalizes Immigrants for Having Larger Families, Even Though Larger Families Actually Aid Self-Sufficiency.

The proposed rule counts dependent children and non-working grandparents as negative factors. First, studies show that married men work longer hours and earn more money, and married men with children are more likely to value higher paying jobs than their single peers.⁷⁸ Second, it should not be a penalty for families to live in multi-generational households when roughly one in five or 60.6 million Americans are living with this arrangement.⁷⁹ Older parents or grandparents who are not working often assist the family with child care, which is now so expensive it costs more than college tuition in 28 states.⁸⁰ By handling child-care in the family, the household is able to divert more income to meeting basic needs and is therefore more likely, not less, to be self-sufficient. Penalizing immigrant families for working to solve family care situations through private family member networks is contrary to the expressed intent of the proposed public charge rule: self-sufficiency.

⁷⁶ Ingraham, Christopher, “There’s no immigrant crisis, and these charts prove it,” *The Washington Post* (June 21, 2018).

⁷⁷ See, 83 Fed. Reg. at 51,166.

⁷⁸ Wilcox, W. Bradford, “Don’t be a bachelor: Why married men work harder, smarter and make more money,” *The Washington Post* (April 2, 2015).

⁷⁹ Carrns, Ann, “Multigenerational Households: The Benefits, and Perils,” *The New York Times* (Aug. 12, 2016).

⁸⁰ Zillman, Claire, “Childcare Costs More Than College Tuition in 28 U.S. States,” *Fortune* (Oct. 22, 2018).

DHS should modify the totality of the circumstances test so as not to penalize larger families. Pertinent questions that DHS should answer regarding this aspect of the test include:

- Does DHS consider it more beneficial to be single and unmarried than to be in a committed relationship with children and/or parents living with the family?
- How will the benefits of childcare be factored into a family's likelihood of self-sufficiency if older parents or grandparents live with the family?
- Will the positive benefits to self-sufficiency and child protection of having older relative care-givers in the home be included?

v. The Totality of the Circumstances Test Must Be Significantly Revised.

DHS must avoid transforming an immigration decision into an elaborate game of chance. As it currently stands, under the proposed public charge rule, societal strengthening actions like welcoming children and the elderly into the home are seen as negatives while taking steps to ensure children have healthcare and adequate nutrition are to be punished. The rule also fails to take in the many added benefits to self-sufficiency and long-term economic prosperity that extended families and even public assistance can have on families. The totality of the circumstances test will put consular officials in the position of trying to consider over 15 different factors and the likelihood that an individual migrant will at any time in the future be a public charge. For example,

- How will consular officials weigh “positive” versus “negative” or “highly negative” factors?
- How will consular officials collect the needed data to even verify many of the proposed factors?
- How will migrant families be able to prepare for an immigration application when the totality of the circumstances test lacks clear direction?
- If consular officials are to weigh whether a migrant is ever to become a public charge, then how will they weigh data which shows that most never become a public charge?

The lack of clarity as to how many “positive” factors that outweigh a “negative” or “high-negative” factor means these officials will have nearly unlimited discretion to deem a person a potential public charge. For this reason, we respectfully request that the proposed rule be withdrawn. While we do not believe this proposed rule is lawful or appropriate, at a bare minimum, the number of negative factors must be significantly reduced, and another round of notice and comment should be issued to ensure that more reasonable guidance is given on how to weigh conflicting factors. This is necessary to avoid arbitrary results and to allow legitimate opportunity for comment on any new and clearer guidance.

III. Conclusion.

DHS should withdraw this deeply flawed proposed rule. In its current form, it will result in harm to the poor and vulnerable, obstruct efforts of those who are trying to assist them, and endanger the lives of mothers and children. It will diminish the public health of the immigrant and native-born community alike. DHS even writes that it is fully aware of the many negative consequences that will follow this rule's implementation. The rule's enormous complexity, and

its inversion of the good and the bad in family decision making, transform an immigration decision into a game of chance with a longer paper trail.

The centuries-long history of our nation has been characterized by families who have come here from distant lands and, through generations of hard work and prayer, have built up the richest bounty in the world. This proposed rule signals a watershed change of course from the best moments of our heritage, to favor only the wealthy, and to turn away the families who come mostly with dreams and hope for their children.

As a nation, we are called to a better path, one that respects the life and dignity of all persons. USCCB and CCUSA urges DHS to withdraw this rule, or at the very least, substantively revise the proposed rule.

Respectfully submitted,



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