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December 10, 2018

Electronically Submitted

The Honorable Kirstjen M. Nielsen
Secretary of Homeland Security
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529-2140

**Re: *Inadmissibility on Public Charge Grounds, Notice of Proposed Rulemaking,*
83 Fed. Reg. 51,114 (Oct. 10, 2018), DHS Docket No. USCIS–2010–0012**

Dear Secretary Nielsen:

The County of Santa Clara (“County”) submits this comment in response to the proposed rule published by the Department of Homeland Security (“Department”) concerning inadmissibility on public charge grounds (“Proposed Rule”).¹ The Proposed Rule is an unlawful attempt to rewrite Congress’s rules for who may be admitted and allowed to stay in the United States. And if it becomes final, the proposal would wreak havoc on public health and safety-net systems, undermining the health and well-being of all residents and the effective functioning of local governments across the country.

The County would suffer these consequences firsthand: it provides and administers critical social safety-net services in one of the most populous and diverse counties in the nation. To promote the health and well-being of its 1.9 million residents, the County operates a 731-bed Level I trauma hospital offering critical regional services, eleven ambulatory care clinics, a specialty care center, and three mobile medical units; provides and administers a wide range of public benefits; offers essential services for residents struggling with mental illness and substance abuse; runs programs to identify, treat, and stop the spread of communicable and potentially lethal diseases; immunizes children and travelers; and provides a wide range of other critical benefits and services. The Proposed Rule would significantly undercut these programs

¹ Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

by deterring eligible residents from using them, thereby undermining public health and the well-being of all County residents. The Proposed Rule also would impose significant costs on the County and other local governments that will continue to provide care and support to the communities they serve. In Santa Clara County alone, more than 117,600 noncitizens live in families in which at least one person receives a public benefit implicated by the Proposed Rule.²

The Proposed Rule is not only harmful, but plainly unlawful. First, the Proposed Rule is contrary to law: its definition of “public charge” conflicts with the term’s plain meaning and statutory context, judicial interpretation, and Congress’s own understanding of the term. And the Proposed Rule flouts other statutes that govern immigration and public benefits. Second, the Proposed Rule is arbitrary and capricious. The Department fails to meaningfully account for the Proposed Rule’s harms to vulnerable groups and its significant public health and fiscal costs; if the Department had considered these harms, it would have recognized that the Proposed Rule does far more harm than good and undermines the very goal of self-sufficiency that it purports to further. Third, the Proposed Rule creates a framework and includes factors for making public charge determinations that lack a reasoned basis and are irrational and vague. For these reasons, the County urges the Department to withdraw the Proposed Rule.

I. Background

Under the Immigration and Nationality Act (INA), the federal government may deny admission and adjustment of status to individuals it determines are “likely at any time to become a public charge.”³ For more than a century this provision has been understood to describe only those who are likely to be primarily dependent on the government to meet their basic living requirements. Consistent with this longstanding meaning, for nearly twenty years, federal policy has defined the term public charge to mean a noncitizen who is “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”⁴ Receipt of these benefits is used as a proxy to identify noncitizens who could not live without the government’s support. This assessment is forward-looking, and is based on the “totality of the circumstances,” which means an immigration official making a public charge determination must consider a number of factors, such as health, family status, education and skills, resources, and assets.⁵

The Department’s predecessor, the Immigration and Naturalization Service (INS), formalized this definition of public charge after taking into account the plain meaning of the

² Jeanne Batalova & Michael Fix, ‘Chilling Effects’ of the Proposed Public-Charge Rule in Santa Clara County, CA, Migration Policy Institute, at 2 (Nov. 2018) (analyzing data from 2014-2016 to estimate the “chilled population” based on a family member’s use of Medicaid, the Children’s Health Insurance Program (CHIP), Supplemental Nutrition Assistance Program (SNAP, formerly known as “food stamps”), Supplemental Security Income (SSI), and Temporary Assistance for Needy Families (TANF)/General Assistance benefits) (attached as Exhibit 1). Further, when family members are included, approximately 255,600 County residents live in households with at least one noncitizen in which one or more family member uses such a benefit. *Id.*

³ 8 U.S.C. § 1182(a)(4).

⁴ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (May 26, 1999) [hereinafter “1999 Field Guidance”]; *accord* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (proposed May 26, 1999) (to be codified at 8 C.F.R. pts. 212, 237) [hereinafter “1999 Proposed Rule”].

⁵ 1999 Field Guidance, 64 Fed. Reg. at 28,690.

term, historical usage, and case law, and “[a]fter extensive consultation with benefit-granting agencies.”⁶ In implementing this definition, INS aimed to eliminate confusion about immigration consequences in the wake of welfare reform, advance public health by encouraging continued use of a variety of public benefit programs by noncitizens, and allow governments to operate a public benefit system that facilitates self-sufficiency.⁷

The Department now seeks to overhaul the framework for determining who is likely to become a public charge. The Proposed Rule would broaden the definition of a public charge to include a noncitizen who “receives one or more public benefit”—even in modest amounts.⁸ In addition to cash assistance for income maintenance and long-term institutionalization at public expense, the “public benefits” considered under this definition would include a number of critical programs and services that are supplemental supports for those earning an income. These benefits include the Supplemental Nutrition Assistance Program (SNAP, formerly known as “food stamps”); non-emergency Medicaid (aside from a few narrow exceptions); certain forms of public housing and housing assistance; and governmental assistance for Medicare Part D premiums.⁹ The Department is also considering adding the Children’s Health Insurance Program (CHIP)—a program that provides low-cost health insurance coverage to children who do not qualify for Medicaid—to its list of included public benefits.¹⁰ Under the Proposed Rule, the receipt of these benefits would factor into a public charge analysis when a noncitizen’s use of one or more of the benefits surpasses a specific amount or durational threshold.¹¹

To conduct the prospective assessment required by statute, the Proposed Rule would expand the list of factors immigration officials must consider to include a noncitizens’ application for public benefits; medical conditions; indicia of assets and resources such as private health insurance coverage; current income; skills such as English language proficiency; prospective immigration status and expected period of admission; and the personal relationship between the noncitizen and the U.S. resident(s) committed to supporting them.¹² The Department contends that, weighing these new factors and the preexisting statutory factors, an immigration officer can predict, based on the totality of the circumstances, whether a noncitizen applying for admission or adjustment of status is likely to use public benefits above the new monetary and durational thresholds, and thereby become a public charge.

II. The Proposed Rule Is Contrary to Law.

The Department’s effort to redefine public charge as “an alien who receives one or more public benefit” ostensibly is rooted in how the term is “used in section 212(a)(4) of the [INA].”¹³

⁶ *Id.* at 28,692; *see* 1999 Proposed Rule, 64 Fed. Reg. at 28,677.

⁷ 1999 Field Guidance, 64 Fed. Reg. at 28,689, 28,692; 1999 Proposed Rule, 64 Fed. Reg. at 28,676-80.

⁸ Proposed Rule, 83 Fed. Reg. at 51,289 (proposing to define “public charge”).

⁹ *Id.* at 51,289-90 (proposing to define “public benefit”).

¹⁰ *Id.* at 51,173-74.

¹¹ *See id.* at 51,289-90 (proposing to define “public benefit” and “public charge”); *id.* at 51,291 (proposing factors that inform “[t]he determination” of whether a noncitizen is likely to become a public charge, as “based on the totality of the [noncitizen’s] circumstances”).

¹² *Id.* at 51,291-92. Some factors are assigned greater weight than others, both negative and positive. *Id.*

¹³ *Id.* at 51,114, 51,157, 51,289. Because the Proposed Rule does “not [interpret] the public charge deportability ground under section 237(a)(5) of the [INA],” *id.* at 51,134, the County does not comment on that ground. Any change to the public charge deportability ground would require a separate rulemaking subject to public notice and

Yet the historical context, case law, and plain meaning of the INA’s text make clear that the Proposed Rule’s definition is inconsistent with the longstanding meaning of public charge.¹⁴

Since 1882, public charge has referred to an individual who is *primarily dependent* on the government for subsistence. And since 1999, public charge has encompassed only those whose primary dependence on the government is “demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”¹⁵ The Department’s proposal to rewrite this longstanding definition is contrary not only to INA Section 212(a)(4) specifically, but also to the broader statutory schemes governing immigration and public benefits that Congress has enacted over the decades.

The Department cannot “exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law” and “must give effect” to the “intent of Congress.”¹⁶ Consequently, the Department must adopt an interpretation of public charge in line with its plain and unambiguous meaning: primary dependence on the government for subsistence.¹⁷ In making this proposal, the Department oversteps the clear bounds of its authority.

A. The Proposed Rule’s Definition of Public Charge Is Unlawful Because It Plainly Contradicts the Term’s Plain Meaning and the INA’s History and Structure.

Congress introduced the term public charge into federal immigration law in 1882. At that time, Congress authorized immigration officers to refuse entry to “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”¹⁸ It retained this term and surrounding language substantively unchanged until 1990, when it “consolidat[ed]” these “related grounds” under the term “public charge.”¹⁹ The “related grounds” show that public charge was one of a certain category of individuals, similar in kind to

comment. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (“*Encino P*”); *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003); *Chief Prob. Officers of Cal. v. Shalala*, 118 F.3d 1327, 1336 (9th Cir. 1997).

¹⁴ See 5 U.S.C. § 706(2)(A) (providing that an agency action is unlawful and must be set aside if it is “not in accordance with law”).

¹⁵ 1999 Field Guidance, 64 Fed. Reg. at 28,689; 1999 Proposed Rule, 64 Fed. Reg. at 28,681 (proposing 8 C.F.R. § 212.102(a)(1)). INS offered this definition “[a]fter extensive consultation with benefit-granting agencies” and to clarify any confusion after the passage of various welfare reform laws. 1999 Field Guidance, 64 Fed. Reg. at 28,689.

¹⁶ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotation marks and citations omitted).

¹⁷ See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) (“An agency has no power to tailor legislation to bureaucratic policy goals by rewriting unambiguous statutory terms . . . [and] must always give effect to the unambiguously expressed intent of Congress.” (internal quotation marks and citations omitted)).

¹⁸ An Act to Regulate Immigration, 22 Stat. 214, Ch. 376, § 2 (Aug. 3, 1882) (attached as Exhibit 2) [hereinafter “1882 Act”].

¹⁹ Immigration Act of 1990, Pub. L. 101-649, § 601(a), 104 Stat. 4978; H.R. Rep. No. 101-955, at 128 (1989-1990) (noting amendment’s “consolidation of related grounds” “for exclusion and deportation”) (attached as Exhibit 3); 8 U.S.C. § 1182(a)(1), (2), (3), (8), (9) (1988 ed.) (excluding, among others, “Aliens who are mentally retarded; . . . who are insane; . . . who have had one or more attacks of insanity; . . . who are paupers, professional beggars, or vagrants; . . . who have been convicted of [certain] crime[s]; . . . [and who] are likely at any time to become public charges”) (attached as Exhibit 4). While Congress did not offer an express statutory definition, in “the absence of an express definition, [courts] must give a term its ordinary meaning.” *Petit v. U.S. Dep’t of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (quoting *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011)).

“lunatics” and “idiots” as those terms were used in the 19th Century.²⁰ In that era, these terms described people “incompetent for self-protection,” for whom the state had to take primary responsibility, as trustee or *parens patriae*, because these individuals could not care for themselves.²¹

The broader scheme of the 1882 Act confirms that Congress intended the term “public charge” to refer to primary dependence on the government, not mere receipt of some public aid.²² At the same time as it established a public charge ground of inadmissibility, the 1882 Act raised money for a fund to pay to provide “for the care of immigrants arriving in the United States [and] for the relief of such as are in distress,” and empowered federal immigration officials “to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid.”²³ Congress therefore anticipated that some immigrants would be in need of some short-term “support,” “relief,” and “public aid” after their arrival, but receipt of such relief would not make them a “public charge” who would “not be permitted to land.”²⁴ The Proposed Rule is therefore inconsistent with what the Congress that first enacted a public charge provision understood the term to mean. Moreover, through the public charge provision, Congress sought to prevent other countries from “send[ing] to this country blind, crippled, lunatic, and other infirm paupers, who ultimately become life-long dependents on our public charities,” most of them as “permanent inmates of [state-funded] charitable institutions”—i.e., people primarily if not wholly dependent on the government.²⁵

Dictionaries at the time similarly defined “charge” as a “person or thing *committed* to another[s] [*sic*] custody, care or management; a trust.”²⁶ In other words, to be a “charge” was to

²⁰ See *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915) (“‘Persons likely to become a public charge’ are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes, and so forth. . . . Presumably [the term public charge] is to be read as generically similar to the others mentioned before and after.”).

²¹ *Penington v. Thompson*, 5 Del. Ch. 328, 350 (1880); see *Stanley v. Colt*, 72 U.S. 119, 161 (1866) (noting that “*parens patriae*” is the state’s power “to act as the general guardian and protector of those who are incompetent to act for themselves.”).

²² *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (stating that a statutory interpretation is unreasonable if it “is inconsistent with the design and structure of the statute as a whole.” (quoting *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013))).

²³ 1882 Act, at §§ 1, 2.

²⁴ *Id.*

²⁵ 13 Cong. Rec. 5109-10 (June 19, 1882) (Statement of Rep. John Van Voorhis) (quoting resolution of New York State Board of Charities expressing the intention to stop the “send[ing] to this country the dependent classes of Europe, for the purpose of . . . shifting onto this country the expense of supporting them.”) (internal quotation marks omitted) (attached as Exhibit 5); *id.* at 5108 (Statement of Rep. John Van Voorhis) (justifying bill on similar basis as board of charities); see generally Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 Yale J.L. & Human. 181 (2005).

²⁶ *Charge*, Webster’s Dictionary 1828 Online Edition, <http://webstersdictionary1828.com/Dictionary/charge> (emphasis added) (attached as Exhibit 6). “Charge” retains a similar meaning in modern usage. See, e.g., *Charge*, Black’s Law Dictionary (10th ed. 2014) (attached as Exhibit 7) (“A person or thing entrusted to another’s care”); *Charge*, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/charge> (attached as Exhibit 8) (“a person or thing given to someone to look after” or “placed under the care of another”).

be given over to, and therefore dependent on, another for custody, care, or management.²⁷ Thus, a *public charge* described a person given over to, and primarily dependent on, the public.

Courts in the early 20th Century also shared this view. The Second Circuit, for example, forcefully rejected a broad definition of the term public charge, tying it instead to dependence on government institutions. By excluding “public charges” from admission to the United States, the court concluded, “[w]e are convinced that Congress meant the act to exclude persons who were *likely to become occupants of almshouses* for want of means with which to support themselves in the future.”²⁸ The Department entirely ignores the Second Circuit opinion, citing instead to decisions that do not address the central issue, as they do not define or address the extent of “public support” necessary to render a person a public charge.²⁹ Moreover, the Department’s historical argument—that late 19th Century history and meaning are irrelevant because “[a]t the time, the wide array of limited-purpose public benefits now available did not yet exist”³⁰—is both historically inaccurate³¹ and immaterial.³²

Furthermore, the Department cannot through regulation institute a definition that Congress has squarely rejected.³³ Here, Congress has already considered and rejected a proposal that, like the Proposed Rule, would have defined a public charge as a person who uses major means-tested government assistance programs but is not primarily dependent on those programs. During debate on the bill that eventually became the Illegal Immigration Reform and Immigrant

²⁷ See *Committed*, Webster’s Dictionary 1828 Online Edition, <http://webstersdictionary1828.com/Dictionary/committed> (defining “committed” to mean “[d]elivered in trust” and “given in charge”) (attached as Exhibit 9).

