



NEW YORK
CITY BAR

**COMMITTEE ON
IMMIGRATION & NATIONALITY LAW**

VICTORIA F. NEILSON
CHAIR
42 W. 44TH STREET
NEW YORK, NY 10036
Phone: (917) 499-8869
Vickie.neilson@gmail.com

**COMMITTEE ON
SOCIAL WELFARE LAW**

SUSAN E. WELBER
CHAIR
42 W. 44TH STREET
NEW YORK, NY 10036
Phone: (212) 577-3320
sewelber@gmail.com

December 11, 2018

Samantha L. Deshommès
Chief, Regulatory Coordination Division
Office of Policy and Strategy, U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140
Via Federal eRulemaking Portal: <https://www.regulations.gov>

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

This comment is submitted in opposition to the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS) proposed changes to inadmissibility on public charge grounds, USCIS Docket ID USCIS-2010-0012, OMB Control Number 1615-AA22, published in the Federal Register on October 10, 2018 (the “Proposed Rule”). **We urge that the rule be withdrawn in its entirety, and that long-standing principles clarified in the 1999 field guidance remain in effect.**

As an organization of 24,000 members, the New York City Bar's mission is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. In doing so, the City Bar uses its voice to address a broad range of policy issues, which include immigration and nationality law, social welfare law and laws affecting children and families. The Proposed Rule implicates each of these areas of the law, and many others, by shifting U.S. immigration policy governing the inadmissibility ground of public charge in ways that (1) radically alter which intending immigrants get to stay permanently in the U.S., and (2) impact millions of other immigrants and U.S. citizens, particularly U.S. citizen children, who are not even subject to the public charge rule. Because of the breadth of harm encompassed by the changes in the Proposed Rule, twenty-three of the City Bar's Committees covering a broad range of practice areas have signed on to a statement of opposition.¹

¹ Statement Opposing Proposed Changes to Broaden “Public Charge” Rule, Oct. 24, 2018,

Without giving a compelling reason for the radical change to how the government will make public charge determinations, the Proposed Rule would depart from two decades of agency practice, making it nearly impossible for many applicants for Lawful Permanent Resident (LPR) status to succeed in their applications. The shift away from a totality of circumstances test to a formula relying on weighted factors, coupled with a diminishing reliance on an affidavit of support from a sponsor, will make public charge adjudications extremely complicated for USCIS officers, and will likely lead to an extraordinary increase in LPR application denials. There is no sound foundation for the rigid requirements in the Proposed Rule, which appears to undermine the will of Congress in establishing an immigration system rooted in family unity. Whether intentional or not, the Proposed Rule will have a particularly adverse impact on the most vulnerable immigrants within the United States, and increase the likelihood that their applications will be denied and that they will be separated from their families.

As a community of lawyers with expertise in many of the substantive areas implicated in the Proposed Rule, we cannot stand by in the face of the drastic legal changes and devastating impacts that would occur if the rule is implemented. And, as New Yorkers, many of whom live and work in this City to be part of an inclusive society and carry on the tradition of New York as a beacon for immigrants from around the world, we strenuously object to the Proposed Rule and urge that it be withdrawn.

I. BACKGROUND

a. Current Policy & Historical Context

“Public charge” has long been a feature of U.S. immigration law as a ground of inadmissibility that applies to non-citizens seeking to enter the U.S. and applicants for adjustment to lawful permanent resident status. This category includes those who are seeking admission or adjustment based on their relationship to a family member already in the U.S. The genesis of the “public charge” rule and its early implementation reflect its use as a tool of racial and ethnic discrimination. In the 1800s, not becoming a public charge was a condition imposed on African-Americans seeking freedom from slavery.² Public charge was later used as a justification for federal and state agencies to deny admission to low-income Irish immigrants,³ and to Jews fleeing Nazi persecution.⁴ In this manner, conditioning the rights of a person on their economic need has long been employed to exclude the poor, ethnic minorities and LGBTQ groups.

<https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/statement-opposing-proposed-changes-to-broaden-public-charge-rule>. (All websites cited in this letter were last visited on December 10, 2018.)

² Center for American Progress, *Trump’s Immigration Plan Imposes Radical New Income and Health Tests* (Jul. 19, 2018), <https://www.americanprogress.org/issues/poverty/reports/2018/07/19/453174/trumps-immigration-plan-imposes-radical-new-income-health-tests/>.

³ Hidetaka Hirota, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (Oxford University Press) (2017).

⁴ Barbara L. Bailin, *The Influence of Anti-Semitism on United States Immigration Policy with Respect to German Jews During 1933-1939* (CUNY Academic Works) (2011), http://academicworks.cuny.edu/cc_etds_theses/262.

Some of this discriminatory impact was lessened in 1999 when “public charge” was defined narrowly to mean only those applicants for admission or adjustment who were assessed to be “primarily dependent” on government cash assistance or long-term institutional care for subsistence (“1999 Guidance”).⁵ Pursuant to the 1999 Guidance, and consistent with the long history of public charge, “in-kind” benefits such as Medicaid and Supplemental Nutritional Assistance Program (“SNAP”, or “Food Stamps”) have not counted towards the public charge assessment, and having a financially sound financial sponsor has been enough to overcome an applicant’s low income. Under definitions used in the 1999 Guidance, relatively few non-citizens have been denied admission or prevented from adjusting to LPR status on “public charge” grounds.⁶

The expansion of this provision as currently proposed by DHS appears designed to restrict immigration to all but the wealthiest, and to radically reshape the American immigration system away from its current guiding principle of family unity. The Proposed Rule harkens back to the discriminatory past of this provision and should be rejected.

b. Proposed Rule Changes

The Proposed Rule contains significant changes to the “public charge” inquiry and upends a scheme that has worked effectively for nearly two decades under the 1999 Guidance.

First, the Proposed Rule defines public charge in a manner that explicitly emphasizes current and past receipt of a wide range of public benefits as a predictive factor of who will become a public charge. This change dramatically widens the potential population of immigrants who may be denied the opportunity to gain admission to the United States or adjust to Lawful Permanent Resident status. Instead of only counting “primary dependence” on one of two types of benefits—cash assistance and long-term institutional care—the Proposed Rule widens “public charge” to mean “an alien who receives one or more public benefit . . .” as defined in the rule.⁷ In turn, the rule uses a two-part definition of “public benefit” for the purposes of public charge. Under the Proposed Rule, a public benefit is (1) a benefit appearing on a newly expanded list of enumerated benefits, and (2) that is received in an amount meeting or exceeding a minimum threshold. The

⁵ See 64 FR 28689: [bit.ly/2KLNdfW](https://www.federalregister.gov/documents/1999/05/17/1999-10247); 8 USC § 1182(a)(4) (providing for public charge ground of inadmissibility); see also USCIS, Public Charge, <https://www.uscis.gov/greencard/public-charge>.

⁶ While DHS does not publish annual statistics on reasons that applications for LPR status are denied when applied for within the United States, the U.S. Department of State (DOS) does publish these statistics for those applying for LPR status from abroad. For the fiscal year that ended in 2016, DOS initially found 1,076 applicants were inadmissible, but 912 of these applicants were able to overcome the finding. See Department of State, Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act), Fiscal Year 2016, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXX.pdf>. By way of contrast, in the fiscal year ending in 2017, DOS initially found 3,237 applicants were inadmissible on public charge grounds and 2,016 were able to overcome the denial, a more than 700% increase in denials since the U.S. Consulates abroad have begun implementing public charge rule changes. See Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act), Fiscal Year 2017, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf>.

⁷ Proposed 8 CFR § 212.21(a).

new benefits added to the list are: Medicaid, Medicare Part D low-income subsidies, SNAP, Section 8 and federal housing assistance. The “monetizable” benefits—all but Medicaid, Medicare Part D subsidies and public housing—are counted where receipt in a 12-month period exceeds 15 percent of the Federal Poverty Level (“FPL”) for a household of one (currently \$1,821). Non-monetizable benefits—Medicaid, Medicare Part D subsidies and public housing—count where they are received for twelve months or more during a period of 36 months, with each benefit counting for one month. Finally, if the intending immigrant uses a combination of monetizable and non-monetizable benefits then thresholds are lower, and only nine months of benefits use is required for a public charge finding.

Second, the Proposed Rule radically changes the applicability of the enumerated statutory factors. Instead of just encouraging the reviewing officer to consider the totality of the circumstances as enumerated in the statute, the Proposed Rule dictates the application of minimum, bright-line rules. These rules are riddled with problems both logical and legal as discussed below. Among them are the instructions to weigh as negative and in some cases, heavily negative, income less than 125 percent of the Federal Poverty Level; benefits use during the past 36 months, including any amount of cash assistance; lack of private health insurance where the intending immigrant has a disabling condition; being a child or over age 62; having limited English proficiency (LEP); having a low credit score or debt; and other factors, all the while radically diminishing the importance of having a financially sound sponsor.⁸ The only heavily weighted positive factors are having income or resources above 250 percent of the Federal Poverty Guidelines (FPG),⁹ approximately \$63,000 for a family of four. Even meeting the income or resource standard would not be determinative under the Proposed Rule. Regardless of the income of the applicant for admission or adjustment, his or her receipt of SNAP, Medicaid, federal housing assistance and Medicare Part D subsidies could still be negative factors which may result in denial of the application for admission or LPR status.¹⁰

Third, the Proposed Rule expands who is subject to a public charge review to include those seeking to renew and extend non-immigrant visas in addition to those seeking admission and adjustment to LPR status.

Fourth, the Proposed Rule changes the public charge review process by including the use of a cumbersome new form, the I-944, and introducing a new public charge bond requirement for those seeking to cure the finding of inadmissibility.

c. Impacts Already Being Felt: “Chilling-Effect”

Adding to the already fraught atmosphere of fear in immigrant communities, the specter of a new rule that penalizes non-citizens for using public benefits is causing panic even among those many non-citizens who are exempt from public charge grounds of inadmissibility, including many humanitarian immigrants such as asylees, refugees, victims of family and other violence, minors

⁸ Family-based applications for LPR status require the applicant to file a binding affidavit of support by the family member sponsor and, if necessary, by a joint sponsor. See USCIS, Instructions for Affidavit of Support, <https://www.uscis.gov/sites/default/files/files/form/i-864instr.pdf>

⁹ 83 FR 51204.

