

Dec. 7, 2018

*Submitted via www.regulations.gov*

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Department of Homeland Security  
20 Massachusetts Avenue NW  
Washington, DC 20529-2140

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

Dear Ms. Deshommès:

The National Women’s Law Center opposes the changes regarding “public charge” proposed in the Department of Homeland Security’s (DHS, or the Department) Notice of Proposed Rulemaking (NPRM or proposed rule) published in the Federal Register on October 10, 2018. For over 45 years, the Center has advocated to expand opportunities for women and girls, with particular emphasis on low-income women and their families. The Center strongly opposes any change in policy or regulation that undermines the health, well-being, and economic security of immigrant women with low incomes, including the proposed rule.

While the “public charge” test is inherently problematic, the proposed rule would radically expand the definition of “public charge” that has been in effect for almost twenty years, from someone who has become or is likely to become *primarily dependent* on the government for support through cash assistance or long-term institutionalization to include anyone who is likely *to use* not only cash assistance, but also health, nutrition, and housing assistance benefits. The proposed rule would also treat a number of factors, including income, income, age, family size, English proficiency, and having a health condition, in an unprecedented way as part of the public charge test.

The proposed rule would detrimentally impact the economic security, health, and well-being of immigrant women, children and families, and communities. We urge that the rule be withdrawn in its entirety, and that the longstanding principles clarified in field guidance issued in 1999 remain in effect.

**1) The proposed rule represents a radical change in current policy that is antithetical to our values and would have a harmful impact on individuals, families, and our communities.**

Under current policy, someone is considered a public charge if they are “primarily dependent on the government for subsistence.” The proposed rule would radically expand the definition to include any immigrant who simply “receives one or more public benefits.” This would exponentially increase the scope of who would be considered a public charge, to include not only those who are institutionalized at government expense or receive cash benefits as their main source of support, but also people who use health, nutrition, and housing benefit programs to meet their basic needs, including while employed.

Currently, immigration officials consider only cash assistance, such as Supplemental Security Income (SSI) and Temporary Assistance for Needy Families (TANF), comparable state or local programs, and government-funded long-term institutional care, in the “public charge” test – and only when it represents the majority of a person’s support. If the proposed rule is finalized, immigration officials would

effectively consider *use* of a much wider range of government programs in the “public charge” determination, including:

- Medicaid (with limited exceptions including Medicaid coverage of an "emergency medical condition," and certain disability services related to education);
- Supplemental Nutrition Assistance Program (SNAP);
- Medicare Part D Low Income Subsidy (assistance in purchasing medicine); and
- Federal Public Housing, Section 8 housing vouchers and Section 8 Project Based rental assistance.

In making the public charge determination, the proposed rule would also negatively weigh certain factors, including whether a person:

- Has income of less than 125% of the Federal Poverty Level (FPL);
- Is younger than 18 or older than 60;
- Has a large family; and
- Has a critical medical condition without insurance coverage.

In addition, the proposed rule would positively weigh other factors, including whether a person:

- Has income above 250% of the FPL; and
- Demonstrates English proficiency.

These radical changes in the proposed rule would skew our immigration system in favor of the wealthy, and against those seeking opportunity in this country and seeking to reunite with family members. Moreover, the proposed rule targets immigrants of color and women for exclusion, undermining our shared values and the foundational principles of our nation.

As described more fully in these comments,<sup>1</sup> the proposed rule would have significant and widespread negative implications for individuals, families, and communities, especially women and people of color. It would force immigrant women into the untenable position of having to choose between caring for themselves and their families by seeking Medicaid, nutrition or housing assistance, or the Medicare Part D Low Income Subsidy, or risking negatively impacting their immigration status. It would harm women’s health and employment. And it poses particular harm to certain groups of women, including women with disabilities, survivors of domestic violence and sexual assault, older women, LGBT women, and women who are caregivers or need caregivers.

DHS should immediately withdraw this punitive proposed rule, which undermines our shared values, would make our nation hungrier, sicker, and poorer, and further entrenches bias against women and immigrants of color into an already flawed and problematic immigration system.

2) **The proposed rule is a repudiation of our core values and is inconsistent with how public charge has been historically understood.**

Immigrants are part of our national fabric and part of every community – they are our coworkers, our classmates, and our neighbors. Almost every family has an immigration story. As a country, we have long aspired to be a land of opportunity that welcomes individuals seeking a better life for themselves and their families. This vision is embedded in our national conscience, proclaimed in Emma Lazarus’ famous and

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<sup>1</sup> All sources cited and linked below are intended to be included as a part of this comment.

oft quoted words, “Give me your tired, your poor, Your huddled masses yearning to breathe free.” Because we believe in opportunity, we value how people live their lives and what they contribute to their communities once they are here, not how much wealth they have when they come to this country or the color of their skin.

The proposed rule, though, is a repudiation of our core values and targets immigrants who are women and people of color for exclusion with almost surgical precision. The unprecedented income test, for example, would treat incomes below 125 percent of the FPL for applicable household size as a negative factor and would treat incomes above 250 percent of the FPL as a positive factor -- which would effectively create an immigration system that assesses the value of an immigrant’s future contributions based on their current wealth, and would have a disproportionate impact on immigrants of color<sup>2</sup> and women, as discussed in more detail in these comments. In addition, the proposed rule’s negative treatment of immigrants younger than 18 and older than 60 represents yet another mechanism for keeping immigrant families apart. The rule’s treatment of family size as a negative factor also directly targets immigrant women’s autonomy and ability to make decisions about the structure of their families, particularly if or when to have children. Further, the proposed rule’s preference for immigrants who speak English would turn xenophobic rhetoric into actual policy. Overall, the proposed rule would create a higher risk of denial for immigrants from Mexico and Central America (with 60 percent of recent immigrants having two or more of the negative factors proposed in the NPRM), the Caribbean (48 percent), Asia (41 percent); South America (40 percent); and Africa (34 percent); compared to immigrants from Europe, Canada, Australia and New Zealand, 27 percent of whom could be expected to have two or more of the negative factors proposed in the NPRM.<sup>3</sup> Moreover, a recent study found that women may be more likely to be denied their green cards under the proposed rule because, as compared to immigrant men, they are less likely to be employed, more likely to be primary caregivers for children and family members, more likely to live in larger households, and more likely to have lower incomes.<sup>4</sup>

While we are opposed to any policy that limits immigrants’ access to public benefits, the proposed expansion is an extraordinary departure from current policy and would reverse more than a century of existing law, policy, and practice. For almost two decades, U.S. immigration officials have explicitly reassured immigrant families, who have relied on that reassurance, that participation in programs like Medicaid and SNAP (formerly food stamps) would not affect their ability to become lawful permanent residents.<sup>5</sup> Even under current law, the receipt of cash benefits has never been the determinative factor in deciding whether an individual is likely to become a public charge.

The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) limited eligibility for “federal means-tested public benefits” to “qualified immigrants” and limited eligibility of

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<sup>2</sup> Recently-admitted LPRs from Mexico and Central America, the Caribbean, and Africa would have been much more likely to fail to meet the 125 percent of FPL threshold than LPRs from Europe, Canada, and Oceania. RANDY CAPPs, MARK GREENBERG, MICHAEL FIX & JIE ZONG, MIGRATION POL’Y INST., *Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration* (2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>. Immigrants from the Caribbean, Mexico and Central America, Africa, Asia, and South America would be significantly less likely to be able to meet the 250 FPL threshold when compared to immigrants from Europe, Canada, and Oceania. JEANNE BATALOVA, MICHAEL FIX, & MARK GREENBERG, MIGRATION POL’Y INST. *Through the Back Door: Remaking the Immigration System via the Expected “Public Charge” Rule* (2018), <https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule>. See also text accompanying notes 100-101, *infra*.

<sup>3</sup> CAPPs ET AL, *Gauging the Impact of DHS’ Public-Charge Rule on U.S. Immigration*, *supra*.

<sup>4</sup> *Id.*

<sup>5</sup> U.S. Citizenship and Immigration Services, *Public Charge*, <https://www.uscis.gov/greencard/public-charge> (last visited Nov. 12, 2018).

lawful permanent residents for “means-tested public benefits” during their first five years in the U.S. In response to concerns that some consular officials and employees of the then-Immigration and Naturalization Service (INS) were inappropriately scrutinizing the use of health care and nutrition programs, and the strong evidence of chilling effects from the 1996 law, INS issued an administrative guidance in 1999.<sup>6</sup> The preamble to the guidance clearly acknowledged that the reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare.<sup>7</sup> Some of the evidence before the agency when it was writing the guidance included detailed accounts of pregnant women with gestational diabetes terrified of seeking care, a child with seizures rushed to the hospital whose parents were afraid to enroll in Medicaid at the hospital so he could continue treatment, and farmworker women afraid to enroll in a state-funded perinatal case management program.<sup>8</sup>

The administrative guidance -- which remains in effect -- specified that non-cash programs such as Medicare, Medicaid, food stamps, WIC, Head Start, child care, school nutrition, housing, energy assistance, emergency/disaster relief were *not* to be considered for purposes of public charge.<sup>9</sup> The 1999 administrative guidance is consistent with Congressional intent and case law.<sup>10</sup> Moreover, it has been relied upon by immigrant families for decades, and should continue to be used.

### **3) The proposed rule is already harming – and would continue to harm – immigrants and their families.**

If finalized, the proposed rule will make -- and has already made -- immigrant families afraid to seek out and utilize programs that support their basic needs. In the current climate of hostility towards immigrants, immigrant families have already begun foregoing critical services and benefits. Health and nutrition service providers noticed an increase in canceled appointments and requests to disenroll from means-tested programs in 2017.<sup>11</sup> Researchers also found that early childhood education programs reported drops in attendance and applications, reduced participation from immigrant parents in classrooms and at events, and an uptick in missed appointments at health clinics.<sup>12</sup> In a 2018 survey of health care providers in California, more than two-thirds (67 percent) noted an increase in parents’ concerns about enrolling their

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<sup>6</sup> Immigration and Naturalization Service, *Inadmissibility and Deportability on Public Charge Grounds, A Proposed Rule by the Immigration and Naturalization Service*, 64 Fed. Reg. 28676 (May 26, 1999), <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-56200/0-0-0-56785.html> (last visited Nov. 12, 2018).