²⁸ *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (emphasis added); see also *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (a person is likely to become a public charge when “the burden of supporting the [person] is likely to be cast upon the public”).

²⁹ Proposed Rule, 83 Fed. Reg. at 51,157-58 (“some courts and administrative authorities have tied public charge to receipt of public benefits without quantifying the level of public support or the type of public support required”). The Department cites *Ex Parte Kichmiriantz*, for instance, but the court in that case had no occasion to decide whether partial public aid could render a person a public charge because the plaintiff was not a recipient of partial public aid, but rather was permanently institutionalized for medical care. 283 F. 697, 698 (N.D. Cal. 1922). None of the other decisions the Department cites shed any light on what kind of public aid renders a person a public charge. See *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927) (imprisonment does not make a person a public charge); *United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (same). The administrative decisions the Department cites also do not address this issue. See *Matter of Vindman*, 16 I. & N. Dec. 131, 132 (BIA 1977); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974); *Matter of Harutunian*, 14 I. & N. Dec. 583, 590 (BIA 1974); *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 420 (Att’y Gen. 1962).

³⁰ Proposed Rule, 83 Fed. Reg. at 51,163.

³¹ While the scope of limited-purpose means-tested benefit programs expanded over time, contemporaneous sources and historical studies reveal that throughout the 19th Century, cities, counties, states, and even the federal government provided limited public assistance short of institutionalization—including through the 1882 Act itself. See, e.g., Burr Blackburn, *State Programs of Public Welfare in the South*, 1 J. Soc. Forces 6, 6 (1922) (attached as Exhibit 10); Walter I. Trattner, *The Federal Government and Needy Citizens in Nineteenth Century America*, 103 Pol. Sci. Q. 347, 349, 352-53 (1988) (attached as Exhibit 11); Mrs. Charles Russel Lowell et al., *Public Outdoor Relief*, 6 Am. J. Soc. 90, 99-100 (1900) (attached as Exhibit 12); *supra* text accompanying notes 23-24.

³² It is immaterial that limited-purpose means-tested benefit programs have expanded since the 19th century because that expansion does not change the meaning of the term set out in the 1882 Act. And in fact, over time, Congress has declined to change its original meaning of the term. See, e.g., *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009); *Felner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 358 (1998) (Scalia, J., concurring).

³³ See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179-90 (1978); *Humane Soc’y of U.S. v. Babbitt*, 849 F. Supp. 814, 817 (D.D.C. 1994); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *Order of R.R. Telegraphers v. Chicago & N. W. R. Co.*, 362 U.S. 330, 356 (1960).

Responsibility Act of 1996 (IIRIRA), Congress stripped the bill of a provision defining public charge as a noncitizen who uses “means-tested public benefits,” meaning “any public benefit (including cash, medical, housing, food, and social services) . . . in which the eligibility of an individual, household, or family eligibility unit for such benefit or the amount of such benefit, or both are determined on the basis of income, resources, or financial need of the individual, household, or unit.”³⁴ Instead, IIRIRA retained the term’s longstanding meaning of primary dependence on the government for subsistence.³⁵

More broadly, the Proposed Rule would directly undermine the family-based immigration system established and maintained by Congress. The Proposed Rule would dramatically restrict the ability of noncitizens to adjust status on the basis of family ties because these applicants are less likely to pass a public charge test under the Proposed Rule.³⁶ The result would be significant: two-thirds of recent green card recipients would have had one factor, and nearly half would have had two factors, that would have counted against them in a public charge analysis under the Proposed Rule’s framework.³⁷ But “[f]amily reunification . . . has long been a key principle underlying U.S. immigration policy.”³⁸ In fact, about two-thirds of recent lawful permanent residents obtained their green cards through family ties,³⁹ and Congress has repeatedly reaffirmed the family-based migration policies that the Proposed Rule now seeks to

³⁴ H.R. Rep. No. 104-828, at 144 (Sept. 24, 1996) (sec. 551 of H.R. 2202, proposing 8 U.S.C. § 1183a(e) (defining “means-tested public benefit” using the language quoted in text)); *id.* at 138 (sec. 532 of H.R. 2202, proposing 8 U.S.C. § 1251(a)(5)(C)(ii), (D) (defining “term ‘public charge’ [to] include[] any alien who receives . . . means-tested public benefits”)) (attached as Exhibit 13); H.R. Rep. No. 104-863, at 564, 690-91 (Sept. 28, 1996) (absence of sec. 532 from prior H.R. 2202) (attached as Exhibit 14); 142 Cong. Rec. 25868 (Sept. 28, 1996) (noting that sec. 532 was stricken and that proposed subsection (e) to INA Sec. 213A defining “Federal means-tested public benefit” was also stricken) (attached as Exhibit 15). Congress’s rejection of the provision was an express political choice to ensure the bill’s passage, not a clerical change. *Compare* 142 Cong. Rec. 25858-25859 (Sept. 28, 1996) (statement of Rep. Sheila Jackson-Lee) (attached as Exhibit 16), *with* 142 Cong. Rec. 25862 (Sept. 28, 1996) (statement of Rep. Lamar Smith) (attached as Exhibit 17).

³⁵ IIRIRA’s other amendments to Section 212(a)(4) likewise made no relevant change. Aside from requiring consideration of the newly enforceable affidavit of support when required, IIRIRA simply codified existing practice by listing the factors that immigration officers had already been considering when conducting a public charge determination. *Compare* 8 U.S.C. § 1182(a)(4)(B), *with Matter of A-*, 19 I. & N. Dec. 867, 869 (BIA 1988).

³⁶ The public charge determination largely applies to noncitizens seeking admission or adjustment of status through their employment or family, and most noncitizens with an employment-based immigration status will pass the review because of the income, skills, education, employment prospects, and health insurance characteristics generally associated with employment-based visas. Proposed Rule, 83 Fed. Reg. at 51,123, 51,235, 51,236, 51,244 (public charge determination applies to family- and employment-based admissions and adjustments of status); *id.* at 51,216 (noncitizen “applying for an employment-based immigrant status . . . is a positive factor in the prospective immigration status factor”); *id.* at 51,200 (health status not likely to be a negative factor for noncitizen who can “provide evidence of the prospect of obtaining health insurance, such as pending employment that provides employer-sponsored health insurance”).

³⁷ Randy Capps et al., *Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration*, at 2 (Migration Policy Institute Nov. 2018) (“69 percent [of recent lawful permanent residents] had at least one negative factor”), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration> (attached as Exhibit 18).

³⁸ William A. Kandel, Cong. Research Serv., R43145, *U.S. Family-Based Immigration Policy* 1 (2018), <https://fas.org/sgp/crs/homesecc/R43145.pdf> (attached as Exhibit 19).

³⁹ *Id.*

dismantle.⁴⁰ The Department cannot impose by regulation a policy goal⁴¹ that is “inconsistent with the design and structure of the statute as a whole” or that rewrites statutes to serve that goal.⁴²

In sum, the Department’s proposed definition of public charge is inconsistent with the term’s plain meaning, statutory context, judicial interpretation of the term, the statutory scheme maintained by Congress, and the legislative history. The Department cannot invent a new definition of public charge at odds with any of these authorities—and certainly not all of them.

B. Including SNAP in the Definition of Public Benefit Is Unlawful.

The proposal to include SNAP in the public charge analysis⁴³ makes the Proposed Rule unlawful on another ground: it plainly contradicts SNAP’s authorizing statute. That statute prohibits the Department from “consider[ing]” the “value of [SNAP] benefits that may be provided . . . [as] income or *resources* for any purpose under any Federal, State, or local laws.”⁴⁴ Yet the Proposed Rule includes SNAP benefits when considering a noncitizen’s “assets, *resources*, and financial status”⁴⁵—and it would “heavily weigh” current or prior receipt of SNAP benefits in evaluating whether a noncitizen is likely to become a public charge. The Proposed Rule also “calculate[s] the *value of the [SNAP] benefit* attributable to the alien” in order to “monetize[]” it, wholly disregarding the authorizing statute’s prohibition on doing so.⁴⁶

C. Including Medicaid and CHIP in the Definition of Public Benefit Is Unlawful.

The Department’s inclusion of Medicaid, and possibly CHIP, in its “public benefit” definition similarly contravenes Congress’s instruction that these benefits not be considered “a cost” of supporting noncitizens. Since 2009, Congress has allowed states to extend CHIP and Medicaid coverage to pregnant women and children who have been lawfully present—including

⁴⁰ *Id.* at 2-3; see Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. Mich. J. L. Reform 107, 111-12 & n.18 (2016) (attached as Exhibit 20) (identifying family reunification priorities in the Emergency Quota Act of 1921, the Immigration & Nationality Act of 1952 (McCarran-Walter Act), the Hart-Celler Act of 1965, and the legislative history in which family reunification is explicitly identified as a legislative priority). Congress has also repeatedly declined to amend the INA to restrict or end family-based migration policies.

⁴¹ See, e.g., Nick Miroff, *Family Ties Drive U.S. Immigration. Why Trump Wants to Break the ‘Chains.’*, Wash. Post (Jan. 2, 2018), https://www.washingtonpost.com/world/national-security/how-chain-migration-became-a-target-in-trumps-immigration-agenda/2018/01/02/dd30e034-efdb-11e7-90ed-77167c6861f2_story.html (attached as Exhibit 21); Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. Times (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> (“President Trump embraced a proposal . . . to slash legal immigration to the United States in half within a decade by sharply curtailing the ability of American citizens and legal residents to bring family members into the country.”) (attached as Exhibit 22).

⁴² *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (regulation “inconsistent with the design and structure of the statute as a whole” is unreasonable); *id.* at 2445 (agency cannot accomplish bureaucratic policy goal by rewriting statute).

⁴³ Proposed Rule, 83 Fed. Reg. at 51,290 (proposing 8 C.F.R. § 212.21(b)(1)(ii)(A)).

⁴⁴ 7 U.S.C. § 2017(b) (emphasis added).

⁴⁵ Proposed Rule, 83 Fed. Reg. at 51,291 (proposing to consider a noncitizen’s past application for, receipt of, or use of a public benefit, as defined, when assessing the noncitizen’s assets, resources, and financial status) (emphasis added).

⁴⁶ Proposed Rule, 83 Fed. Reg. at 51,293 (proposing 8 C.F.R. § 212.24(a)) (emphasis added).

as lawful permanent residents—for less than five years.⁴⁷ At the same time, Congress directed that, with respect to these individuals, “no debt shall accrue under an affidavit of support against any sponsor of such an alien on the basis of provision of assistance . . . and the cost of such assistance shall not be considered as an unreimbursed cost.”⁴⁸ The affidavit of support is the main way in which the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) “establish[es] that [a noncitizen] is not excludable as a public charge under section 1182(a)(4)”⁴⁹ and that benefit-granting agencies can recoup the costs of benefits paid to sponsored noncitizens.⁵⁰ Thus, Congress’s carve-out for pregnant women’s and children’s CHIP and Medicaid benefits from recoupment through an affidavit of support plainly demonstrates Congress’s intent that no such benefits should be considered in a public charge analysis.

D. Discounting a Sponsor’s Income Is Contrary to Law.

The Proposed Rule’s assessment of a noncitizen’s income also contravenes PRWORA and IIRIRA by drastically limiting how a sponsor’s income is considered as part of the public charge analysis—even though the sponsor’s commitment is legally enforceable. Under the Proposed Rule, a sponsor’s income is not considered unless (i) the sponsor physically lives with the noncitizen, or (ii) “the sponsor is already contributing 50 percent or more of the alien’s financial support.”⁵¹ Similarly, the Proposed Rule would discount the value of an affidavit of support in the public charge analysis unless the sponsor is a “close family member[]” or “lives with this [noncitizen].”⁵² However, neither PRWORA nor IIRIRA offer a basis for disregarding a sponsor’s income, which would run contrary to the basic logic undergirding the sponsor affidavit provisions of both laws. Under PRWORA and IIRIRA, a sponsor must have an income of at least 125 percent of the Federal Poverty Line,⁵³ and both the sponsored noncitizen and benefit-granting agencies may legally enforce the affidavit of support as the sponsor’s promise to maintain a noncitizen above 125 percent of the Federal Poverty Line.⁵⁴ Moreover, PRWORA requires benefit-granting agencies to include a sponsor’s income when determining whether a sponsored noncitizen is income-eligible for means-tested benefits.⁵⁵ By discounting the value of an affidavit of support in the public charge determination unless the sponsor is closely related to or lives with the noncitizen, the Proposed Rule would ignore the legally enforceable nature of the sponsor’s promise and that the sponsor’s income is deemed that of the noncitizen.⁵⁶ Thus, the

⁴⁷ 42 U.S.C. § 1396b(v)(4)(A); *see* Letter to State Health Officials from Center for Medicaid, CHIP and Survey & Certification, DHHS, Regarding Medicaid and CHIP Coverage of “Lawfully Residing” Children and Pregnant Women (July 1, 2010), <https://www.medicare.gov/federal-policy-guidance/downloads/sho10006.pdf> (attached as Exhibit 23).

⁴⁸ 42 U.S.C. § 1396b(v)(4)(B).

⁴⁹ 8 U.S.C. § 1183a(a)(1).

⁵⁰ 8 U.S.C. § 1183a(a)(1)(B), (b).

⁵¹ Proposed Rule, 83 Fed. Reg. at 51,177.

⁵² *Id.* at 51,198.

⁵³ 8 U.S.C. § 1183a(f)(4)(B)(i).

⁵⁴ 8 U.S.C. § 1183a(a)-(c).

⁵⁵ 8 U.S.C. § 1631.

⁵⁶ Proposed Rule, 83 Fed. Reg. at 51,198; *id.* at 51,292 (proposing 8 C.F.R. § 212.22(b)(7)(A)(2), (3)); 8 U.S.C. § 1182(a)(4)(B)(ii) (requiring consideration of affidavit of support, when required under 8 U.S.C. § 1183(a)(4)(C) and (D)).

Proposed Rule seeks to allow immigration officials to deny a green card to a noncitizen in a manner that contravenes both PRWORA and IIRIRA.

III. The Proposed Rule is Arbitrary and Capricious.

The Proposed Rule does not comply with the basic requirements of administrative rulemaking.⁵⁷ A rulemaking is invalid if the agency has not “give[n] adequate reasons for its decisions,”⁵⁸ examined the relevant data, or offered a “rational connection between the facts found and the choice made.”⁵⁹ This is especially so where, as here, an agency is changing its existing policy.⁶⁰ In these circumstances, an agency must demonstrate that there are “good reasons” for the new policy, take into account that longstanding policies may have created significant reliance interests, and offer “a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁶¹ Here, the Department has followed none of these requirements. It fails to adequately grapple with the congressional policies undergirding the scheme it seeks to rewrite, to account for the harms that its departure from longstanding laws would engender, and to offer a reasoned explanation for its policy reversal. As a result, Proposed Rule is both arbitrary, capricious, and vague.