¹⁰ 83 FR 51159.

with Special Immigrant Juvenile status, and even LPRs who have already adjusted and those applying for naturalization. Public charge does not apply to people in any of these categories. In some cases, people seeking adjustment have U.S. citizen children who are eligible for the federal benefits implicated by the rule. The intending immigrant parents often assume—falsely—that their children’s use of benefits will negatively affect their immigration options, and they become faced with the impossible decision of meeting their children’s basic needs or pursuing their immigration goals of permanent residence.

In New York City, almost half a million New Yorkers would be subject to the Proposed Rule.¹¹ This is a large number, but the chilling effect would harm even greater numbers of New Yorkers who forego vital benefits out of fear of the Proposed Rule’s reach. Analysis of the American Community Survey data by Manatt has found that there are 912,157 non-citizens living in New York City with incomes under 250 percent of the poverty level, representing households consisting of 1,569,167 people.¹² Even before the Proposed Rule was published in the Federal Register on October 10, 2018, low-income noncitizens in New York City, including those who are exempt from public charge consideration, have been fearful about accessing benefits that they are eligible for and which would address pressing health concerns, food shortages, and housing emergencies.¹³ Immigrant communities around New York and around the country are reporting the same.¹⁴

Nationwide, Manatt finds that there are 13.9 million noncitizens below 250 percent of the FPG and estimates that a total of 25.9 million noncitizens and their family members are likely to experience chilling impacts from the proposed rule.¹⁵ Research conducted in 2017 and 2018 confirms that anti-immigrant federal policy and rhetoric continue to create barriers in access to health and nutrition programs for people in immigrant families. Health and nutrition service providers have noticed an increase in canceled appointments and requests to dis-enroll from means-tested programs in 2017.¹⁶ Researchers also found that early childhood education programs reported drops in attendance and applications as well as reduced participation from immigrant

¹¹ “Mayor Announces Up To 475,000 Immigrant New Yorkers Could Be Harmed By Trump’s ‘Public Charge’ Proposal” (October 11, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/507-18/mayor-up-475-000-immigrant-new-yorkers-could-be-harmed-trump-s-public-charge>

¹² Manatt, Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard, October 11, 2018: <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population#DataDashboard> [hereinafter “Manatt Dashboard”].

¹³ See, Liz Robbins, *How Trump’s Plan for Immigrants on Welfare Could Hurt a Million New Yorkers*, THE NEW YORK TIMES, Aug. 13, 2018 (featuring a client of The Legal Aid Society with Temporary Protected Status who fears accessing Medicaid because of the impact on her ability to adjust to LPR status),: www.nytimes.com/2018/08/13/nyregion/welfare-immigrants-trump-public-charge-rule.html.

¹⁴ See, e.g., “City Immigrants Fear Being a Public Charge,” WNYC, Nov. 1, 2018, <https://www.wnyc.org/story/city-immigrants-fear-being-public-charge/>; “Immigrant families appear to be dropping out of Food Stamps,” POLITICO.COM, Nov. 14, 2018 (reporting on study by Children’s HealthWatch, looking at mothers with children under the age of 4 in Boston, Baltimore, Philadelphia, Minneapolis and Little Rock, Arkansas), <https://www.politico.com/story/2018/11/14/immigrant-families-dropping-out-food-stamps-966256>.

¹⁵ See Manatt Dashboard, *supra*, note 12.

¹⁶ Jennifer Laird et al, *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*, Columbia Population Research Center (April 5, 2018) https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5af1a2b28a922db742154bbe/1525785266892/Poverty+and+Social+Policy+Brief_2_2.pdf

parents in classrooms and at events, along with an uptick in missed appointments at health clinics.¹⁷ Another recent study found that immigrant families—including those who are lawfully present—are experiencing resounding levels of fear and uncertainty across all background and locations.¹⁸

In New York, community based organizations are already reporting that many immigrant families are withdrawing from critical public nutrition programs and services like SNAP (food stamps), which is counted under the Proposed Rule, and WIC (even though it is not counted under the Proposed Rule), out of fear that their immigration status will be negatively impacted.¹⁹ This reporting comports with the experiences of City Bar committee members who work with immigrant clients. Public Health Solutions, the largest WIC provider in New York State, said WIC caseloads fell after the proposed public charge changes were reported in the press.²⁰ These trends are mirrored nationally; 18 state agencies reported drops of up to 20 percent in enrollment in nutrition programs, attributing the drop largely to fears about immigration policy.²¹

II. COMMENTS

The City Bar objects to the Proposed Rule on many grounds, some of the most critical of which are described below.

a. **The Proposed New Standard for Assessing Public Charge Is Unworkably Complicated and Will Lead to Grossly Increased Findings of Inadmissibility on Public Charge Grounds**

i. The Definition of Public Charge

The Immigration and Nationality Act § 212(a)(4) states that “any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.” The Proposed Rule would radically redefine how USCIS determines whether an LPR applicant is likely to become a public charge.

¹⁷ Hannah Matthews et al, “Immigration Policy’s Harmful Impacts on Early Care and Education,” The Center for Law and Social Policy (March 2018).

https://www.clasp.org/sites/default/files/publications/2018/03/2018_harmfulimpactsece.pdf

¹⁸ Samantha Artiga, Kaiser Family Foundation, “Living as an Immigrant Family in America: How Fear and Toxic Stress are Affecting Daily Life, Well-Being, & Health.” <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/>.

¹⁹ Bijan Kimiagar, et al, *CityViews: Proposed U.S. Public Charge Rule Threatens NYC Kids, Families*, CITYLIMITS, Nov. 19, 2018, <https://citylimits.org/2018/11/19/cityviews-proposed-u-s-public-charge-rule-threatens-nyc-kids-families/>.

²⁰ Elena Bottemiller Evich, *Immigrants, fearing Trump crackdown, drop out of nutrition programs*, POLITICO, Sep. 3, 2018, <https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292>.

²¹ *Id.*

ii. *New List of Benefits*

The City Bar opposes the addition of all of the newly enumerated benefits to the list of what potentially counts for public charge purposes. None of the newly included benefits—Medicaid, SNAP, Section 8, public housing, Medicaid Part D low-income subsidies—have ever been considered in the public charge analysis, and for good reason. First, few if any non-citizens subject to public charge are even eligible for these federally-funded benefits. The Personal Responsibility and Work Opportunity Act (PROWRA) barred from eligibility for federally-funded means tested benefits all but a few categories of immigrants (most of whom are exempt from public charge),²² with others required to wait five years in a qualifying status before being eligible for such benefits.²³ Second, even if the intending immigrant were eligible for these programs at the time of public charge review, each of these programs is designed to *supplement* household resources not provide a *substitute* for income. Each of the newly added benefits enable the recipient to afford essential services—food, housing and health care. DHS’s claim that “by virtue of their employment, such immigrants should have adequate income and resources to support themselves without resorting to seeking public benefits” is patently untrue.²⁴ The reality of low-wage work, with a minimum wage in many parts of the country of \$7.50 an hour, is such that non-citizens can work full time and still be eligible for these benefits, which are meant to help provide for the most basic of needs. Minimum wage jobs often do not come with health insurance and there are increasingly few Section 8 vouchers and public housing slots for low-income people, including in New York City.²⁵ Programs like SNAP enable hard-working families to put food on the table and secure housing. Likewise, when families have access to housing assistance, they have more resources to cover the cost of nutritious foods, health care, and other necessities.²⁶ Instead of being indications of a lack of financial health, these programs enhance financial health and long-term prospects.

In response to DHS’ request for comments about whether additional programs should be counted as part of the definition or in the totality of circumstances to be considered,²⁷ the City Bar submits that not only should Medicaid, SNAP, Section 8, public housing and Medicare Part D subsidies not be included, but no additional programs should be added, counted or considered as part of the public charge determination. DHS separately asks whether CHIP should be included,²⁸ and the City Bar likewise asserts no. The inclusion of CHIP—a program for working families who

²² Alison Siskin, “Noncitizen Eligibility for Federal Public Assistance: Policy Overview,” Congressional Research Service, Dec. 12, 2016, <https://fas.org/sgp/crs/misc/RL33809.pdf> [hereinafter, “CRS Noncitizen Eligibility”].

²³ *Id.*

²⁴ 83 Fed. Reg. 51123.

²⁵ Bowen Garrett, et al, The Urban Institute, *Workers Without Health Insurance: Who Are They And How Can Policy Reach Them?* <https://www.urban.org/sites/default/files/publication/61271/310244-Workers-Without-Health-Insurance.PDF> ; *See also*, Will Fischer & Barbara Sard, Center on Budget & Policy Priorities, “Chart book: Federal Housing Spending is Poorly Matched to Need,” (March 8, 2017), <https://www.cbpp.org/research/housing/chart-book-federal-housing-spending-is-poorly-matched-to-need> (finding that only one in four families who meet eligibility requirements receive assistance).

²⁶ Nabihah Maqbool, Janet Viveiros, and Mindy Ault, *The Impacts of Affordable Housing on Health: A Research Summary*, Center for Housing Policy, 2015, http://www.housingpartners.com/assets/creating_change/http_app.bronto.pdf.

²⁷ 83 FR 51173.