<sup>7</sup> Immigration and Naturalization Service, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999), <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>.

<sup>8</sup> Note: The following report is an example of the data that was collected and shared at the time the Field Guidance was written. CLAUDIA SCHLOSBERG ET AL., NAT’L IMMIGR. LAW CTR., *The Impact of INS Public Charge Determinations on Immigrant Access to Health Care* (1998) <https://www.montanaprobono.net/geo/search/download.67362>.

<sup>9</sup> See Immigration and Naturalization Service, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> JENNIFER LAIRD ET AL., COLUMBIA POPULATION RES. CTR., *Foregoing Food Assistance Out of Fear Changes to “Public Charge” Rule May Put 500,000 More U.S. Citizen Children at Risk of Moving into Poverty* (2018), <https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5af1a2b28a922db742154bbe/1525785266892/Poverty+and+Social+Policy+Brief+2+2.pdf>.

<sup>12</sup> HANNAH MATTHEWS ET AL., THE CTR. FOR LAW AND SOC. POL’Y, *Immigration Policy’s Harmful Impacts on Early Care and Education* (2018), [https://www.clasp.org/sites/default/files/publications/2018/03/2018\\_harmfulimpactsece.pdf](https://www.clasp.org/sites/default/files/publications/2018/03/2018_harmfulimpactsece.pdf)

children in Medi-Cal (California’s Medicaid program), WIC, and CalFresh (California’s SNAP program), and nearly half (42 percent) reported an increase in skipped scheduled health care appointments.<sup>13</sup>

Disincentivizing the use of the public benefits cited in the proposed rule would likely have a further chilling effect upon the use of other critical benefits by immigrant families. This “chilling effect,” which causes families to withdraw from a wide variety of benefits programs due to fear, has already resulted from draft versions of the proposed rule being leaked to the press prior to its publication.<sup>14</sup> The fear created by these rules, moreover, would extend far beyond any individual who may be subject to the “public charge” determination, harming entire families, their communities, and the infrastructure that serves all of us, such as schools, hospitals and clinics.

Researchers report that immigrants’ use of health, nutrition, and social services could decline significantly if the proposed public charge rule were finalized.<sup>15</sup> Approximately 25.9 million people, or an estimated 8 percent of the U.S. population, would potentially be impacted, including by experiencing a chilling effect on the use of benefits, by the proposed public charge rule.<sup>16</sup> This includes individuals and family members with at least one noncitizen in their household, in households with incomes under 250 percent of the FPL because when one family member fails to receive healthcare, housing, or nutrition benefits, the resources available to all family members, including children, decline.

Of these 25.9 million people who are family members of at least one noncitizen or are noncitizens themselves, approximately 9.2 million are children under 18 years of age, representing approximately 13 percent of our nation’s child population.<sup>17</sup> The proposed rule, moreover, would have a disproportionate impact on people of color. While people of color account for approximately 36 percent of the total U.S. population, of the 25.9 million people who would potentially be impacted by the proposed rule, approximately 90 percent are people from communities of color (23.2 million). Among people of color who could potentially be affected by the rule, an estimated 70 percent are Latino (18.3 million), 12 percent are Asian American and Pacific Islander (3.2 million), and 7 percent are Black people (1.8

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<sup>13</sup> THE CHILDREN’S PARTNERSHIP, *California Children in Immigrant Families: The Health Provider Perspective*, <https://www.childrenspartnership.org/wp-content/uploads/2018/03/Provider-Survey-Infographic-.pdf> (last visited Nov. 12, 2018).

<sup>14</sup> Leaked versions of drafts of the public charge expansion rule earlier in the year have had a demonstrable chilling effect on immigrants’ use of WIC benefits, for example, resulting in vulnerable women and children foregoing essential nutrition assistance. *See, e.g.*, HELENA BOTTEMILLER EVICH, *Immigrants, Fearing Trump Crackdown, Drop Out of Nutrition Programs*, POLITICO, Sept. 3, 2018, <https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292>; HELENA BOTTEMILLER EVICH, *Immigrant Families Appear to be Dropping out of Food Stamps*, POLITICO, Nov. 14, 2018, <https://www.politico.com/story/2018/11/14/immigrant-families-dropping-out-of-food-stamps-966256>.

<sup>15</sup> JEANNE BATALOVA, MICHAEL FIX, & MARK GREENBERG, MIGRATION POLICY INST., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use* (2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

<sup>16</sup> This number represents individuals and family members with at least one non-citizen in the household and who live in households with earned incomes under 250 percent of the federal poverty level. Custom Tabulation by Manatt Phelps & Philips LLP, *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard* (2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population> (using 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 2012-2016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC) MABLE PUMA-County Crosswalk).

<sup>17</sup> *Id.*

million). To put this in perspective, among all people of color in this country, approximately 33 percent of Latinos, 17 percent of Asian Americans and Pacific Islanders, and 4 percent of Black people would potentially be impacted by the proposed rule.<sup>18</sup>

If finalized, the proposed rule would only exacerbate precarious economic circumstances for immigrants and their families by discouraging them from using the programs for which they are eligible, preventing access to essential health care, healthy, nutritious food and secure housing. It would increase poverty, hunger, poor health and unstable housing by discouraging enrollment in programs that have profound consequences for families' well-being and long-term success.

4) **The proposed rule would have a significant detrimental impact on women.**

a) **The proposed rule would be especially harmful to immigrant women.**

Throughout their lives, immigrant women, especially Black, Latinx,<sup>19</sup> and Asian American and Pacific Islanders (AAPI) immigrant women, generally are at higher risk of economic insecurity than men because of pay disparities<sup>20</sup> and other forms of discrimination,<sup>21</sup> overrepresentation in low-wage work,<sup>22</sup> and disproportionate responsibility for caregiving,<sup>23</sup> among other factors. For example, immigrant women

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<sup>18</sup> *Id.* In addition, these policies will have a significant impact on the LGBTQ community. In 2013, the Williams Institute estimated that there were 24,700 non-citizens who were part of a same-sex couple with a U.S. citizen; a quarter of the couples were raising children. GARY J. GATES, THE WILLIAMS INSTITUTE, *LGBT Adult Immigrants in the United States* (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf>.

<sup>19</sup> “Latinx” is a gender-neutral term that challenges the gender binary in the Spanish language and embraces the diversity of genders that often are actively erased from spaces. Due to the limitations of data collection, we use “Latina(s)” or “women” where research only shows findings for cisgender women, including Latinas.

<sup>20</sup> Women on average earn less than men, with even greater wage gaps for women of color, LGBTQ women, older women, and women with disabilities. See NAT'L WOMEN'S LAW CTR., *Frequently Asked Questions About the Wage Gap* (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/09/Wage-Gap-FAQ.pdf>; NAT'L WOMEN'S LAW CTR., *The Wage Gap: The Who, Why, How, and What to Do* (2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2017-2.pdf>.

<sup>21</sup> Discrimination and harassment based on gender, race, sexual orientation, age and disability (or a combination of these) and domestic violence also impose economic costs on women, including by disrupting and jeopardizing their employment. See, e.g., NAT'L WOMEN'S LAW CTR., *Sexual Harassment in the Workplace* (2016), <https://nwlc.org/wp-content/uploads/2016/11/Sexual-Harassment-Fact-Sheet.pdf>; INST. FOR WOMEN'S POL'Y RES., *The Economic Cost of Intimate Partner Violence, Sexual Assault, and Stalking* (2017), <https://iwpr.org/wp-content/uploads/2017/08/B367-Economic-Impacts-of-IPV-08.14.17.pdf>. Immigrant women are particularly vulnerable to abuse from employers, including discrimination and harassment, because of lack of awareness of workplace rights and fear of retaliation such as termination or being reported to immigration authorities for deportation. See, e.g., MAYA RAGHU, NAT'L WOMEN'S LAW CTR., *Standing with Immigrant Women Workers on May Day* (2017), <https://nwlc.org/blog/standing-with-immigrant-women-workers-on-may-day/>.

<sup>22</sup> Women make up two-thirds of the low-wage workforce (defined for the purposes of this discussion as jobs that pay, on average, \$11.50 per hour or less). KAYLA PATRICK, MEIKA BERLAN & MORGAN HARWOOD, NAT'L WOMEN'S LAW CTR., *Low-Wage Jobs Held Primarily by Women Will Grow the Most Over the Next Decade* (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/04/Low-Wage-Jobs-Held-Primarily-by-Women-Will-Grow-the-Most-Over-the-Next-Decade-2018.pdf>.

<sup>23</sup> Women are more likely than men to raise children on their own. See, e.g., U.S. Census Bureau, *America's Families and Living Arrangements 2018*, Tbl. A3, <https://www.census.gov/data/tables/2018/demo/families/cps-2018.html>, (showing that 30 percent of mothers living with children are not living with a partner or spouse, while



earn less on average than U.S.-born women.<sup>24</sup> Immigrant women also face a significant wage gap compared to native-born and naturalized men: foreign-born, noncitizen women, on average, earned 58 cents for every dollar earned by native-born men in 2015.<sup>25</sup> Immigrant women are, in addition, overrepresented in low-wage jobs (such as maid or housekeeper, nursing, psychiatric, or home health aide, or cashier), as are women of color.<sup>26</sup> And more than half of all immigrant women live in a household with children, compared to 43 percent of immigrant men and 28 percent of native-born women.<sup>27</sup> This heightened risk for economic insecurity means that immigrant women's ability to continue to participate in the programs targeted by the proposed rule is vitally important.

While immigrant women only make up a small share of public benefits recipients overall,<sup>28</sup> noncitizen women predominate among noncitizen recipients of income security programs. For example, in 2016, almost 47 percent of noncitizen Medicaid recipients were women (while 39 percent were men and 14 percent children).<sup>29</sup> Almost 48 percent of noncitizen recipients of SNAP benefits were women in 2016, compared to the 41 percent who were men and the 11 percent who were children.<sup>30</sup> These benefits reduce poverty and help women, including immigrant women in low-wage jobs, provide a basic standard of living for their families.