A. The Proposed Rule’s Harms to Local Communities and Governments Demonstrate It Is Arbitrary and Capricious.

It is no surprise that a proposal that would upend intricate congressional statutory schemes would also inflict significant harms on the County, its residents, and other local governments and communities across the country. Yet the Department fails to meaningfully grapple with these harms. It states only in passing that the drop-off in acceptance of public benefits by otherwise eligible enrollees could result in worse health outcomes, increased emergency room and emergent care use, a higher prevalence of communicable diseases, higher uncompensated care costs, increased poverty and housing instability rates, and lower productivity and educational attainment—without explaining how any of those harms could be justified.⁶² The Department’s cursory treatment of these harms does not meet the standard of reasoned decisionmaking required for this type of departure from longstanding policy.

As the Department acknowledges, the Proposed Rule will cause large numbers of people—including both noncitizens and citizens in immigrant families and households—to forgo and disenroll from benefits due to fear and confusion caused by the Proposed Rule.⁶³ In fact,

⁵⁷ See 5 U.S.C. § 706(2)(A)-(B) (agency action that is “arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law,” or “contrary to constitutional right” shall be set aside).

⁵⁸ *Encino I*, 136 S. Ct. at 2125.

⁵⁹ See, e.g., *id.*; *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Tripoli Rocketry Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 528 (9th Cir. 2010).

⁶⁰ *Encino I*, 136 S. Ct. at 2125.

⁶¹ *Id.* at 2125-26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)) (internal quotation marks omitted).

⁶² Proposed Rule, 83 Fed. Reg. at 51,270.

⁶³ *Id.* at 51,266. Such chilling of public benefit use occurred in the years following the 1996 passage of PRWORA and IIRIRA—even though little had changed regarding eligibility for these benefits. See 1999 Field Guidance, 64 Fed. Reg. at 28689. According to one study, during the two years following the laws’ passage, the use of public benefits by noncitizens dropped by 35 percent due to a “chilling effect.” Michael E. Fix & Jeffrey S. Passel, *Trends*

early evidence from within the County suggests that the Proposed Rule is already having this effect. In September 2018, the month the Department announced the Proposed Rule, noncitizens' applications for Medicaid and SNAP dropped significantly from the prior month—by around 17 percent for Medicaid and around 16 percent for SNAP.⁶⁴ And the spillover “chilling” effects extend beyond non-use of benefit programs included in the Proposed Rule to public benefit programs generally. For example, some participants in the County's Women, Infants and Children program (WIC)—which provides food, nutrition education, and breastfeeding support to pregnant and breastfeeding women and their young children—have returned unused coupons for fear of immigration-related consequences that would be imposed by the Proposed Rule, even though WIC is not included within the proposal.⁶⁵

The Department predicts that by causing noncitizens and others to forgo and disenroll from federal programs, the Proposed Rule would reduce federal government contributions to means-tested program benefits by \$16 billion over ten years.⁶⁶ But this is not an overall cost-saving. The costs currently covered by these federal dollars will be passed on to public healthcare providers like the County, which will face higher rates of uncompensated care; a shift toward emergency treatment and away from preventive care, with an accompanying increase in costs; and lower federal reimbursements. And, because the Department anticipates that it would deny a higher number of green card applications,⁶⁷ the Proposed Rule would curb the growth of the noncitizen population. That population constitutes the workforce that drives much of the County's innovation-driven economy, helps sustain the County's tax base, and contributes substantially to funding widely utilized public programs like Medicare and Social Security.⁶⁸

in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform 1994-97 (Urban Institute Mar. 1, 1999), <https://www.urban.org/sites/default/files/publication/69781/408086-Trends-in-Noncitizens-and-Citizens-Use-of-Public-Benefits-Following-Welfare-Reform.pdf> (attached as Exhibit 24).

⁶⁴ Compared to the same time in the prior year (September 2017), Medicaid applications dropped by 9 percent and SNAP applications dropped by almost 20 percent.

⁶⁵ Other noncitizen women using WIC have exhibited similar fears. *See, e.g.,* Catherine Rampell, *Proposed Immigration Policy Penalizes Legal Residents for Use of Public Benefits*, PBS, Oct. 18, 2018, <https://www.pbs.org/newshour/show/proposed-immigration-policy-penalizes-legal-residents-for-use-of-public-benefits>.

⁶⁶ The Department's ten-year estimate of transfer payment reductions is \$22.7 billion undiscounted, \$19.3 billion at a 3 percent discount rate, and \$15.9 billion at a 7 percent discount rate. Proposed Rule, 83 Fed. Reg. at 51,274.

⁶⁷ Proposed Rule, 83 Fed. Reg. at 51,277; *accord id.* at 51,119, 51,121.

⁶⁸ City of San José, *New Americans in San José and Santa Clara County and Santa Clara County*, at 1, 3, 4, 5 (2016), http://research.newamericaneconomy.org/wp-content/uploads/2016/08/SAN-JOSE-Factsheet_FinalDigital.pdf (noting that immigrants contribute \$77 billion annually to the County—including \$16 billion in taxes and Social Security and Medicare contributions; and that immigrants in the County constitute 47 percent of all employed people and two-thirds of all workers in the information and computer technology sectors) (relying on 2014 data analyzed by the New American Economy) [hereinafter “San José Report”] (attached as Exhibit 25); American Immigration Council, *Immigrants in California*, at 4 (Oct. 4, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_california.pdf (stating that immigrants own approximately 42 percent of all businesses in the Santa Clara County area) (relying on 2016 Current Population Survey data) (attached as Exhibit 26); Randy Capps et al., *Civic Contributions: Taxes Paid by Immigrants in the Washington, DC Metropolitan Area* 23-24 (Urban Institute 2006), https://www.migrationpolicy.org/sites/default/files/publications/411338_civic_contributions.pdf (demonstrating that, on average, households headed by naturalized citizens, green card holders, and lawful temporary migrants contribute almost the same amount in taxes as households headed by natural-born citizens) (attached as Exhibit 27).

Ultimately, contrary to the Department’s unsubstantiated claim, the Proposed Rule will diminish rather than enhance self-sufficiency.⁶⁹ By targeting vulnerable groups—including those noncitizens who hope to adjust their status, their family members, and even the broader noncitizen population—and coercing them to forgo and disenroll from benefits designed to help them thrive, the Proposed Rule would threaten many immigrants’ chances of living healthy and self-sufficient lives and *increase* local government costs of supporting them. The Department has wholly failed to “pay[] attention to” and “account” for these significant costs, as required under the Administrative Procedure Act.⁷⁰ Had these harms been given meaningful consideration, it would be clear that the Proposed Rule does “significantly more harm than good”⁷¹ and cannot stand.

1. The Proposed Rule Fails to Consider the Significant Harms to Vulnerable Groups.

The Department, in conducting its cost-benefit analysis, wholly fails to consider the Proposed Rule’s impact on children, pregnant women, and individuals facing housing insecurity.

i. Children. Publicly-funded programs like Medicaid assist families in addressing their children’s basic needs and provide a buffer against adversities children may face. Causing children to forgo or disenroll from Medicaid would be harmful to children’s development and have implications for their well-being and self-sufficiency into adulthood.⁷² Children enrolled in Medicaid in their early years are not only healthier in childhood than children without health insurance,⁷³ but they also have better health, income, and employment outcomes in adulthood.⁷⁴

⁶⁹ Proposed Rule, 83 Fed. Reg. at 51,122-23.

⁷⁰ *Encino I*, 136 S. Ct. at 2125; *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (agency must “pay[] attention to the advantages *and* the disadvantages of [its] decisions.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 242 (D.D.C. 2016) (“In the end, cost must be balanced against benefit because ‘[n]o regulation is ‘appropriate’ if it does significantly more harm than good.’” (quoting *Michigan v. EPA*, 135 S. Ct. at 2707)); *see also* Exec. Order No. 12866, 58 Fed. Reg. 51,735, 51,735, 51,741 (Oct. 4, 1993); Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (requiring an agency to “take into account benefits and costs, both quantitative and qualitative”).

⁷¹ *Michigan v. EPA*, 135 S. Ct. at 2707; *Metlife, Inc.*, 177 F. Supp. 3d at 242.

⁷² Forgone programs could include services like the Kid Connections Network of Providers (KCN), which provides high quality developmental screening and behavioral health assessment, home visitation, and therapeutic services reimbursable in part through Medi-Cal, the program through which California offers Medicaid. These harms would be compounded by the Department’s assessment of whether a child has 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.” Proposed Rule, 83 Fed. Reg. at 51,291. Use of this “medical condition” factor would allow federal immigration officials to penalize children with disabilities and chronic medical conditions based on an unsubstantiated assumption that a diagnosis determines a child’s future abilities and job prospects.

⁷³ Amanda R. Kreider et al., *Quality of Health Insurance Coverage and Access to Care for Children in Low-Income Families*, 170(1) JAMA Pediatrics 43 (Jan. 2016), <https://www.cdc.gov/rdc/data/b6/poi150069.pdf> (showing that children insured by Medicaid or CHIP experienced greater access to preventive medical care than children with private insurance or who were uninsured) (attached as Exhibit 28); Lawrence R. Wherry et al., *Childhood Medicaid Coverage and Later Life Health Care Utilization* (Nat’l Bureau of Econ. Research Working Paper 20929 2015), <https://www.nber.org/papers/w20929.pdf> (showing that black children with Medicaid coverage are likely to have lower hospitalization and emergency room visit rates as adults) (attached as Exhibit 29).

⁷⁴ Rourke L. O’Brien & Cassandra L. Robertson, *Early Life Medicaid Coverage and Intergenerational Economic Mobility*, 59(2) J. of Health & Soc. Behavior 300-315 (2018), <https://www.ncbi.nlm.nih.gov/pubmed/29672187> (finding that early-life Medicaid coverage has a direct and measurable effect on economic mobility levels as

Thus, penalizing the use of Medicaid in a public charge assessment would undermine the Department's ostensible self-sufficiency goal by making children less able to sustain themselves and contribute as adult workers.

U.S. citizen children of noncitizen parents also could suffer the ill effects of the Proposed Rule.⁷⁵ Uninsured parents delay care for themselves due to cost, are less likely to see doctors and dentists, report difficulty paying family medical bills, and are more likely to forgo medical care entirely.⁷⁶ These behaviors disconnect whole families from the healthcare system: the children of these noncitizen parents, including U.S. citizen children, may themselves be less likely to have health insurance coverage or to receive medical care as their parents' financial or medical circumstances worsen.⁷⁷ The Proposed Rule could also harm these children's educational prospects: access to health insurance coverage increases rates of high school and college graduation.⁷⁸

Research also demonstrates that access to nutrition is crucial to a child's physical and intellectual development.⁷⁹ Sufficient nutritious food of the type provided through SNAP is associated with improved reading and math skills in elementary school, especially for young girls, and increases the likelihood of high school graduation.⁸⁰ Indeed, food assistance for girls has been linked to improved economic self-sufficiency later in life.⁸¹ Moreover, a single year of

measured in adulthood) (attached as Exhibit 30); Andrew Goodman-Bacon, *The Long-Run Effects of Childhood Insurance Coverage: Medicaid Implementation, Adult Health, and Labor Market Outcomes* (Nat'l Bureau of Econ. Research Working Paper No. 22899 2016), www.nber.org/papers/w22899 (finding early childhood Medicaid eligibility reduces mortality and disability, and for some, increases employment) (attached as Exhibit 31); Steven Carlson & Brynne Keith-Jennings, *SNAP Is Linked With Improved Nutritional Outcomes and Lower Health Care Costs 2* (Center on Budget & Policy Priorities 2018), <https://www.cbpp.org/research/food-assistance/snap-is-linked-with-improved-nutritional-outcomes-and-lower-health-care> (finding that low-income adults participating in SNAP on average incur nearly 25 percent less in healthcare costs in a year than low-income adults not enrolled in SNAP) (attached as Exhibit 32).

⁷⁵ The number of potentially affected children is significant: as of 2016, around ten million U.S. citizen children in the United States have at least one noncitizen parent. Kaiser Family Foundation, *Proposed Changes to "Public Charge" Policies for Immigrants: Implications for Health Coverage* (Sept. 24, 2018), <https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage/> (attached as Exhibit 33).

⁷⁶ Michael Karpman et al., *Uninsurance among Parents, 1997-2014: Long-Term Trends and Recent Patterns*, Urban Institute, at 10-11 (2016), <https://www.urban.org/sites/default/files/publication/81626/2000822-Uninsurance-among-Parents-1997-2014-long-term-trends-and-recent-patterns.pdf> (attached as Exhibit 34).

⁷⁷ *Id.* at 1, 14.

⁷⁸ Sarah Cohodes et al., *The Effect of Child Health Insurance Access on Schooling: Evidence from Public Insurance Expansions* (Nat'l Bureau of Econ. Research Working Paper No. 20178 2014), <http://www.nber.org/papers/w20178.pdf> (attached as Exhibit 35).

⁷⁹ Gillian Dutton, *The Effect of Welfare Reform on Immigrant Children*, 32 Clearinghouse Rev. 503 (1999), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1363&context=faculty> (attached as Exhibit 36); Katherine M. Joyce, *Household Hardships, Public Programs, and Their Associations with the Health and Development of Very Young Children: Insights from Children's HealthWatch*, 3(1) Food Insecurity art. 4 (2012), at 12-14, <https://www.centerforhungerfreecommunities.org/sites/default/files/pdfs/Household%20Hardships%2C%20Public%20Programs%2C%20and%20the%20Health%20and%20Development%20of%20Very%20Young%20Children.pdf> (attached as Exhibit 37); Steven Carlson et al., *SNAP Works for America's Children*, Ctr. on Budget Pol'y Priorities (Sept. 29, 2016), <http://www.cbpp.org/research/food-assistance/snap-works-for-americas-children> (attached as Exhibit 38).

⁸⁰ Steven Carlson et al., *supra* note 79.

⁸¹ *Id.*

parental SNAP eligibility is associated with fewer overnight hospitalizations and doctor's visits in children, and with significant health benefits in later childhood and adolescence.⁸² But when children do not have enough to eat, they can experience toxic stress and suffer brain development and physical and mental health problems in early childhood that extend into adulthood.⁸³ U.S. citizen children also would likely suffer these adverse consequences because of the Proposed Rule's broad chilling effects.