²⁸ 83 FR 51174.

earn too much to be eligible for Medicaid—in the public charge definition would extend the reach of the Proposed Rule even further to exclude moderate income working families and applicants likely to earn a moderate income at some point in the future. The chilling effect would likely lead to many eligible children foregoing health care benefits. Nearly 9 million children across the U.S. depend on CHIP for health care.²⁹ Eligible citizen children likely would forego CHIP and lose access to any health care if their parents think receipt of CHIP coverage would subject someone in their family to a negative public charge determination.

iii. New Monetary and Durational Thresholds of Use

The new monetary thresholds apply to monetizable benefits—forms of cash assistance, SNAP and Section 8 housing benefits. If use of these benefits during a 12-month period exceeds 15 percent of the Federal Poverty Level, currently \$1,821, then the benefit “counts” as receipt of a benefit for public charge purposes. This change contrasts starkly with the current standard, which is “primary dependence” on the benefit at issue. The City Bar submits that any bright-line threshold is inappropriate and inconsistent with the legislative history, precedential decisions, and agency practice, which have been aimed at examining the totality of circumstances, not a bright-line benefits receipt test. Notwithstanding this position, the 15 percent of the Federal Poverty Level threshold is exceedingly low. Under this standard, an intending immigrant would meet the definition of public charge if they received any more than \$5 a day in one of the qualifying government benefits, regardless of household size and regardless of the relative share of income represented by the government benefits. For example, a family of four that earns \$43,925 annually in private income but receives just \$2.50 per day per person in monetizable public benefits would be receiving just 8.6 percent of their income from the government programs, meaning that they are 91.4 percent self-sufficient.³⁰ Yet the rule would still consider the receipt of assistance as a heavily weighed negative factor in the public charge determination. Accordingly, the City Bar answers the question of whether DHS should consider receipt of the monetizable benefits below the 15 percent threshold in the negative.³¹

The 15 percent threshold would particularly hurt recipients of cash assistance. Although historically cash assistance has been considered one of the few types of benefits that can trigger public charge, the test has never been whether the intending immigrant receives virtually any amount of cash assistance, it has been whether a person is “primarily dependent” on cash assistance. The dramatic reduction in threshold alone would mean that many more people who receive cash assistance would be considered a public charge, even if cash assistance is just a small percentage of their income. This result is arbitrary and unfair and punishes people for making necessary economic choices to take advantage of income supplements for which they are eligible.

The durational thresholds applicable to Medicaid, Medicare Part D subsidies and public housing are also inconsistent with the long-standing meaning of public charge and are arbitrary. Use of such benefits for 12 months or more in a 36-month period means the receipt of those

²⁹ See Medicaid.gov, <https://www.medicaid.gov/chip/index.html>, based on 2017 Statistical Enrollment Report.

³⁰ David Bier, The Cato Institute, “New Rule to Deny Status to Immigrants Up to 95% Self-Sufficient,” Sep. 24, 2018, <https://www.cato.org/blog/new-rule-deny-status-immigrants-95-self-sufficient>.

³¹ 83 FR 51165.

benefits will count under the proposed public charge definition. The threshold goes down to nine months if the recipient also receives monetizable benefits below the threshold. In reality, the threshold goes down even further because the Proposed Rule counts a month for every non-monetizable benefit received. Therefore, even if an intending immigrant received Medicaid and public housing for five months, it would count as ten months and trigger the definition. DHS can offer no justification for how it concluded that these arbitrary durational thresholds indicate an intending immigrant's primary dependence on the government for subsistence. More importantly, it cannot explain how such limited assistance means that an individual is likely to become a public charge.

iv. Elevation of Weighted Factors over Totality of Circumstances

The City Bar also opposes the Proposed Rule because it replaces a totality of circumstances test – in which a sufficient Form I-864, Affidavit of Support, from a qualifying sponsor is considered a persuasive indication that the intending immigrant will not become a public charge – with one requiring USCIS to enforce prescribed bright-line rules regarding how the factors should be weighed: positive, negative, heavily positive or heavily negative.³² This overall shift from an individualized assessment of an intending immigrant's circumstances to bright-line rules is an unreasonable and arbitrary departure from the current role that the totality of circumstances method plays in assessing public charge, a process that has worked well.³³

b. DHS Fails To Support Many of The Individual, Minimum Factors Enumerated with Evidence of Their Predictive Value for Assessing Who Is Likely to Be a Public Charge

While the City Bar opposes any prescribed weight scheme in favor of a true totality of the circumstances test, we also have serious concerns about many of the individual factors enumerated. Beyond asserting that correlations between the factor and a low-income amount to causation — which is not persuasive evidence—DHS offers nothing. The result is a series of arbitrary, illogical, and, in some cases, discriminatory factors. We address the most critical of them here.

i. Negative Factor of Earning Under 125 Percent of the Federal Poverty Guidelines and the Heavily Weighted Positive Factors of Earnings or Resources over 250 Percent of the Federal Poverty Guidelines

The Proposed Rule treats income below 125 percent of the Federal Poverty Guidelines (“FPG”) for the applicable household size as a negative factor, and proposes that income or resources above 250 percent of the FPG be counted as heavily-weighted positive factors; the government invites comments on the use of these factors.³⁴ The City Bar opposes the use of these arbitrary and unreasonable income thresholds. Contrary to DHS’s statement that 125 percent of

³² 83 FR 51198 et seq.

³³ See S.354 (115th Congress), the RAISE Act, <https://www.congress.gov/bill/115th-congress/senate-bill/354> and Statement of President Donald J. Trump, Aug. 2, 2017, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>.

³⁴ 83 FR 51187.

the FPG has long served as a “touchpoint” for public charge inadmissibility,³⁵ the thresholds do not have a statutory basis. The 125 percent standard has been the income threshold applied to sponsors who are required to submit an affidavit of support, not to the immigrant subject to the public charge determination. Many applicants for lawful permanent residence do not have a long work history within the U.S. because they have not had a stable immigration status. Requiring an LPR applicant to already be earning above 125% of the poverty guideline before being granted permanent status in the U.S. will pose an impossible burden for many applicants. In the past, it was the sponsor—by definition a U.S. citizen or LPR—whose income had to be above 125% of the poverty level. The Agency offers no justification for why the 125 percent threshold for the applicant is appropriate.

Even less justification is offered for the 250 percent of FPG threshold, which a person must exceed to have their income or resources weighed heavily as a positive factor. A standard of 250 percent of the FPL is nearly \$63,000 a year for a family of four—more than the median household income in the U.S.³⁶ Even a single individual who works full-time, year-round in New York, where the minimum wage is increasing to \$15 an hour in 2019, who does not miss a single day of work due to illness or inclement weather, would have wages that fall short of the 250 percent of FPG threshold, which is \$30,350 for a household of one. This is clearly not the person that Congress envisioned when it directed DHS to deny permanent status to those at risk of becoming a public charge.

These arbitrary income tests also have the perverse effect of discouraging people from supporting family members. For example, if a couple with two children have income just over the 250 percent of poverty threshold for a family of four, take in a sibling who is temporarily unemployed, they will become a household of five and no longer qualify for the heavily weighed positive factor.

The rules are not only unfair to low-wage workers, but also to full-time students, parents who opt to stay home and care for children or other family members, persons recovering from an illness—none of these people would meet the income standard under the Proposed Rule, and yet the fact that they are building their personal capital, recovering, or spending time on uncompensated work does not mean their longer term ability to support themselves should be heavily weighed against them. Instead of encouraging people to use benefits to create a more sustainable life while trying to live more freely and independently in the United States, this rule will further burden people who are already struggling to survive, often with limited resources and opportunities.

ii. Public Benefit Use within the Past Thirty-Six Months

The Proposed Rule requires a 36-month lookback for public benefits use. Public benefits use during the look-back is a heavily weighted negative factor.³⁷ There are several problems with this aspect of the rule, including its unfair retroactivity and lack of evidence that past receipt of

³⁵ *Id.*

³⁶ U.S. Census Bureau, *Income and Poverty in the United States: 2017*, Sep. 12, 2018, <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

³⁷ 83 FR 51199.

benefits is relevant to the determination of whether a person is likely to become dependent on government support in the future.

DHS asks for comments about whether 36 months is the right lookback period and whether a shorter or longer time frame would be better.³⁸ We oppose any arbitrary lookback period for use of public benefit programs. Inclusion of a retrospective test is fundamentally inconsistent with the forward-looking design of the public charge determination as mandated by law. Past use of a government-funded program is not necessarily predictive of future use. For example, if past public benefits use was due to unemployment, but the intending immigrant now has a job, the previous use of benefits is irrelevant because the specific circumstances that led to the use of public benefits no longer apply.

DHS cites studies indicating that families that stop receiving cash assistance under Temporary Aid to Needy Families (TANF) frequently continue to receive nutrition and health assistance,³⁹ but that analysis is not relevant. Cash assistance is only available to an extremely limited population of people living in deep poverty. There are almost no foreign nationals who would be subject to public charge inadmissibility grounds who would even be eligible to receive TANF benefits. These studies provide no evidence that previous receipt of a newly added, non-cash benefit is an indicator of future use of benefits. Moreover, numerous studies point to the positive, long-term effects of receipt of health, nutrition and housing benefits. The Proposed Rule ignores the fact that public programs are often used as work supports which encourage future financial independence. Using benefits can help individuals and their family members become healthier, stronger, and more employable in the future. Receipt of benefits that cure a significant medical issue or provide an individual with the opportunity to complete their education can be highly significant positive factors that contribute to future economic self-sufficiency.

In sum, the 36-month lookback will discourage families from using benefits to which they are entitled if there is even just one non-U.S. citizen family member who may apply to adjust his or her status in the future. Discouraging families from receiving health, nutrition, housing, or educational supports for their children will only make it harder for them to achieve economic security in the future.

Although the Proposed Rule indicates that past use of newly considered public benefits will not start counting towards the lookback until the Final Rule goes into effect, the lookback would include past use of cash assistance. The lookback would apply to cash assistance in a grossly unfair manner because instead of considering past cash assistance receipt under the “primarily dependent” standard that has governed during the period of receipt, the lookback would count as a highly negative factor “any” receipt of cash assistance. DHS asks if past cash assistance should be considered in some other way,⁴⁰ and we respond that the past receipt of cash assistance should only be considered in accordance with the 1999 Guidance.

³⁸ 83 FR 51200.

³⁹ 83 FR 51199.

⁴⁰ 83 FR 51210.

Even if an individual has received cash assistance or long-term care at government expense, the agency must assess the individual’s overall circumstances with respect to the future likelihood of the applicant becoming a public charge. The public charge determination was designed to be a narrow tool to identify individuals likely to become primarily dependent on the government for support. The test was never designed to prevent immigration of low- and moderate-income families that may at some point need access to public programs that provide support and allows them to continue working.