Immigrants already face significant barriers to accessing programs like Medicaid, SNAP, and housing assistance. Discouraging immigrant women's use of these programs – as the proposed rule does – would further detrimentally impact the livelihood and wellbeing of immigrant women and their families. And it would be particularly harmful to certain groups of immigrant women who can least afford to be put in the position of choosing between programs that support their safety, independence, and economic security and negatively affecting their immigration status.

In addition, the proposed rule's consideration of factors such as whether an applicant has completed high school will detrimentally affect immigrant women. Immigrant women from countries such as Mexico, El Salvador, and China are less likely to have completed high school, and would therefore be more likely to

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only 9 percent of fathers living with children are not living with a partner or spouse) meaning that their incomes must stretch to support more family members.

<sup>24</sup> INST. FOR WOMEN'S POL'Y RES., *Status of Women in the States: The Employment and Earnings of Immigrant Women* (2018), <https://statusofwomendata.org/immigrant-women/>.

<sup>25</sup> ELISE GOULD, JESSICA SCHIEDER & KATHLEEN GEIER, ECON. POL. INST., *What is the Gender Pay Gap and Is It Real?* (2015), <https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/>.

<sup>26</sup> AM. IMMIGR. COUNCIL, *The Impact of Immigrant Women on America's Labor Force* (2017), <https://www.americanimmigrationcouncil.org/research/impact-immigrant-women-americas-labor-force>; NAT'L WOMEN'S LAW CTR., *Underpaid & Overloaded: Women in Low-wage Jobs* (2014), [https://nwlc.org/wp-content/uploads/2015/08/final\\_nwlc\\_lowwagereport2014.pdf](https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_lowwagereport2014.pdf).

<sup>27</sup> ARIEL G. RUIZ, JIE ZONG, & JEANNE BATALOVA, MIGRATION POL'Y INST., *Immigrant Women in the United States* (2015), <https://www.migrationpolicy.org/article/immigrant-women-united-states>.

<sup>28</sup> Noncitizen women constituted about 4 percent of all SNAP and Medicaid recipients in 2016. National Women's Law Center calculations based on U.S. Census Bureau, 2017 Current Population Survey, using Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles, and J. Robert Warren. Integrated Public Use Microdata Series, Current Population Survey: Version 6.0 [dataset]. Minneapolis, MN: IPUMS, 2018.

<https://doi.org/10.18128/D030.V6.0>. This share is also roughly proportional to noncitizen women's share of the population (3.3 percent in 2017). *Id.*

<sup>29</sup> Nat'l Women's Law Ctr. calculations based on U.S. Census Bureau, 2017 Current Population Survey, using Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles, and J. Robert Warren. Integrated Public Use Microdata Series, Current Population Survey: Version 6.0 [dataset]. Minneapolis, MN: IPUMS, 2018.

<https://doi.org/10.18128/D030.V6.0>.

<sup>30</sup> *Id.*

receive a negative assessment based on this factor.<sup>31</sup> By including education as a factor in the public charge determination, the proposed rule would embed discrimination experienced by women in other countries into the United States' immigration system.

b) The proposed rule would harm women's health.

The proposed rule's unprecedented consideration of Medicaid as part of the public charge determination poses a dire threat to the health of immigrant women. Medicaid is a critically important program for women, meeting most of women's health needs throughout their lives.<sup>32</sup> Yet, under this proposed rule, immigrant women who are eligible for Medicaid<sup>33</sup> and to whom the proposed rule would apply<sup>34</sup> face having their use of Medicaid counted against them. This puts them in the untenable situation of having to decide between critical health coverage that keeps them healthy and being able to become a lawful permanent resident. In addition, the proposed rule is generating fear and confusion that has already had – and will continue to have – a chilling effect on immigrant women. According to the Kaiser Family Foundation, an estimated 2.1 million to 4.9 million Medicaid/CHIP enrollees could disenroll if the proposed rule is finalized.<sup>35</sup>

Losing, disenrolling, or avoiding Medicaid coverage would put women's health at risk. Without affordable health coverage, women will not get the health care they need. Women who have health coverage are more likely to receive preventive care, such as breast cancer and cervical cancer screenings.<sup>36</sup> People with health insurance also have lower mortality rates.<sup>37</sup> When people do not have health coverage, they are more likely to forgo needed care, leading to worse health outcomes.<sup>38</sup> Half of uninsured women reported going without health care in 2016 because of cost, compared to 25 percent of women with Medicaid and 21 percent of women with private health insurance.<sup>39</sup> Cost poses a particular barrier for women of color; in 2016, Latinx and Black women were more likely than white women to say

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<sup>31</sup> INST. FOR WOMEN'S POL'Y RES., *supra* note 24.

<sup>32</sup> Although Medicaid covers a range of services women need, it is important to note that federal law restricts federal Medicaid coverage of abortion except if the pregnancy is the result of rape or incest, or if the woman's life is in danger. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 202, 129 Stat. 2242, 2311 (2015).

<sup>33</sup> With certain, limited exceptions, immigrants are barred from obtaining Medicaid for five years after they obtain "qualified" status. This means, for example, that an immigrant must wait five years after becoming a lawful permanent resident before they are eligible to receive Medicaid benefits.

<sup>34</sup> Immigrants for whom the proposed rule would apply, and who are also eligible for Medicaid, include people who have been granted withholding of deportation, such as those eligible for DACA. Also included are people with protected statuses, such as asylees, who then decide to apply for a lawful permanent resident status through a quicker option, such as becoming engaged to a U.S. citizen.

<sup>35</sup> Calculated assuming disenrollment rates between 15 percent and 35 percent. SAMANTHA ARTIGA, RAPHAEL GARFIELD, & ANTHONY DAMICO, KAISER FAM. FOUND., *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid* (2018), <https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/>.

<sup>36</sup> MUNIRA Z. GUNJA ET AL., THE COMMONWEALTH FUND, *Women Gain Insurance and Improved Their Ability to Get Health Care* (2017), <https://www.commonwealthfund.org/publications/issue-briefs/2017/aug/how-affordable-care-act-has-helped-women-gain-insurance-and>.

<sup>37</sup> STEFFIE WOOLHANDLER & DAVID U. HIMMELSTEIN, ANNALS OF INTERNAL MED., *The Relationship of Health Insurance and Mortality: Is Lack of Insurance Deadly* (2017), <http://annals.org/aim/fullarticle/2635326/relationship-health-insurance-mortality-lack-insurance-deadly>.

<sup>38</sup> COMMITTEE ON THE CONSEQUENCES, BOARD ON HEALTH SERV., INST. OF MED., *Care Without Coverage: Too Little, Too Late* (2002), <https://www.ncbi.nlm.nih.gov/pubmed/25057604>.

<sup>39</sup> USHA RANJI ET AL., KAISER FAM. FOUND., *Overview: 2017 Kaiser Women's Health Survey* (2018), <https://www.kff.org/report-section/executive-summary-2017-kaiser-womens-health-survey/>.



that cost kept them from seeing a doctor.<sup>40</sup> Already, immigrant women are less likely to be insured than their citizen counterparts. Twenty-seven percent of noncitizen immigrant women are uninsured, compared 11 percent for women overall.<sup>41</sup> Women of reproductive age fare even worse: while 34 percent of noncitizen women of reproductive age are uninsured, nine percent of citizen women of reproductive age are uninsured. The gap widens further for poor immigrant women: nearly half (48 percent) of noncitizen women of reproductive age living in poverty are uninsured, while 16 percent of citizen women of reproductive age living in poverty live without coverage.<sup>42</sup> The proposed rule would only make the situation worse, leading to even worse health outcomes for immigrant women.

Moreover, even though this proposed rule would not punish those who seek health care services that are unconnected to Medicaid – such as free or subsidized care at health centers – some immigrant women may avoid that care for fear of risking their future status. This would exacerbate existing inequalities. Latinx, Black, and Asian women in the United States are already less likely to have a personal doctor than white women.<sup>43</sup> And when women forgo medical care, including preventive reproductive health care, because they cannot afford it or do not have health coverage, easily treatable illnesses or medical conditions can escalate, leading to worsening of existing conditions, lengthening of illness, and even disability or death.<sup>44</sup>

More specifically, this proposed rule may discourage women from obtaining prenatal care, which has ramifications not only for their health and their pregnancies, but also for birth outcomes.<sup>45</sup> Lack of adequate health care, including prenatal care, contributes to higher rates of maternal mortality, higher rates of infant mortality, and increased risk of low-infant birth weight.<sup>46</sup> This is particularly dangerous for

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<sup>40</sup> KAISER FAM. FOUND., *Percent of Adult Women Who Did Not See a Doctor in the Past 12 Months Due to Cost*, <https://www.kff.org/womens-health-policy/state-indicator/percent-of-adult-women-who-did-not-see-a-doctor-in-the-past-12-months-due-to-cost-by-raceethnicity/?currentTimeframe=0&selectedDistributions=all-women&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Oct. 18, 2018).

<sup>41</sup> KAISER FAM. FOUND., *Women's Health Insurance Coverage* (2017), <https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/>.

<sup>42</sup> GUTTMACHER INST., *Dramatic Gains in Insurance Coverage for Women of Reproductive Age Are Now in Jeopardy* (2018), <https://www.guttmacher.org/article/2018/01/dramatic-gains-insurance-coverage-women-reproductive-age-are-now-jeopardy>.

<sup>43</sup> KAISER FAM. FOUND., *Percent of Women Who Report Having No Personal Doctor*, <https://www.kff.org/disparities-policy/state-indicator/no-personal-doctor/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

<sup>44</sup> See WOOLHANDLER, *supra*, note 37; RACHEL WEST, CTR. FOR AM. PROGRESS, *Expanding Medicaid in All States Would Save 14,000 Lives Per Year* (2018); COMMITTEE ON THE CONSEQUENCES, BOARD ON HEALTH SERV., INST. OF MED., *Care Without Coverage: Too Little, Too Late* (2002); ADAM SONFIELD, GUTTMACHER POL'Y REV., *Beyond Contraception: The Overlooked Reproductive Health Benefits of Health Reform's Preventive Services Requirement* (2012), <https://www.guttmacher.org/gpr/2012/10/beyond-contraception-overlooked-reproductive-health-benefits-health-reforms-preventive>.