Including CHIP in the Proposed Rule's public charge analysis would only exacerbate these harms to children's health and well-being. CHIP is a state and federally funded program that provides health, vision, and dental insurance to children as part of a Medicaid extension program.⁸⁴ Coverage includes critical preventive care and treatment, including regular check-ups, shots and immunizations, inpatient and outpatient hospital care, laboratory and x-ray services, doctor visits, dental and vision care, mental health services, medication, and hospital care. If families forgo or disenroll from CHIP coverage for their children, all of the negative health outcomes described above would worsen.

ii. Pregnant Women. The Proposed Rule also would have a particularly harmful effect on the County's efforts to provide services to pregnant women. In California, certain noncitizen pregnant women who are not lawful permanent residents are eligible for federally funded emergency and pregnancy-related services under Medicaid, which in California is offered through "Medi-Cal."⁸⁵ The Proposed Rule would penalize these women for accessing non-emergency services, including the critical prenatal care that protects the health of both mother and unborn child.⁸⁶

⁸² Chloe East, *The Effect of Food Stamps on Children's Health: Evidence from Immigrants' Changing Eligibility*, at 3-4 (March 2016), http://cneast.weebly.com/uploads/8/9/9/7/8997263/east_jmp.pdf (attached as Exhibit 39); see also Hilary Hoynes et al., *Long-Run Impacts of Childhood Access to the Safety Net*, 106(4) *Am. Econ. Rev.* 903, 905 (2016), <https://dx.doi.org/10.1257/aer.20130375> (concluding that access to SNAP benefits in utero and as young children leads to a large reduction in "metabolic syndrome," a combined measure of incidence of obesity, high blood pressure, heart disease, and diabetes, as well as an increase in reporting of good health) (attached as Exhibit 40).

⁸³ National Scientific Council on Developing Child, *Persistent Fear and Anxiety Can Affect Young Children's Learning and Development: Working Paper No. 9* (2010), <https://developingchild.harvard.edu/resources/persistent-fear-and-anxiety-can-affect-young-childrens-learning-and-development/> (attached as Exhibit 41); Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 *Pediatrics* e232 (2013), <http://pediatrics.aappublications.org/content/pediatrics/129/1/e232.full.pdf> (attached as Exhibit 42); Karen Hughes et al., *The Effect of Multiple Adverse Childhood Experiences on Health: A Systematic Review and Meta-Analysis*, 2 *The Lancet Public Health* e356 (2017), <https://www.thelancet.com/action/showPdf?pii=S2468-2667%2817%2930118-4> (attached as Exhibit 43); Natalie Slopen et al., *Cumulative Adversity in Childhood and Emergent Risk Factors for Long-Term Health*, 164 *The Journal of Pediatrics* 631 (2014), [https://www.jpeds.com/article/S0022-3476\(13\)01389-9/pdf](https://www.jpeds.com/article/S0022-3476(13)01389-9/pdf) (attached as Exhibit 44).

⁸⁴ To be eligible for CHIP in Santa Clara County, the child's household income must be between 266 and 322 percent of the federal poverty level, among other criteria. Families are required to pay a small premium contribution, depending on household size and income, in addition to copays for specific outpatient services and prescriptions. See Social Services Agency, County of Santa Clara, CCHIP, <https://www.sccgov.org/sites/ssa/debs/hc/Pages/cchip.aspx>; see also Medicaid Guide, *CHIP in California*, <https://medicaid-guide.org/chip/california.html>.

⁸⁵ See California Dep't of Health Care Services, *Medi-Cal's Non-Citizen Population: A Brief Overview of Eligibility, Coverage, Funding, and Enrollment* at 1, 5 (Oct. 2015), https://www.dhcs.ca.gov/dataandstats/statistics/Documents/noncitizen_brief_ADAfinal.pdf (attached as Exhibit 45).

⁸⁶ For example, non-emergency services like the Comprehensive Perinatal Services Program, which provides enhanced pregnancy care services through Medi-Cal for pregnant and postpartum women, would be included in the Proposed Rule's public charge analysis.

The effects of congenital syphilis illustrate the potentially devastating impact of forgoing this non-emergency prenatal care. When a pregnant woman's syphilis infection is not caught and treated early during pregnancy, babies often contract congenital syphilis and suffer devastating clinical outcomes, including heart trouble, blindness, deafness, bone deformities, and death. Prenatal care is an extremely effective defense against these devastating outcomes: 98 percent of cases of congenital syphilis can be prevented when a pregnant woman takes antibiotics. For this reason, California state law requires healthcare providers to screen all pregnant patients for syphilis at their first prenatal encounter—ideally during the first trimester.⁸⁷ Early detection leads to earlier treatment, which can reduce risks of morbidity to the pregnant patient and fetus, and thereby significantly reduce costs to the infant's family and public healthcare providers like the County. Even late prenatal detection provides significant public health and economic benefits: an additional screening for syphilis in the third trimester results in fewer maternal and neonatal adverse outcomes, as well as an estimated national cost-savings of \$52 million per year.⁸⁸ And healthcare for nonpregnant women of childbearing age—whether through Medicaid, CHIP, or otherwise—also mitigates these risks, since detection of early syphilis in these women reduces the risk to public health and individual health harms associated with congenital syphilis. But due to the Proposed Rule's inclusion of non-emergency Medicaid in the public charge analysis, many women in the County may forgo prenatal care that is vital to maternal and infant health.

iii. Individuals Facing Housing Insecurity. The Proposed Rule's inclusion of housing-related subsidies and assistance in the public charge analysis will have devastating consequences for immigrants and their families who need even moderate assistance to achieve housing security—a critical issue given that the County has the seventh largest homeless population in the nation.⁸⁹ For example, in addition to programs that fall within the proposed definition of public benefit, the Proposed Rule would also discourage noncitizens from utilizing a number of key programs offered by the County's Office of Supportive Housing (OSH). These include Rapid Rehousing programs, which provide swift support for homeless families and individuals who need housing and short-term financial assistance and services to help stabilize, increase their income, and eventually take over the cost of their rent. The County's homelessness prevention programs also streamline access to essential resources to help those on the verge of homelessness (including noncitizens) remain housed and avoid more costly extended shelter or transitional housing stays.⁹⁰

These programs reduce homelessness and expand opportunities for healthy and safe housing, benefiting the entire community. As noncitizens stop using these and other benefit programs out of fear of immigration consequences, they are at greater risk of becoming or

⁸⁷ Cal. Health & Safety Code, Div. 105, Part 3, Chapter 2.

⁸⁸ Alyssa R. Hersh et al., *Repeat Screening for Syphilis in the Third Trimester of Pregnancy: A Cost-Effectiveness Analysis*, 132 *Obstetrics & Gynecology* 699 (Sept. 2018) (attached as Exhibit 46).

⁸⁹ County of Santa Clara Office of Supportive Housing, *How does Santa Clara County compare to other jurisdictions?* (last visited on Nov. 27, 2018), https://www.sccgov.org/sites/osh/ContinuumofCare/ReportsandPublications/Documents/2017%20PIT%20Co_Comparisons.pdf (attached as Exhibit 47); *see generally* Santa Clara County Homeless Census & Survey: Comprehensive Report, Applied Survey Research (2017), <https://www.sccgov.org/sites/osh/ContinuumofCare/ReportsandPublications/Documents/2017%20Santa%20Clara%20County%20Homeless%20Census%20and%20Survey%20Report.pdf> (attached as Exhibit 48).

⁹⁰ County of Santa Clara Office of Supportive Housing, *Homelessness Prevention*, <https://www.sccgov.org/sites/osh/solutions/PermanentSolutions/Pages/Homelessness-Prevention.aspx> (last visited on Dec. 2, 2018).

remaining homeless. This, in turn, puts greater pressure on the County's supportive housing services and imposes an array of other harms and costs on the community as a whole. The County's investments in housing assistance contribute to positive health outcomes.⁹¹ Combatting long-term homelessness also mitigates tremendous public costs stemming from frequent use of emergency medical and psychiatric care and encounters with the criminal justice system. The County and its contracted service providers invest more than \$520 million per year on these services.⁹²

2. The Proposed Rule Fails to Seriously Consider the Significant Costs to Public Healthcare Providers.

The Proposed Rule also fails to seriously address the impact it would have on public healthcare providers. These providers are the backbone of the country's public health system: when residents lack private health insurance or the ability to pay out of pocket, they turn to public healthcare providers for a wide range of services, from preventive and specialized clinical care to emergency treatment. Under the Proposed Rule, significant numbers of noncitizens are likely to forgo or disenroll from Medicaid. And public healthcare providers are likely to face lower reimbursement rates, higher uncompensated care costs, increased emergency department and other programmatic costs, undermining of bundled benefit programs, and greater contagious disease and other public health risks. Yet the Proposed Rule mentions only in passing that emergency room and emergent care use and uncompensated care costs could rise, without any meaningful consideration of the significant consequences the Proposed Rule would have on public healthcare systems across the country.

The County runs a public healthcare system that faces exactly these kinds of costs. As the only public safety-net healthcare provider in Santa Clara County, and the second largest such provider in California, the Santa Clara Valley Health and Hospital System ("Health and Hospital System" or SCVHHS) provides the vast majority of the healthcare services available to low-income and underserved patients in the County, including through Santa Clara Valley Medical Center (SCVMC).⁹³ In addition to its hospital, SCVMC provides essential preventive and other outpatient services to underserved patients through eleven ambulatory care clinics. SCVHHS also administers and provides a number of programs to promote preventive care and avoid more costly hospital visits.⁹⁴ The Proposed Rule would undercut many of these services, rolling back

⁹¹ See Seena Fazel et al., *The Health of Homeless People in High-Income Countries: Descriptive Epidemiology, Health Consequences, and Clinical and Policy Recommendations*, 384 *The Lancet* 1529, 1532 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4520328/pdf/emss-63192.pdf> (attached as Exhibit 49).

⁹² Daniel Flaming et al., *Home Not Found The Cost Of Homelessness In Silicon Valley*, Economic Roundtable, at 2 (2015), https://destinationhomesv.org/wp-content/uploads/2015/05/er_homenotfound_report_6.pdf (attached as Exhibit 50); County of Santa Clara Office of Supportive Housing, *Ending Homelessness: The State of the Supportive Housing System in Santa Clara County 4* (2017), <https://www.sccgov.org/sites/osh/ContinuumofCare/ReportsandPublications/Documents/EndingHomelessness2017.pdf> (attached as Exhibit 51).

⁹³ Santa Clara Valley Medical Center, *Delivery System Reform Incentive Pool Plan* (Feb. 18, 2011), http://www.dhcs.ca.gov/Documents/11_SCVMC%20DSRIP%20Proposal%202-18-11.pdf (attached as Exhibit 52).

⁹⁴ For example, the County's Primary Care Access Program (PCAP) provides primary care services to adults who are not eligible for full benefits under Medi-Cal, state subsidies, or employer health insurance. Whole Person Care, funded through the Medi-Cal 2020 Waiver, provides a wide array of supportive services to the highest utilizers of SCVHHS services. And the Global Payments Program, which combines federal Disproportionate Share Hospital and uncompensated care funding, reimburses care provided by public healthcare providers according to a point

hard-fought gains that have increased preventive care, and instead would defer treatment to more expensive and complicated emergent care.

i. Increased Costs Associated with Medi-Cal Reimbursement and Uncompensated Care. Medi-Cal covers the cost of caring for more than two-thirds of SCVMC patients and is a critical source of cost recovery for the County's Health and Hospital System.⁹⁵ In the early 2000s, the County made significant investments to ensure that as many children in the County as possible have medical coverage. If any significant proportion of Medi-Cal enrollees who are noncitizens disenrolled in the program because of the Proposed Rule, SCVHHS could lose millions of dollars in annual Medicaid funding.⁹⁶

The County is also likely to experience significantly higher uncompensated care costs. As noncitizens and their family members forgo or disenroll from Medi-Cal due to fear and confusion caused by the Proposed Rule, they are increasingly likely to seek medical treatment at the County's hospital and clinics without insurance. Because the County provides care regardless of ability to pay, the County's uncompensated care costs would increase.⁹⁷ Other SCVMC programs could face higher utilization and attendant costs as well. These programs include the Healthy Kids program, which provides heavily subsidized services to 3,000 children whose family income is between 250 and 300 percent of the Federal Poverty Level (FPL),⁹⁸ and the Primary Care Access Program, which provides primary care services to adults who are not eligible for state subsidies, employer health insurance, or full benefits under Medi-Cal.⁹⁹ And because others will be deterred by the Proposed Rule from accessing essential healthcare services altogether, the County could experience cascading negative consequences for public health, well-being, self-sufficiency, and the public purse.

ii. Increased Emergency Department and Other Programmatic Costs. Given the Proposed Rule's expected effect of compelling eligible noncitizens to forgo or drop Medi-Cal coverage, SCVMC Emergency Department costs are likely to rise due to higher utilization,

system that incentivizes the provision of primary and preventive care and creates more flexibility for the provision of non-traditional care.

⁹⁵ In Fiscal Year 2017-2018, Medi-Cal enrollees constituted approximately 67 percent of SCVMC's patient visits and around 59 percent of hospital patient days.

⁹⁶ See California Dep't of Health Care Services, *supra* note 85.

⁹⁷ On average, each newly uninsured patient increases hospital uncompensated care costs by approximately \$800 annually. See Craig Garthwaite et al., *Hospitals as Insurers of Last Resort*, 10 Am. Econ. J.: Applied Econ. 1 (2018) (attached as Exhibit 53). The County covers these costs through a variety of funds and programs. Through the Charity Care program, the County writes off hospital charges incurred by eligible individuals at or below 100 percent of the Federal Poverty Level (FPL), and through the Discount program, the County reduces hospital charges for eligible individuals at 100 to 350 percent of FPL to what SCVMC would receive from a government payer. Both are available to all SCVMC patients based solely on income or high medical costs. Through the Ability to Pay Determination (APD) program, the County reduces liabilities for eligible County residents earning up to 350 percent of FPL to co-payments ranging from \$0 to \$300. In Fiscal Year 2018, the APD program incurred many tens of millions in gross charges, most of which will be written off under the County's Charity Care program. And through the Sliding Fee for Homeless program, the County waives hospital charges for homeless individuals at or below 200 percent of FPL or reduces their payment to \$5.

⁹⁸ Santa Clara Family Health Plan, *Healthy Kids* (last visited Dec. 6, 2018), <https://www.scfhp.com/healthcareplans/healthy-kids>.

⁹⁹ Valley Health Plan, *Primary Care Access Program – Description of Services*, <https://www.sccgov.org/sites/vhpn/pcap/Documents/PCAP%20DOS.pdf> (attached as Exhibit 54). As of November 1, 2018, the County is serving more than 3,900 individuals through PCAP. *Id.*

treatment of conditions not well-suited to the Emergency Department, and rising wait times for all patients who require emergency medical attention.

Research has shown that adults without insurance are three times less likely to visit clinics or doctors' offices for preventive care,¹⁰⁰ and that uninsured adults are around 20 percent more likely than those with insurance to go to an emergency room simply because they have no other medical care option.¹⁰¹ Costs increase significantly when patients use emergency services to deal with conditions that should have been treated through primary care.¹⁰² On average, a primary care visit costs between \$100 and \$200,¹⁰³ whereas an average emergency room visit costs around \$2,000—and can be significantly more.¹⁰⁴ Consider, for example, the treatment of asthma. Studies have shown that when children have access to public health insurance, their instances of hospitalization for asthma drop by around 75 percent,¹⁰⁵ saving an average of \$4,200 per visit in hospitalization costs.¹⁰⁶ Another study estimated that people with nonemergent health conditions visiting emergency departments wastes \$4.4 billion annually because of the higher cost of providing care in an emergency department setting.¹⁰⁷

The County absorbs many of these increased Emergency Department costs. Under state and federal law, the County is required to provide screening and emergency medical care to all

¹⁰⁰ Julia Foutz et al., *The Uninsured: A Primer - Key Facts about Health Insurance and the Uninsured Under the Affordable Care Act* (Dec. 14, 2017), <https://www.kff.org/report-section/the-uninsured-a-primer-key-facts-about-health-insurance-and-the-uninsured-under-the-affordable-care-act-how-does-lack-of-insurance-affect-access-to-health-care/> (attached as Exhibit 55).