The Proposed Rule also considers as a negative factor simply having applied for benefits, even if the application was withdrawn or denied. There is absolutely no basis for this element of the Proposed Rule.

iii. Being a Child

The Proposed Rule weighs being a child as a negative factor, citing data that non-citizen children receive means-tested benefits. At best, this amounts to circular logic if, indeed, the goal of the Proposed Rule is to better predict who is likely to become a public charge in the future. Receipt of benefits like Medicaid and SNAP are associated with positive short- and long-term outcomes, including a reduction in poverty.⁴¹ 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.⁴² Children in immigrant families with health insurance coverage are more likely to have a usual source of care and receive regular health care visits, and are less likely to have unmet care needs.⁴³ Children with access to Medicaid have fewer absences from school, are more likely to graduate from high school and college, and are more likely to have higher paying jobs as adults.⁴⁴ Compared to children in immigrant families without SNAP, families with children who participate in the program have more resources to afford medical care and prescription medications.⁴⁵ Likewise, many studies show that SNAP improves food security, dietary intake, and health, especially among children, and with lasting positive effects.⁴⁶ An additional year of SNAP eligibility for young children with immigrant parents is

⁴¹ Page, Marianne, “Safety Net Programs Have Long-Term Benefits for Children in Poor Households,” Policy Brief, University of California, Davis, 2017, https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-health_and_nutrition_program_brief-page_0.pdf.

⁴² Rourke O’Brien and Cassandra Robertson, *Medicaid and Intergenerational Economic Mobility*, University of Wisconsin—Madison, Institute for Research on Poverty, 2015, <https://search.library.wisc.edu/catalog/9910223409002121>; Andrew Goodman-Bacon, *The Long-Run Effects of Childhood Insurance Coverage: Medicaid Implementation, Adult Health, and Labor Market Outcomes*, NBER Working Paper No. 22899, 2016, www.nber.org/papers/w22899.

⁴³ Christine Percheski and Sharon Bzostek, “Public Health Insurance and Health Care Utilization for Children in Immigrant Families,” *Maternal and Child Health Journal* 21 (2017).

⁴⁴ Karina Wagnerman, Alisa Chester, and Joan Alker, *Medicaid is a Smart Investment in Children*, Georgetown University Center for Children and Families, March 2017, <https://ccf.georgetown.edu/2017/03/13/medicaid-is-a-smart-investment-in-children/>.

⁴⁵ Children’s Health Watch, *Report Card on Food Security and Immigration: Helping Our Youngest First-Generation Americans To Thrive*, 2018, <http://childrenshealthwatch.org/wp-content/uploads/Report-Card-on-Food-Insecurity-and-Immigration-Helping-Our-Youngest-First-Generation-Americans-to-Thrive.pdf>

⁴⁶ Hartline-Grafton, H. (2013). *SNAP and Public Health: The Role of the Supplemental Nutrition Assistance Program in Improving the Health and Well-Being of Americans*. Food Research & Action Center.

associated with significant health benefits in later childhood and adolescence.⁴⁷ For millions of families, Medicaid and SNAP are lifelines that keep them living above the poverty threshold.⁴⁸

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.⁴⁹ Essential health, nutrition and housing assistance prepares children to be productive, working adults. DHS asks whether non-citizen children should be subject to a public charge determination.⁵⁰ The answer is most certainly no. The receipt of benefits as a child should not be taken into account in the public benefits determination as it provides little information on their future likelihood of receiving benefits.

iv. Being a Senior

The Proposed Rule also classifies being over 62 as a negative factor.⁵¹ As people age, they are more likely to need health care, both preventative and to treat chronic conditions that emerge. Any rule that scares seniors away from using public health insurance and subsidies is contrary to the goal of ensuring immigrants are financially independent. While Medicare, which provides coverage for hospital, doctors' visits, and prescription drugs, is an important health benefit for seniors, many immigrant seniors are not eligible for Medicare. Even if they were, many Medicare beneficiaries still need to rely on other programs to help them afford out-of-pocket costs. Almost 1 in 3 Medicare beneficiaries enrolled in Part D prescription drug coverage get "Extra Help" with their premiums and copays through the low-income subsidy.⁵² 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.⁵³ Medicaid is also critical for services Medicare does not cover and older adults could otherwise not afford. Low-income seniors also greatly benefit from programs such as Section 8 rental assistance and SNAP to meet their basic needs.⁵⁴ If immigrant families are afraid to access nutrition assistance programs, more older adults will be food insecure and at risk of unhealthy eating which can cause or exacerbate other health conditions. If immigrant families are afraid to seek housing assistance, seniors with limited fixed incomes and their families will have fewer resources to spend on other basic needs, including food, medicine, transportation, and clothing.

⁴⁷ Chloe N. East, "The Effect of Food Stamps on Children's Health: Evidence from Immigrants' Changing Eligibility," Working Paper, 2017, http://www.chloeneast.com/uploads/8/9/9/7/8997263/east_fskids_r_r.pdf.

⁴⁸ <https://ccf.georgetown.edu/2017/03/09/medicaid-how-does-it-provide-economic-security-for-families/>

⁴⁹ Kathryn Bailey, Elizabeth March, Stephanie Ettinger de Cuba, et al., *Overcrowding and Frequent Moves Undermine Children's Health*, Children's HealthWatch, 2011, www.issuelab.org/resources/13900/13900.pdf.

⁵⁰ 83 FR 51174.

⁵¹ 83 FR 51180.

⁵² Kaiser Family Foundation, Medicare Part D in 2018: The Latest on Enrollment, Premiums, and Cost Sharing May 17, 2018, www.kff.org/medicare/issue-brief/medicare-part-d-in-2018-the-latest-on-enrollment-premiums-and-cost-sharing/.

⁵³ Kaiser Family Foundation, Medicaid Enrollment by Age, www.kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/?dataView=1¤tTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

⁵⁴ See Justice in Aging, Supporting Older Americans' Basic Needs: Health Care, Income, Housing and Food, Apr. 2018, www.justiceinaging.org/wp-content/uploads/2018/04/Supporting-Older-Americans%E2%80%99-Basic-Needs-Health-Care-Income-Housing-and-Food.pdf.

Moreover, the Proposed Rule discourages intergenerational families and puts even greater strain on families already struggling to provide for older adults. Intergenerational families play an invaluable role in the U.S. Grandparents often play critical roles in caring for grandchildren and other family members, which enables others to work, thereby supporting the family and contributing to the economy. The proposed rule ignores this, focusing instead on the burden parents and grandparents pose because of their age, health needs, and English proficiency. Under the Proposed Rule families could be penalized for sharing housing or providing significant support to a parent or grandparent or other family member, as this would increase their household size and force them to demonstrate higher levels of income to avoid being considered a public charge. It would force these families to impoverish themselves out of fear that a beloved elder may face adverse consequences.

In addition, families already working hard to support immigrant seniors will be further strained due to the inclusion in the public charge test of Medicare Part D Low-Income Subsidies, and Medicaid as seniors avoid or dis-enroll from such programs fearing adverse consequences for their immigration status. Families in the U.S. are already squeezed due to the care needs of an older adult relative. Many currently spend \$7,000 to \$12,000 per year caring for an aging loved one including healthcare expenses, varying by race, financial ability, and distance, including those who live in the same home as or near the care recipient.⁵⁵ These families may also provide hands-on assistance; one survey found that 41% of registered voters in New York are currently caregivers, and that 60% of these caregivers assist a loved one with tasks like bathing and dressing, and complex medical tasks. Roughly 60% of these caregivers often help financially.⁵⁶

The precious few families that can afford to simply pay out of pocket to meet the demands of a loved one in need are favored by the Proposed Rule, which looks positively on wealth. Families that cannot afford to do so on their own turn to public benefits for financial and nutritional aid for themselves and to Medicare, the low-income subsidy, and Medicaid to defray the costs of healthcare for their loved ones. The chilling effect of including these benefits in the Proposed Rule will put even more pressure on families who are already struggling to help their loved ones. These families should be celebrated, not made to feel like outlaws. It is hard to imagine a more core “family value” than providing for loved ones who are in need.

The Proposed Rule threatens the well-being of paid caregivers, a significant number of whom are immigrants, and upon whom many older adults, immigrant and nonimmigrant alike, depend to maximize their independence. Direct care workers provide critical assistance to millions of older adults and people with disabilities nationwide who need help with daily tasks like bathing, dressing, and meal preparation—services that help American citizens stay out of institutions. These jobs tend to be part-time, and low-wage, driving many direct care workers to rely upon public benefits for themselves and their families. Instead of acknowledging the significant

⁵⁵ Chuck Rainville, Laura Skufca, Laura Mehegan, “AARP Research, Family Caregivers Cost Survey: What They Spend & What They Sacrifice,” Nov. 2016, <https://www.aarp.org/research/topics/care/info-2016/family-caregivers-cost-survey.html?CMP=RDRCT-PPI-CAREGIVING-102416>.

⁵⁶ Terry Guengerich, AARP Research, State Caregiver Profiles 2018, Nov. 2018, <https://www.aarp.org/research/topics/care/info-2018/state-caregiver-profiles.html>.

contribution these workers make to an aging society, the Proposed Rule takes a limited view by utilizing an income test that dismisses their labor as low wage work.

Moreover, the Proposed Rule overlooks the fact that immigrants make up a quarter of the direct care workforce⁵⁷ and about 30% of these workers are over age 55 themselves. Nearly half of immigrant direct care workers live at or below 200% of the federal poverty level, and more than 40% rely on programs such as SNAP and Medicaid.⁵⁸ Hence, the proposed rule may prevent these workers from coming to the U.S. in the first place, because without access to health care, nutritious food and housing, many care workers may be unable to afford to remain in the U.S. The ripple effect would be a shortage in direct care workers, leaving many older Americans and people with disabilities without access to the caregiving they need. The proposed rule is sure to cause direct care workers to fear utilizing these programs, compromising their health and well-being. This is especially true in New York where 56% of direct care workers are immigrants.⁵⁹

v. Disability without Private Health Insurance

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.”⁶⁰

Whether someone’s health is considered likely to make them a public charge will be decided by DHS predicting outcomes of what a person can and will do based on their diagnosis and other information submitted to DHS, such as an attestation from their treating physician regarding whether a medical condition impacts the ability to work or go to school. On reliance of a panel physician and a civil surgeon medical examination, DHS would have discretion to conclude that an individual who has either no “chronic” health conditions, or who may have a health condition but who can pay for health insurance without the use of government-funded assistance, should not be assigned a positive factor when determining public charge.⁶¹ While DHS did not define or determine what constitutes a “chronic medical condition,” the agency does cite to overall healthcare cost to either the consumer or health insurance paying for treatment as a factor in determining whether or not a condition is chronic.⁶²

The health factor—with the proposed standards and related evidentiary requirements—explicitly singles out people with disabilities and chronic health conditions and perpetuates the false assumption that a medical diagnosis is solely determinative of an individual’s current abilities and future prospects. While health has always been a factor in the public charge test, the Proposed Rule codifies and unduly weights the specific standard for evaluating an individual’s health. The new standard includes any medical condition likely to require extensive medical treatment or

⁵⁷ Robert Espinoza, PHI, Immigrants and the Direct Care Workforce, June 20, 2017, <https://phinational.org/resource/immigrants-and-the-direct-care-workforce/>.