<sup>45</sup> MEGAN M. SHELLINGER, ET AL., MATERNAL & CHILD HEALTH J., *Improved Outcomes for Hispanic Women with Gestational Diabetes Using the Centering Pregnancy Group Prenatal Care Model* (2016), <https://link.springer.com/article/10.1007/s10995-016-2114-x>.

<sup>46</sup> JACQUES BALAYLA & HAIM ARIE ABENHAIM, AM. J. OF PERINATOLOGY, *Inadequate Prenatal Care Utilization and Risks of Infant Mortality and Poor Birth Outcome: A Retrospective Analysis of 28,729,765 U.S. Deliveries over 8 Years* (2012), [https://www.researchgate.net/profile/Jacques\\_Balayla2/publication/230573498\\_Inadequate\\_Prenatal\\_Care\\_Utilization\\_and\\_Risks\\_of\\_Infant\\_Mortality\\_and\\_Poor\\_Birth\\_Outcome\\_A\\_Retrospective\\_Analysis\\_of\\_28729765\\_US\\_Deliveries](https://www.researchgate.net/profile/Jacques_Balayla2/publication/230573498_Inadequate_Prenatal_Care_Utilization_and_Risks_of_Infant_Mortality_and_Poor_Birth_Outcome_A_Retrospective_Analysis_of_28729765_US_Deliveries)

Black women, who already experience disproportionately high rates of maternal mortality, in part due to existing barriers to health care and systemic inequalities.<sup>47</sup> Similarly, the proposed rule may also discourage women from seeking postpartum care, which is crucial to the health and well-being of mothers, newborns, and families.<sup>48</sup> Forgoing postpartum care could mean that women endure postpartum depression without proper medical, social, and psychological care, skip doctor's visits that address infant feeding, nutrition, physical activity and family planning, or leave other postpartum health issues unaddressed.

c) The proposed rule would undermine women's employment.

The proposed rule ignores the positive impact of public benefits in facilitating economic self-sufficiency. There is a large body of research demonstrating positive long-term effects of receipt of many of the benefits that are included in the public charge determination, including SNAP and Medicaid. In particular, the use of these benefits often enables workers (especially those in the low-wage workforce) to remain employed.<sup>49</sup> Because many of these jobs, in addition to paying unjustly low wages, are unstable and offer few benefits, many individuals in the low-wage workforce are unable to support their families on their wages alone.<sup>50</sup> Discouraging the receipt of these benefits would be especially problematic for working women whose employment may already be destabilized by discrimination, harassment, domestic violence, or caregiving responsibilities – in other words, for women with low incomes, women of color, and LGBTQ women.<sup>51</sup>

Women make up two-thirds of the low-wage workforce (defined for the purposes of this discussion as jobs that typically pay \$11.50 per hour or less),<sup>52</sup> and immigrant women in particular are overrepresented in low-wage jobs such as maid or housekeeper, nursing, psychiatric, or home health aide, or cashier.<sup>53</sup> Thus, the proposed rule's counting SNAP, non-emergency Medicaid, and housing assistance against women for the purposes of their immigration status would actually make it more difficult for many

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<sup>47</sup> NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *Black Women's Maternal Health: A Multifaceted Approach to Addressing Persistent and Dire Health Disparities* (2018), <http://www.nationalpartnership.org/research-library/maternal-health/black-womens-maternal-health-issue-brief.pdf>.

<sup>48</sup> THE AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, *Ob-Gyns Stress the Importance of Postpartum Care: The Fourth Trimester* (2016), <https://www.acog.org/About-ACOG/News-Room/News-Releases/2016/Ob-Gyns-Stress-the-Importance-of-Postpartum-Care-The-Fourth-Trimester?IsMobileSet=false>.

<sup>49</sup> See, e.g., MATTHEW DESMOND & CARL GERSHENSON, SOC. PROBLEMS, *Housing and Employment Insecurity among the Working Poor* (2016), <https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf?m=1452638824>; NAT'L WOMEN'S LAW CTR., *Medicaid Is Vital for Women's Jobs in Every Community* (2017), <https://nwlc.org/resources/medicaid-is-vital-for-womens-jobs-in-every-community/>; CTR. ON BUDGET & POL'Y PRIORITIES, *Chart Book: The Far-Reaching Benefits of the Affordable Care Act's Medicaid Expansion* (2018), <https://www.cbpp.org/research/health/chart-book-the-far-reaching-benefits-of-the-affordable-care-acts-medicaid>.

<sup>50</sup> See, e.g., JULIE VOGTMAN & KAREN SCHULMAN, NAT'L WOMEN'S LAW CTR., *Set Up to Fail: When Low-Wage Work Jeopardizes Parents' and Children's Success* (2016), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/01/FINAL-Set-Up-To-Fail-When-Low-Wage-Work-Jeopardizes-Parents'-and-Children's-Success.pdf>.

<sup>51</sup> See GATES, *supra* note 18.

<sup>52</sup> PATRICK ET AL, *supra* note 22.

<sup>53</sup> AM. IMMIGR. COUNCIL, *supra* note 26; NAT'L WOMEN'S LAW CTR., *supra* note 26.

immigrant women to support themselves and their families through work, and thus be economically self-sufficient.

d) The proposed rule would harm women with disabilities and serious health conditions.

People with disabilities rely upon benefits like SNAP and Medicaid so that they can continue to work, stay healthy, and remain productive members of the community. For example, more than one-quarter of people who use SNAP benefits for nutritional support are also disabled. Likewise, about one-third of adults under age 65 enrolled in Medicaid have a disability, compared with about 12 percent of adults in the general population.<sup>54</sup> Many of these individuals are eligible for Medicaid, and unable to obtain private insurance, precisely because of their disability. Because many critical disability services are only available through Medicaid, the proposed rule would prevent many people with disabilities from getting needed services that allow them to manage their medical conditions and participate in the workforce.

In addition, the proposed rule targets individuals with chronic health conditions and disabilities. Under the proposed rule, DHS will consider whether a person's health makes them more or less likely to become a public charge, including whether they have been "diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with their ability to provide for and care for themselves, to attend school, or to work." § 212.22(b)(2). This category will mean most people with disabilities – including people with intellectual and developmental disabilities, psychiatric disabilities, or physical disabilities who need personal care services – will have this factor weighed against them. And it perpetuates the false assumption that medical diagnosis is solely determinative of an individual's current abilities and future prospects.

The preamble states that, conversely, absence of a diagnosis of such a condition would be a positive factor. Virtually no person with disabilities will be able to meet this positive factor, contrary to well-established principles in the Americans with Disabilities Act, and elsewhere.

e) The proposed rule would harm survivors of domestic violence and sexual assault.

The proposed rule will have a detrimental impact on survivors of domestic violence and sexual assault and their ability to keep themselves and their families safe from abuse. While survivors who seek to adjust their immigration status through VAWA or U pathways, *see* INA 212(a)(4)(E), and proposed 8 CFR 212.25, are not subject to a public charge determination, many survivors do not fall under those named categories, and will be harmed by this proposal.<sup>55</sup> That is because access to health care, housing, food assistance, and other public benefits plays a pivotal role in helping survivors escape and heal from domestic violence and sexual assault.

While domestic violence and sexual assault occur across the socio-economic spectrum, there are unique challenges and barriers for survivors at the intersection of gender-based violence and economic hardship. Survivors with low incomes face unique challenges and barriers. In order to exercise control over their partners, abusers often actively prevent their partner from attaining economic independence by sabotaging

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<sup>54</sup> See, e.g., NATIONWIDE ADULT MEDICAID CAHPS, *Health Care Experiences of Adults with Disabilities Enrolled in Medicaid Only: Findings from a 2014-2015 Nationwide Survey of Medicaid Beneficiaries* (2016), <https://www.medicaid.gov/medicaid/quality-of-care/downloads/performance-measurement/namcahpsdisabilitybrief.pdf>.

<sup>55</sup> While the rule exempts self-petitioners under VAWA and asylees, this rule will nevertheless harm immigrant women who are survivors of domestic violence or sexual assault but do not fall into these specific immigration categories, or survivors who are citizens or have LPR status but have family members who are not.

their partner's economic stability, interfering with access to financial resources, employment, child care, or health care, engaging in reproductive coercion, ruining their credit, leaving them with tax debt, and more.<sup>56</sup> Abuse can also result in survivors falling into poverty; violence often undermines survivors' ability to work, have a place to live, and do what is necessary to pursue a more stable life for themselves and their children.<sup>57</sup> Ending an abusive relationship, moreover, may mean losing not only access to a partner's income, but also housing, health care, or child care.

Poverty and economic instability can also make it more difficult to cope with the physical, psychological, and financial impacts of domestic violence. Survivors often incur substantial out-of-pocket costs while navigating medical, mental health, relocation, legal, and other systems. Survivors in marginalized and underserved communities (such as people of color, LGBTQ people, immigrants, and people with disabilities) often face intersecting forms of discrimination that exacerbate their likelihood of facing economic instability. Additionally, poverty increases the likelihood that people live and work in unhealthy and unstable environments. Without sufficient resources, survivors may be compelled back into an abusive relationship, or face destitution and homelessness.<sup>58</sup>

Accessing public benefits that help meet basic needs is therefore imperative for women's safety.<sup>59</sup> Survivors' access to public benefits like housing assistance, SNAP, and Medicaid is fundamental to determining whether they can leave an abusive relationship,<sup>60</sup> and critical to helping them establish a safer and more stable life. In a 2017 survey of service providers working with survivors, over 88 percent of respondents said that SNAP is a very critical resource for most domestic violence and sexual assault survivors.<sup>61</sup> But by disincentivizing access to such benefits, the proposed rule would put the safety of survivors of domestic violence or sexual assault at risk.

f) The proposed rule would harm older women.

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<sup>56</sup> See, e.g., JUDY POSTMUS ET AL., *Understanding Economic Abuse in the Lives of Survivors*, 27 J. OF INTERPERSONAL VIOLENCE 411–430 (2011), <https://journals.sagepub.com/doi/abs/10.1177/0886260511421669>; ADRIENNE ADAMS ET AL., *Development of the Scale of Economic Abuse*, 13 VIOLENCE AGAINST WOMEN 563-588 (2008), <https://vaw.msu.edu/wp-content/uploads/2013/10/Scale-of-Economic-Abuse.pdf>.