¹⁰¹ Center for Disease Control, *Emergency Room Use Among Adults Aged 18–64: Early Release of Estimates From the National Health Interview Survey, January–June 2011* (May 2012), https://www.cdc.gov/nchs/data/nhis/earlyrelease/emergency_room_use_january-june_2011.pdf (attached as Exhibit 56). The inverse is also true: localities with broader Medicaid eligibility have lower average rates of preventable hospitalizations because individuals receive preventive care and treatment. Leighton Ku & Christine Ferguson, *Medicaid Works: A Review of How Public Insurance Protects the Health and Finances of Children and Other Vulnerable Populations* 13 (George Washington Univ. Sch. of Pub. Health & Health Servs. 2011), <https://firstfocus.org/wp-content/uploads/2014/05/Medicaid-Works.pdf> (attached as Exhibit 57).

¹⁰² Erik J. Olson, Note, *No Room at the Inn: A Snapshot of an American emergency Room*, 46 Stan. L. Rev. 449, 489 (1994) (attached as Exhibit 58); see also Gillian Dutton, *supra* note 79.

¹⁰³ Johns Hopkins Bloomberg School of Public Health, *Primary Care Visits Available to Most Uninsured But at a High Price* (May 5, 2015), <https://www.jhsph.edu/news/news-releases/2015/primary-care-visits-available-to-most-uninsured-but-at-a-high-price.html> (attached as Exhibit 59).

¹⁰⁴ Health Care Cost Institute, *2016 Health Care Cost and Utilization Report* at 9 (2018), <https://www.healthcostinstitute.org/research/annual-reports/entry/2016-health-care-cost-and-utilization-report> (attached as Exhibit 60).

¹⁰⁵ Peter G. Szilagyi et al. *Improved Asthma Care After Enrollment in the State Children's Health Insurance Program in New York*, 117 *Pediatrics* 486, 486 (Feb. 2006), <http://pediatrics.aappublications.org/content/pediatrics/117/2/486.full.pdf> (attached as Exhibit 61).

¹⁰⁶ Kathryn Fingar & Raynard Washington, *Potentially Preventable Pediatric Hospital Inpatient Stays for Asthma and Diabetes, 2003–2012*, Healthcare Cost and Utilization Project Statistical Brief No.192 (June 2015), <https://www.hcup-us.ahrq.gov/reports/statbriefs/sb192-Pediatric-Preventable-Hospitalizations-Asthma-Diabetes.jsp> (providing cost estimates for 2012) (attached as Exhibit 62).

¹⁰⁷ Robin M. Weinick et al., *Many Emergency Department Visits Could Be Managed at Urgent Care Centers and Retail Clinics*, 29 *Health Affairs* 1630 (2010), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2009.0748> (attached as Exhibit 63).

persons who present at its emergency room for treatment.¹⁰⁸ Much of this care is uncompensated. As noted above, these uncompensated care costs likely would rise significantly if the Proposed Rule were implemented. Moreover, as emergency rooms become overburdened and overcrowded, all patients are likely to experience longer wait times while their conditions worsen, potentially requiring more intensive care.¹⁰⁹

The Proposed Rule imposes other significant programmatic costs on the County's Health and Hospital System. Due to the anticipated increase in the use of the Emergency Department, the County may need to reorganize its staff and administrative structures to address overcrowding and emergency treatment of conditions that ordinarily would be addressed in primary and ambulatory care settings.¹¹⁰ Other hospital divisions, such as Gynecology and Obstetrics, the Neo-Natal Intensive Care Unit, and Primary Care, may need to make staffing and programmatic adjustments, with some likely facing higher demand and others expecting drop-offs. The County's Social Services Agency also would have to consider shifting programming if utilization of certain programs, such as SNAP/Cal-Fresh, drop even as nutrition needs in the County persist.¹¹¹

iii. Undermining Bundled Public Benefit Programs. The Proposed Rule's harms will extend even further because access to certain state and local benefits depends on individuals applying for federally funded Medi-Cal. The California Children's Services program (CCS) is a key example. CCS, which is administered by the County in partnership with the California Department of Health Care Services, coordinates and pays for the cost of treatment of certain serious medical conditions for children and young adults, such as cystic fibrosis and cerebral palsy. To qualify for CCS, an individual must apply for Medi-Cal if CCS believes the individual may be Medi-Cal eligible.¹¹² Due to this application requirement, an individual wary of applying for or utilizing Medi-Cal because of the Proposed Rule's expanded public charge definition may also be forced to forgo CCS services.

Similarly, the Proposed Rule could undercut the County's efforts to provide HIV-related health services under the federal Ryan White HIV/AIDS Program. The County receives around \$4 million from this program to provide HIV-related care, which it supplements it with about \$2 million in County general funds. As a payor of last resort program, the Ryan White Program conditions its funding on patients' enrollment in other programs for which they are eligible—including Medi-Cal.¹¹³ Individuals who forgo Medi-Cal for fear of possible immigration consequences under the Proposed Rule must then also forgo the Ryan White Program's

¹⁰⁸ See Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd; Cal. Health & Safety Code §§ 1317-1317.10 (2008).

¹⁰⁹ See Kevin Grumbach et al., *Primary Care and Public Emergency Department Overcrowding*, 83 Am. J. Pub. Health 372, 372-75 (Mar. 1993) (attached as Exhibit 64).

¹¹⁰ See Erik J. Olson, *supra* note 102, at 489-90.

¹¹¹ These increased costs also would be pushed onto the County's community partners, such as subsidized health clinics and food banks, which are already stretched thin. See, e.g., Leslie Bacho et al., *Opinion: Trump Administration Rule Would Worsen Bay Area Hunger*, Mercury News (Nov. 7, 2018), <https://www.mercurynews.com/2018/11/07/opinion-proposed-policy-would-worsen-hunger> (attached as Exhibit 65).

¹¹² California Department of Health Care Services, *Information About California Children's Services (CCS)*, <https://www.sccgov.org/sites/phd/services/CCS/Documents/Applications/application-eng.pdf> (last visited Dec. 6, 2018) (attached as Exhibit 66).

¹¹³ 42 U.S.C. §§ 300ff-15(a)(6), 300ff-27(b)(7)(F), 300ff-64(f)(1), 300ff-71(i).

assistance to get life-saving medication and associated support. This would jeopardize individual patients' health and ultimately require more expensive and intensive treatment. It would also jeopardize public health by increasing the risk of HIV transmission and associated costs of acute, chronic, and preventive care for newly infected individuals.¹¹⁴

iv. Increased Risk of Contagious Diseases and Other Public Health Risks. Public health also will be threatened if noncitizens do not get preventive care and treatment for highly contagious diseases, a risk scarcely mentioned in the Proposed Rule. For example, tuberculosis (TB) can infect anyone who lives, works, or breathes in close proximity to someone with infectious TB.¹¹⁵ TB can be very severe and even fatal; nearly ten percent of patients with TB die.¹¹⁶ Santa Clara County has one of the highest rates of TB in the United States.¹¹⁷ On average, a drug-susceptible case of TB is associated with over \$34,000 in direct medical costs; for multidrug-resistant cases, the costs are over three times as high.¹¹⁸ Societal costs add an estimated \$44,000 per drug-susceptible TB case and \$282,000 per multidrug-resistant TB case.¹¹⁹ Although the Proposed Rule exempts testing for and treatment of symptoms of communicable diseases, the Proposed Rule would increase the likelihood of delays in care, as patients will be less likely to see a primary care physician for evaluation, postponing healthcare providers' opportunity to intervene and treat these patients until they seek emergency care. This delay likely would increase morbidity for the individual patient and increase transmission across citizen and noncitizen populations within the County.

Primary care is not only important for early diagnosis of TB disease, but it is also a critical component of preventing the disease. Before developing TB disease, individuals have latent TB infection (LTBI), which means they are infected with TB bacteria but have no symptoms and are not contagious. Treatment of LTBI can decrease the risk of developing TB disease by more than 90 percent.¹²⁰ As a result, the U.S. Preventive Services Task Force has recommended that during routine preventive care, primary care providers screen asymptomatic

¹¹⁴ Other types of programs may be affected as well. For example, an applicant must be enrolled in Medi-Cal in order to apply for In-Home Supportive Services (IHSS), which is a federal-, state-, and County-funded program that provides supportive care for aged, blind, and disabled individuals to remain safely in their own homes. See Social Services Agency, In-Home Supportive Services, https://ssaconnect.sccgov.org/ssa_departments/ihss/pages/about.aspx (last visited Dec. 5, 2018).

¹¹⁵ Santa Clara County Public Health, TB Fact Sheet, at 1 (2018), <https://www.sccgov.org/sites/phd/DiseaseInformation/TbResources/Documents/tb-factsheet.pdf> (attached as Exhibit 67).

¹¹⁶ California Department of Public Health, *Report on Tuberculosis in California, 2017*, at 8 (Aug. 2018), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/TBCB_Report_2017.pdf (from 2003 to 2005, 9 percent of individuals in California with TB died) (attached as Exhibit 68).

¹¹⁷ TB Fact Sheet, *supra* note 115, at 2.

¹¹⁸ Peter Oh et al., *A Systematic Synthesis of Direct Costs to Treat and Manage Tuberculosis Disease Applied to California, 2015*, 10 BMC Research Notes 434 (2017), <https://dx.doi.org/10.1186/s13104-017-2754-y> (estimating that, in 2015 dollars, the cost of case managing and treating a TB case is \$34,600 for an average TB case and \$110,900 for a multidrug-resistant TB case) (attached as Exhibit 69).

¹¹⁹ K.G. Castro et al., *Estimating Tuberculosis Cases and Their Economic Costs Averted in the United States Over the Past Two Decades*, 20 Int'l J. Tuberculosis Lung Disorder 926, 928 (2016), <https://dx.doi.org/10.5588/ijtld.15.1001> (attached as Exhibit 70).

¹²⁰ N.J. Thompson, *Efficacy of Various Durations of Isoniazid Preventive Therapy for Tuberculosis: Five Years of Follow-Up in the IUAT Trial*, 60 World Health Organization Bulletin 560 (1982) (attached as Exhibit 71); TB Fact Sheet, *supra* note 115, at 2.

adults at increased risk for LTBI.¹²¹ The California Department of Public Health has estimated that nearly 160,000 people in Santa Clara County are infected with the bacteria that causes TB.¹²² And genotyping data of the County suggest that 5 to 10 percent of these cases progress from longstanding LTBI to TB disease.¹²³ But most have not been diagnosed and treated, creating an enormous reservoir of individuals who could develop TB.

Noncitizens and other County residents born outside the U.S. must access preventive healthcare for testing to determine if they have LTBI and for the treatment necessary to prevent it from becoming TB disease. This is especially critical for those with risk factors for TB, like being born in a country where TB is common. But the Proposed Rule would dissuade these individuals from obtaining that preventive healthcare. The result will be greater risk of TB incidences—as well as other contagious diseases—and greater costs to the County in addressing them.

Moreover, due to fear and confusion caused by the Proposed Rule, many County residents are likely to face other health risks. For example, if noncitizens do not receive critically important vaccines that they would otherwise get during preventive care appointments, the County could expect an increased rate of communicable diseases, including among the County's unvaccinated U.S. citizen population.¹²⁴ This risk is significant: children with Medicaid coverage, for example, are twice as likely as uninsured children to access preventive care such as vaccinations.¹²⁵ A higher prevalence in communicable diseases would result in significant public health problems and attendant costs to the County in providing care.¹²⁶

3. The Proposed Rule Fails to Consider the Substantial Fiscal Harms to Local Governments.

Beyond the increased cost of providing safety-net healthcare services, local governments like the County also would suffer from a diminished tax base and workforce, consequences the Proposed Rule wholly omits from its analysis. By curbing the number of visa extensions and noncitizens admitted and granted green cards, the Proposed Rule would reduce the number of

¹²¹ Centers for Disease Control and Prevention, *U.S. Preventive Services Task Force Recommendation Statement: Screening for Latent Tuberculosis Infection (LTBI) in Adults* 12-13 (Sept. 2016), https://www.cdc.gov/tb/publications/ltbi/pdf/USPSTF_Recommendation_Statement_Screening_For_Latent_TB_Infection_in_Adults.pdf (attached as Exhibit 72).

¹²² California Department of Public Health, *Report on Tuberculosis in California*, *supra* note 116; TB Fact Sheet, *supra* note 115, at 2.

¹²³ TB Fact Sheet, *supra* note 115, at 1.

¹²⁴ See Mitchell H. Katz & Dave A. Chokshi, *The “Public Charge” Proposal and Public Health: Implications for Patients and Clinicians*, 320 JAMA 20 (2018), <https://jamanetwork.com/journals/jama/fullarticle/2705813> (attached as Exhibit 73); Wendy E. Parmet, *The Health Impact of The Proposed Public Charge Rules*, Health Affairs Blog (Sept. 27, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180927.100295/full/> (attached as Exhibit 74).

¹²⁵ America's Health Insurance Plans, *The Value of Medicaid: Providing Access to Care and Preventive Health Services*, at 7 (April 2018), https://www.ahip.org/wp-content/uploads/2018/04/ValueMedicaid_Report_4.4.18.pdf (attached as Exhibit 75).

¹²⁶ One study found that, in 2015 alone, the economic burden associated with ten vaccine-preventable diseases totaled approximately \$9 billion. Sachiko Ozawa et al., *Vaccine-Preventable Diseases in the United States*, 35 Health Affairs 11 (Nov. 2016), <https://dx.doi.org/10.1377/hlthaff.2016.0462> (attached as Exhibit 76).

noncitizens residing in the County and contributing to its innovation-driven economy.¹²⁷ Currently, immigrants contribute \$77 billion annually to the County, including \$16 billion in taxes and Social Security and Medicare contributions.¹²⁸ Among these noncitizens are more than 12,000 university students whose spending and tuition payments contribute \$425 million to the Santa Clara County economy.¹²⁹ Noncitizens' tax payments fund the full range of services offered by federal, state, and local governments, from public safety, law enforcement, and national defense to economic development, and environmental protection. Noncitizens are also net contributors to widely used public benefit programs like Medicare and Social Security.¹³⁰ The Proposed Rule would undercut a sizeable portion of these economic contributions, particularly as green card recipient rates decrease, and noncitizens are forced to leave the country (and therefore the County).¹³¹ Further, early projections indicate that the Proposed Rule's deterrent effect on noncitizens accessing benefits would result in billions of dollars of lost revenue nationally from hospitals and supermarkets, and an accompanying loss of tens of thousands of jobs.¹³²

The increase in green card denials predicted by the Department would have an enduring negative effect on household income and the County's tax revenue. One study found that for an employer-sponsored visa-holder, securing a green card led to an annual wage increase of about \$16,000 when adjusted for inflation.¹³³ This pay difference is attributed to the significantly better bargaining position green card holders have with respect to their employers, given that they can more easily switch jobs than employer-sponsored immigrants.¹³⁴ Another study found

¹²⁷ See, e.g., Nat'l Acads. of Sciences, Engineering, Medicine Panel on the Economic and Fiscal Consequences of Immigration, *The Economic and Fiscal Consequences of Immigration* 316-17 (2017), <http://nap.edu/23550> (concluding that the addition of all immigrants—skilled and unskilled—to the labor force reduce the prices of some goods and services; that new arrivals and their descendants provide a major source of demand in sectors such as housing, benefiting residential real estate markets; and that the infusion by high-skilled human capital boosts the nation's capacity for innovation and technological change) (attached as Exhibit 77).