⁵⁸ *Id.*

⁵⁹ *Id.* at Appendix D.

⁶⁰ Proposed 8 CFR § 212.22(b)(2).

⁶¹ *Id.* at 97.

⁶² *Id.*

institutionalization or that will interfere with a person's ability to provide and care for him- or herself, to attend school, or to work. The Proposed Rule also correlates five chronic health conditions, heart disease, cancer, trauma, mental disorders, and pulmonary conditions, to their financial cost to treat or control, concluding that the higher the direct medical cost to an insurer, regardless how nuanced or how quickly treatable the condition may be, the greater the probability that, without non-subsidized health insurance, the condition can be determinative as a as a negative factor in determining public charge.

As a result, this category will include most people with disabilities—including people with intellectual and developmental disabilities, psychiatric disabilities, or physical disabilities who need personal care services. Thus, most people with disabilities will have this factor weigh against them in the public charge determination. In the reverse, the preamble states that absence of a diagnosis of such a condition would be a positive factor.

Moreover, the harmful impact of this new health standard is intensified against people with disabilities when combined with a person's ability to pay for their health care costs (which is an element in the assets factor) and with the ability to pay for medical costs or have them covered under private insurance (which is a “heavily weighed negative factor”). In sum, this new interpretation of the health factor, particularly when combined with the other components related to health in the proposed rule, will in effect exclude people simply because either they have a disability, or they have a disability and they do not have a financially independent manner in which to pay for their physical or mental health costs.

vi. Limited English Proficiency

DHS cites the 2014 Survey of Income and Program Participation (SIPP) data about the use of benefits by populations at various levels of English language ability and concludes that the ostensible correlation equals causation.⁶³ Yet DHS fails to provide any causal linkage between the data cited and its conclusions, and fails to consider alternative reasons why people who are more limited English proficient may be more likely to secure services. For example, states such as New York and California, which have higher numbers of Limited English Proficiency (LEP) populations, also have higher income thresholds for Medicaid. In addition, DHS claims that “numerous studies have shown that immigrants’ English language proficiency or ability to acquire English proficiency directly correlate to a newcomer’s economic assimilation into the United States,”⁶⁴ yet three out of the four studies cited use data derived from Europe, while the fourth relies on Current Population Survey data, which is nearly 30 years old. This evidence is insufficient to support DHS’ proposed change.

vii. Credit Score, Bankruptcy and Debt

Credit scores are not designed to be a judge of character or admissibility and should not be used as part of the “public charge” determination. Neither credit reports nor credit scores were designed to provide information on whether a consumer is likely to rely on public benefits or on

⁶³ 83 FR 51160.

⁶⁴ 83 FR 51196.

the character of the individual.⁶⁵ DHS offers no evidence to support its claim that a low credit score is an indication of lack of future self-sufficiency. A bad credit record is often the result of circumstances beyond a consumer's control, such as illness or job loss, from which the consumer may subsequently recover.⁶⁶ Moreover, credit scores do not take into consideration rent payments, typically a family's largest recurring expense. Using credit reports and credit scores to determine public charge status is also inappropriate because many immigrants will not even have a credit history for USCIS to consider, and studies show that even when immigrants do have credit histories, their credit scores are artificially low.⁶⁷ DHS invites comments on how to use credit scores.⁶⁸ We recommend not using them at all.

viii. Prior Fee Waiver Application

Under the Proposed Rule, the use of a fee waiver (Form I-912) for any immigration benefit would be considered a negative factor in determining an immigrant's financial status. This is improper. Separate consideration of the use of a fee waiver means that factors such as income would be unfairly counted twice. For example, immigrants who received a fee waiver based on household income would have two strikes against them for what is essentially the same factor—once for the income and a second for the fee waiver granted because of the income. As a result, consideration of the use of a fee waiver has the unintended effect of double-counting negative factors related to financial status.

The consideration of fee waiver usage is also improperly retroactive. The statute calls for a forward-looking analysis of whether the immigrant is likely to become a public charge in the future. Because a fee waiver is not a continuing benefit, the Proposed Rule's consideration of *prior* receipt of a fee waiver impermissibly penalizes applicants for their financial status on the date of the application for the fee waiver and not on the date of application for admission, adjustment of status, or for a visa.

⁶⁵ Consumer Financial Protection Bureau, Data Point: Credit Invisibles 7, May 2015, http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf (most credit scoring models are built to predict likelihood relative to other borrowers that consumer will become 90 or more days past due in the following two years).

⁶⁶ See generally Chi Chi Wu, National Consumer Law Center, Solving the Credit Conundrum: Helping Consumers' Credit Records Impaired by the Foreclosure Crisis and Great Recession 9-12, Dec. 2013, www.nclc.org/images/pdf/credit_reports/report-credit-conundrum-2013.pdf.

⁶⁷ 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 (Aug. 2007) ("Evidence also shows that recent immigrants have somewhat lower credit scores than would be implied by their performance").

⁶⁸ 83 FR 51189.

c. The Introduction of New Aspects to the Process Including a Flawed I-944 Form and Public Charge Bond

i. New Form I-944

The Proposed Rule introduces a new form to the process of adjustment, submission of a new Form I-944, the Declaration of Self-Sufficiency, and proposed instructions.⁶⁹ The instructions direct intending immigrants to provide documentation if they have “ever applied for or received the listed public benefits in the form of “a letter, notice, certification, or other agency documents” that contain information about the exact amount and dates of benefits received.⁷⁰ Not only will it be difficult for many intending immigrants to complete the detailed information called for by the form, especially if benefits receipt occurred in the more distant past, but the form is inconsistent with even the Proposed Rule itself, which limits any lookback to 36 months, and exempts from lookback newly considered public benefits. None of this is evident from the form or the instructions. Also, just as we object to a rigid system of arbitrary factors being elevated over the use of a pure totality of circumstances inquiry, we object to a form that serves to implement that rigid system of arbitrary factors. We submit that the new Form I-944 should be withdrawn along with the rest of the Notice of Proposed Rule Making (NPRM).

ii. Bond Requirement

The Proposed Rule also introduces the use of a public charge bond, a \$10,000 bond that intending immigrants who are found to be inadmissible on public charge grounds can post to cure their inadmissibility.⁷¹ Should the applicant access any public benefits after posting the bond, the \$10,000 would be revoked and they would be found inadmissible. DHS asks for comments on the bond process.⁷²

The use of public charge bonds is impractical and would place an impossible burden on immigrant families. There is a lack of evidence demonstrating that public charge bonds will prevent people from becoming dependent on government assistance. Analysis of the use of monetary bonds in the criminal pretrial context demonstrates the critical importance of empirical study identifying both predictors and effective mitigators of risk.⁷³ Monetary bonds in the criminal pretrial context have been critiqued as being both inefficient and unfair given the lack of evidence that money motivates people to appear for court.⁷⁴ Moreover, just as financially-based pretrial detention systems have been found to have a disparate negative impact on minorities, public charge bonds would likely have the same result.⁷⁵

⁶⁹ 83 FR 51254.

⁷⁰ Proposed form I-944, <https://www.regulations.gov/document?D=USCIS-2010-0012-0047>.

⁷¹ 83 FR 51133 et seq.

⁷² 83 FR 51220.

⁷³ See Denise L. Gilman, “To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial immigration Detention,” 92 Ind. L.J. 157, 205 (2016) [hereinafter “Loose the Bonds”].

⁷⁴ *Id.*

⁷⁵ See, Color of Change & ACLU’s Campaign for Smart Justice, *Selling Off Our Freedom: How insurance companies have taken over our bail system* (May 2017)

Studies also show that bonds cause long-term hardship and increase the likelihood of financial instability.⁷⁶ Given the indefinite life of public charge bonds, they are even more likely to cause long-term hardship.⁷⁷ Families will face years of annual fees, non-refundable premiums, and liens on the homes and cars put up as collateral required by for-profit surety companies and their agents.⁷⁸ Moreover, the indefinite term and extremely broad and vague conditions governing breach only heightens the risk of exploitation by for-profit companies managing public charge bonds. Imposing yet another financial burden on immigrants and their families will make them more likely to need assistance, not less.

d. The Proposed Rule Will Negatively Impact Vulnerable Segments of the Immigrant Community⁷⁹

In addition to making it harder for non-citizens and their families to access needed support without facing adverse immigration consequences, immigrant communities around the nation and here in New York will be negatively impacted in further, unforeseen ways. In New York City, three million residents were born outside of the United States, including around 130,000 children. At least one in every six people in every community district was born outside of the U.S. In nine communities, all of which fall in Queens and Brooklyn, the proportion is one in two. Furthermore, the majority of all New York City children (54 percent or 968,000) have at least one foreign-born parent.⁸⁰ The impacts of the Proposed Rule will be especially strong on the following communities

https://d11gn0ip9m46ig.cloudfront.net/images/059_Bail_Report.pdf [hereinafter “Selling Off Our Freedom”]; Maryland Office of the Public Defender, *The High Cost of Bail: How Maryland’s Reliance on Money Bail Jails the Poor and Costs the Community Millions*, at 12-13, Nov. 2016,

<http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf>, [hereinafter “High Cost of Bail”]; and Vera Institute of Justice, *Past Due, Examining the Costs and Consequences of Charging for Justice in New Orleans*, Jan. 2017, <https://www.vera.org/publications/past-due-costs-consequences-charging-for-justice-new-orleans>, [hereinafter, “Past Due”]; see also Loose the Bonds, *supra*, note 73.