<sup>57</sup> See, e.g., INST. FOR WOMEN'S POL'Y RES., *supra* note 21.

<sup>58</sup> See ELEANOR LYON, NAT'L ELECTRONIC NETWORK ON VIOLENCE AGAINST WOMEN, *Poverty, Welfare and Battered Women: What Does the Research Tell Us?* (1997), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.208.7702&rep=rep1&type=pdf>.

<sup>59</sup> See, e.g., ELEANOR LYON, NAT'L RESOURCE CTR ON DOMESTIC VIOLENCE, *Welfare, Poverty and Abused Women: New Research and its Implications* (2002), <https://vawnet.org/material/welfare-poverty-and-abused-women-new-research-and-its-implications>.

<sup>60</sup> ELEANOR LYON ET AL., NAT'L INSTITUTE OF JUSTICE, *Meeting Survivors' Needs: A Multi-state Study of Domestic Violence Shelter Experiences* (2008), [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/MeetingSurvivorsNeeds-FullReport.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/MeetingSurvivorsNeeds-FullReport.pdf); ELEANOR LYON ET AL., NAT'L RESOURCE CTR ON DOMESTIC VIOLENCE, *Meeting Survivors' Needs through Non-Residential Domestic Violence Services & Supports: Results of a Multi-State Study* (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237328.pdf>; RACHEL KIMERLING ET AL., *Unemployment Among Women: Examining the Relationship of Physical and Psychological Intimate Partner Violence and Posttraumatic Stress Disorder*, 24 J. OF INTERPERSONAL VIOLENCE 450-463 (2009), <https://www.ncbi.nlm.nih.gov/pubmed/18458353>.

<sup>61</sup> SHAINA GOODMAN, NAT'L RESOURCE CTR. ON DOMESTIC VIOLENCE, *The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims' Economic Security* (2018), <https://vawnet.org/material/difference-between-surviving-and-not-surviving-public-benefits-programs-and-domestic-and>.

Women made up about 56 percent of immigrants age 60 and older in 2016.<sup>62</sup> In 2010, there were nearly five million immigrants age 65 and older in the U.S.<sup>63</sup> In addition, the number of naturalized citizens who sponsor their parents to immigrate to the U.S. is rising; in fact, the number of parents of U.S. citizens who have been admitted as lawful permanent residents nearly tripled between 1994 and 2017.<sup>64</sup> Parents of U.S. citizens now account for almost 15 percent of all admissions and almost 30 percent of family-based admissions.<sup>65</sup>

The elderly, and especially older women, are at greater risk of economic insecurity, and the same is true for older immigrants. Over 1.1 million noncitizens age 62 and older live in households with low incomes,<sup>66</sup> and in 2017, 24 percent of older noncitizen women had incomes below 125 percent of the FPL.<sup>67</sup> This means that public benefits programs likely play an important role in meeting their basic needs. Health care is particularly important for older adults, and older women tend to have more health issues and health-related costs than men. Nearly 7 million seniors 65 and older are enrolled in both Medicare and Medicaid, and 1 in 5 Medicare beneficiaries relies on Medicaid to help them pay for Medicare premiums and cost-sharing.<sup>68</sup> Programs such as Section 8 rental assistance, Section 202 supportive housing, and SNAP also help low-income seniors meet their basic needs.<sup>69</sup> More than one in ten SNAP recipients is age 60 or older.<sup>70</sup>

The proposed rule's disincentivizing of Medicaid, nutrition and housing assistance, as well as the Medicare Part D Low Income Subsidy thus will harm older immigrants. Specifically, the rule's targeting of Medicaid coverage as part of the public rule determination will jeopardize older adults' ability to obtain services such as long-term care, home and community-based services, dental, transportation, and other services not covered by Medicare. Moreover, if immigrant families are afraid to access nutrition

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<sup>62</sup> Nat'l Women's Law Ctr. calculations based on Migration Pol'y Inst., *Age-Sex Pyramids of U.S. Immigrant and Native-Born Populations, 1970-Present*, <https://www.migrationpolicy.org/programs/data-hub/charts/age-sex-pyramids-immigrant-and-native-born-population-over-time?width=1000&height=850&iframe=true>.

<sup>63</sup> JEANNE BATALOVA, MIGRATION POL'Y INST., *Senior Immigrants in the United States* (2012), <https://www.migrationpolicy.org/article/senior-immigrants-united-states>.

<sup>64</sup> *Comparing* Dept. of Homeland Security, Office of Immigration Statistics, *2017 Yearbook of Immigration Statistics*, Table 7, [www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf](http://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf) with Immigration & Naturalization Service, Office of Policy & Planning, *Legal Immigration, Fiscal Year 1997*, Table 1, [www.dhs.gov/sites/default/files/publications/INS\\_AnnualReport\\_LegalImmigration\\_1997\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/INS_AnnualReport_LegalImmigration_1997_1.pdf); see also STACY TORRES & XUEMEI CAO, *The Immigrant Grandparents America Needs*, N.Y. TIMES, Aug. 20, 2018, [www.nytimes.com/2018/08/20/opinion/family-immigration-grandparents.html](http://www.nytimes.com/2018/08/20/opinion/family-immigration-grandparents.html).

<sup>65</sup> *Id.*

<sup>66</sup> MANATT PHELPS & PHILIPS LLP, *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard* (2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population#DataDashboard>.

<sup>67</sup> Nat'l Women's Law Ctr. calculations based on the Current Population Survey (CPS) 2018 using Sarah Flood et al., IPUMS-CPS: Version 6.0. Minneapolis, MN: IPUMS, 2018. <https://doi.org/10.18128/D030.V6.0>.

<sup>68</sup> KAISER FAM. FOUND., *Medicaid Enrollment by Age*, [www.kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/?dataView=1&currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D](http://www.kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/?dataView=1&currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D).

<sup>69</sup> See JUSTICE IN AGING, *Supporting Older Americans' Basic Needs: Health Care, Income, Housing and Food* (2018), [www.justiceinaging.org/wp-content/uploads/2018/04/Supporting-Older-Americans%E2%80%99-Basic-Needs-Health-Care-Income-Housing-and-Food.pdf](http://www.justiceinaging.org/wp-content/uploads/2018/04/Supporting-Older-Americans%E2%80%99-Basic-Needs-Health-Care-Income-Housing-and-Food.pdf).

<sup>70</sup> *Id.*



assistance programs or seek housing assistance, seniors and their families will have fewer resources to spend on other basic needs, including food, medicine, transportation, and clothing. In short, the proposed rule would cause significant hardship to older immigrants and their families.

By discouraging receipt of Medicaid, nutrition and housing assistance, and the Medicare Part D Low Income Subsidy, and treating age and poor health as negative factors, moreover, the proposed rule characterizes parents and grandparents as a burden – but ignores the critical contributions of older family members, including caregiving that enables others in the family to work.<sup>71</sup> This represents yet another way that the proposed rule targets family-based immigration, and undermines the ability of immigrants and their families to attain economic self-sufficiency, including through work.

g) The proposed rule would harm lesbian, gay, bisexual, and transgender immigrants.

The proposed public charge regulation would have significant harmful effects on lesbian, gay, bisexual, and transgender (LGBT) immigrants and their families. There are an estimated 904,000 LGBT immigrants living throughout the U.S.<sup>72</sup> While there are no specific data collected or reported by the Departments of Homeland Security or State about LGBT immigrants, LGBT individuals always have, and will continue to, use family-based, employment-based, and other available categories to apply for lawful permanent residence in the U.S.<sup>73</sup> For example, LGBT immigrants in same-sex marriages are recognized as spouses under U.S. immigration law after the U.S. Supreme Court's 2013 decision in *U.S. v. Windsor*. LGBT individuals with higher education and skills often are able to use employment-based visas to work in multi-national and domestic corporations that welcome and support diverse employees, including LGBT employees. Since the 1990's, LGBT refugees who are fleeing persecution based on their sexual orientation or gender identity have been able to find legal protection in the U.S., but often face many hurdles in proving their claims to persecution.

Similar to other immigrants, not all LGBT immigrants and their families have achieved economic security. Many LGBT immigrants and their families struggle economically, and use some of the government benefits that would be counted against them under the proposed rule. As an intersectional subset of both the immigrant and LGBT populations, it is likely that tens of thousands of LGBT immigrants and their families, including those with U.S. citizen children, are using Medicaid, SNAP, and housing assistance to support themselves and their families. For example, an estimated 11 percent of LGBT adults ages 18-64 use Medicaid as their health insurance program.<sup>74</sup> An estimated 27 percent of LGBT adults ages 18-44 use SNAP, with higher utilization rates among racial and ethnic minority LGBT adults and those with children.<sup>75</sup> A recent nationwide survey found that one in five LGBTQ women reported that they or their family participated in Medicaid, one in four LGBTQ women reported that they or their family received SNAP, and over seven percent of LGBTQ women reported they or their families

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<sup>71</sup> TORRES, *supra* note 64.

<sup>72</sup> GARY J. GATES, THE WILLIAMS INSTITUTE, *LGBT Adult Immigrants in the United States* (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf>.

<sup>73</sup> IMMIGRATION EQUALITY, *Legal Resources*, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/#.W8Thd2hKhPY> (last visited Dec. 6, 2018).

<sup>74</sup> KERITH J. CONRON & SHOSANA K. GOLDBERG, THE WILLIAMS INSTITUTE, *LGBT Adults on Medicaid* (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Medicaid.pdf>.

<sup>75</sup> TAYLOR N.T. BROWN, ADAM P. ROMERO, GARY J. GATES, THE WILLIAMS INSTITUTE, *Food Insecurity and SNAP Participation in the LGBT Community* (2016), <https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf>.



received public housing assistance.<sup>76</sup> Some subset of these LGBT adults are LGBT immigrants and their families, who will be impacted by the proposed public charge rule.