¹²⁸ San José Report, *supra* note 68, at 1 (relying on 2014 data analyzed by the New American Economy).

¹²⁹ *Id.* (citing National Association of Foreign Student Advisers, California Benefits from International Students and relying on U.S. Department of Education, U.S. Department of Commerce, and Institute of International Education statistics for the 2014-2015 academic year).

¹³⁰ See, e.g., The 2017 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds 180-81 (Jul. 13, 2017), <https://www.ssa.gov/oact/TR/2017/tr2017.pdf> (increases in net immigration increase sustainability of Social Security and other Old-Age, Survivors Insurance, and Federal Disability Insurance programs by reducing program costs relative to taxable payroll) (attached as Exhibit 78); see also Patrick Oakford & Robert Lynch, *How Will Immigration Reform Impact the Medicare Trust Fund?* (Feb. 27, 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/02/OakfordMedicare-briefv3.pdf> (net increases in immigration make the Medicare Trust Fund more sustainable) (attached as Exhibit 79); Leah Zallman et al., *Unauthorized Immigrants Prolong the Life of Medicare's Trust Fund*, 31(1) J. of Gen. Internal Med. 122 (Jan. 2016), <https://dx.doi.org/10.1007/s11606-015-3418-z> (same, for net increases in immigration of undocumented immigrants) (attached as Exhibit 80); Leah Zallman et al., *Immigrants Contributed An Estimated \$115.2 Billion More To The Medicare Trust Fund Than They Took Out In 2002-09*, 32 Health Affairs 1153 (June 2013), <https://doi.org/10.1377/hlthaff.2012.1223> (similar, for all immigration) (attached as Exhibit 81).

¹³¹ Proposed Rule, 83 Fed. Reg. at 51,277 (explaining that the Department anticipates that it would deny admission and green card applications at a higher rate under the Proposed Rule); *accord id.* at 51,119, 51,121.

¹³² Fiscal Policy Institute, *Economic and Fiscal Impacts of Reduced Food and Medical Assistance* (Oct. 2018), <http://fiscalpolicy.org/public-charge> (attached as Exhibit 82).

¹³³ Sankar Mukhopadhyaya & David Oxborrow, *The Value of an Employment-Based Green Card*, 49 Demography 219 (Feb. 2012) (attached as Exhibit 83).

¹³⁴ *Id.*

that, on average, households headed by naturalized citizens, green card holders, and lawful temporary migrants contribute almost the same amount in taxes as households headed by natural-born citizens.¹³⁵ By depriving immigrants of the opportunity to obtain permanent resident status, the Proposed Rule would depress their wages and undermine the County’s tax base. Moreover, by including immigration fee waivers as a negative factor when making a public charge determination,¹³⁶ the Proposed Rule likely will cause noncitizens to forgo or delay applying for immigration benefits until they can afford to apply without the fee waiver, delaying or preventing the increase in earning power that comes with permanent status.

As fewer noncitizens are able to obtain green cards, fewer will be able to naturalize as well. That, too, has financial ramifications: even when controlling for a variety of population characteristics, naturalized citizens earn at least 5 percent more than noncitizens.¹³⁷ Their inability to naturalize results in a significant loss in wages for these individuals and in tax contributions for the County. Noncitizens also contribute to economic activity more broadly. Research shows that a foreign-born person’s increase in wages due to naturalization accrues not only to that individual worker, but to the economy as a whole: for every \$1 increase in wages due to naturalization, GDP increases by \$1.17.¹³⁸ Likewise, studies show that increased immigrant participation in the labor force raises citizen employment rates.¹³⁹

Other research indicates that there are longer-term negative repercussions to increasing denial rates of adjustment of status applications: denying green cards not only results in immigrants leaving the United States, but it also means that the children of those individuals—who, when born or raised here, tend to attain relatively high levels of education and earnings—also leave the country.¹⁴⁰

¹³⁵ Randy Capps et al., *supra* note 68, at 23-24.

¹³⁶ See Proposed Rule, 83 Fed. Reg. at 51,187-88.

¹³⁷ See, e.g., Madeleine Sumption & Sarah Flamm, *The Economic Value of Citizenship for Immigrants in the United States*, 13 (Migration Policy Institute 2012), <https://www.migrationpolicy.org/pubs/citizenship-premium.pdf> (attached as Exhibit 84); Brent Bratsberg et al., *The Effect of Naturalization on Wage Growth: A Panel Study of Young Male Immigrants*, 20 J. of Labor Econ. 568, 589-91 (July 2002) (attached as Exhibit 85); Manuel Pastor & Justin Scoggins, *Citizen Gain: The Economic Benefits of Naturalization for Immigrants and the Economy*, 11 (Center for the Study of Immigration Dec. 2012), https://dornsife.usc.edu/assets/sites/731/docs/citizen_gain_web.pdf (attached as Exhibit 86).

¹³⁸ Manuel Pastor & Justin Scoggins, *supra* note 137, at 20.

¹³⁹ See Madeline Zavodny, *Immigration, Unemployment and Labor Force Participation in the United States* (National Foundation for American Policy May 2018), <https://nfap.com/wp-content/uploads/2018/05/IMMIGRANTS-AND-JOBS.NFAP-Policy-Brief.May-2018-1.pdf> (attached as Exhibit 87).

¹⁴⁰ Nat’l Acads. of Sciences, Engineering, Medicine, Panel on the Economic and Fiscal Consequences of Immigration, *supra* note 127, at 7, 11-12 (“[I]mmigrants’ children—the second generation—are among the strongest economic and fiscal contributors in the population. Estimates of the long-run fiscal impact of immigrants and their descendants would likely be more positive if their role in sustaining labor force growth and contributing to innovation and entrepreneurial activity were taken into account. . . . [W]ithin age and education categories, immigrants generally have a more salutary effect on budgets,” in part “because their children tend to have higher levels of education, earnings, and tax paying than the children of similar third-plus generation adults”).

4. The Proposed Rule Undermines and Misconstrues Self-Sufficiency.

The Proposed Rule’s stated purpose is to ensure that noncitizens seeking admission or extensions to stay in the United States are “self-sufficient” and “do not depend on public resources to meet their needs.”¹⁴¹ But the facts do not support the policy “choice made.”¹⁴²

First, the costs detailed above show that the Proposed Rule will have harmful effects on vulnerable groups, public healthcare systems, and local government coffers. In many cases, the Proposed Rule would worsen noncitizen health outcomes and well-being—with long-term consequences. As discussed above, diminishing access to nutritious food hampers school performance, increases hospitalizations, increases the likelihood of brain development issues and other physical and mental problems later in a child’s life, and increases per capita healthcare expenditures.¹⁴³ These outcomes make children *less* likely to become self-sufficient, and in greater need of public assistance—the exact opposite of the Department’s desired result. Despite these facts, the Proposed Rule offers no contrary evidence to show that reducing benefit use leads to greater self-sufficiency.

Second, the Department’s proposal to include non-cash benefit programs contradicts the reason INS excluded most of them from the current policy: these programs promote public health and well-being, and can aid self-sufficiency.¹⁴⁴ INS excluded “special-purpose non-cash benefits” from the current policy on the basis that they help “low-income working families to sustain and improve their ability to remain self-sufficient.”¹⁴⁵ The Proposed Rule fails to recognize the self-sufficiency and public health rationales underlying the current rule’s exclusion of the added non-cash benefits, much less offer a “reasoned explanation” for disregarding them.¹⁴⁶ But the Department “cannot avoid its duty to confront these inconsistencies by blinding itself to them”¹⁴⁷ and must offer “good reasons” for rejecting current policy.¹⁴⁸

¹⁴¹ Proposed Rule, 83 Fed. Reg. at 51,122.

¹⁴² *Encino I*, 136 S. Ct. at 2125 (internal quotation marks and citations omitted).

¹⁴³ See, e.g., Hilary Hoynes et al., *supra* note 82, at 905 (concluding that, “for women, [] access to food stamps in early childhood leads to an increase in economic self-sufficiency”); Seth A. Berkowitz et al., *Supplemental Nutrition Assistance Program (SNAP) Participation and Health Care Expenditures Among Low-Income Adults*, 177 JAMA Int. Med. 1642, 1642 (Nov. 2017), <https://dx.doi.org/10.1001/jamainternmed.2017.4841> (SNAP participation is associated with more than \$1,400 less in annual healthcare expenditures) (attached as Exhibit 88).

¹⁴⁴ 1999 Proposed Rule, 64 Fed. Reg. at 28,686 (quoting letter from HHS); *id.* at 28,677 (confusion over meaning of public charge risks “undermining the Government’s policies of increasing access to healthcare and helping people to become self-sufficient”).

¹⁴⁵ *Id.* at 28,678.

¹⁴⁶ In fact, available data show that benefit recipients often *are* on the road to self-sufficiency. For instance, data from 2009-2011 regarding refugees (who are not subject to a public charge determination and use benefits at much higher rates than other noncitizens) showed that their usage rates for several covered benefit programs fell dramatically as their time in the United States increased. Randy Capps & Kathleen Newland, *The Integration Outcomes of U.S. Refugees: Successes and Challenges 2*, 24-27 (Migration Policy Institute 2015), <https://www.migrationpolicy.org/sites/default/files/publications/UsRefugeeOutcomes-FINALWEB.pdf> (attached as Exhibit 89). Likewise, the 2003 Medicaid Expenditure Panel Survey shows that immigrants’ income rises the longer they are in the country. Leighton Ku, *Health-Insurance Coverage and Medical Expenditures for Immigrants and Native-Born Citizens in the United States*, 99 Am. J. of Pub. Health 1322, 1324 (2009) (attached as Exhibit 90).

¹⁴⁷ *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010).

¹⁴⁸ *Encino I*, 136 S. Ct. at 2125.

Congress itself has expressed similar views about the overall social and public health benefits of the non-cash programs included in the Proposed Rule,¹⁴⁹ as well as the programs' intent to foster recipient self-sufficiency.¹⁵⁰ Moreover, PRWORA itself demonstrates that the meaning of "self-sufficiency" asserted by the Department is unreasonable.¹⁵¹ Under Title IV of PRWORA, Congress enacted for the first time a detailed federal regulatory regime governing noncitizens' eligibility for public benefits.¹⁵² In the introduction to the statute, Congress stated that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes" and that "the immigration policy of the United States" is that noncitizens should "not depend on public resources to meet their needs."¹⁵³ The remainder of the title operationalizes these statements by explaining when various categories of noncitizens may use public benefits. Specifically, Congress prohibited non-qualified noncitizens from receiving public benefits, but offered those same benefits to qualified noncitizens (including lawful permanent residents) after five years.¹⁵⁴ Thus, Congress plainly contemplated that an immigrant could become a lawful permanent resident and use SNAP or Medicaid benefits in the future, consistent with its understanding of self-sufficiency.

In enacting these eligibility requirements, Congress felt it had "achiev[ed] the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy,"¹⁵⁵ and that states choosing to mirror Title IV's eligibility rules¹⁵⁶ would "be

¹⁴⁹ See, e.g., 7 U.S.C. § 2011 (SNAP "promote[s] the general welfare[and] safeguard[s] the health and well-being of the Nation's population by raising levels of nutrition among low-income households" and in so doing "promote[s] the distribution in a beneficial manner of the Nation's agricultural abundance and . . . strengthen[s] the Nation's agricultural economy"); United States Housing Act of 1937, Pub. L. 75-412, at sec. 1, 50 Stat. 888, 888 (Sept. 1, 1937) (assistance under the Housing Act advances "the national policy of the United States to promote the general welfare" to help states and localities "remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation").

¹⁵⁰ The Proposed Rule claims that "an individual who receives monetizable public benefits in excess of 15 percent of FPG is neither self-sufficient *nor on the road to achieving self-sufficiency*." 83 Fed. Reg. at 51,165 (emphasis added). But Congress disagrees. See, e.g., 7 U.S.C. § 2015(d)(1), (d)(4)(B)(vi) (requiring most SNAP recipients to work and to participate in SNAP Employment and Training Programs, including "[p]rograms designed to increase the self-sufficiency of recipients"); 42 U.S.C. § 1437u(a) (requiring most public housing authorities to administer Family Self-Sufficiency programs "to enable eligible families to achieve economic independence and self-sufficiency"); see also 24 C.F.R. pt. 984; Department of Housing and Urban Development, *Family Self-Sufficiency (FSS) Program*, https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/fss (last visited Dec. 5, 2018); HUD Office of Public Housing and Voucher Programs & Office of Public Housing Investments, *Fact Sheet: Family Self-Sufficiency (FSS) Program* (Feb. 2016) https://www.hud.gov/sites/documents/FSSFACTSHEET_FEB2016.PDF (attached as Exhibit 91).

¹⁵¹ See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011); *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

¹⁵² PRWORA, Pub. L. 104-193 (Aug. 22, 1996), codified at 8 U.S.C. § 1601 *et seq.*

¹⁵³ 8 U.S.C. § 1601(1), (2)(A).

¹⁵⁴ See 8 U.S.C. §§ 1611-15. As a technical matter, restrictions on eligibility for housing programs are governed by Section 214 of the Housing and Community Development Act of 1980 rather than by PRWORA, but the categories of noncitizens eligible for housing programs largely overlaps with the definition of "qualified alien" under PRWORA. See 42 U.S.C. § 1436a(a).

¹⁵⁵ 8 U.S.C. § 1601(7). Likewise, PRWORA's proponents contended during legislative debate that the eligibility regime in Title IV of PROWRA "ensure[s] that immigrants are self-reliant." 104 Cong. Rec. H9401 (Jul. 31, 1996) (statement of Rep. Lamar Smith).

¹⁵⁶ See 8 U.S.C. § 1621(d) (authorizing states to provide that undocumented immigrants are "eligible for any State or local public benefit for which such alien would otherwise be ineligible" by "affirmatively provid[ing] for such

considered to have chosen the least restrictive means available for achieving” national immigration policy’s self-sufficiency goal.¹⁵⁷ The Department’s alternate “view[.]” of self-sufficiency—that a noncitizen’s receipt of even a modest amount of public benefits could render that person a public charge—is both wrong and unreasonable.¹⁵⁸

Third, the Department’s alternative basis for choosing which programs to include—its “preference to prioritize those programs that impose the greatest cost on the Federal government”¹⁵⁹—is irrelevant to the statutorily directed inquiry of whether *a specific individual* is likely to become a public charge. Moreover, if the Department’s aim is to reduce “cost[s] [imposed] on the Federal government,” it must seriously consider the local government costs described above.