⁷⁶ See, e.g., “Selling Off Our Freedom, *supra* note 75; see also Pretrial Justice Institute, *Pretrial Justice: What Does It Cost?* (Jan. 2017)

<https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd&forceDialog=0>.

⁷⁷ The Proposed Rule seeks to revise the current regulations to eliminate the automatic cancellation of the public charge bond upon naturalization, death, or permanent departure. See 8 C.F.R. § 103.6(c)(1). Instead, DHS seeks to impose an affirmative obligation on the immigrant or obligor to request the cancellation of the bond upon naturalization, death, or permanent departure. Most LPRs are not eligible to naturalize until at least five years after becoming an LPR, and many more are unable to naturalize for longer than that for a variety of reasons.

⁷⁸ See, e.g., Selling Off Our Freedom, *supra* note 75; High Cost of Bail, *supra* note 75; Past Due, *supra* note 75; UCLA School of Law Criminal Justice Reform Clinic, *The Devil in the Details: Bail Bond Contracts in California* (May 2017) https://static.prisonpolicy.org/scans/UCLA_Devil%20in%20the%20Details.pdf [hereinafter “Devil in the Details”]; see also Brooklyn Community Bail Fund, *License & Registration, Please...An examination of the practices and operations of the commercial bail bond industry in New York City*, at 2 (Jun. 2017) https://static1.squarespace.com/static/5824a5aa579fb35e65295211/t/594c39758419c243fdb27cad/1498167672801/NYCBailBondReport_ExecSummary.pdf [hereinafter “License & Registration”].

⁷⁹ The City Bar thanks the Family Court and Family Law Committee (Glenn Metsch-Ampel, Chair; Marjorie Cohen and Lorena Jiron, Immigration & Children Subcommittee Co-Chairs) for its contributions to this letter and, in particular, to this section.

⁸⁰ “CityViews: Proposed U.S. Public Charge Rule Threatens NYC Kids, Families,” CityLimits.org, Nov.19, 2018, <https://citylimits.org/2018/11/19/cityviews-proposed-u-s-public-charge-rule-threatens-nyc-kids-families/>.

of immigrants nationwide, including here in New York. The Proposed Rule will specifically harm many of the most vulnerable immigrants, and by extension will harm their families, and the larger communities in which they live and to which they contribute.

i. Impact on Children and Families

The Proposed Rule will have a negative impact on children and families for many of the reasons already stated, including preventing children, both citizen and non-citizen, from accessing health care, nutrition assistance and housing.

In addition, survivors of domestic violence might feel compelled to remain in dangerous relationships out of fear of that moving into public housing would negatively impact their ability to adjust their immigration status. Or, they may not seek medical care out of fear that it will come back to haunt them if they were to seek immigration relief in the future. Though some people in domestic violence relationships may have immigration relief that is exempt from “public charge,” even people who are exempt are choosing to forego any type of public benefit so as not to be viewed as dependent on the government.

Another one of the worst impacts will be the way in which this rule could tear families apart. Many of the persons seeking admission or adjustment to LPR status are doing so through immediate family members: U.S. citizen spouses, parents, and children. One recent report estimates that this rule could result in the separation of at least 200,000 married couples annually as applications for LPR by immediate family members are denied.⁸¹

ii. Impact on Immigrants of Color

The proposed rule will have a disproportionate impact on people of color. While people of color account for approximately 36% of the total U.S. population, of the 25.9 million people who would be potentially chilled by the Proposed Rule, approximately 90% are people from communities of color (23.2 million).⁸²

1. Latinx immigrants

For many recent immigrants of color, access to federal programs like SNAP, Medicaid and affordable housing have allowed millions to begin a stable life in the United States. For example,

⁸¹ “Trump Plan Could Break Up Nearly 200,000 Married Couples,” Houston Chronicle (Oct. 9, 2018), <https://www.houstonchronicle.com/opinion/outlook/article/Trump-administration-threatens-to-break-up-nearly-13293747.php>. See also Migration Policy Institute, *Through the Back Door: Remaking the Immigration System via the Expected “Public Charge” Rule*, (Aug. 2018), <https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule>.

⁸² 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. Custom Tabulation by Manatt health, 9/30/2018, <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

21% of Latino households received SNAP in the last year;⁸³ approximately 32% of Latinos are covered by Medicaid;⁸⁴ and approximately 740,000 Latino households received federal rental assistance in 2015.⁸⁵ For progress to continue in the Latino community and our nation, immigrants should have an opportunity to support the resilience and upward mobility of their families.

Communities with high numbers of lawful permanent residents entering this country through family reunification channels will naturally be impacted by the proposed policy change. In FY 2017, for example, 87% of the roughly 170,600 Mexican immigrants who became lawful permanent residents did so as family members of LPRs or U.S. citizens, a much higher share than 66% of new LPRs from all countries.⁸⁶ In turn, the vast majority of Mexican Americans would be scrutinized for public charge related inadmissibility and subject to the stringent requirements of the Proposed Rule.

2. *Asian Americans and Pacific Islanders*

The Proposed Rule would have a dramatic impact on Asian American and Pacific Islander families. In recent years, three out of every ten individuals obtaining permanent residence status have been from Asia and Pacific Island nations.⁸⁷ Forty percent of all family-based immigrants are from Asian and Pacific Islander nations, while 54% of employment-based immigrants are from these nations.⁸⁸ The vast majority of immigrants from many Asian countries are entering based on employment-based visas or as immediate relatives of U.S. citizens. For example, 97% of Vietnamese and 91% of Bangladeshi immigrants became LPRs as immediate relatives of U.S. citizens.⁸⁹ Like Mexican immigrants seeking admission or adjustment discussed above, vast numbers of Asian American immigrants would be scrutinized under the new Proposed Rule. As such, many would be deterred from participating in programs for which they are eligible and which play an important role in improving their health and well-being and the health and well-being of their families.

Progress made since the passage of the Affordable Care Act, that had partially equalized the disparities in uninsured rates between white Americans and Asian Americans and Pacific

⁸³ UnidosUS Fact Sheet “Federal Programs Lift Millions of Latinos Out of Poverty,” (July, 2017), http://publications.unidosus.org/bitstream/handle/123456789/1894/federalprograms_national_101718.pdf?sequence.

⁸⁴ *Id.*

⁸⁵ *Id.*, see also, UnidosUS, FY18 Federal Budget: Affordable Housing and Latinos, Aug. 2017, <http://publications.unidosus.org/bitstream/handle/123456789/1755/Main%20document%20download?sequence=5&isAllowed=y>.

⁸⁶ Jie Zong and Jeanne Batalova, Migration Policy Institute, *Mexican Immigrants in the United States*, Oct. 11, 2018, <https://www.migrationpolicy.org/article/mexican-immigrants-united-states>.

⁸⁷ Department of Homeland Security, Yearbook of Immigration Statistics 2016, <https://www.dhs.gov/immigration-statistics/yearbook/2016>.

⁸⁸ Jie Zong and Jeanne Batalova, Migration Policy Institute, *Asian Americans in the United States 2016*, Jan. 6, 2016, <https://www.migrationpolicy.org/article/asian-immigrants-united-states>

⁸⁹ *Id.*

Islanders through the expansion of Medicaid and establishment of health insurance marketplaces, could easily be wiped out.⁹⁰

Subgroups that are particularly at risk of poverty, such as South Asians, would be particularly likely to be forced to choose between access to health and nutrition and the ability to keep their family united.⁹¹

Finally, the Proposed Rule would also impact Compact of Free Association (COFA) migrants who are able to reside in the U.S. as “non-immigrants” under ongoing treaty obligations. This includes citizens from the Republic of Palau, the Federated States of Micronesia and the Republic of the Marshall Islands. Non-immigrants under COFA are not eligible for many federal benefits, but some do participate in federal housing programs and state and local programs. In addition, in many states, COFA migrant children and pregnant women are eligible for Medicaid. If this rule is finalized, many COFA migrants may dis-enroll from these programs, creating greater public health and other problems. Others would be blocked from entering or reentering the U.S., separating them from their families.

3. *Black immigrants*

Black immigrants have been disproportionately subject to aggressive immigration enforcement in recent years.⁹² The Proposed Rule leaves public charge determinations to the discretion of adjudicating USCIS officers, giving them wide latitude to weigh certain pre-determined factors. This discretionary environment is ripe for implicit and explicit bias and preconceived stereotypes.

4. *Impact on individuals living with disabilities*

As discussed above, the proposed regulations will make it difficult if not impossible for LPR applicants with disabilities to overcome the public charge ground of inadmissibility. People with disabilities may be in particular need of using public benefits in order to fully participate in society. The Proposed Rule will cruelly discriminate against anyone who faces an impediment to full employment.

In contrast to the Proposed Rule, Congress has determined to allow generous eligibility parameters when it comes to people with disabilities. For example:

⁹⁰ Park et al, “Health Insurance for Asian Americans, Native Hawaiians, and Pacific Islanders Under the Affordable Care Act,” JAMA Internal Medicine. (April 30, 2018).

<https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2678830?redirect=true>

⁹¹ Asian American Center for Advancing Justice, *A Community of Contrasts Asian Americans, Native Hawaiians and Pacific Islanders in the Midwest*, at 42, 2012, https://www.advancingjustice-chicago.org/wp-content/uploads/2015/08/Community_of_Contrasts_Midwest_2012.pdf.

⁹² Samira Sadeque, *Trump’s ICE Removed a higher Number of Africans in 2017, Even as Overall Removals Fell*, QUARTZ AFRICA, Feb. 10, 2018, <https://qz.com/africa/1204111/trumps-immigration-ice-kicked-out-more-africans-than-ever-while-reducing-overall-removals/>.

- 1/3 of the adults under aged 65 who are enrolled in the Medicaid program have disabilities; as compared to only 12 % of adults in the general population.⁹³
- 3 in 10 nonelderly adults with disabilities are enrolled in Medicaid.⁹⁴
- 41 % of children with special needs are enrolled in Medicaid or CHIP only; another 7 % are dually enrolled in private insurance and Medicaid and CHIP.⁹⁵
- More than one quarter of individuals who use SNAP have a disability.⁹⁶

The U.S. has, in the past, made policy decisions that understand the challenges faced by individuals living with disabilities, and provided for accommodations to such individuals, including through recognition of the increased need for ongoing medical care. The Proposed Rule will penalize individuals with disabilities as being less able to work and more likely to make use of benefits. In so doing, the Proposed Rule enshrines discrimination against an entire class of people.