Moreover, because of continuing discrimination based on their sexual orientation and gender identity, LGBT immigrants, similar to all LGBT individuals, face additional challenges in accessing and maintaining education, employment, housing, and health care, and may be more likely to need assistance with basic family supports such as health insurance and nutrition. The multiple and intersectional identities of LGBT immigrants mean greater risk for a lifetime of discrimination that restricts educational, employment, and other opportunities. These cumulative and compounding experiences of discrimination make transgender immigrants, especially transgender women of color, and lesbian immigrants, especially lesbians of color, particularly vulnerable. The proposed public charge regulation threatening denial of permanent residence for simply using benefits that provide low-income families with health care, nutrition, and housing would impose the untenable choice on LGBT immigrants and their families between disenrolling from these public benefits programs, or jeopardizing their future immigration status.

h) The proposed rule threatens the well-being of immigrant caregivers.

The proposed rule threatens the well-being of caregivers, many of whom are immigrants. Direct care workers provide critical assistance to millions of older adults and people with disabilities who need help with dressing, bathing, eating and other daily tasks. An estimated one million immigrants work in direct care, making up a quarter of the direct care workforce.<sup>77</sup> More than four in five care workers are women, and nearly a third are over age 55. Because caregiving jobs tend to be part-time and low-wage, many direct care workers utilize public benefits programs to support themselves and their families. Nearly half of immigrant direct care workers live at or below 200 percent of the FPL, and more than 40 percent participate in programs like SNAP and Medicaid to make ends meet.<sup>78</sup>

If direct care workers are afraid to access these programs, their own health and well-being will be compromised – and many will be unable to afford to remain in the United States. Alternatively, if care workers use these programs to supplement their low wages, they may be denied LPR status or prevented from coming to the U.S. in the first place. The proposed rule thus could cause a shortage in direct care workers, leaving many older Americans and people with disabilities without access to the caregiving they need.

**5) The proposed rule would harm children, families, and our communities.**

The loss of critical food, health care, and housing assistance would decrease not only women’s economic stability, but also that of their families, including children. By the Department’s own admission, the proposed rule *“has the potential to erode family stability and decrease disposable income of families and children because the action provides a strong disincentive for the receipt or use of public benefits by aliens, as well as their household members, including U.S. children.”*

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<sup>76</sup> CAITLIN ROONEY, CHARLIE WHITTINGTON & LAURA E. DURSO, CTR. FOR AM. PROGRESS, *Protecting Basic Living Standards for LGBTQ People* (2018), <https://cdn.americanprogress.org/content/uploads/2018/08/10095627/LGBT-BenefitCuts-report.pdf>.

<sup>77</sup> ROBERT ESPINOZA, PHI, *Immigrants and the Direct Care Workforce* (2017), <https://phinational.org/resource/immigrants-and-the-direct-care-workforce/>.

<sup>78</sup> *Id.*

Children thrive when they and their parents can access needed health care, and when their families have enough to eat and have a roof over their heads. As compared to children without health insurance, children enrolled in Medicaid in their early years have better health, educational, and employment outcomes not only in childhood but as adults.<sup>79</sup> Children whose families receive housing assistance are more likely to have a healthy weight and to rate higher on measures of well-being—especially when housing assistance is accompanied by food assistance.<sup>80</sup> Children of immigrants who participate in SNAP are more likely to be in good or excellent health, be food secure, and reside in stable housing.

Conversely, the impact of the loss of critical food, health care, and housing assistances falls particularly hard upon the children in a family. Children in immigrant families are already more likely to face certain hardships and are already less likely to secure help, due in part to complex eligibility rules that create barriers for immigrant families.<sup>81</sup> Research shows that not having the essentials of food, shelter, and health care can have life-long, irreparable negative impacts on developing children.<sup>82</sup> And, as detailed elsewhere, when families lose health coverage and nutrition and housing assistance, they must expend resources to meet those basic needs – or go without. The constant stress of struggling to access basic needs itself can be toxic to young brains and bodies.<sup>83</sup> Moreover, parents’ stress and consequent health challenges impede effective caregiving.

Immigrant families are already facing considerable mental stress. A Kaiser Family Foundation report shows that immigrant families, including those with lawful status, are experiencing significant levels of fear and uncertainty, particularly individuals from the Latinx and Muslim communities. The report also shows that such fear has a direct impact on the health and well-being of children and is likely to have

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<sup>79</sup> ROURKE O’BRIEN & CASSANDRA ROBERTSON, UNIVERSITY OF WISCONSIN—MADISON, INST. FOR RES. ON POVERTY, *Medicaid and Intergenerational Economic Mobility* (2015), <https://search.library.wisc.edu/catalog/9910223409002121>; ANDREW GOODMAN-BACON, NBER WORKING PAPER NO. 22899, *The Long-Run Effects of Childhood Insurance Coverage: Medicaid Implementation, Adult Health, and Labor Market Outcomes* (2016), [www.nber.org/papers/w22899](http://www.nber.org/papers/w22899).

<sup>80</sup> KATHRYN BAILEY ET AL., CHILDREN’S HEALTHWATCH, *Overcrowding and Frequent Moves Undermine Children’s Health* (2011), [www.issuelab.org/resources/13900/13900.pdf](http://www.issuelab.org/resources/13900/13900.pdf).

<sup>81</sup> TANYA BRODER, AVIDEH MOUSSAVIAN, & JONATHAN BLAZER, NAT’L IMMIGR. LAW CTR, *Overview of Immigrant Eligibility for Federal Programs* (2015), <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/>; KINSEY ALDEN DINAN, NAT’L CTR FOR CHILDREN IN POVERTY, *Federal Policies Restrict Immigrant Children’s Access to Key Public Benefits* (2005), [http://www.nccp.org/publications/pdf/text\\_638.pdf](http://www.nccp.org/publications/pdf/text_638.pdf).

<sup>82</sup> See, e.g., FOOD RES. ACTION CTR, *The Impact of Poverty, Food Insecurity, and Poor Nutrition of Health and Well-Being* (2017), <http://frac.org/wp-content/uploads/hunger-health-impact-poverty-food-insecurity-health-well-being.pdf>; KATE MARCAL & PATRICK J. FOWLER, CTR FOR SOC. DEVELOPMENT, *Housing and Child Well-Being* (2015), <https://csd.wustl.edu/Publications/Documents/RB15-40.pdf>; DAVID MURPHEY, CHILD TRENDS, *Health Insurance Coverage Improves Child Well-Being* (2017), <https://www.childtrends.org/publications/health-insurance-coverage-improves-child-well>.

<sup>83</sup> See, e.g., PRIYANKA BOGHANI, *How Poverty Can Follow Children Into Adulthood*, FRONTLINE, Nov. 22, 2017, <https://www.pbs.org/wgbh/frontline/article/how-poverty-can-follow-children-into-adulthood/>.

lifelong consequences.<sup>84</sup> The impact on Latinx children would likely be particularly widespread, since 52 percent of Latinx children have at least one immigrant parent.<sup>85</sup>

The proposed rule would destabilize the lives and undermine the well-being of countless families across the United States. The strength of the country's future workforce and economy would also be jeopardized by the long-term impacts of the proposed rule upon children in these families. Forcing parents to choose between remaining with or reuniting their family and accessing critical benefits is short-sighted and yet another form of government-induced family separation.

**6) The proposed rule's inclusion of English proficiency as a weighed factor violates well-established civil rights principles.**

The Department's proposal to add English proficiency as a weighed factor will disproportionately harm immigrants from countries whose national language is not English. Treating English proficiency as a positive factor in the public charge determination will create a de facto preference for people from English-speaking, and thus, predominantly white, countries, further embedding racism into the immigration system.

The proposed rule stands in stark contrast to federal civil rights laws prohibiting discrimination on the basis of English proficiency. Our country does not have a national language, and there is no law that allows the federal government to prefer those who speak English over those who are limited English proficient (LEP). Indeed, numerous federal civil rights laws *protect* LEP persons from discrimination on the basis of English proficiency. Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.<sup>86</sup> Title VII of the Civil Rights Act prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion.<sup>87</sup> In addition, the Affordable Care Act's Health Care Rights Law (section 1557) prohibits discrimination on the basis of race, color, national origin, sex, disability, and age, in health care.<sup>88</sup> The Supreme Court has interpreted that discrimination on the basis of language or English proficiency is a form of national origin discrimination.<sup>89</sup> These protections are also embedded in Executive Order 13166, which provides that all LEP persons should have meaningful access to federally conducted and federally funded programs and activities and directs federal agencies to ensure they are in compliance.<sup>90</sup>

The proposed rule thus undermines our nation's values and violates well-established civil rights principles and protections and should be rejected.

**7) Responses to DHS questions regarding specific elements of the proposed rule.**

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<sup>84</sup> SAMANTHA ARTIGA & PETRY UBRI, KAISER FAM. FOUND., *Living in an Immigrant Family in America: How Fear and Toxic Stress are Affecting Daily Life, Well-Being, & Health* (2017), <https://www.kff.org/disparities-policy/issue-brief/living-in-an-immigrant-family-in-america-how-fear-and-toxic-stress-are-affecting-daily-life-well-being-health/>.

<sup>85</sup> RICHARD FRY & JEFFREY S. PASSEL, PEW RES. CTR., *Latino Children: A Majority Are U.S.-Born Offspring of Immigrants* (2009), <http://www.pewhispanic.org/2009/05/28/latino-children-a-majority-are-us-born-offspring-of-immigrants/>.

<sup>86</sup> 42 U.S.C. § 2000d (2018).

<sup>87</sup> 42 U.S.C. § 2000e (2018).

<sup>88</sup> 42 U.S.C. § 18116 (2018).

<sup>89</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>90</sup> Exec. Order No. 13,166, 3 C.F.R. § 159 (2000), <https://www.gpo.gov/fdsys/pkg/FR-2000-08-16/pdf/00-20938.pdf>.

In the proposal, the Department explicitly posed a number of questions with regard to specific elements of the rule. We are responding in order to ensure that the rule is not made even more punitive and harmful than the current proposal, but our response should in no way be interpreted to indicate that the proposed rule would be acceptable in its current form. Moreover, we are responding to the questions that are core priorities for our organization, but our lack of response to specific questions should in no way be interpreted as support for the underlying proposals.

- a) Unenumerated benefits should not be considered as part of a public charge determination.