Finally, the non-cash public benefits covered under the Proposed Rule are not good indicators of self-sufficiency. As the Department acknowledges, noncitizens may be eligible for Medicaid, CHIP, and housing assistance at incomes that would not suggest dependence on the federal government.¹⁶⁰ The Proposed Rule draws that line at 125 percent of the Federal Poverty Guideline (FPG).¹⁶¹ But most of the public benefits included in the Proposed Rule are available to individuals with incomes far above that line. In fact, some states offer Medicaid to adults with household incomes as high as 319 percent of the FPL and CHIP to children with household incomes as high as 400 percent of the FPL.¹⁶² Medicaid is also available to some people with disabilities or medical conditions regardless of income.¹⁶³ And in Santa Clara County, an individual may be eligible for Section 8 housing subsidies with an income almost five and a half times the FPG, while households can be eligible for Section 8 assistance at incomes of up to four

eligibility”); *id.* § 1622(a) (authorizing states “to determine the eligibility for any State public benefits” for qualified noncitizens, nonimmigrants (i.e., those in the United States on temporary visas), or parolees); *cf.* Exec. Order No. 13132 at § 2(i), 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999) (“[t]he national government should be deferential to the States when taking action that affects the policymaking discretion of the States”).

¹⁵⁷ 8 U.S.C. § 1601(7).

¹⁵⁸ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (regulation that is “inconsistent with the design and structure of the statute as a whole” is unreasonable (internal quotation, alteration, and citation omitted)). Even as PRWORA enacted new restrictions on noncitizen access to public benefits, Congress allowed otherwise not qualified noncitizens to continue receiving several benefits if those noncitizens had received the benefit continually since before August 22, 1996. 8 U.S.C. § 1611(b)(1)(E), (b)(5).

¹⁵⁹ Proposed Rule, 83 Fed. Reg. at 51,173; *see also id.* at 51,164 (criticizing 1999 Field Guidance as “insufficiently protective of the public budget, particularly in light of significant public expenditures on non-cash benefits”); *id.* at 51,166-69 (reciting costs for TANF, SNAP, Medicaid, and housing assistance programs).

¹⁶⁰ *See id.* at 51,174, 51,187 n.482.

¹⁶¹ *Id.* at 51,187 (citing 8 U.S.C. § 1183a(f)(1)(E)).

¹⁶² *See* Medicaid.gov, *Medicaid, Children’s Health Insurance Program, & Basic Health Program Eligibility Levels*, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-eligibility-levels> (last visited Dec. 5, 2018) (attached as Exhibit 92).

¹⁶³ *See generally* Molly O’Malley Watts et al., *Medicaid Financial Eligibility for Seniors and People with Disabilities in 2015* (Kaiser Comm’n on Medicaid and the Uninsured Mar. 2016), <http://files.kff.org/attachment/report-medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-in-2015> (attached as Exhibit 93).

and a half times the FPG.¹⁶⁴ Thus, receipt of these benefits is a poor indicator of a noncitizen's self-sufficiency, even using the Proposed Rule's own definition.

B. Many Other Elements of the Proposed Rule Are Arbitrary and Capricious.

Beyond the harms it causes, the Proposed Rule is fundamentally illogical. The Proposed Rule's public benefit use thresholds and weighing scheme are riddled with irrationality and uncertainty. Further, many of the Proposed Rule's provisions lack a sound explanation or reasoned basis, and other provisions have been informed by data that is inappropriate for its purported use. The result is a Proposed Rule that is administratively and constitutionally untenable.

1. The Proposed Rule's Benefit Use Thresholds Are Irrational.

The Proposed Rule's definition of "public benefit" sets the threshold for benefits at (i) 15 percent of FPG for a household of one for "monetizable benefits," (ii) 12 months of use within a 36-month period for "nonmonetizable benefits" (use of two public benefits during one month counts as two months of use), or (iii) any amount of monetizable benefits, combined with nine months of use of nonmonetizable benefits within a 36-month period.¹⁶⁵ These thresholds are arbitrary and unsupported by data, evidence, or a reasoned explanation. Basic principles of agency rulemaking show this does not amount to a reasoned decisionmaking.¹⁶⁶

The proposed 15-percent threshold for monetizable benefits and 12-month threshold for nonmonetizable benefits are based entirely on the Department's unsupported "beliefs" that the proposal is "reasonable" and covers noncitizens who are "neither self-sufficient nor on the road to achieving self-sufficiency."¹⁶⁷ These "beliefs" "do[] not help us to understand why" the Department set the 15 percent and 12-month thresholds.¹⁶⁸ The difference from the current policy is stark: the Department is proposing to change the nature of the inquiry from a qualitative prediction (whether a person is likely, in the future, to depend primarily on the government for subsistence) to a quantitative prediction (whether a person will use more than 15 percent of FPG of monetizable benefits or nonmonetizable benefits for a certain duration). At a minimum, the Proposed Rule must offer a more detailed explanation for such a significant change in position.

¹⁶⁴ Compare Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2,642, at 2,643 (Jan. 18, 2018) (providing federal poverty guidelines), with U.S. Dep't of Hous. & Urban Dev., *Tables for Section 8 Income Limits* 18 (2018), <https://www.huduser.gov/portal/datasets/il/il18/Section8-IncomeLimits-FY18.pdf> (attached as Exhibit 94).

The Proposed Rule also fails to exclude certain TANF benefits that INS excluded in 1999 on the basis that they are not cash assistance for income maintenance purposes. Compare Proposed Rule, 83 Fed. Reg. at 51,290 (proposing to define "public benefit" to include "[a]ny Federal, State, local, or tribal cash assistance for income maintenance, including . . . Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 *et seq.*"), with 1999 Proposed Rule, 64 Fed. Reg. at 28,678; Proposed Rule, 83 Fed. Reg. at 28,677, 28,682 (INS proposal to exclude "certain supplemental cash benefits not defined as 'assistance' under TANF rules," specifically identified in proposed regulatory text as "supplemental cash benefits excluded from the term 'assistance' under TANF program rules . . . or any non-cash benefits and services provided by the TANF program").

¹⁶⁵ Proposed Rule, 83 Fed. Reg. at 51,289-90.

¹⁶⁶ See, e.g., *Encino I*, 136 S. Ct. at 2127; see generally *supra* notes 57-61 and accompanying text.

¹⁶⁷ See, e.g., Proposed Rule, 83 Fed. Reg. at 51,165.

¹⁶⁸ See *Humane Soc. of U.S.*, 626 F.3d at 1052.

Second, the Department’s proposal to double-count months in which an individual receives two nonmonetizable benefits is irrational. Such double-counting is inconsistent with the Department’s proffered rationale for including a durational threshold in the first place—that “the *duration* of the alien’s receipt of these benefits *over a period of time* is also a reasonable proxy for assessing an alien’s reliance on public benefits.”¹⁶⁹ If benefit usage over time reflects the absence of self-sufficiency, then it makes little sense to shorten the period of time considered by double-counting those months in which multiple benefits are received.

Third, the Proposed Rule fails to offer any data, evidence, or rationale to justify its three-month reduction in the duration for the combined threshold (any amount of monetizable benefits plus nine months in 36 of nonmonetizable benefits). The Department again offers only its own unsupported “belief” and “view” that the three-month reduction “is a reasonable and easily administrable guideline” and that the combined threshold captures people who “are unable to meet their basic needs without government help.”¹⁷⁰

2. The Proposed Rule’s Unclear Weighing Scheme Is Irrational and Impermissibly Vague.

The Proposed Rule assigns weights to various factors considered as part of its “totality of the circumstances” analysis.¹⁷¹ Receipt of certain benefits, for example, is one of several “heavily weighed negative factor[s]” in the public charge determination.¹⁷² But such receipt alone would not be “determinative” of the assessment.¹⁷³ Only income, resources, or support exceeding 250 percent of FPG is heavily weighed positively.¹⁷⁴ The Proposed Rule suggests that the weighing scheme will “formaliz[e] and standardiz[e] the criteria and process for public charge determinations.”¹⁷⁵ But it does neither. The Department provides no reason, data, or logic from which to conclude that its proposed framework produces a rational, consistent, or accurate answer to the Proposed Rule’s ultimate question: whether a given individual is likely in the future to use the specified benefits at or above the specified thresholds.¹⁷⁶

The Department offers no explanation for how an immigration officer would determine whether positive factors “outweigh” negative ones, or how the officer should account for eligibility criteria for public benefits varying over time and across the country.¹⁷⁷ Nor does the Proposed Rule explain how the aggregate weight of negative factors (if greater than the aggregate weight of positive factors) serves to predict whether the particular noncitizen will use benefits in the future at all—let alone above the proposed thresholds—or how the framework aids “[t]he ultimate inquiry [of] whether the alien is likely in the totality of the circumstances to become a public charge, *i.e.*, to receive the designated public benefits above the applicable

¹⁶⁹ Proposed Rule, 83 Fed. Reg. at 51,165 (emphases added).

¹⁷⁰ *Id.* at 51,166.

¹⁷¹ *Id.* at 51,210-18.

¹⁷² *Id.* at 51,198-99, 51,292.

¹⁷³ *Id.* at 51,198.

¹⁷⁴ *Id.* at 51,292.

¹⁷⁵ *See, e.g., id.* at 51,119.

¹⁷⁶ *See, e.g., id.* at 51,179.

¹⁷⁷ *See, e.g., U.S. Dep’t of Hous. & Urban Dev., supra* note 164.

threshold(s), either in terms of dollar value or duration of receipt.”¹⁷⁸ The Proposed Rule offers no answers, no reliable data or other evidence, no logic, and no reasoned basis for this weighing scheme. Further, the scheme’s unreliability makes it impossible for any noncitizen subject to a public charge determination to know how to conform her conduct to avoid being deemed inadmissible or unable to adjust status. In the absence of a more precise, comprehensible, and predictable rule, noncitizens lack “fair warning” of the consequences of accepting certain public benefits.¹⁷⁹

One of the Proposed Rule’s own examples underscores how unpredictable application of the Proposed Rule’s standard would be: the Proposed Rule states that an individual who is currently in school and employed with an income of 120 percent of FPG and who has no health insurance but exhibits no other negative factors would not be deemed likely to become a public charge.¹⁸⁰ Yet if that individual’s immigration status did not preclude receipt of public benefits, he or she would be income-eligible for SNAP, Medi-Cal, and federal housing assistance.¹⁸¹ But the Proposed Rule does not explain why an official would deem such an individual unlikely, in the future, to receive the public benefits at issue (or perhaps merely unlikely to accept the benefits or receive benefits in excess of the Proposed Rule’s thresholds), despite their income eligibility for several such benefits. Where an arbitrary determination can deny someone the right to remain in this country and ultimately lead to deportation, the U.S. Constitution, Congress, and the Department’s own policies require more precision.¹⁸²

The proposed regulatory text suffers from other problematic imprecisions as well. The Department’s apparent intent is to consider only those public benefits or fee waivers applied and received by and *for the benefit of* the individual noncitizen undergoing the public charge determination—not those benefits or fee waivers associated with other members of that individual’s household.¹⁸³ But the proposed regulation states only that the Department would consider whether a noncitizen has “applied for” or “received” benefits or fee waivers, without defining those terms.¹⁸⁴ The proposed regulatory text fails both to clearly explain how the Department will identify “the portion of the benefit that is attributable to the alien” (for example, when the individual lives in a household that receives housing assistance and is herself ineligible to receive such assistance) and to state that the Department will only consider a noncitizen’s application for benefits on her own behalf.¹⁸⁵ These omissions would allow immigration officers to penalize a noncitizen during a public charge determination when she is the formal applicant for, or payee of, benefits for which her children or others are the true beneficiaries. In the

¹⁷⁸ Proposed Rule, 83 Fed. Reg. at 51,165.

¹⁷⁹ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁸⁰ Proposed Rule, 83 Fed. Reg. at 51,216.

¹⁸¹ See 7 U.S.C. § 2014(c)(2) (setting gross-income threshold for SNAP eligibility at 130 percent of the Federal Poverty Guidelines); Cal. Welf. & Inst. Code. § 15832(a)(1)(B) (setting income threshold for Medi-Cal eligibility at 208 percent of the Federal Poverty Guidelines); U.S. Dep’t of Hous. & Urban Dev., *supra* note 177.

¹⁸² See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (“the most exacting vagueness standard should apply” in assessing statutes that lead to removal); 5 U.S.C. § 706(2)(A) (arbitrary and capricious agency actions are unlawful); USCIS Policy Manual vol. 7, pt. A, Ch. 10 (“The exercise of discretion does not mean the decision can be arbitrary, inconsistent, or dependent on intangible or imagined circumstances.”).

¹⁸³ See, e.g., Proposed Rule, 83 Fed. Reg. at 51,218.

¹⁸⁴ *Id.* at 51,291 (proposing 8 C.F.R. § 212.22(b)(4)(F)(1) and (G)).

¹⁸⁵ *Id.* at 51,218.

County, for example, a noncitizen parent may be ineligible to receive benefits (or otherwise decline to seek them) but will nonetheless be deemed the “applicant” when she submits the application for her children to receive them. In these circumstances, the County will also treat the noncitizen parent as the payee, even if it is the children who are certified to receive the benefits. As a result, the parent technically “receives” the benefits, but is not the beneficiary of them. This is a significant issue: County data indicates that one out of four CalWORKs (California’s TANF program) payees and one out of seven CalFresh (California’s SNAP program) payees receives benefits for others.

Additionally, the Proposed Rule is unclear on the meaning of Medicaid: the regulatory language refers only to “Medicaid” as a public benefit to be considered in a public charge determination, but the preamble discusses “benefits paid for by Medicaid.”¹⁸⁶ Consequently, it is unclear whether programs that are funded only by the state and provided under the auspices of Medi-Cal would be considered Medicaid for the purposes of a public charge analysis.

3. It Is Irrational to Apply the Federal Poverty Guideline in Effect on the Date of Adjudication to a Forward-Looking Prediction.

The Proposed Rule’s ultimate inquiry is whether, at some point in the future, a noncitizen will use listed public benefits above the defined thresholds. For “monetizable” benefits, that threshold is 15 percent of FPG. Yet the dollar value of the FPG is adjusted at least once annually—it increases each year alongside the Consumer Price Index.¹⁸⁷ At the same time, the dollar value of benefits under the listed benefit programs frequently *do not* increase in value—or they increase more slowly than the FPG. That means each year the amount of a given benefit represents a smaller and smaller proportion of the FPG. On average over the last five years, the FPG increased almost 8 percent over five years and the maximum monthly SNAP benefit actually *declined* almost 2 percent over the same period. The result is that over time, SNAP benefits represent a smaller and smaller percentage of FPG.¹⁸⁸ Therefore, a rule predicting whether benefit use will exceed a specified percentage of FPG must pinpoint the time in the future that it is attempting to assess: the further into the future a noncitizen’s benefit use is predicted to occur, the lower the chance that benefit usage will exceed 15 percent of FPG. Failure to account for reduction in the amount of benefits relative to the amount of FPG would arbitrarily and irrationally penalize noncitizens by overestimating the possibility that their benefit use will exceed 15 percent of FPG.

But the Department ignores the changing dollar values of benefits and the FPG over time. Instead, it proposes to rely on “the FPG in effect on the date of adjudication” of an admission or adjustment of status petition—without accounting for increases in the FPG and changes in

¹⁸⁶ Compare *id.* at 51,159, with *id.* at 51,290.