5. *Impact on individuals living with HIV/AIDS*

The Proposed Rule would cause disproportionate and discriminatory harm to individuals living with HIV/AIDS who, lacking care and fair treatment in their countries of birth, seek admission to the U.S. with the hope of joining family members.

While the City Bar opposes discrimination against any class of individuals, and opposes the adverse impact of the Proposed Rule on all people living with disabilities, the codified discrimination against people living with HIV is especially pernicious, given our nation's former ban on entry into the U.S. for HIV-positive individuals which was only overturned in 2010.⁹⁷ While a person's health has long been a factor considered in the public charge analysis, the heightened burden imposed on immigrants by the Proposed Rule would cause disastrous health outcomes for those living with HIV. Prior to reforms made by Congress in 2008 which amended the INA to strike a provision that classified HIV/AIDS as a Class A medical designation,

⁹³ Center on Budget and Policy Priorities, *Medicaid Works for People with Disabilities*, 2017, <https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities>

⁹⁴ MaryBeth Musumeci, Julia Foutz, *Medicaid Restructuring under the American Health Care Act and Nonelderly Adults with Disabilities*, Kaiser Family Foundation Issue Brief, March 2017, <http://files.kff.org/attachment/Issue-Brief-Medicaid-Restructuring-Under-the-American-Health-Care-Act-and-Nonelderly-Adults-with-Disabilities>.

⁹⁵ MaryBeth Musumeci, Julia Foutz, *Medicaid's Role for Children with Special Health Care Needs: A Look at Eligibility, Services and Spending*, Kaiser Family Foundation, Issue Brief, Feb. 2018, <https://www.kff.org/medicaid/issue-brief/medicaids-role-for-children-with-special-health-care-needs-a-look-at-eligibility-services-and-spending/2018>, <https://www.kff.org/medicaid/issue-brief/medicaids-role-for-children-with-special-health-care-needs-a-look-at-eligibility-services-and-spending>.

⁹⁶ Steven Carlson, Brynne Keith-Jennings & Raheem Chaudhry, Center on Budget and Policy Priorities, *SNAP Provides Needed Food Assistance to Millions of People with Disabilities*, June 14, 2017, <https://www.cbpp.org/research/food-assistance/snap-provides-needed-food-assistance-to-millions-of-people-with>.

⁹⁷ Human Rights Campaign, *After 22 Years, HIV Travel and Immigrant Ban Lifted*, 2010, www.hrc.org/press/after-22-years-hiv-travel-and-immigration-ban-lifted. Note, the HIV ban was previously enshrined both in the Immigration and Nationality Act and in regulations. It therefore took a two-step process to eliminate the ban, with the statutory change coming under President Bush in 2008 and the regulatory change coming under President Obama in 2010.

immigrants with HIV/AIDS were effectively inadmissible.⁹⁸ As it stands now, a positive HIV status is not grounds for inadmissibility to the United States.⁹⁹ Nevertheless, the Proposed Rule will create a backdoor means of excluding those with HIV from the United States by classifying HIV/AIDS as a Class B medical condition that can be used as a negative factor in determining public charge.

While not automatically excludable, Class B medical designations are relevant to public charge determinations.¹⁰⁰ By making this decision discretionary, rather than explicitly deeming HIV status irrelevant, the test would heavily disfavor immigrants with HIV and invites discriminatory and, thus, disparate outcomes for immigrants with HIV.¹⁰¹ Additionally, if HIV positive individuals decide to forego benefits in order to qualify to adjust status, then that would create public health consequences.¹⁰² The Proposed Rule will return people living with HIV to the Catch-22 of being unable to enter the U.S. until they have secured private health insurance here, but being unable to secure private health insurance in the U.S. until they have obtained residence and a U.S. social security number.

Immigrants with HIV will potentially forego treatment out of fear that they will be denied the opportunity to adjust status based on their HIV status. This would result in negative public health outcomes such as increased new infection rates and more severe complications. Lastly, the inclusion of HIV as a negatively weighted factor in public charge determination undoes Congress' intent in removing HIV as a ground of inadmissibility.

6. Impact on children with special health care needs

Under the Proposed Rule, children with special health care needs will face two hurdles to overcoming public charge grounds of inadmissibility—being too young to work and having a disability. According to estimates from the National Survey of Children's Health, roughly 2.6 million children in immigrant families have a disability or special health care need.¹⁰³ These children who are most in need of the specialized and ongoing care that only a close family member can provide, are most in danger of not being allowed in to the U.S. or of having their applications for LPR denied. In particular, the inclusion of Medicaid in the "public benefit" definition will lead to determinations that many children with special health needs are likely to become public charges. Furthermore, parents of such children may be in danger of being assessed as likely to become a public charge because they may have to work fewer hours or choose more flexible work

⁹⁸ <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-2006/0-0-0-2867.html#0-0-0-2307>.

⁹⁹ *Id.*

¹⁰⁰ 83 FR 51114.

¹⁰¹ Kyle Taylor, NASTAD, *Public Charge Proposed Rule Is an Attack on Immigrants; Will Hurt Public Health Efforts to End HIV and Hepatitis*, Oct. 10, 2018, <https://www.nastad.org/blog/public-charge-proposed-rule-attack-immigrants-will-hurt-public-health-efforts-end-hiv-and>

¹⁰² AIDS United, *Trump's "Public Charge" Rules Would Harm Immigrants with HIV*, Aug. 29, 2018, POZ, <https://www.aidsunited.org/blog/Default.aspx?id=3802>; <https://www.poz.com/blog/trumps-public-charge-rules-harm-immigrants-hiv>.

¹⁰³ Data Resource Center for Child & Adolescent Health, *National Survey of Children's Health, 2016*, <https://www.childhealthdata.org/learn-about-the-nsch/NSCH>.

environments to be able to care for their children.¹⁰⁴ Children with special health care needs will face two strikes against them, making it very unlikely that they will be able to overcome the public charge ground. The effect of the Proposed Rule may be to force U.S. citizen and LPR family members of children with special health care needs to choose between remaining in the U.S. without a child with special needs, or returning to a country where those needs may not be met. As stated above, all children should be considered exempt from the public charge ground of inadmissibility.

7. *Impact on LGBTQ immigrant communities*

The Proposed Rule will impose disproportionate burdens on the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) immigrant community as well as exacerbate longstanding institutional biases and discrimination.¹⁰⁵ The Williams Institute estimates there are 637,000 LGBTQ-identified individuals among the adult authorized immigrant population.¹⁰⁶ Assumptions that LGBTQ people are likely to become a public charge have historically been used to keep this community out of the U.S., even before immigration laws explicitly excluded LGBTQ people from entry.¹⁰⁷ The 1952 amendments to the INA included the phrase “sexual deviants and psychopathic personalities” to refer to LGBTQ persons as those who should be barred from entering the United States.¹⁰⁸ This ban on LGBTQ persons continued through the 1965 amendments to the INA¹⁰⁹ and was not removed until 1990. Further, the Defense of Marriage Act (“DOMA”)¹¹⁰ denied same-sex couples access to marriage-based federal benefits, such as petitioning for an immigrant spouse to obtain an immigrant visa.

The LGBTQ community is already susceptible to institutional and cultural prejudices that make it more difficult for LGBTQ immigrants to attain equitable outcomes in health, education, and employment¹¹¹—all factors that are weighted negatively by USCIS to determine whether to

¹⁰⁴ Sloan Work and Family Research Network, *Questions and Answers about Employed Parents Caring for Children with Disabilities*, https://wfrn.org/wp-content/uploads/2018/09/Factsheet_Caring_Child_Disability.pdf.

¹⁰⁵ James, S. E., Herman, et al, National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey*. Washington, DC, (2016) <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>; [hereinafter NCTE Transgender Survey]; Margot Canaday, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH CENTURY AMERICA* (2011).

¹⁰⁶ 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> (“LGBT” rather than “LGBTQ” is used to reference the study’s findings, which were limited to LGBT individuals.)

¹⁰⁷ Canaday, *supra* note 105.

¹⁰⁸ Human Rights Watch, “Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law,” (May, 2006), https://www.hrw.org/reports/2006/us0506/4.htm#_ftn50

¹⁰⁹ 1965 Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965),

¹¹⁰ Defense of Marriage Act, Pub. L. No. 104-199, 100 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

¹¹¹ Paying an Unfair Price: The Financial Penalty for LGBT People of Color in America, Center for American Progress and Movement Advancement Project, 2015, at: <http://www.lgbtmap.org/file/paying-an-unfair-price-lgbt-people-of-color.pdf>; Kastanis A, Wilson B. Race/Ethnicity, Gender, and Socioeconomic Wellbeing of Individuals in Same-Sex Couples, The Williams Institute, 2014, at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-Compare-Feb-2014.pdf>; Kastanis A, Gates GJ. LGBT African Americans and African-American Same-Sex Couples, The Williams Institute, 2013, at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-AFAMER-Oct-2013.pdf>; Kastanis A, Gates GJ. LGBT Latino/as and Latino/a Same-Sex

grant adjustment of status.¹¹² Additionally, the chilling effect on LGBTQ immigrants will undermine access to essential health, nutrition, housing, and other critical programs for eligible immigrants and their family members.