At FR 51173, the Department asks about unenumerated benefits -- both whether additional programs should explicitly be counted, and whether use of other benefits should be counted in the totality of circumstances. We strongly oppose adding any additional programs to the list of counted programs, or in any way considering the use of non-listed programs in the totality of circumstances test. No additional programs should be considered in the public charge determination. The programs enumerated in the proposed rule already go far beyond what should be considered, for all of the reasons set forth in these detailed comments, and will harm millions of immigrants and their families. The addition of any more programs would only increase this harm.

- b) The Children's Health Insurance Program (CHIP) should not be included in a public charge determination.

At FR 51174, the Department specifically requests comment on whether the Children's Health Insurance Program (CHIP) should be included in a public charge determination. As stated above, it is our strong view that no additional programs should be considered as part of the public charge test. In response to the Department's specific question, we adamantly oppose the inclusion of CHIP.

Nearly nine million children across the U.S. depend on CHIP for their health care.<sup>91</sup> CHIP has been a significant factor in dramatically reducing the rate of uninsured children across the U.S. According to the Kaiser Family Foundation, between 1997 (when CHIP was enacted) through 2012, the uninsured rate for children fell by half, from 14 percent to seven percent.<sup>92</sup> Medicaid and CHIP together have helped to reduce disparities in coverage that affect children, particularly children of color.<sup>93</sup> Including CHIP in the public charge determination would likely lead to many eligible children foregoing health care benefits, both because of the direct inclusion in the public charge determination and because of the likely chilling effect detailed elsewhere in these comments.

As described elsewhere in these comments, access to health care is critical to children's development, well-being and long-term success. Since its inception in 1997, CHIP has enjoyed broad, bipartisan support based on the widespread recognition of this fact. A 2018 survey of the existing research noted that

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<sup>91</sup> Children's Insurance Program (CHIP), <https://www.medicaid.gov/chip/index.html>, (last visited Dec. 4, 2018). The CHIP program withholds insurance coverage for abortion, except in extremely limited circumstances where a woman is pregnant as a result of rape or incest, or when her life is in danger. 42 U.S.C. § 1397jj(a)(16) (2018).

<sup>92</sup> SAMANTHA ARTIGA & PETRI UBRI, KAISER FAM. FOUND., *Key Issues in Children's Health Coverage* (2017), <https://www.kff.org/medicaid/issue-brief/key-issues-in-childrens-health-coverage/>.

<sup>93</sup> KARINA WAGNERMAN & TRICIA BROOKS, CTR FOR CHILDREN & FAMILIES, *Medicaid And CHIP Help Address Racial/Ethnic Disparities In Children's Health* (2017), <https://ccf.georgetown.edu/2017/04/26/medicaid-and-chip-help-address-raciaethnic-disparities-in-childrens-health/>.

the availability of “CHIP coverage for children has led to improvements in access to health care and to improvements in health over both the short-run and the long-run.”<sup>94</sup> CHIP improves health, which translates into educational gains, with potentially positive implications for both individual economic well-being and overall economic productivity.<sup>94</sup>

The inclusion of CHIP in the public charge determination would be counter to Congress’ explicit intent to expand coverage to lawfully present children and pregnant women. Section 214 of the 2009 Children’s Health Insurance Program Reauthorization Act (CHIPRA) gave states a new option to cover, with regular federal matching dollars, lawfully residing children and pregnant women under Medicaid and CHIP during their first five years in the U.S. This reflects Congress’ recognition of the public health, economic, and social benefits of ensuring that these populations have access to care. DHS should not include either CHIP or Medicaid as part of the public charge determination.

- c) Receipt of public benefits by noncitizen children should not be considered in a public charge determination.

At FR 51174, the Department asks about public charge determinations for noncitizen children under age 18 who receive one or more public benefit programs. We strongly believe that the public charge determination should not take receipt of benefits by children into account. First, as described elsewhere in these comments, public benefits like SNAP, housing assistance, and Medicaid have short and long-term benefits for children’s health, development, educational success, and overall well-being. If anything, the receipt of public benefits that help provide basic needs helps stabilize families and increases children’s chances of good health and future success in school and in the workforce. Indeed, these public benefits serve as crucial levers that reduce the intergenerational transmission of poverty.<sup>95</sup> Second, children’s receipt of benefits reflects their current circumstances, but provides little information about their future likelihood of receiving benefits, or future economic self-sufficiency. It is therefore not only cruel, but also counterproductive to penalize a child for receiving public benefits in the immigration process.

Moreover, negatively weighing a child’s enrollment in health and nutrition programs in immigration proceedings would be specifically counter to the congressional intent expressed in both the 2009 CHIPRA and in section 4401 of the Farm Security and Rural Investment Act of 2002 (which restored access to Food Stamps, now the Supplemental Nutrition Assistance Program, to immigrant children). This legislation is yet another indication of the broad consensus in support of ensuring that children’s basic needs are met – a consensus that this proposed rule flouts at every turn.

- d) Previous receipt of public benefits should not be considered in a public charge determination.

At FR 51200, the Department asks whether 36 months is the right lookback period for considering previous use of public benefits and whether a shorter or longer timeframe would be better. We strongly oppose a lookback period of any length of time related to use of public benefit programs. Inclusion of a retrospective test is fundamentally inconsistent with the forward-looking nature of the public charge determination as mandated by law. Moreover, past use of public benefits is not necessarily predictive of future use. If the specific circumstances that led to an individual’s use of public benefits, such as a job

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<sup>94</sup> *Id.*

<sup>95</sup> MARIANNE PAGE, POL’Y BRIEF, UNIVERSITY OF CALIFORNIA, DAVIS, *Safety Net Programs Have Long-Term Benefits for Children in Poor Households* (2017), [https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-health\\_and\\_nutrition\\_program\\_brief-page\\_0.pdf](https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-health_and_nutrition_program_brief-page_0.pdf).

loss or serious illness, cease to exist, the individual's prior use of benefits is irrelevant to his or her future economic self-sufficiency.

Moreover, a look-back period of any length disregards the positive long-term effects of receipt of health, nutrition and housing benefits on individuals, children, and families, which are well-established. For example, benefits that allow for the treatment of an illness or provide support to an individual pursuing their education can significantly contribute to an individual's future self-sufficiency. Past receipt of benefits can thus help individuals and their family members become healthier, stronger, and primed for future success in education, employment, and beyond. Including a look-back period also ignores the fact that public benefits are often necessary to supplement income from work, especially low-wage work, on an ongoing basis. Moreover, many of these benefits, such as nutrition assistance, are meant as counter-cyclical programs that support people during economic downturns. Use of such benefits during a recession, for example, cannot conscientiously be counted against immigrants in immigration proceedings. As such, a look-back period of any length should not be included in a public charge determination.

- e) The receipt of benefits previously considered should continue to be assessed under the totality of the circumstances, consistent with current policy and statutory authority.

At FR 51210, the Department asks whether receipt of benefits previously considered (cash and long-term institutionalization) should be considered in "some other way" than as a negative factor in the totality of the circumstances test. The Department's proposal to heavily weigh receipt of benefits negatively—including benefits considered under current policy—is deeply problematic and inconsistent with the plain meaning of the statutory totality of the circumstances test. Even if an individual has received the majority of their support from cash assistance or long-term care at government expense, under current policy, immigration officials must assess the individual's *overall circumstances* with respect to the future likelihood of the applicant becoming a public charge. Moreover, the public charge determination was designed to be a narrow tool to identify individuals likely to become *primarily dependent* on the government for support. We strongly object to the proposed rule's treatment of both benefits previously considered, and Medicaid, nutrition assistance, housing assistance, and the Medicare Part D Low Income Subsidy.

- f) The proposed rule's threshold for counting the monetized value of designated public benefits should be rejected.

At FR 51165, the Department seeks input on whether to consider the receipt of designated monetizable public benefits at or below a certain threshold, defined as the equivalent of more than 15 percent of the FPL for a household of one. We strongly oppose this arbitrary and punitive threshold. The 2018 FPL for a household of one is \$12,140, and 15 percent of that amount is \$1,821 — which would equal just \$5 a day. The proposed rule thus penalizes an individual for receipt of literally de minimis amounts of public benefits. This would be tantamount to having no threshold at all, as people would be afraid to apply for and receive any benefits, no matter how token, for fear of it being held against them.

In addition, this threshold applies regardless of the size of the individual's family. For example, a family of four with annual income of \$43,925 who receives \$2.50 per day, per person in monetizable public benefits would exceed the threshold in the proposed rule. Yet this family receives just 8.6 percent of their collective income from the monetizable benefits. More importantly, the proposed rule ignores that the



family in this example is 91.4 percent self-sufficient,<sup>96</sup> and would consider the receipt of assistance as a heavily weighed negative factor in the public charge determination of an individual family member. Furthermore, the proposed rule's threshold ignores the positive impact of even a small amount of benefits on the economic security of families. In sum, the proposed rule's threshold is punitive and nonsensical, and should be rejected.

g) The proposed rule's arbitrary income thresholds should be rejected.

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

There is no statutory or policy basis for either threshold. The Department provides no substantive justification for why this threshold is appropriate, or even relevant, to a public charge determination.<sup>97</sup> Moreover, the statement that 125 percent of the FPG has long served as a "touchpoint" for public charge inadmissibility determinations is deeply misleading: the cited statute refers to the income threshold for sponsors, who are required to submit an affidavit of support, not to the immigrant subject to the public charge determination.

As described elsewhere in these comments, the proposed rule disregards the fact that many working people around the country, including immigrants, work in jobs that pay exceedingly low wages. A single individual who works full-time, year-round at the federal minimum wage would fail to meet the threshold of 125 percent of FPL. The proposed rule's income thresholds thus ignore that an immigrant with income below 125 percent of FPL may be working – including in some of this country's hardest and lowest-paying jobs – while other elements of the proposed rule undermine the economic security and self-sufficiency of those workers, as detailed elsewhere in these comments. Moreover, for a family of four, 250 percent of the FPL is nearly \$63,000 a year<sup>98</sup> -- a level of income that exceeds 2017 U.S. median household income.<sup>99</sup>

The proposed income test would place a substantial burden on Latinx, Black, and Asian and Pacific Islander (AAPI) immigrant communities, as 24 percent of Latinx immigrants, 20 percent of Black

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<sup>96</sup> DAVID BIER, THE CATO INST., *New Rule to Deny Status to Immigrants Up to 95% Self-Sufficient* (2018), <https://www.cato.org/blog/new-rule-deny-status-immigrants-95-self-sufficient>.