¹⁸⁷ 42 U.S.C. § 9902(2).

¹⁸⁸ The USDA publishes the annual maximum allotments for SNAP each year and has collected historical maximum allotments on its website. See USDA, Food And Nutrition Service, *Cost of Living Adjustment (COLA) Information*, <https://www.fns.usda.gov/snap/cost-living-adjustment-cola-information> (last visited Dec. 5, 2018). A compilation of the annual notices for the years 2008-2018 is attached as Exhibit 95). HHS publishes the Federal Poverty Guidelines each year and has compiled historical FPGs on its website. See HHS ASPE, *Prior HHS Poverty Guidelines and Federal Register References*, <https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references> (last visited Dec. 5, 2018) (attached as Exhibit 96).

benefit values between the date of adjudication and the date of predicted benefit use.¹⁸⁹ Its failure to do so imposes an arbitrary and irrational penalty on noncitizens by underestimating how much in benefits a noncitizen can receive in the future before exceeding the 15 percent threshold.

4. It Is Irrational to Consider a Person’s Mere Application for Benefits.

The Proposed Rule states that when assessing a noncitizen’s “assets, resources, and financial status,” it would consider whether the noncitizen has even “*applied for ... any public benefit, as defined*” or even “*applied for ... a fee waiver for an immigration benefit.*”¹⁹⁰ But the Department offers no data that justify consideration of mere application for benefits, and the data it does provide undermine rather than support the Proposed Rule.¹⁹¹ Moreover, mere application for benefits has no bearing on whether applicants are even eligible for the benefit, let alone whether their application will be completed or approved, or that the individual, if approved, will receive enough of the benefit to exceed the proposed monetary and durational thresholds. The Proposed Rule offers no evidence, data, or justification for why a mere application—when no benefits have been used—should be a relevant factor when making a public charge determination. And because applications do not always lead to receipt of a benefit, applying for a benefit bears no rational relationship to actual benefit use or self-sufficiency.

5. The Proposed Rule’s Assessment of a Noncitizen’s Current Income Is Irrational.

The Department proposes to consider a noncitizen’s income at the time of the public charge determination—that is, when the noncitizen is a resident of a foreign country or is a United States resident who is not a lawful permanent resident. Under the Proposed Rule, low income would be weighed negatively.¹⁹² But significant research that the Proposed Rule ignores shows that individuals born elsewhere experience significant wage increases when they adjust from nonimmigrant status to lawful permanent resident,¹⁹³ and then again when adjusting from a green card holder to naturalized citizen.¹⁹⁴ Incomes also rise due to inflation and, in some places, increases in the minimum wage.¹⁹⁵ It is irrational to assess noncitizens’ potential *future*

¹⁸⁹ Proposed Rule, 83 Fed. Reg. at 51,164.

¹⁹⁰ *Id.* at 51,291 (proposing 8 C.F.R. § 212.22(b)(4)(F) and 8 C.F.R. § 212.22(b)(4)(G)) (emphases added).

¹⁹¹ In fact, one GAO study cited by the Department showed that almost all of the applications for TANF, Medicaid, or SNAP submitted by sponsored noncitizens in 2007 were withdrawn or denied. U.S. Gov’t Accountability Off., GAO-09-375, *Sponsored Noncitizens and Public Benefits: More Clarity in Federal Guidance and Better Access to Federal Information Could Improve Implementation of Income Eligibility Rules* 9-14 (2009), <https://www.gao.gov/assets/290/289864.pdf> (attached as Exhibit 97). Nor is the phenomenon of withdrawn and denied applications limited to sponsored noncitizens. According to the County’s Social Services Agency, one third of applications submitted by County residents for benefits under CalFresh, general assistance (including TANF/CalWORKs), and Medi-Cal are denied or withdrawn.

¹⁹² Proposed Rule, 83 Fed. Reg. at 51,291 (proposing 8 C.F.R. § 212.22(b)(4)(A)).

¹⁹³ Sankar Mukhopadhyaya & David Oxborrow, *supra* note 133, at 219.

¹⁹⁴ *See, e.g.*, Manuel Pastor & Justin Scoggins, *supra* note 137, at 11 (concluding that naturalization leads to an 8 to 11 percent increase in income).

¹⁹⁵ The Department relies on the federal minimum wage to calculate noncitizens’ opportunity costs associated with completing new forms. Proposed Rule, 83 Fed. Reg. at 51,244. But more noncitizens reside in California than anywhere else, and California’s minimum wage is almost 50 percent higher than the federal minimum wage. Cal.

benefit use on the basis of their *current* income without accounting for the established likelihood that their current income will rise in the future due to change in status or other factors.

6. The Proposed Rule’s Bond Forfeiture Requirement Is Irrational.

The Proposed Rule would require that any breach of a public charge bond’s conditions result in the forfeiture of the entire bond amount—not just the amount of the public benefits received—but the Proposed Rule does not offer a coherent explanation for why recovery of the entire amount is appropriate. The Department does not substantiate its claim that the “total damages to the government go beyond the simple amount of the benefits received, and are difficult if not impossible to calculate with precision.”¹⁹⁶ It makes little sense to forfeit the entire bond since the Department itself asserts that the purpose of the bond is to “recoup [the] cost of public benefits received.”¹⁹⁷ The forfeiture proposal cannot stand because the Proposed Rule lacks a “good” justification for changing current and longstanding practice.¹⁹⁸

7. The Proposed Rule Ignores that Noncitizens Undergoing a Public Charge Determination Are and Will Remain Ineligible for Most Covered Benefits.

Although the public charge assessment is fundamentally forward-looking, the Proposed Rule entirely ignores that under PRWORA, applicants for admission are and will remain ineligible for most public benefits even after admission, and that applicants for adjustment of status are and will remain ineligible for most public benefits until they have had green cards for five years. Consequently, the Proposed Rule is at odds with this aspect of PRWORA. First, applicants for adjustment of status have lived and will continue to live in the United States for years in precisely the manner the Department considers self-sufficient: they “rely on their own capabilities and secure financial support, including from family members and sponsors, rather than seek and receive public benefits to meet their needs.”¹⁹⁹ Second, under PRWORA, very few individuals undergoing a public charge determination will receive public benefits in the near future because the law renders most of them ineligible for those benefits.²⁰⁰

8. The Proposed Rule Relies on Misleading and Irrelevant Data to Support Its New Public Charge Factors and Weighing Scheme.

The Department relies on faulty data to justify many aspects of the proposal, including which benefit programs to include and the proposal’s consideration of age, family status, education level, and professional certification in a public charge analysis. These data are misleading and irrelevant because they do not describe benefit usage by the subpopulations of

Labor Code § 1182.12. Indeed, four of the five states with the largest noncitizen populations have minimum wages above the federal minimum. As a result, the Department significantly underestimates these opportunity costs.

¹⁹⁶ Proposed Rule, 83 Fed. Reg. at 51,226.

¹⁹⁷ *Id.* at 51,221, 51,224.

¹⁹⁸ *Encino I*, 136 S. Ct. at 2126; *see also Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 876-77 (D.C. Cir. 1981).

¹⁹⁹ Proposed Rule, 83 Fed. Reg. at 51,123.

²⁰⁰ The Proposed Rule also should not put much weight on the possibility that a noncitizen will use public benefits five years after becoming a green card holder, both because noncitizens’ incomes increase over time, *supra* note 146 (and particularly when they receive green cards and again when they naturalize, *supra* notes 137-138, 193-194 and accompanying text) and because after five years, a green card holder can become a naturalized citizen, 8 U.S.C. §§ 1427(a), 1613, after which she could not by definition be a public charge, Proposed Rule, 83 Fed. Reg. at 51,289.

noncitizens who are actually subject to a public charge determination. Consequently, the data do not inform whether the Proposed Rule’s factors and weighing scheme will accurately predict future benefit usage for noncitizens undergoing a public charge determination.

The Proposed Rule largely relies on data culled from several panels of the Survey of Income and Program Participation (SIPP).²⁰¹ However, as the Department acknowledges, the SIPP data “do not align precisely with the populations covered by this rule—for instance, the data include refugees, asylees, and other populations that may access public benefits but are not subject to the public charge ground of inadmissibility.”²⁰² And refugees are “more likely to receive food stamps, cash welfare, or public health insurance benefits than either nonrefugee immigrants or the U.S. born” (but, unlike most green card applicants, refugees and asylees are eligible for benefits as soon as they arrive in the United States).²⁰³ These differing benefit use rates among the noncitizens covered by the SIPP data, many of whom are not subject to a public charge determination, means the data are skewed not reflective of the population to which INA Section 212(a)(4) applies.²⁰⁴

Yet far more accurate and informative data are obtainable. For instance, a recent analysis by the U.S. Department of Health and Human Service’s Office of the Assistant Secretary for Planning and Evaluation (HHS ASPE) used more specific data sets than the Department to evaluate both public benefit usage and revenue generated (i.e., taxes paid) by refugees.²⁰⁵ The Proposed Rule provides no explanation for why it did not conduct a similar analysis using the

²⁰¹ Proposed Rule, 83 Fed. Reg. at 51,160-63 (using SIPP data to assess several programs, including Medicaid and CHIP); *id.* at 51,167 (using SIPP data to assess housing assistance programs); *id.* at 51,180-81 (using SIPP data to assess age); *id.* at 51,184-86 (using SIPP data to assess family status); *id.* at 51,190-95 (using SIPP data to assess education level and professional certification).

²⁰² *Id.* at 51,160; *see also id.* at 51,161 n.289 (noting further limitations of the SIPP data, including that they “do[] not distinguish between Medicaid, CHIP, and other types of comprehensive medical assistance for low-income people”). The Department’s own data show that almost one-third of green card applicants are exempt from a public charge determination. *Id.* at 51,241 (annually, an average of 382,264 green card applicants were subject to the public charge determination and 161,981 LPR applicants were exempt from the review).

²⁰³ Randy Capps & Kathleen Newland, *supra* note 146, at 24. The usage rate differences are stark: “[r]efugees [a]re twice as likely as the U.S. born to live in households receiving food stamps” and TANF, and “refugees were more likely than either nonrefugee immigrants or the U.S. born to have health insurance coverage through Medicaid, [CHIP], or similar public programs.” *Id.* at 24-25.

²⁰⁴ The Department misuses and misstates available data in other ways, too. Most glaringly, its contention that “there is a lack of academic literature and economic research examining the link between immigration and public benefits (i.e., welfare), and the strength of that connection,” Proposed Rule, 83 Fed. Reg. at 51,235, is demonstrably false (and unsupported by the citation the Department offers). Even beyond the many studies and reports cited and attached to this Comment, there is a large and compelling body of literature on immigration and public benefits, much of it studying the issue in the years preceding and following welfare and immigration reform in 1996. One recent synthesis of the literature concluded that immigrants are substantial net positive contributors to the country’s economy and fiscal strength and sustainability. Nat’l Acads. of Sciences, Engineering, Medicine, Panel on the Economic and Fiscal Consequences of Immigration, *supra* note 127, at 7.

²⁰⁵ *See* HHS ASPE, *The Fiscal Costs of the U.S. Refugee Admissions Program at the Federal, State, and Local Levels, from 2005-2014*, at 6, 9-11, 42-51 (July 19, 2017), <https://assets.documentcloud.org/documents/4056060/Refugee-Report-Draft.pdf> (attached as Exhibit 98).

Current Population Survey (CPS),²⁰⁶ CPS's Annual Social and Economic Supplement,²⁰⁷ the American Community Survey,²⁰⁸ the Transfer Income Model, version 3,²⁰⁹ and the Annual Survey of Refugees administered by the HHS Office of Refugee Resettlement²¹⁰—all of which HHS ASPE has relied on in assessing public benefit usage by noncitizens across the country.²¹¹

The Department also fails to account for other differences within populations described by the cited data. With respect to Medicaid usage, the Department relies on the assertion that Medicaid expenditures are, on average, \$7,426.59 per person per year.²¹² But “[g]enerally, immigrants have lower per capita medical expenditures than the native-born, regardless of type of insurance,” and the data reflect that per capita Medicaid expenditures are substantially lower for immigrants than for native-born individuals.²¹³ For immigrant adults, for example, expenditures were roughly a quarter lower, and for immigrant children, expenditures were less than half than those of native-born individuals.²¹⁴ Likewise, the per capita expenditures are lower for noncitizens than for citizens (especially native-born individuals) with respect to CHIP, SNAP, and cash assistance, including Supplemental Security Income.²¹⁵ Yet the Proposed Rule looks to the national expenditure and overall per capita levels without regard to these centrally relevant distinctions between benefit recipients. Consequently, this data does not and cannot support any aspect of the Proposed Rule.

²⁰⁶ See United States Census Bureau, *Current Population Survey (CPS)*, <https://www.census.gov/programs-surveys/cps.html> (last visited Dec. 5, 2018).

²⁰⁷ See United States Census Bureau, *Small Area Income and Poverty Estimates (SAIPE) Program*, <https://www.census.gov/programs-surveys/saibe/guidance/model-input-data/cpsasec.html> (last visited Dec. 5, 2018).

²⁰⁸ See United States Census Bureau, *American Community Survey (ACS)*, <https://www.census.gov/programs-surveys/acs> (last visited Dec. 5, 2018).

²⁰⁹ See Urban Institute, *Transfer Income Model, version 3*, <http://trim3.urban.org/T3Welcome.php> (noting that this model “is developed and maintained at the Urban Institute under primary funding from Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (HHS/ASPE)”) (last visited December 5, 2018); Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States: Data Appendix 22* n.14 (Jan. 5, 2017), <http://gabriel-zucman.eu/files/PSZ2016DataAppendix.pdf>, (calling this model “[t]he most extensive effort to create a benefit simulator in the United States”) (unpublished appendix) (attached as Exhibit 99).

²¹⁰ See HHS, Office of Refugee Resettlement, *Annual ORR Reports to Congress*, <https://www.acf.hhs.gov/orr/resource/annual-orr-reports-to-congress> (last visited Dec. 5, 2018); see also Office of Refugee Resettlement, *Annual Report to Congress: Office of Refugee Resettlement Fiscal Year 2016*, https://www.acf.hhs.gov/sites/default/files/orr/arc_16_508.pdf (attached as Exhibit 100); Urban Institute, *2016 Annual Survey of Refugees*, (July 18, 2018), <https://doi.org/10.3886/E104642V2> (providing data sets).

²¹¹ See HHS ASPE, *supra* note 205, at 6, 9-11, 42-51.

²¹² Proposed Rule, 83 Fed. Reg. at 51,160.

²¹³ Leighton Ku & Brian Bruen, *Poor Immigrants Use Public Benefits at a Lower Rate than Poor Native-Born Citizens*, 17 *Cato Institute Economic Development Bulletin* 1, 2 (Mar. 4, 2013), <https://object.cato.org/sites/cato.org/files/pubs/pdf/edb17.pdf> (attached as Exhibit 101).

²¹⁴ *Id.* at 2.

²¹⁵ *Id.* at 2-6.

* * *

For all the foregoing reasons, the Proposed Rule is fatally flawed and unlawful. The County urges the Department of Homeland Security to withdraw the Proposed Rule in its entirety.

Very truly yours,

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