The absence of current employment, employment history, or reasonable prospect of future employment are a heavily weighed negative factor against the intending immigrant under the Proposed Rule.¹¹³ The LGBTQ community has some federal protections against employment discrimination on the grounds of sexual orientation or gender identity in Title VII of the Civil Rights Act of 1964.¹¹⁴ However, nearly half of the U.S. population lives in a state without explicit employment discrimination protections for sexual orientation and gender identity.¹¹⁵ The lack of full and explicit protections on the federal level and in multiple states leaves the LGBTQ population uniquely vulnerable to discrimination and harassment in the workplace, which can manifest itself in lower employment opportunities and diminished prospects for future employment.¹¹⁶ The transgender community is especially vulnerable to workplace discrimination and harassment, which results in lower socioeconomic status and higher rates of unemployment.¹¹⁷ Transgender individuals have an unemployment rate three times higher than the average population and live in poverty at twice the rate of average population.¹¹⁸ Nearly 19 percent of transgender individuals reported being fired, denied a promotion, or not being hired for a job they applied for because of their gender identity or expression.¹¹⁹ The heavy weight that USCIS seeks to place on employment and employability will reinforce and integrate societal workplace discrimination against LGBTQ persons into federal immigration policy.¹²⁰

Couples, Williams Institute, 2013, at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-2010-Latino-Final.pdf>; Kastanis A, Gates GJ. LGBT Asian Pacific Islander Individuals and Same-Sex Couples, Williams Institute, 2013, at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-2010-API-Final.pdf>

¹¹² 83 FR 51114.

¹¹³ 83 FR 51198

¹¹⁴ 42 U.S.C.A. § 2000e-2; *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (Employee was entitled to bring Title VII claim for discrimination based on sexual orientation.); *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018)(EEOC was entitled to bring Title VII claim on ground that employer discriminated against employee on basis of her transgender and transitioning status); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017)(held that person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes); *See also Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir.), cert. denied, 138 S. Ct. 557, 199 L. Ed. 2d 446 (2017)(discrimination based on sexual orientation was not actionable under Title VII)

¹¹⁵ Movement Advancement Project, "Local Employment Nondiscrimination Ordinances," 2015.

<http://lgbtmap.org/file/policy-spotlight-local-NDOs.pdf>

¹¹⁶ Research has shown that transgender people face pervasive mistreatment, harassment, and discrimination in the workplace and during the hiring process. NCTE Transgender Survey, at 50-71, *supra* note 105; Williams Institute, *Documented Evidence of Employment Discrimination & Its Effect on LGBT People*, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-DiscriminationComplaintsReport-July-2011.pdf>; Rainey, T. & Imse, E. E. DC Office of Human Rights, *Qualified and Transgender: A Report on Results of Resume Testing for Employment Discrimination Based on Gender Identity*, 2015 https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf.

¹¹⁷ *Id.*

¹¹⁸ NCTE Transgender Survey, *supra* note 105, at p. 147.

¹¹⁹ *Id.* at p. 11.

¹²⁰ Robert Pear, *Trump Plan Would Cut Back Health Care Protections for Transgender People*, THE NEW YORK TIMES, Apr. 21, 2018, <https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html>.

The Proposed Rule will also have adverse impacts on the health of LGBTQ immigrants. Already, community health centers are seeing immigrants drop from crucial health programs in anticipation of the proposed rule taking effect.¹²¹ The Williams Institute found LGBTQ people are more likely than non-LGBTQ people to report experiencing food insecurity, and a CAP survey found LGBTQ survey respondents and their families are more than twice as likely to report receiving SNAP benefits.¹²² Thus, the proposed rule will disparately impact the LGBTQ community.

The Proposed Rule will also be detrimental to transgender and gender non-conforming individuals by forcing transgender immigrants to choose between transition care and adjusting status. Lack of access to care can have severe health impacts on transgender individuals as they are likely to suffer negative mental health outcomes and are more likely to commit suicide in the absence of adequate healthcare.¹²³ By tying access to healthcare to public charge decisions by USCIS, transgender and gender non-conforming individuals could face application denials due to biased assumptions and misconceptions surrounding transgender healthcare (for example, that transgender individuals require costly surgeries or disproportionately rely on government funded healthcare at a higher rate). In actuality, around 13 percent of transgender individuals rely on Medicaid compared to 15 percent of the total adult U.S. population.¹²⁴ The combined effects of the proposed rule will inhibit transgender immigrants from seeking healthcare, leading to negative healthcare outcomes.

III. CONCLUSION

According to the Kaiser Family Foundation, an estimated 2.1 million to 4.9 million Medicaid/CHIP enrollees could disenroll if the Proposed Rule leads to disenrollment rates between 15 percent and 35 percent.¹²⁵ Overall, approximately 25.9 million people would be potentially chilled by the proposed public charge rule, accounting for an estimated 8% of the U.S. population. 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% of the federal poverty level. Of these 25.9 million people, approximately 9.2 million are children under 18 years of age

¹²¹ National Association of Community Health Centers, *Joint Statement of America's Health Centers Opposing Public Charge Proposal* (Oct. 10, 2018) <http://www.nachc.org/news/joint-statement-of-americas-health-centers-opposing-public-charge-proposal/>.

¹²² Caitlin Rooney, Center for American Progress, "Protecting Basic Living Standards for LGBTQ People," 2018, <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>.

¹²³ S Romanelli M, Lu W, Lindsey MA. *Examining Mechanisms and Moderators of the Relationship Between Discriminatory Health Care Encounters and Attempted Suicide Among U.S. Transgender Help-Seekers*. *Adm Policy Ment Health*. 2018 Nov; 45(6):831-849, <https://www.ncbi.nlm.nih.gov/pubmed/29574543>; See also Safer JD, Coleman E, Feldman J, Garofalo R, Hembree W, Radix A, et al. *Barriers to healthcare for transgender individuals*. *Curr Opin Endocrinol Diabetes Obes*. 2016;23(2):168–71 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4802845/>.

¹²⁴ NCTE Transgender Survey, *supra* note 105, at 94.

¹²⁵ Samantha Artiga, et al, Kaiser Family Foundation, *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/> [hereinafter "Estimated Impact."]

who are family members of at least one non-citizen or are non-citizen themselves, representing approximately 13% of our nation’s child population.¹²⁶ Since welfare reform in the 1990s did not affect immigration status directly, unlike the proposed public charge rule, these estimates may actually underestimate the impact of the rule on benefit usage.¹²⁷ The chilling effect,¹²⁸ and the likely impact of the Proposed Rule are well-documented.¹²⁹ Further, given current efforts to reduce legal immigration for the first time in decades and increased arrests and deportations, fear of immigration consequences of using public benefits could be even greater.¹³⁰ The failure to factor in the chilling effect in the Proposed Rule is reason alone for DHS to withdraw the rule.

Moreover, when a policy’s impact is to separate children, including U.S. citizen children, from essentials like health care, food, and housing on a large scale, there can be no sound basis for justifying the rule. For all of the foregoing reasons, the New York City Bar Association objects to the Proposed Rule on public charge and urges it to be withdrawn.

Respectfully,

Immigration & Nationality Law Committee
Victoria F Neilson, Chair

Social Welfare Committee
Susan E. Welber, Chair

¹²⁶ 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 20122016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC) MABLE PUMA-County Crosswalk. Custom Tabulation by Manatt health, 9/30/2018.

<https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

¹²⁷ Estimated Impact, *supra* note 125.

¹²⁸ See, e.g., Leighton Ku & Alyse Freilich, Kaiser Family Foundation, *Caring for Immigrants: Health Care Safety Nets in Los Angeles, New York, Miami, and Houston*, 7 at 13-15 (2001)

<https://aspe.hhs.gov/system/files/pdf/72701/report.pdf> (describing the chilling effect after enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in the late 1990s, which led to immigrants avoiding treatment, delaying care and seeking uncompensated care); Jeanne Batalova, et al, Migration Policy Institute, *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>, [hereinafter “Chilling Effect”]; Neeraj Kaushal and Robert Kaestner, “Welfare Reform and health insurance of Immigrants,” *Health Services Research*, 40(3), (June 2005) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361164/pdf/hesr_00381.pdf) (finding that after new eligibility restrictions were implemented for recent immigrants as part of welfare reform, there were 25% disenrollment among children of foreign-born parents from Medicaid even though the majority of these children were not affected by the eligibility changes and remained eligible).

¹²⁹ Wendy Cervantes et al, CLASP, *Our Children's Fear Immigration Policy's Effects on Young Children*, Mar. 2018, https://www.clasp.org/sites/default/files/publications/2018/03/2018_ourchildrensfears.pdf.

¹³⁰ Chilling Effect, *supra* note 128.

See also New York City Bar Association Statement Opposing Proposed Changes to Broaden "Public Charge" Rule, Oct. 24, 2018,

<https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/statement-opposing-proposed-changes-to-broaden-public-charge-rule>

Signed by:

Bioethical Issues Committee
Alan J. Brudner, Chair

Children & the Law
Sara L. Hiltzik, Chair

Civil Right to Counsel Task Force
Alison McKinnell King and Andrew A. Scherer, Co-Chairs

Civil Rights Committee
Phil Desgranges, Chair

Council on Children*
Lauren A. Shapiro, Chair

Domestic Violence Committee
Amanda M. Beltz, Chair

Enhance Diversity in the Profession Committee
Kathy Chin, Co-Chair

European Affairs Committee
Victor P. Muskin, Chair

Family Court & Family Law Committee
Glenn Metsch-Ampel, Chair

Federal Courts Committee
Laura G. Birger, Chair

Health Law Committee
Brian McGovern, Chair

Housing Court Committee
Justin R. La Mort, Chair

Housing & Urban Development Committee
Daniel M. Bernstein, Co-Chair

Immigration and Nationality Law Committee
Victoria F. Neilson, Chair

International Human Rights Committee
Lauren Melkus, Chair

Labor & Employment Law Committee
Katherine A. Greenberg, Chair

Legal Problems of the Aging Committee
Britt Burner, Chair

Lesbian, Gay, Bisexual & Transgender Rights Committee
Noah E. Lewis, Chair

Mental Health Law Committee
Naomi Weinstein, Chair

Pro Bono & Legal Services Committee
Amy P. Barasch and Jennifer K. Brown, Co-Chairs

Sex & Law Committee
Mirah Curzer and Melissa Lee, Co-Chairs

Social Welfare Law Committee
Susan E. Welber, Chair

United Nations Committee
Simon O'Connor, Chair

**This letter is the product of an intensive drafting, review and approval process by the members of the two identified sponsoring City Bar committees, the Immigration and Nationality Law Committee and the Social Welfare Law Committee, plus input from the Family Court and Family Law Committee, the LGBT Rights Committee, and the Legal Problems of the Aging Committee. The comments draw upon some of the material included in model comments organized by the Protecting Immigrants Family Campaign.