<sup>97</sup> Even less justification is offered for the 250 percent of FPG threshold. At footnote 583, the Department admits that the differences in receipt of non-cash benefits between noncitizens living below 125 percent of FPG and those living either between 125 and 250 percent of the FPG, or between 250 and 400 percent of the FPG, was not statistically significant.

<sup>98</sup> Nat'l Women's Law Ctr. calculations based on Office of the Federal Register, Annual Update of the HHS Poverty Guidelines (Jan. 1, 2018), <https://www.federalregister.gov/documents/2018/01/18/2018-00814/annual-update-of-the-hhs-poverty-guidelines>.

<sup>99</sup> KAYLA FONTENOT, JESSICA SEMEGA, & MELISSA KOLLAR, U.S. CENSUS BUREAU, *Income and Poverty in the United States: 2017* (2018), <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

immigrants, and 13 percent of AAPI immigrants lived below the FPL in 2014.<sup>100</sup> Immigrants from countries and regions comprised predominantly of communities of color, including Mexico and Central America, the Caribbean, and Africa, would be much more likely to fail to meet the 125 percent of FPL threshold and would have a much more difficult time meeting 250 percent of FPL.<sup>101</sup>

The new income test, in addition, will heavily impact women, since 27 percent of noncitizen women had incomes that fell below 125 percent of the FPL in 2017.<sup>102</sup> This is likely due at least in part to immigrant women's caregiving and family responsibilities. In particular, immigrant *mothers* are much more likely to stay at home with their children: in 2012, an estimated 40 percent of immigrant mothers stayed at home, compared to 25 percent of native-born mothers.<sup>103</sup> Moreover, women constitute two-thirds of low-wage workers (those earning, on average, \$11.50 or less per hour).<sup>104</sup> What is more, the proposed rule's inclusion of English proficiency in a public charge assessment would compound the impact of the income test on women. Among LEP individuals, women are much less likely to participate in the labor force than men (49 percent vs. 75 percent).<sup>105</sup> Further, LEP women who have jobs are more than twice as likely to work in low-wage service occupations (45 percent vs. 20 percent) than are women with English proficiency.<sup>106</sup> For many of the same reasons, the new income test would have a significant impact on immigrant women of color: in 2017, 32 percent of noncitizen Latinas, 30 percent of noncitizen Black women, and 19 percent of noncitizen AAPI women had incomes below 125 percent of the FPL.<sup>107</sup> Put simply, the proposed income test is a thinly disguised race and gender test.

It is worth noting that the combination of these thresholds, which are based on household size, with the proposed rule's expansive definition of household, would not only have the perverse effect of discouraging people from supporting family members, but would also interfere with immigrant families' decisions about whether and when to have children. For example, if a couple with one child and income of \$52,000 (which is just over 250 percent of the FPL for a family of 3 in 2018), had another child or took in a brother who is temporarily unemployed (and did not charge him rent), their household size would increase to four. But 250 percent of the FPL for a family of four in 2018 is \$62,750. If one of the couple

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<sup>100</sup> IRC Analysis of U.S. Census Bureau, American Community Survey, 2014 ACS 1-Year PUMS. Data available for download at [http://factfinder.census.gov/bkml/navigation/1.0/en/d\\_dataset:ACS\\_14\\_1YR/d\\_product\\_type:PUMS](http://factfinder.census.gov/bkml/navigation/1.0/en/d_dataset:ACS_14_1YR/d_product_type:PUMS).

<sup>101</sup> CAPPs ET AL., *Gauging the Impact of DHS' Public-Charge Rule on U.S. Immigration*, *supra* note 2. Conversely, immigrants from the Caribbean, Mexico and Central America, Africa, Asia, and South America would be significantly less likely to be able to meet this 250 FPL threshold when compared to immigrants from Europe and Canada. BATALOVA, ET AL., *Through the Back Door: Remaking the Immigration System via the Expected "Public Charge" Rule*, *supra* note 2.

<sup>102</sup> Nat'l Women's Law Ctr. calculations based on the Current Population Survey (CPS) 2018 using Sarah Flood et al., IPUMS-CPS: Version 6.0. Minneapolis, MN: IPUMS, 2018, <https://doi.org/10.18128/D030.V6.0>. An estimated 23 percent of noncitizen foreign born men lived below 125 percent of FPL in 2017. *Id.*

<sup>103</sup> D'VERA COHN, GRETCHEN LIVINGSTONE, & WENDY WANG, PEW RES. CTR., *After Decades of Decline, a Rise in Stay-At-Home Mothers* (2014), <http://www.pewsocialtrends.org/2014/04/08/chapter-2-stay-at-home-mothers-by-demographic-group/>.

<sup>104</sup> PATRICK ET AL., *supra* note 22.

<sup>105</sup> MIGRATION POL'Y INST., *The Limited English Proficient Population in the United States* (2015), <https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.

<sup>106</sup> *Id.*

<sup>107</sup> Nat'l Women's Law Ctr. calculations based on the Current Population Survey (CPS) 2018 using Sarah Flood et al., IPUMS-CPS: Version 6.0. Minneapolis, MN: IPUMS, 2018. <https://doi.org/10.18128/D030.V6.0>. Twenty-two percent of noncitizen Black men, 17 percent of noncitizen AAPI men, and 26 percent of noncitizen Latino men had incomes below 125 percent of FPL. *Id.*

sought to adjust their immigration status, they would not receive the heavily weighed positive factor under the proposed rule because their income would fall below 250 percent of the FPL for their family size. The expansive definition of household appears to be rooted in unfounded stereotypes and anxieties about immigrant families, and particularly immigrant families of color, having children or caring for their extended families.

Setting these standards goes well beyond reasonable interpretation of the law and is in fact an attempt to achieve by regulation a change to immigration policy that the Administration has sought, but that would require congressional action.<sup>108</sup> For all of these reasons, the proposed income thresholds should be rejected.

h) Credit scores should not be considered in a public charge determination.

At FR 51189, the Department invites comments on how to use credit scores. We vehemently oppose the use of credit scores as part of the “public charge” determination. The Department offers no evidence to support its claim that a low credit score is an indication of lack of future self-sufficiency. Neither credit reports nor credit scores were designed to provide information on a consumer’s current or future self-sufficiency.<sup>109</sup> Indeed, a bad credit score is often the result of circumstances beyond a consumer’s control, such as illness or job loss, from which the consumer may subsequently recover,<sup>110</sup> or even fraud. Moreover, credit scores do not take into consideration rent payments, typically a family’s largest recurring expense.

Using credit reports and credit scores in a public charge determination would also be inappropriate because many immigrants will not even have a credit history, and studies show that when immigrants do have credit histories, their credit scores are artificially low.<sup>111</sup> In addition, some studies have shown that women have lower credit ratings than men – despite having lower levels of debt<sup>112</sup> -- and that credit scores and reports perpetuate racial inequality.<sup>113</sup> In short, considering credit scores as part of the public charge determination would exacerbate the disproportionate negative impact of the proposed rule on

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<sup>108</sup> See RAISE Act, S.354, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/354>; See also The White House, *President Donald J. Trump Backs RAISE Act* (2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>.

<sup>109</sup> Consumer Financial Protection Bureau, Data Point: Credit Invisibles (2015), [http://files.consumerfinance.gov/f/201505\\_cfpb\\_data-point-credit-invisibles.pdf](http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf) (most credit scoring models built to predict likelihood relative to other borrowers that consumer will become 90 or more days past due in the following two years).

<sup>110</sup> See generally CHI CHI WU, NAT’L CONSUMER LAW CTR., *Solving the Credit Conundrum: Helping Consumers’ Credit Records Impaired by the Foreclosure Crisis and Great Recession* 9-12 (2013), [www.nclc.org/images/pdf/credit\\_reports/report-credit-conundrum-2013.pdf](http://www.nclc.org/images/pdf/credit_reports/report-credit-conundrum-2013.pdf).

<sup>111</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYSTEM, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit at S-2* (2007) (“Evidence also shows that recent immigrants have somewhat lower credit scores than would be implied by their performance.”).

<sup>112</sup> See, e.g., JONELLE MARTE, *How Being a Woman Can Ding Your Credit Score*, WASH. POST, Feb. 17, 2016, [https://www.washingtonpost.com/news/get-there/wp/2016/02/17/how-being-a-woman-can-ding-your-credit-score/?utm\\_term=.b7e671f471](https://www.washingtonpost.com/news/get-there/wp/2016/02/17/how-being-a-woman-can-ding-your-credit-score/?utm_term=.b7e671f471).

<sup>113</sup> See, e.g., SARAH LUDWIG, *How Credit Scores in America Perpetuate Racial Injustice*, THE GUARDIAN, Oct. 13, 2015, <https://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why>.

women and immigrants of color. For all of these reasons, credit scores should not be included in the public charge determination.

- i) The proposed rule should not be finalized, but if it is, implementation should be delayed as long as possible.

At FR 51174, the Department asks about whether the effective date of the rule should be delayed in order to help “public benefit granting agencies” adjust systems. Implementation of the proposed rule would create new challenges and impose a tremendous burden on state and local agencies that administer public benefit programs. The proposal should not be implemented at all, but if it is, implementation should be delayed for as long as possible.

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**For all of the reasons set forth in this comment,** DHS should immediately withdraw this punitive proposed rule. If finalized, the rule would have significant and widespread negative implications for individuals, families, and communities. This proposal undermines our shared values, and would force families to choose between accessing needed supports and reuniting or staying together, making our nation hungrier, sicker, and poorer.

Thank you for the opportunity to submit comments on the proposed rulemaking. Please do not hesitate to contact Amy Matsui ([amatsui@nwlc.org](mailto:amatsui@nwlc.org)) or Kelli Garcia ([kgarcia@nwlc.org](mailto:kgarcia@nwlc.org)) to provide further information.

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